BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 8 Complainant, vs. Keith L. Mohn West Bloomfield, MI, Respondent.	DECISION Complaint No. C8A960063 District No. 8 (CHI) Dated: January 22, 1999

Pursuant to NASD Procedural Rule 9311, Keith L. Mohn ("Mohn") has appealed a January 30, 1998 decision of the District Business Conduct Committee for District No. 8 ("DBCC"). After a review of the entire record in this matter, we affirm the findings of the DBCC that Mohn participated in private securities transactions without prior notice to, and approval of, his employer firm. As to sanctions, we affirm the imposition of a censure, $52,222 fine, DBCC hearing costs of $4,155.50, and a bar in all capacities. We also impose appeal costs of $750.

Background

The DBCC issued the complaint on October 15, 1996, after an investigation into the circumstances of a report of disciplinary action taken against Mohn by his employer firm. The complaint alleged that on February 25, 1994 and March 17, 1994, Mohn participated in private securities transactions by participating in the sales of certain products of Citi Equity Group, Inc. ("Citi-Equity"), specifically interests in Citi-South Carolina II ("Citi-South") and Citi-Virginia Beach ("Citi-Virginia") limited partnerships (collectively, the "Limited Partnerships") to John and Carolyn Shettler ("the Shettlers") and Stephen and Martha Soehren ("the Soehrens"), respectively. The complaint further alleged that in connection with such participation, Mohn failed to provide the requisite prior written notice of his intention to engage in such activities to his employer firm and to receive prior written approval from that firm, in violation of NASD Conduct Rules 2110 and 3040.

Mohn entered the securities industry on January 7, 1983 as an investment company and variable contracts representative of John Hancock Distributors, Inc. ("John Hancock") and John Hancock Mutual Life Insurance Company ("John Hancock Mutual"). On March 25, 1987, Mohn became registered as a direct participation program representative. He is currently registered in both capacities with John Hancock.[1]

Mohn's wife, Lisa Mohn, through whom Mohn alleged that the sales of the Limited Partnerships were effected, entered the securities industry in June 1988 as a registered representative with E.F. Hutton, Inc. ("Hutton") (n/k/a Lehman Brothers, Inc.) and served in such capacity until March 1989. The records further show that Lisa Mohn was registered in the same capacity with the following NASD member firms: Paine Webber Incorporated ("Paine Webber"), from April 1989 to May 1991; Mariner Financial Services, Inc. ("Mariner"), from February 24, 1993 to June 22, 1993; Portfolio Asset Management/USA Financial Group, Inc. ("Portfolio"), from July 26, 1993 to November 1, 1993; Martha Seger & Co., Inc. ("Martha Seger"), from February 25, 1994 to July 19, 1994; and [Chapel Hill Securities, Inc. ("Chapel Hill")], from August 18, 1994 to October 26, 1995.

Facts

Undisputed Facts. Mohn admitted that the Shettlers and Soehrens purchased interests in the Limited Partnerships on the dates and in the amounts alleged in the complaint. Mohn further admitted that the Limited Partnerships were securities[2] and that they had not been approved for sale by John Hancock. Although Mohn contended that the actual sales of the securities were effected through Lisa Mohn, he also admitted that Lisa Mohn had never met or spoken with either the Shettlers or the Soehrens.

We find that the differing explanations given by the individuals involved in the transactions at issue are important in assessing credibility, making findings, and determining the seriousness of the violations alleged. Accordingly, we present the facts in separate segments, as told in testimony by the persons involved.

Customers' Testimony - The Shettlers. The Shettlers responded to certain promotional material that they had received from John Hancock in 1993, and they began a series of meetings to discuss financial planning with Mohn and Michael J. Aller ("Aller"), another John Hancock representative from the Detroit Mohn Agency. The financial planning discussion included consideration of a securities product that would provide a tax shelter for the Shettlers. The Shettlers indicated that Mohn was presented to them as the expert on tax-sheltered investments. They believed that Aller was their agent of record regarding their life insurance purchases and that Mohn was their agent for the purchase of a tax credit investment. They were told that Mohn

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[1] Mohn is employed by the Detroit Mohn General Agency ("Detroit Mohn Agency"), which was founded by his father, Laurence F. Mohn, and which serves as a franchise of John Hancock Mutual and John Hancock.

[2] The investments were made in Limited Partnerships that had purchased properties to be rented at below-market rates to low-income people. The investors wished to obtain tax credits which were available for financiers of low-income housing.

would investigate various offerings and select one that would be appropriate for them. All of the initial meetings between the Shettlers and Mohn and Aller were conducted at the offices of John Hancock.

Around March 5, 1994, Aller and Mohn went to the Shettlers' home for a meeting at which the investment in Citi-South was discussed. Mohn brought the subscription documents for Citi-South with him, and he told the Shettlers that he had selected that investment for them. Mohn stated that he knew that Citi Equity, which offered the limited partnership, was a "very large, very reliable organization, very stable and solid." That was the first time that the Shettlers had received any documents pertaining to Citi-South, and they stated that Mohn did not present them with any other tax shelter options. The Shettlers signed the subscription documents at the March 5 meeting and gave Mohn a check for $27,778 for the investment.[3] They stated that Mohn directed them as to where to initial and sign portions of the subscription documents, and that they relied on Mohn because they signed the documents without reading them. The Shettlers further stated that they were not told that they would have to purchase the Citi-South limited partnership through Lisa Mohn and Martha Seger, nor were they told that John Hancock had determined that it would not permit Mohn or Aller to sell the limited partnership for John Hancock. To the contrary, they declared that they believed that they were purchasing the securities through John Hancock.

In May 1994, Mohn telephoned the Shettlers and told them "something was wrong" with Citi Equity, but that their investment was not involved. On July 8, 1994, in response to a request from the Shettlers, Mohn sent them a letter, on John Hancock stationery, enclosing a copy of the confirmation for the Shettlers' Citi-South purchase, which he stated they should have received in March 1994. The confirmation letter, which the Shettlers testified they had not previously received, showed a copy to Lisa Mohn at Martha Seger. The Shettlers stated that this was the first time they had seen these names and that they presumed that Lisa Mohn was a family member helping with correspondence. Mohn's July 8 letter also stated that if the Shettlers had any questions about Citi-South, they should "please call [him] directly;" no mention was made of Lisa Mohn or Martha Seger.

Sometime in July 1994, the Shettlers learned that Citi-South was in bankruptcy and called Mohn. He met with the Shettlers in their home and stated that he was surprised about the bankruptcy and that he would be personally responsible for the losses. Afterward, the Shettlers were contacted by Bruce Plemmons ("Plemmons"), an investigator with John Hancock, about Citi-South. The Shettlers stated that they lost the entire investment of $27,778, lost the benefit of having their funds in a 401(k) account that they had liquidated to make the Citi-South purchase,[4]

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[3] The Shettlers stated that Mohn told them to date their check February 25, 1994, even though the meeting occurred in March, so that they would be able to get a tax credit for 1994.

[4] The Shettlers testified that they had to pay $18,000 in taxes for the sale of the stock options that had comprised their 401(k) plan with General Motors, their employer.

and did not receive any tax credits. The Shettlers filed a lawsuit against Mohn, Lisa Mohn, John Hancock, and Martha Seger to attempt to recoup their losses.[5]

Customers' Testimony - The Soehrens. The Soehrens had purchased insurance policies from John Hancock in the mid-1980s; thus in 1993, when they wanted to increase their insurance, they consulted the yellow pages and chose the local John Hancock agency -- the Detroit Mohn Agency.

During October and November 1993, the Soehrens had several meetings to discuss their financial needs with Mohn and Jordan Pollack ("Pollack"), another John Hancock representative. The Soehrens believed that Mohn was their agent, and that Pollack assisted Mohn in clerical matters. During the course of their meetings, Mohn, who was described as "the presenter and the program designer," suggested the need for a tax shelter. In mid-March 1994, Mohn told the Soehrens that he had located a suitable tax vehicle for them and presented the idea of a Citi-Equity limited partnership. No other investment possibilities were presented to the Soehrens by Mohn. The Soehrens testified that they missed the date to invest in Citi-South, so they wrote a new check for $35,844 for the Citi-Virginia limited partnership. The Soehrens had received a prospectus about a week before their purchase, but they told Mohn that they did not understand the documents. Mohn summarized the prospectus for them, and they followed Mohn's instructions when they initialed and signed the subscription documents. In response to a question from the Soehrens, Mohn advised them that he owned a $17,000 interest in a Citi-Equity limited partnership and that the company was sound.

Prior to their investment, the Soehrens contacted Gary Lefkowitz ("Lefkowitz"), the owner of Citi-Equity, who informed them that the return of principal invested was not guaranteed and that it was a very risky investment. When the Soehrens voiced this concern to Mohn, he assured them that he was confident about the product, that Lefkowitz was a good manager, and that the limited partnership was a good investment. The Soehrens believed that Citi-Virginia was offered by Mohn as part of John Hancock's broad range of available products, and they were not told that John Hancock had not permitted Mohn to sell the limited partnership. The Soehrens testified that they never met or spoke with Lisa Mohn and had no idea at the time of their investment that Lisa Mohn or Martha Seger had any connection to the Citi-Virginia purchase.

In May 1994, the Soehrens heard a radio report that Lefkowitz had been arrested for fraud. They contacted Pollack, who spoke to Mohn, and then advised the Soehrens that a bankruptcy reorganization was in effect and that their investment might be protected. Subsequently, the Soehrens learned that they had lost their entire investment of $35,844. In September 1994, the Soehrens received a telephone message from Mohn advising them that John Hancock was conducting an audit, that Plemmons would be contacting them, and that they should inform Plemmons that they knew Citi-Virginia was not a John Hancock product, and that it had been purchased through Lisa Mohn's firm. The Soehrens stated that this phone message

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[5] At the oral argument on appeal, Mohn stated that the Shettlers' lawsuit had been settled for $100,000. Mohn and Lisa Mohn contributed $10,000 to the settlement and Mohn's insurance company paid $35,000. The remainder was paid by John Hancock and Martha Seger.

was the first time that they had heard any mention of Mohn acting on behalf of his wife in the Citi-Virginia transaction.

Testimony of John Hancock's Compliance Officer. Lawrence Carter ("Carter) testified that he is a compliance enforcement supervisor with John Hancock and that he conducted an investigation into Mohn's involvement with the investments in the Limited Partnerships. He stated that John Hancock held compliance meetings, which were attended by Mohn in 1992-1994, and which included information about the prohibition on private securities transactions. John Hancock also maintained compliance manuals that were issued to every sales representative and prohibited the sale of products not approved by John Hancock. The manuals also contained procedures for brokers who wanted to make a referral to a representative at another firm, which required the John Hancock representative to obtain home office approval before making the referral. Carter testified that Mohn never sought permission to make a referral to Lisa Mohn for the Limited Partnerships.

Carter stated that Mohn had made a request in April 1993 for John Hancock to permit him to sell Citi-Equity products, but that this request was denied in a letter to Mohn, dated April 23, 1993, from Mary C. Owston ("Owston"), Product Manager. In this letter, Owston outlined a "number of concerns" with the offerings, including questions regarding the product's financing, cash flow, and rate of return. Owston also expressed concern with the private placement structure of the offering, in that it was not registered with the Securities and Exchange Commission ("SEC" or "the Commission"), and stated that the payment options might be unsuitable for some investors, which could raise compliance issues. Owston further noted that:

> Citi Equity sells through smaller regional financial firms. They do not sell through any large insurance broker/dealers or any of the wirehouses. If a problem did arise with the sponsor or the program itself, John Hancock Distributors, as the largest and most recognized firm, would have the greatest exposure.
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> In addition to these concerns are the inherent risks associated with these types of offerings (property risk, financing risk, operating risk, etc.). Due to these concerns, we feel that it is not in our best interest to sign a selling agreement with Citi Equity Group, Inc.

In a letter dated June 30, 1993, Mohn again requested permission from the President of John Hancock to sell Citi-Equity products. Mohn stated that he "would like to have [the Mohn Agency] office set-up as a pilot program where [he] can prove to [John Hancock] that the sale of this product will be profitable for Hancock as well as for [Mohn Agency] representatives." In a telephone conversation with Mohn, John Hancock's President once again advised Mohn that John Hancock would not permit Mohn to sell Citi-Equity limited partnerships.

Carter testified that in August 1994, John Hancock received information that someone in the Mohn Agency may have been selling unapproved products, and Plemmons was assigned to

investigate the matter. As part of his investigation, Plemmons obtained copies of Mohn's customer contact logs. Upon review, Plemmons discovered that the customer contact logs provided to him were different from those that had been previously provided by Mohn's office to Martha Seger. Specifically, the logs provided to John Hancock had references that indicated that Mohn was acting on behalf of Lisa Mohn when he contacted Limited Partnership customers, whereas the logs provided to Martha Seger do not contain any references to Lisa Mohn's involvement.

The John Hancock investigation resulted in the issuance of a letter of reprimand dated December 19, 1994, which concluded that Mohn had participated in the sales of private securities transactions. Mohn was fined $25,000 and subjected to special supervision for one year.

Testimony of Aller and Pollack. Aller testified that he initially met with Mr. Shettler in 1993 and that the Shettlers needed an evaluation of their financial situation in order to determine a plan for the future. Aller had Mohn attend subsequent meetings with the Shettlers because he felt that Mohn was more familiar with the financial program that he believed the Shettlers needed. Aller confirmed that the Citi-Equity products were mentioned for the first time at a meeting with both Shettlers in March 1994, which occurred at the Shettlers' home. Aller stated that Mohn discussed limited partnerships on a "very generic basis," explaining that there were two types of limited partnerships, public and private. The Shettlers asked Mohn which type he owned, and when he said private, they also chose a private limited partnership investment. Aller stated that Mohn told the Shettlers that he did not personally handle private offerings but that Lisa Mohn would do so. Aller testified that the Shettlers agreed to purchase the private limited partnership and Mohn pulled the Citi-Equity documents out of his briefcase and told the Shettlers to fill them out and return them to Mohn. According to Aller, Mohn did not mention the limited partnerships which John Hancock had approved its representatives to sell and did not leave documents about any other limited partnerships with the Shettlers.

Pollack testified that the Soehrens were his insurance clients at John Hancock. When they contacted Pollack about additional insurance in 1993, he suggested that they participate in the financial program espoused by Mohn. The Soehrens agreed and then had a series of meetings with Pollack and Mohn to discuss their financial situation. Pollack stated that Mohn was educating Pollack as well as the Soehrens during these sessions. Pollack stated that Mohn discussed tax shelters with the Soehrens and described tax sheltered investments "in a generic sense," by explaining public versus private offerings. Pollack testified that Mohn told the Soehrens about the limited partnerships that were offered by John Hancock and that Mohn believed that the John Hancock-approved products were too costly and unsuitable for the Soehrens. Mohn did not give the Soehrens a prospectus for any John Hancock-approved limited partnership. According to Pollack, Mohn told the Soehrens about Citi-Equity products because they asked Mohn which type of investment he owned. Pollack stated that Mohn implied that the Citi-Equity products were suitable for the Soehrens and advised the Soehrens that he would have to refer them to Lisa Mohn for the Citi-Equity offerings because he did not have a license to sell those products.

Pollack stated that he obtained a prospectus for the Citi-Virginia limited partnership from the Detroit Mohn Agency office and delivered it to the Soehrens, telling them that it was from Lisa Mohn. Pollack also picked up the check and signed offering documents from the Soehrens and gave them to Mohn for delivery to Lisa Mohn. Pollack confirmed that Lisa Mohn was not present at any of the meetings with the Soehrens, but he stated that he gave her address and telephone number to the Soehrens.

Testimony of President of Martha Seger. The President of Martha Seger, Damian Kassab ("Kassab"), testified that in 1993 and 1994 Martha Seger was authorized to sell only direct participation programs ("DPP"). Kassab and Mohn had gone to high school together, but did not meet again until 1993. At that time, Mohn told Kassab that Lisa Mohn wanted to spend more time with her children, but also wanted to continue in the securities business with her established clientele by working part-time from her home. Kassab stated that Mohn told him that Lisa Mohn had a "book of business" with high-net-worth individuals who needed to focus on income sheltering. Kassab testified that he did not hire Lisa Mohn from a profit perspective, but as an accommodation to an old friend. Kassab testified that neither Mohn nor Lisa Mohn informed him that Lisa Mohn wanted to "park" her license with Martha Seger, and that if he had been advised of that fact, he would not have permitted Lisa Mohn to become registered with Martha Seger.

Kassab testified that in 1994, Mohn requested that Martha Seger permit Lisa Mohn to sell Citi-Equity limited partnerships. Kassab had never heard of Citi-Equity before, and Mohn provided some material on the company to him. Mohn advised Kassab that Lisa Mohn had been selling Citi-Equity partnerships for some time and that she had a long list of clients who were interested in such products. Kassab performed a due diligence investigation of Lefkowitz and Citi-Equity for Martha Seger and then permitted the firm to sell the products. Kassab stated that Mohn never advised him that Mariner and John Hancock had previously refused to sell Citi-Equity products, and Kassab declared that if he had been aware of such refusals, he would have contacted those firms to find out their reasons and would have conducted more investigation before permitting the sale of the partnerships.

Kassab testified that Lisa Mohn did not effect any other transactions through Martha Seger. He stated that he was unaware that Lisa Mohn had never spoken to, or had any contact with, either the Shettlers or the Soehrens and that he would have considered this a "very big problem." Martha Seger compensated Lisa Mohn for the Citi-Equity sales, but Kassab did not know what she did with the monies.

On May 18, 1994, Kassab read an article in The New York Times that reported that Lefkowitz allegedly had bilked investors of some $130 million and was facing criminal charges in Minnesota. Kassab immediately stopped sales of the Limited Partnerships at Martha Seger and attempted to retrieve customer funds from pending transactions. Martha Seger also suspended Lisa Mohn's registration. When Kassab tried to obtain additional information about Citi-Equity from Lisa Mohn, she told him to talk to Mohn. Martha Seger terminated Lisa Mohn's registration shortly thereafter.

Testimony of Lisa Mohn. Lisa Mohn testified that she began working in the securities industry in 1983 as a sales assistant with Merrill Lynch. She obtained her registration as a general securities representative with Hutton, but while she worked there and later at Paine Webber, she was a sales assistant and did not have any customers of her own. In May 1991, she left Paine Webber to have her first child, and she stated that she became registered with Mariner in 1993 because she wanted to "warehouse" her license, i.e., maintain her license with a firm so that she would not have to retake the Series 7 examination after being out of the securities business for two years. Lisa Mohn did not know that it was inappropriate for her to "warehouse" or "park" her license with a firm when she was not actively engaged in the securities business. She did not recall having any clients or doing any securities business at Mariner.

Lisa Mohn stated that she became employed with Martha Seger in 1993, but again worked from her home. She testified that she did not have any clients when she became registered with Martha Seger and that she had never completed any transactions for her own clients during her employment at any of her previous firms. Lisa Mohn stated that she did not intend to do any business at Martha Seger because she only wanted to "warehouse" her license.

Lisa Mohn admitted that she never spoke to the Shettlers or the Soehrens, but she stated that they were her clients and that she made the sales of the Limited Partnerships to them through Mohn. She stated that she did not decide which limited partnerships would be sold to the clients, and that she gave Mohn the offering documents for the clients. Lisa Mohn later received the completed offering documents, which she forwarded to Martha Seger. She stated that she did not know who had completed the offering memoranda, and that she relied on the suitability information provided by the clients therein and on Mohn's judgment as to whether the investments were suitable for the customers.

Lisa Mohn stated that she was not aware that she had been suspended from Martha Seger. She testified that she decided to leave Martha Seger because it "was not worth the effort" and she would rather stay at home with her children. She admitted that she received a check for about $2,200 from Martha Seger. She stated that she did not give the money to Mohn, but rather deposited it in their joint checking account and spent the money on items for her children, or on clothes.

Testimony of Mohn. Mohn testified that he learned about the Citi-Equity products in 1991 or 1992 when he attended a financial planning conference. He and his wife decided to purchase a full unit for $23,000 in one of Citi-Equity's limited partnerships through the secondary market. On February 9, 1993, Mohn forwarded Lisa Mohn's registration documents to Mariner. He and Lisa Mohn also met with representatives of Mariner and stated that Lisa Mohn was interested in selling Citi-Equity products. Mohn stated that he believed these products were a good alternative for his clients and that they would be a "perfect niche" for Lisa Mohn to develop, with his help. Mohn denied that they had made a decision to "park" Lisa Mohn's registration with Mariner; rather, he stated that it was a way to prevent the expiration of her registration and "maybe slowly get her back involved" in the securities business.

In April 1993, Mariner informed the Mohns that it would no longer permit the sale of Citi-Equity products. Mohn testified that he was told that Mariner was in the midst of a merger and did not want to be involved with Citi-Equity because Citi-Equity was involved in a lawsuit with a disgruntled female employee. Mohn stated that he confirmed the information about the lawsuit with a representative of Citi-Equity. Mohn asserted that Lisa Mohn decided to leave Mariner because it was charging her previously undisclosed monthly registration fees.

In April 1993, Mohn requested John Hancock to consider sales of private tax shelter partnerships. Mohn denied that he specifically asked John Hancock to sell Citi-Equity limited partnerships; he asserted that he provided information about Citi-Equity only because the John Hancock compliance person wanted to review an example of such a partnership. Mohn did not tell John Hancock that Mariner had discontinued sales of Citi-Equity products. Mohn admitted that John Hancock denied his request in a letter dated April 23, 1993 and raised a number of concerns, including Citi-Equity's lack of audited financial statements. Mohn also admitted that he represented that Citi-Equity was "credible" and "ethical" and asked the President of John Hancock to reconsider this decision. Again Mohn did not disclose that Mariner had discontinued its sales of Citi-Equity products. Mohn admitted that the President refused the request and that Mohn never received any written approval from John Hancock to sell the Citi-Equity limited partnerships.

Mohn stated that he became reacquainted with Kassab late in 1993, when Kassab was forming Martha Seger. When Mohn learned that Martha Seger was going to be a DPP firm, Mohn thought that it would be a good opportunity for Lisa Mohn to develop her niche in the sale of tax credit limited partnerships. Mohn denied that he told Kassab that Lisa Mohn had her own client base. Mohn admitted that he did not inform Kassab that both Mariner and John Hancock had determined not to sell Citi-Equity products.

Mohn testified that he did not make specific recommendations either to the Shettlers or the Soehrens to purchase Citi-Equity limited partnerships, but only "generally educated" them regarding their options and the existing programs. Mohn admitted, however, that the customers would not have known about Citi-Equity unless he had raised the issue. Mohn stated that because he is a Chartered Financial Consultant ("CHFC"), he is required to review a client's entire financial situation and provide the best financial advice possible. Mohn stated that he was obligated to do this even if John Hancock did not sell the products that he believed to be the best for the client. Mohn conceded, however, that the Citi-Equity products were an important factor in the financial models he developed for the Shettlers and the Soehrens because the limited partnerships had significant tax consequences, or were proposed as replacement investments for items that he recommended be discontinued from their financial profiles.

Mohn stated that he spoke about Citi-Equity products only after the Shettlers and the Soehrens had asked him which type of investment he owned. When the customers expressed their interest in private limited partnerships, Mohn stated that he told them he could not sell such products because John Hancock only sold public limited partnerships, but that they could obtain the partnerships through Lisa Mohn and her firm. Mohn admitted that he made the determination as to whether the Citi-Equity investments were suitable for the customers, and that Lisa Mohn

relied on his knowledge of the clients' asset bases. Mohn also admitted that he never told the Shettlers or the Soehrens about Mariner's decision to discontinue sales of Citi-Equity products, or about John Hancock's stated concerns and ultimate denial of his requests to sell Citi-Equity investments.

Although Mohn initially maintained that he had simply "directed business" to Lisa Mohn, he admitted in response to questioning that she had never spoken with or met the Shettlers or the Soehrens and that he had "handled" the business for her. Mohn stated that Aller was the Shettlers' agent of record, but Mohn admitted that he had met with the Shettlers at John Hancock's offices and at their home, where tax shelters were discussed. Mohn obtained a prospectus for Citi-South from Lisa Mohn and presented it to the Shettlers during a meeting at their home in March 1994. Mohn stated that he did not mention a John Hancock-approved limited partnership to the Shettlers because they were not interested in public limited partnerships. Mohn also denied that he recommended that the Shettlers sell their General Motors stock options; he stated that selling it was their decision because the stock was at its highest price in a 10-year period. Mohn admitted, however, that the sale of the stock options created significant tax consequences for the Shettlers.

Mohn testified that Pollack was the agent of record for the Soehrens, but he admitted that he suggested that they purchase an investment that would give them tax credits. After the Soehrens expressed an interest in a private limited partnership, Mohn gave a prospectus for Citi-Virginia to Pollack for delivery to the Soehrens. Mohn admitted that certain correspondence regarding the Citi-Equity limited partnerships was sent to both the Shettlers and the Soehrens on John Hancock letterhead over what appeared to be his signature, but he stated that his assistant had sent the letters, with his signature stamp, without his knowledge. Mohn also asserted that, without his knowledge, his assistant had prepared both sets of the customer logs provided to Martha Seger and Plemmons, and that she must have made the changes on the set to Plemmons that showed that Mohn was acting on behalf of Lisa Mohn.

Mohn learned in May 1994 that Lefkowitz had been indicted on criminal charges. In August 1994, Mohn was aware that Plemmons was conducting the investigation for John Hancock of his alleged sales of non-approved products. He admitted that he left a telephone message for the Soehrens because he was "paranoid and in a panic," in order to make sure that the Soehrens understood that their purchase was through Lisa Mohn.

Mohn admitted that he attended John Hancock compliance meetings and that he possessed the John Hancock compliance manual. He stated, however, that although he was aware that he could not represent another firm to sell a product or have an agreement with another firm, he did not know that he was absolutely prohibited from "participation in any manner" in the sales of non-approved products. Mohn did not consult with anyone in John Hancock's compliance department at the time of the Citi-Equity transactions. He did state that he consulted with his father, who was his direct supervisor, and that he placed a call to an NASD examiner. Mohn testified that the NASD examiner advised him that it was permissible for him to refer clients to another representative, even if that representative was his wife, as long as she was registered to sell the securities in question. Mohn admitted that he did not inform the

examiner that Mohn had met with the customers without Lisa Mohn, or that he assisted the customers in completing the offering documents and collected their checks.

Mohn stated that he received no compensation from Martha Seger for the Citi-Equity transactions and that Lisa Mohn had not given him any monies from the sales. Mohn also stated that he did not receive commissions from the sales of insurance by Aller and Pollack, and did not earn an override on Aller's commissions because his sales had not reached the minimum level for overrides to be assessed.

Mohn asserted that he was acting in his customers' interest at all times and that he consistently refers mortgage business and insurance business to other individuals and still assists his customers with paperwork. Mohn admitted, however, that in other referral situations, his customers eventually met or spoke with the individuals to whom the referrals were made. Mohn also admitted that if, in his capacity as a CHFC, he did not believe that John Hancock had products suitable for a particular client, he could tell that client that he or she should find a different broker who could provide more suitable investments.

Discussion

Conduct Rule 3040 prohibits any person associated with a member firm from participating in any manner in a private securities transaction outside the regular course or scope of his or her employment without providing prior written notice to the member. The Commission outlined the importance of the prohibition on private securities transactions in In re Anthony J. Amato, et al., 45 S.E.C. 282, 285 (1973):

> The regulatory scheme under the Exchange Act, in which the NASD is assigned a vital role, imposes on broker-dealer entities and NASD member firms the responsibility to exercise appropriate supervision over their personnel for the protection of investors. Where employees effect transactions for customers outside of the normal channels and without disclosure to the employer, the public is deprived of protection which it is entitled to expect. Moreover, the employer may also thus be exposed to risks to which it should not be exposed. Thus, such conduct is not only potentially harmful to public investors, but inconsistent with the obligation of an employee to serve his employer faithfully . . . . There is always a possibility in these situations that some improper conduct may be involved or that the employer's interests may be adversely affected. At the least, the employer should be enabled to make that determination. (Footnotes omitted).

Even though the final paperwork for the sales of the Limited Partnerships may have been effected through Martha Seger, the record contains overwhelming evidence that Mohn violated Conduct Rule 3040 by participating in private securities transactions without the permission of

John Hancock.[6] In reaching our determination, we, like the DBCC, have credited the testimony of the Shettlers, the Soehrens, and Kassab over that of Mohn, Lisa Mohn, Aller, and Pollack.[7]

The SEC has upheld Conduct Rule 3040's prohibition on an associated person from participation "in any manner" in a private securities transaction without prior written notice to that person's employer. In In re Ronald J. Gogul, Exchange Act Rel. No. 35824 (June 8, 1995), the SEC considered a matter in which the representative argued that he did not sell the securities to the investors, but merely referred clients to the seller for the transactions. In holding that Gogul had violated Conduct Rule 3040 by participating in the sales of the securities by referring customers to the sellers, the SEC stated that Conduct Rule 3040:

> requires that an associated person give notice to the firm when participating "in any manner" in a private securities transaction outside the regular course of his association with the firm. The reach of [Conduct Rule 3040][8] is very broad. It covers an associated person who not only makes a sale but who participates "in any manner" in the transaction. We have previously held that a salesman who referred a customer to the issuer of a promissory note, and received a commission when the customer purchased the note, participated in a private securities transaction to an extent sufficient to subject him to the requirements of [Conduct Rule 3040]. Id. at 1092. (footnotes omitted)

See also, In re Gilbert M. Hair, 51 S.E.C. 374 (1993).

The record in this matter fully supports our finding that Mohn actively participated in the sale of the interests in the Limited Partnerships. The evidence includes:

> Mohn's admission that Lisa Mohn never met or spoke with the Shettlers or the Soehrens;

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[6] We concur with the DBCC in rejecting Mohn's argument that the United States Supreme Court's decision in Pinter v. Dahl, 486 U.S. 638 (1988), controls this matter. In Pinter, the Supreme Court discussed the interpretation of the term "seller" as contained in Section 12(1) of the Securities Act of 1933. In the instant matter, we are concerned with NASD Conduct Rule 3040's prohibition of an associated person's participating in any manner in a sale of securities without prior notice to and approval by the employer firm.

[7] The SEC has repeatedly held that the credibility determinations of an initial fact-finder are entitled to considerable weight and deference, since they are based on hearing the witnesses' testimony and observing their demeanor. In re Falcon Trading Group, Ltd., Exchange Act Rel. No. 36619 at 5 (Dec. 21, 1995). E.g., In re Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)).

[8] Since the 1995 Gogul decision, Article III, Section 40 of the Rules of Fair Practice ("Section 40") has been renumbered and is now known as NASD Conduct Rule 3040. The text of Section 40 has not changed, and for the sake of simplicity we replace the SEC's references to "Section 40" with "Conduct Rule 3040."

Lisa Mohn's admission that she never met or spoke with the Shettlers or the Soehrens;

Mohn's statement that he suggested that Kassab hire Lisa Mohn and that Martha Seger sell Citi-Equity limited partnerships;

Mohn's admission that he brought the Citi-Equity limited partnership investments to the attention of the Shettlers and the Soehrens;

Mohn's admission that he was considered the "expert" in regard to the investments in the limited partnerships, and that he provided the prospectuses to the Shettlers and Soehrens;

Mohn's statement that he completed portions of the subscription documents that the Shettlers and Soehrens were required to sign to invest in the Limited Partnerships;

Mohn's admission that he instructed the Shettlers and Soehrens as to the manner in which they should complete their checks for the payment of their investments in the Limited Partnerships;

Mohn's statement that he made the determination regarding the Shettlers' and the Soehrens' suitability for their purchases of the interests in the Limited Partnerships;

Certain correspondence to the Shettlers and the Soehrens, regarding their investments in the Limited Partnerships, which was sent on John Hancock letterhead, appeared to include the signature of Mohn, and was mailed using John Hancock envelopes;[9] and

The subscription documents, which were sent to Martha Seger through Mohn's branch office with John Hancock.

Based on these facts, there is no question that Mohn did not simply refer the customers to his wife, as he attempted to argue, but actively participated in the transactions with the customers. He was the person who directed the customers, made suitability decisions, assisted the customers in completing subscription documents and their checks, and even completed some portions of the subscription documents himself. Moreover, the purported seller of the interests in the Limited Partnerships, Lisa Mohn, never even spoke with the Shettlers or the Soehrens. Mohn was an active participant in the sales of these securities to the customers, despite being twice told by John Hancock that he was not permitted to sell such securities. Accordingly, these facts fully support our finding that Mohn violated NASD Conduct Rules 2110 and 3040 by participating in the sales of securities to the customers without prior written permission from John Hancock.

In reaching our determination, we have considered Mohn's contention that his status as a CHFC obligated him to evaluate his clients' entire financial situation and recommend investments that were suitable for the clients, without regard to whether such investments had been approved for sale by John Hancock. We find no basis to this argument. Not only were the Citi-Equity Limited Partnerships risky investments, eventually resulting in a total loss to the

[9] Although Mohn maintained that he did not sign the letters in question, he admitted that he was responsible for the letters allegedly sent by his assistant which contained his signature from a signature stamp.

Shettlers of $27,778 and to the Soehrens of $35,844[10], but Mohn admitted that he could have alleviated his suitability concerns by recommending that the customers purchase a tax sheltered limited partnership and allowing them to locate another representative who was permitted to sell them such a product.

There is also no merit to Mohn's argument that Conduct Rule 3040 applies only to instances in which the registered representative receives compensation. The text of the rule itself reveals that it applies whether or not a registered representative receives compensation. The registered representative remains obligated in each instance to provide the requisite written prior notice to his or her firm, and to state in that notice whether compensation has been or will be received. In matters not involving compensation to the registered representative, Conduct Rule 3040(d) provides that the employer member shall provide written acknowledgment of said notice and, in the employer's discretion, may require the registered person to adhere to specified conditions in connection with his or her participation in the transaction. Thus, the employer retains the ability to provide appropriate supervision and involvement as necessary to protect its interests, as well as that of the investing public. The only provisions of Conduct Rule 3040 that do not apply in transactions without compensation are the requirements of Conduct Rule 3040(c)(2) relating to the mandatory inclusion of the transactions on the books and records of the employer firm.

We also do not credit Mohn's argument citing to Patricia A. Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996), that a five-year statute of limitations, pursuant to 28 U.S.C. § 2464, applies to this action because the sanctions are penal in nature. The Johnson decision resulted in the court's reversal of a decision by the SEC that Ms. Johnson had failed properly to supervise a registered representative; in that case, the SEC had filed its complaint against her more than five years after the events alleged in the complaint. Mohn has not shown, and we do not find, that the Johnson decision is applicable to actions brought by the NASD. Further, even if we were to assume, arguendo, that the Johnson case applies, the record here is clear that the complaint against Mohn was filed well within five years of the alleged violation (the transactions at issue occurred in February and March 1994 and the complaint was issued on October 15, 1996).

Finally, contrary to Mohn's assertion, there is no requirement that we find that Mohn acted with scienter to establish a violation of Conduct Rule 3040. See In re Gilbert M. Hair, 51 S.E.C. 374, 379 (1993). All of Mohn's arguments with regard to a scienter requirement involve

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[10] The Shettlers and the Soehrens testified that they lost their entire investments in the Citi-Equity Limited Partnerships and never received any of the tax benefits that had been touted by Mohn as the primary reason to purchase the partnerships. Moreover, the Shettlers filed a lawsuit as a result of their losses in Citi-South, alleging that Mohn, Lisa Mohn, John Hancock, and Martha Seger sold the interest in a limited partnership which they should have known was insolvent. The allegations in this lawsuit that Lisa Mohn was responsible for the sale of the Limited Partnerships do not affect our finding that Mohn participated in the sales in violation of Conduct Rule 3040. Thus, we uphold the NAC hearing subcommittee's decision to allow Mohn to introduce into evidence on appeal a copy of a Brief in Support of Motion for Summary Judgment, filed by counsel for the Shettlers in the civil action. We do not find, however, that any statements made by the Shettlers, through counsel, in that action have any bearing on our findings herein.

actions that were taken pursuant to SEC Rule 10b-5 and Section 10(b) of the Securities Exchange Act of 1934, and do not relate to actions taken pursuant to NASD Conduct Rules 2110 and 3040.

Accordingly, we find that Mohn violated Conduct Rules 2110 and 3040 by his actions in participating in the sales of the Limited Partnerships to the Shettlers and the Soehrens.

Sanctions

In imposing sanctions on Mohn, we have considered the factors enumerated in the NASD Sanction Guidelines ("Guidelines") for private securities transactions and the aggravating and mitigating factors present in this particular case. We find that Mohn's actions merit serious sanctions, for the reasons set forth below.

The Guidelines state that "serious cases" of private securities transactions involve situations that include numerous sales and attempts to conceal the activity. Further, the principal considerations include situations that involve the use of the employer's offices or facilities for the private securities transactions. These circumstances are present here — there were two instances of private securities transactions involving two different customers; and Mohn utilized John Hancock's offices for sales presentations, used John Hancock stationery to communicate with customers about the Citi-Equity limited partnerships, and his assistant at John Hancock was involved with administrative duties at various times relating to the Limited Partnerships. Mohn also attempted to conceal his activities with regard to the Limited Partnerships. Like the DBCC, we do not credit Mohn's explanation that his assistant first prepared and later altered his customer logs to indicate that he had informed the Shettlers and the Soehrens that the purchases were being made through Lisa Mohn at Martha Seger. We find that Mohn altered the documents to try to conceal the fact that he was the only person who contacted the customers about the investments in questions. Further, the telephone message that Mohn left on the Soehrens' answering machine indicated that he had failed to inform them that Lisa Mohn was involved in the transactions and that he was attempting to encourage the Soehrens to tell the John Hancock investigator that they had known about Lisa Mohn at the time of the transaction.

Other aggravating factors include Mohn's deliberate conduct in participating in the sales of products that John Hancock had twice advised him he could not sell, and in failing to advise Kassab that Mariner and John Hancock had determined not to permit the sales of any Citi-Equity products. Thus, Mohn's actions placed both John Hancock and Martha Seger at risk from action by the Shettlers (which actually did occur) and the Soehrens, and jeopardized Lisa Mohn's registration for having effected transactions with customers with whom she had never spoken or met.

We also note that Mohn's alleged ignorance of the requirements of Conduct Rule 3040 is no excuse for his conduct. Moreover, the record demonstrates that John Hancock provided Mohn with compliance manuals and meetings that included discussion of private securities transactions. Mohn apparently failed to understand the information provided to him, and failed to consult with the compliance department of John Hancock, which might have prevented him from violating the rules.

For the foregoing reasons, we have determined to affirm the DBCC's imposition of a censure, $52,222 fine,[11] $4,155.50 in costs, and a bar in all capacities.[12]

Accordingly, Mohn is censured, fined $52,222, assessed $4,155.50 in costs, barred in all capacities, and assessed appeal costs of $750.[13] The bar is effective immediately upon the service of this decision.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

[11] In deciding to affirm this fine, we considered the fact that Mohn was also fined $25,000 by John Hancock. We also, however, considered Mohn's statement on appeal that he and his wife only contributed $10,000 towards the $100,000 settlement of the civil action with the Shettlers. Mohn's insurance company paid $35,000, and Martha Seger paid $5,000; therefore, John Hancock was responsible for the remaining amount of the settlement. Mohn also stated that John Hancock had paid $29,000 to the Soehrens. Accordingly, Mohn's $25,000 fine to John Hancock ultimately wound up being paid to the customers, with John Hancock still having to pay the customers from its own funds. Under these circumstances, we have determined to affirm the fine of $52,222 (which is the maximum $50,000 fine under the Guidelines plus the $2,222 in commissions received). See NASD Sanction Guidelines (1996 ed.) at 45 (Private Securities Transactions).

[12] Mohn has argued that the sanctions imposed on him are unduly harsh when compared to sanctions imposed on other wrongdoers. We note that the Commission consistently has stated that the appropriateness of sanctions "depends on the particular facts of each case and cannot be determined with any exactness by comparison with the action taken in other cases." In re Donald W. Collins, 46 S.E.C. 642, 647 (1976). Moreover, to the extent that Mohn has cited sanctions imposed in allegedly similar actions in settled cases, we note that "it may be expected that sanctions in settled cases will differ from those in litigated cases." In re Mike K. Lulla, 51 S.E.C. 1036, 1039 (1994).

[13] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be revoked for non-payment.