

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

MARY FRANCES SPEARS
(CRD No. 4297575),

Respondent.

Disciplinary Proceeding
No. E3B20040231-02

Hearing Officer – RSH

DEFAULT DECISION

September 27, 2006

Respondent violated NASD Conduct Rules 3040 and 2110 by engaging in a private securities transaction; Conduct Rules 2310(a) and 2110 by recommending unsuitable securities to her customers; and Conduct Rules 3030 and 2110 by engaging in an outside business activity without notifying her member firm. For these violations, Respondent is barred from associating with any NASD member in any capacity.

Appearances

Mark A. Graves, Lewis Taylor Egan, San Francisco, CA (Rory C. Flynn, Washington, DC, Mark P. Dauer, New Orleans, LA, Of Counsel), for Complainant.

No appearance by or for Respondent.

DECISION

I. Procedural History

The Department of Enforcement ("Enforcement") filed a Complaint on January 5, 2006, alleging that Respondent Mary Frances Spears violated Conduct Rules 3040 and 2110 by engaging in a private securities transaction; Conduct Rules 2310 and 2110 by recommending unsuitable securities to her customers; and Conduct Rules 3030 and 2110 by engaging in an outside business activity without notifying her member firm.

On February 13, 2006, Respondent filed an Answer contesting the allegations.

On June 5, 2006, the undersigned Hearing Officer issued an order holding Respondent in default for failing to appear at a scheduled May 23, 2006 pre-hearing conference and for not responding to a May 24, 2006 Order to Show Cause Why Respondent Should Not Be Held in Default ("Order to Show Cause"). On July 5, 2006, Enforcement filed a Motion for Entry of Default Decision, supported by the declaration of Mark A. Graves¹ and ten exhibits.² Respondent did not reply to the motion.³ Accordingly, for the reasons set forth below, Enforcement's motion is granted.

II. Respondent's Default

On March 16, 2006, all parties joined the conference call for the initial pre-hearing conference in this case. On May 11, 2006, the Office of Hearing Officers ("OHO") served an Order Scheduling Pre-Hearing Conference on Respondent by facsimile and overnight mail to Respondent's most current residential address listed in the Central Registration Depository (the "CRD address"). The Pre-Hearing Conference was scheduled in order to ascertain whether Spears intended to continue her defense. The order specifically stated, "The parties are reminded that a failure to appear at the Conference, in person or through counsel or a representative, may be deemed a default." Respondent failed to appear at the May 23, 2006 pre-hearing conference. Therefore, on May 24, 2006, OHO served the Order to Show Cause on Respondent by facsimile and overnight mail to her CRD address. Respondent did not respond to the Order to Show Cause.

By not appearing at the pre-hearing conference, not replying to the Order to Show Cause, and failing to respond to the Motion for Entry of Default Decision, Respondent effectively

¹ "Graves Decl."

² CX-1 through CX-10.

³ The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, and the additional materials filed by Enforcement with its motion.

abandoned her defense. On June 5, 2006, the Hearing Officer issued an Order Holding Respondent in Default.

The Order Scheduling Pre-Hearing Conference and Order to Show Cause were served on Respondent in accordance with Rules 9132 and 9134. Pursuant to Rule 9241(f), the Hearing Officer may issue a default decision against a party that fails to appear at a pre-hearing conference, of which the party has due notice.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was registered with NASD as a General Securities Representative through member firm American Express Financial Advisors, Inc, ("American Express") (n/k/a Ameriprise Financial Services, Inc.) from October 11, 2001 through April 30, 2003. She was then registered through Lincoln Financial Advisors Corporation ("Lincoln") from May 12, 2003 through March 12, 2004. Respondent was last registered from March 1, 2004 until June 6, 2005 through member firm Private Consulting Group, Inc. ("PCG").⁴ Although Respondent is not currently registered or associated with any NASD member, the Complaint was filed on January 5, 2006--within two years after the termination of her registration with PCG. The Complaint charges her with misconduct that is alleged to have occurred while she was registered with an NASD member firm. Therefore, Respondent remains subject to NASD jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of NASD's By-Laws.

⁴ CX-1; Graves Decl., ¶¶ 3-5.

B. Private Securities Transaction

NASD Conduct Rule 3040 requires that an associated person who intends to participate⁵ in any private securities transaction,⁶ must, prior to the transaction, “provide written notice to the member with which he is associated describing in detail the proposed transaction and the person’s proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction...”

The first cause of the Complaint alleges that while Spears was an American Express account executive, she participated in the sale of 12,800 shares of preferred stock of Ultimate Ventures, Inc., at a cost of \$10 per share, to her customers, Mr. and Mrs. K. Ultimate Ventures was a private securities investment that was not available through American Express. Spears did not provide American Express with prior written notification of the transaction.

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this proceeding, that Spears violated Conduct Rule 3040. It is a well-established rule that a violation of one NASD rule also constitutes a violation of Rule 2110, which provides that, “A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.”⁷ The Hearing Officer therefore finds that Spears violated Rules 3040 and 2110.

⁵ *Dep’t. of Enforcement v. Abbondante*, 2003 NASD Discip. LEXIS 50 at *26 (OHO Nov. 7, 2003) (“even very limited involvement by an associated person is sufficient to trigger the requirement that the person give notice to the employer.”).

⁶ Rule 3040 defines a private securities transaction as “any securities transaction outside the regular course or scope of an associated person’s employment with a member, including, though not limited to, new offerings of securities which are not registered with the Commission...”

⁷ See, e.g., *E. Magnus Oppenheim & Co., Inc.*, Exchange Act Release No. 51479, 2005 SEC LEXIS 764, at *7 (Apr. 6, 2005); *Jim Newcomb*, Exchange Act Release No. 44945, 2001 SEC LEXIS 2172, at n1; *Stephen J. Gluckman*, Securities Exchange Act Release No. 41628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999).

C. Unsuitable Recommendations

NASD Conduct Rule 2310 requires that “in recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.” Thus, “a representative may make only such recommendations...as would be consistent with the customer’s financial situation and needs.”⁸

The second cause of the Complaint alleges that in early 2002, Mr. and Mrs. K met with Spears to review their assets, cash flow and investment objectives. Mr. and Mrs. K were retired and Mr. K had recently taken a part-time job to make ends meet. Mr. and Mrs. K had all of their liquid assets, worth approximately \$128,000, invested in mutual funds through their account at American Express.

In early 2002, Mr. and Mrs. K were unhappy with the performance of their mutual funds; however, they told Spears that they could not afford to lose any money and that they wanted to invest in something with no risk. Spears recommended that Mr. and Mrs. K liquidate their entire portfolio and invest the proceeds in the preferred shares of Ultimate Ventures. Spears represented to Mr. and Mrs. K that Ultimate Ventures was an “insurance pool” offering a five-year “investment contract” that would pay them a guaranteed 16% minimum annual return. Spears further told Mr. and Mrs. K that she was both licensed and “insured” and that if anything happened to their investment in Ultimate Ventures, they could recover their money through her.

Based on Spears’ representations and recommendation, Mr. and Mrs. K liquidated their

⁸ *Dep’t. of Enforcement v. Stein*, Complaint No. C07000003, 2001 NASD Discip. LEXIS 38 at *10 (NAC Dec. 3, 2001), *aff’d*, Exchange Act Rel. No. 47335 (Feb. 10, 2003).

portfolio of mutual funds at American Express and invested the entire \$128,000 in Ultimate Ventures. Ultimate Ventures subsequently collapsed, and Mr. and Mrs. K lost their entire investment of 128,000, minus approximately \$30,700 they received in dividend payments before the company collapsed. Based upon the information provided by the customers, Spears could not have had a reasonable basis for believing that such an investment was suitable for them.

These allegations, which are deemed admitted, are sufficient to establish for purposes of this proceeding that Spears violated Conduct Rule 2310 and thereby violated Conduct Rule 2110.

D. Outside Business Activities

Rule 3030 provides that no person registered with a member “shall be employed by, or accept compensation from, any person as a result of any business activity...outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member...”

The third cause of the Complaint alleges that on or about June 16, 2003, while Spears was employed by Lincoln, she engaged in an outside business activity by recommending and referring Mr. and Mrs. K to Assurance Financial for the purpose of purchasing viatical settlement contracts. Based on Spears’ recommendation, Mr. and Mrs. K made three viatical investments, totaling \$76,257.96, through Assurance Financial. Mr. and Mrs. K’s return on the viatical investments depended upon the timing of the insureds’ deaths. Spears received compensation of \$1,806 from Assurance Financial for her referral of Mr. and Mrs. K. Mr. and Mrs. K subsequently lost all of the funds that they used to purchase the viatical investments. Spears failed to provide prompt written notification to American Express of her participation in the three transactions.

These allegations, which are deemed admitted, are sufficient to establish for purposes of this proceeding, that Spears violated Conduct Rule 3030 and thereby violated Conduct Rule 2110.

IV. Sanctions

Enforcement is recommending that Spears be barred. Regardless of whether, considered individually, the violations committed by Spears would merit a bar, given the totality of the circumstances, Spears' conduct was egregious and a bar is clearly appropriate.

Spears recommended investments to her retired customers that were clearly unsuitable for them. She advised them to liquidate their entire portfolio of mutual funds in order to invest in a single security—the preferred stock of Ultimate Ventures, an apparently high-risk and speculative company. After Mr. and Mrs. K had lost all of their liquid assets on Ultimate Ventures, Spears advised them to refinance their home, withdraw the equity and purchase viatical settlement contracts with the proceeds.⁹ Once again, Mr. and Mrs. K lost their entire investment of over \$76,000.

Spears was able to steer Mr. and Mrs. K to these financially devastating investments by failing to notify and receive permission from her firms to engage in a private securities transaction and an outside business activity. By violating NASD rules 3040 and 3030, Spears deprived Mr. and Mrs. K of the firm oversight and protection the rules were designed to ensure.

As a result of Spears' violations, Mr. and Mrs. K suffered severe financial harm. Spears' actions demonstrate a pattern of disregard for the interests of her customers and the industry rules meant to protect them. Her conduct was egregious and warrants a bar from the securities industry.

⁹ Motion for Entry of Default Decision at 6; Graves Decl., 29-30, 38-39.

V. Conclusion

Respondent Mary Frances Spears is barred from associating with any NASD member firm in any capacity for making unsuitable recommendations, in violation of Rule 2310 and 2110; engaging in a private securities transaction, in violation of Rules 3040 and 2110; and engaging in an outside business activity, in violation of Rules 3030 and 2110. In light of the bar, no fines are imposed. The bar will become effective immediately if this decision becomes NASD's final disciplinary action.

SO ORDERED.



Rochelle S. Hall
Hearing Officer

Copies to: Mary Frances Spears (*via overnight and first class mail*)
Mark A. Graves, Esq. (*electronically and via first class mail*)
Lewis Taylor Egan, Esq. (*electronically and via first class mail*)
Mark Dauer, Esq. (*via first class mail*)
Rory C. Flynn, Esq. (*via first class mail*)

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DEPARTMENT OF ENFORCEMENT,

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MARY FRANCES SPEARS
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JAN - 5 2006

Hearing Officer

OFFICE OF HEARING OFFICERS

COMPLAINT

Upon information and belief, the Department of Enforcement ("Complainant") alleges as follows:

JURISDICTION

1. On or about October 11, 2001, Respondent Mary Frances Spears ("Respondent") first became registered with member firm American Express Financial Advisors, Inc. (BD No. 6363) ("AEFA"). Respondent remained registered with AEFA until on or about April 30, 2003, when she voluntarily left AEFA and terminated her registration with the firm.
2. On or about May 12, 2003, Respondent first became registered with member firm Lincoln Financial Advisors Corporation (BD No. 3978) ("LFAC"). Respondent remained registered with LFAC until on or about March 12, 2004, when she voluntarily left LFAC and terminated her registration with the firm.
3. On or about March 1, 2004, Respondent first became registered with member firm Private Consulting Group, Inc. (BD No. 45053) ("PCG"). Respondent remained

registered with PCG until on or about June 6, 2005, when she voluntarily left PCG and terminated her registration with the firm.

4. NASD retains jurisdiction over Respondent through June 5, 2007 (two years from June 6, 2005), pursuant to Article V, Section 4 of its By-Laws.

FIRST CAUSE OF COMPLAINT

(Private Securities Transaction) Violation of NASD Conduct Rules 3040 and 2110

5. Paragraphs one through four above are realleged and incorporated herein by reference.
6. On or about April 12, 2002, Respondent Mary Frances Spears participated in the sales of 12,800 shares of preferred stock of Ultimate Ventures, Inc., which cost \$10 per share, to CK and NK, husband and wife, for whom she was the account executive at AEFA. Ultimate Ventures, Inc. was a private securities investment that was not available through AEFA, but through an outside third party.
7. Respondent did not provide AEFA with prior written notification describing in detail the proposed transaction, her proposed role therein, and stating whether she had received or might receive selling compensation in connection with the transaction. Nor did Respondent receive written permission from AEFA to participate in the private securities transaction.
8. The foregoing acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rules 3040 and 2110 by Respondent Spears.

SECOND CAUSE OF COMPLAINT

(Unsuitable Recommendation)

Violation of NASD Conduct Rules 2310 and 2110

9. Paragraphs one through four and six through seven above are realleged and incorporated herein by reference.
10. In early 2002 CK and NK met with Respondent to review their assets, cash flow analysis, and their goals and objectives. CK and NK were retired, although CK had recently taken a part-time job to make ends meet, and had all of their liquid assets, which were approximately \$128,000 at that time, invested in mutual funds through their account at AEFA.
11. In early 2002, CK and NK were unhappy with the performance of the mutual funds in their AEFA account. During the meeting, NK asked Respondent whether they should keep all of their liquid assets in the mutual funds. Respondent replied with something to the effect that "only a fool would stay in" the mutual funds. CK and NK were surprised by Respondent's response, advising Spears that they could not afford to lose any money and that they wanted to invest in something with no risk. Respondent advised CK and NK that although they could certainly find a "safe" investment through AEFA, such an investment would not provide a meaningful return.
12. Respondent then recommended CK and NK liquidate their entire portfolio then held in mutual funds at AEFA valued at \$128,000 and invest the proceeds in the preferred stock of Ultimate Ventures, Inc. Spears represented to CK and NK that Ultimate Ventures, Inc. was an "insurance pool" that offered a five-year "investment contract." This investment contract would pay them a guaranteed

minimum of 16% annually and possibly more. Respondent further represented to CK and NK that she owned a similar type of investment, herself. She assured the Ks that she was both licensed and “insured” and that if anything happened to the Ultimate Ventures, Inc. investment, CK and NK could recover their money through her.

13. Based upon Respondent’s representations and recommendation, CK and NK liquidated their portfolio of mutual funds at AEFA and invested the entire proceeds of \$128,000 in preferred shares of Ultimate Ventures, Inc.
14. The purchase of Ultimate Ventures, Inc. preferred stock was not suitable for CK and NK based upon the facts disclosed by them as to their other securities holdings, financial situation, financial needs, and based upon the fact that the purchase required the investment of CK and NK’s entire liquid net worth.
15. Ultimate Ventures, Inc. subsequently collapsed. CK and NK lost their entire investment of \$128,000; minus approximately \$30,700 they received in dividend payments before the company collapsed.
16. The foregoing acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rules 2310 and 2110 by Respondent Spears.

THIRD CAUSE OF COMPLAINT

(Outside Business Activity)

Violation of NASD Conduct Rules 3030 and 2110

17. Paragraphs one through four above are realleged and incorporated herein by reference.
18. On or about June 16, 2003, Respondent Mary Frances Spears engaged in an outside business activity in that she recommended and referred CK and NK,

husband and wife, to Assurance Financial for the purpose of purchasing viatical investments.

19. Based upon Respondent Spears' recommendation, CK and NK made three viatical investments through Assurance Financial, which totaled \$76,257.96: one for \$13,600; one for \$47,457.96; and one for \$15,200.
20. According to the three viatical agreements ("Agreements"), CK and NK became a substitute beneficiary and/or assignee of a beneficial interest in certain life insurance policies that were set forth in each of the three Agreements. Lifetime Capital, Inc. or US Bank NA owned the policies. US Bank NA acted as the escrow agent of the life insurance policies, in regard to the payment of the insurance policy premiums and maintenance of the insurance policies.
21. CK and NK's return on the three viatical investments depended upon the timing of the insureds' deaths.
22. Respondent received compensation of \$1,806 from Assurance Financial for the referrals.
23. Respondent failed to provide prompt written notice to her member firm in connection with her participation in these three transactions.
24. In or around February 2004, eight individuals associated with Lifetime Capital, Inc. were indicted in Pensacola, Florida on charges of money laundering and mail fraud. The court appointed a receiver over Lifetime Capital, Inc. The receiver's report indicated that companies like Lifetime Capital Inc. are to establish and fund an insurance premium escrow account in order to make payments on the policies until the insured dies. Lifetime Capital Inc., however, apparently failed to make

- many of the insurance policy premium payments it was supposed to be making on the insurance policies it had sold to investors. Also, in conjunction with the “matching” of policies for sale, a medical evaluation was to be performed by an independent underwriter of the insured to establish the anticipated life expectancy and possible “yield” of the investments. According to the receiver’s report, however, Lifetime Capital Inc. controlled the underwriting arm and as such, evaluations of the insurance policies it sold to investors may have been fabricated. There are also allegations of misappropriation of funds by Lifetime Capital Inc.’s principals. The receiver’s report stated that approximately 4,000 investors made over 6,000 investments, which totaled \$100 million in Lifetime Capital, Inc.
25. CK and NK subsequently lost all of the funds that they had used to purchase the three viatical investments, which totaled \$76,257.96.
26. The foregoing acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rules 3030 and 2110 by Respondent Spears.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon the Respondent in accordance with NASD Procedural Rule 8310;
- C. An order requiring Respondent Spears to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;

- D. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Procedural Rule 8330; and
- E. An order imposing any other fitting sanction.

NASD DEPARTMENT OF ENFORCEMENT

Dated: January 4, 2006



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