UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-70734

DONALD P. HATELEY, THE CAMBRIDGE GROUP, INC., and WENDY J. SERETAN,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the Securities and Exchange Commission

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ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Securities and Exchange Commission abused its discretion when it affirmed a $55,000 fine imposed jointly and severally by the National Association of Securities Dealers, Inc. ("NASD") on the petitioners -- a member firm and two officers and directors of the firm -- for permitting a person to solicit sales of securities on the firm's behalf without registering the person with the NASD.

STATEMENT OF JURISDICTION

The Commission agrees with the petitioners' statement of jurisdiction.

COUNTERSTATEMENT OF THE CASE

A. Introduction

The petitioners, The Cambridge Group, Inc., Donald Patrick Hateley, and Wendy Joy Seretan, seek review of an order of the Securities and Exchange Commission affirming disciplinary action taken against them by the NASD. The NASD censured the petitioners and fined them $55,000, jointly and severally, for permitting a representative to solicit securities business for Cambridge when he was not registered with the NASD as a representative of the firm, in contravention of the NASD's by-laws 1/ and rules 2/. The Commission, based upon an independent review of the record, affirmed the NASD's findings of violation and the sanction imposed on the petitioners. They do not challenge the Commission's finding that they committed these

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1/ Part III, Section 1(a) of Schedule C of the NASD's By-Laws, as in effect at the time the violative conduct occurred, provided: "All persons associated with a member who are to function as representatives shall be registered as such * * *." "Representative" was defined in Part III, Section 1(b) of Schedule C to include "[p]ersons associated with a member * * * who are engaged in the * * * securities business for the member including the functions of * * * solicitation or conduct of business in securities * * *." NASD Manual (CCH) (January 1986 Reprint) ¶ 1753, at 1542. (The NASD Manual has been amended since the petitioners' violative conduct occurred, but the changes do not affect this case.)

2/ Article III, Section 1 of the NASD's Rules of Fair Practice states: "A member in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." NASD Manual (CCH) (January 1986 Reprint) ¶ 2151, at 2014.

violations; they contend only that the fine imposed on them was excessive and ask this Court to reduce it.

B. The Regulatory Scheme

The NASD, which is registered with the Commission as a securities association pursuant to Section 15A of the Securities Exchange Act, 15 U.S.C. 78o-3, is responsible for self regulation of its members, subject to Commission review. The Exchange Act requires registered securities associations such as the NASD to adopt rules regulating the conduct of members and persons associated with members, and to enforce those rules through disciplinary proceedings. 3/ With an exception that is not pertinent to this case, brokerage firms registered with the Commission must be members of the NASD. 4/ The NASD, in turn, requires persons associated with a member brokerage firm to be registered with the NASD as a representative of the member. 5/

Disciplinary action taken by a securities association is subject to appeal to the Commission. 6/ Orders of the Commission affirming such disciplinary actions are reviewable in the courts of appeals. 7/

3/ See Section 15A(b)(7), (f)(2), (h)(1), 15 U.S.C. 78o-3 (b)(7), (f)(2), (h)(1).

4/ See Section 15(b)(8), 15 U.S.C. 78o(b)(8).

5/ See supra, n.1.

6/ See Section 19(d)(2) of the Exchange Act, 15 U.S.C. 78s (d)(2). See also Section 19(e), 15 U.S.C. 78s(e).

7/ See Section 25(a) of the Exchange Act, 15 U.S.C. 78y(a).

C. The Facts

Petitioner Cambridge was a broker-dealer firm that was a member of the NASD. Petitioners Hateley and Seretan were officers and directors of Cambridge and were jointly responsible for direction, control, and day-to-day operation of the firm. R. 19-20. 8/ Hateley was president, a director, and sole shareholder. R. 20, 117. Seretan, Hateley's wife, was executive vice president and a director. R. 20, 160-161.

In June 1985, Winston C. Sheppard, Jr., Cambridge's other executive vice president and third director, acting on Cambridge's behalf, entered into a "finder's fee agreement" with Lawrence Jay Hold pursuant to which Cambridge would pay Hold commissions for securities transactions he solicited for the firm. R. 20, 229-232. 9/ Sheppard, however, was not authorized to enter into such contracts on behalf of the company. R. 20. At the time the contract was signed, Hateley and Seretan were out of the country on their honeymoon. R. 483-484. When they returned in early July 1985 and learned about the finder's fee agreement, Hateley called a meeting of Cambridge's board of directors at which he and Seretan voted to honor the agreement

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8/ R. __ refers to the record before the Commission; Br. __ refers to the petitioners' opening brief in this Court.

9/ The agreement provided that Hold would receive 90% of all commissions and Cambridge would receive 10%. See R. 152, 236-237.

for a period of thirteen months, until August 1986. R. 47, 335, 483-486.

Between June 1985 and August 1986, Cambridge received $54,500 in commissions on 14 transactions involving the sale of limited partnerships and mutual funds. R. 10, 138, 361. 10/ These 14 transactions, which ranged in amounts from $25,000 to $250,000, represented $1,075,000 in securities business for the firm. See R. 361. Both Hateley and Seretan signed Cambridge checks paying Hold for soliciting and delivering these securities transactions. R. 161, 342. Cambridge stopped paying Hold commissions when the agreement was terminated in August 1986. R. 336. During the period he was soliciting business with Cambridge, Hold was not registered with the NASD as a representative of Cambridge. R. 93, 97, 136, 375-376. 11/

Subsequently, in the spring of 1987, Hateley and Seretan contacted the NASD to report possible violations of its rules in

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10/ Cambridge paid $49,437.50 of the commissions to Hold, retaining the balance of $5,062.50. R. 361.

11/ In a letter that Hateley had sent to Hold on July 8, 1985 informing him that the finder's fee agreement would be honored for 13 months, Hateley stated that "[i]f you activate your securities license, it will be required that you register your license with our firm to receive any compensation as a licensed registered representative." R. 335. Cambridge nonetheless paid Hold commissions until the contract terminated in August 1986. In a letter Hateley sent Hold on August 11, 1986 informing him of the termination of the finder's fee agreement, he enclosed an NASD registration form to activate Hold's license and stated that "[u]pon activation, you will be registered with our firm and then can receive commissions." R. 336.

connection with Hold's activities. R. 339. At the same time that Hold had been soliciting business for Cambridge, he was a registered representative of another NASD member firm, Private Ledger Financial Services. R. 47, 310. NASD rules require persons registered with a member who transact business outside the regular course or scope of their employment to report those activities to the member. 12/ Hold did not report the Cambridge transactions to Private Ledger. R. 334.

Hateley and Seretan had learned of Hold's registration with Private Ledger in December 1986, when Hold demanded that Cambridge pay him commissions for an additional 12 securities transactions he claimed to have brought to Cambridge between August 1986 and November 1986. R. 338, 366; see also R. 243-245. 13/ Several months later, after Hold filed suit to recover the disputed commissions, Hateley and Seretan reported to the NASD that Hold had been soliciting business for Cambridge while he was registered with Private Ledger. R. 339. At the same time the petitioners told the NASD about Hold's activities, they admitted that they had paid Hold for soliciting securities

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12/ Article III, Section 40(b) of the Rules of Fair Practice. NASD Manual (CCH) (January 1986 Reprint) ¶ 2200, at 2186.

13/ The petitioners had refused payment on the ground that the finder's fee agreement had been terminated. R. 337-338. They also contended that the 12 additional securities transactions for which Hold was seeking commissions had not come to Cambridge through his efforts. R. 51.

transactions for Cambridge without his being registered with the firm. R. 50.

D. The Proceedings Below

1. Proceedings Before the NASD District Business Conduct Committee

In May 1988, the NASD District Business Conduct Committee for District No. 2 ("DBCC") filed a complaint against the petitioners charging that they had violated the requirement that a person who solicits business for a member firm must be registered with the NASD as a representative of that member. R. 8-9. 14/ The petitioners admitted in their answer to the complaint that they had violated the registration requirement. R. 21.

The NASD staff thereafter engaged in settlement discussions with the petitioners. R. 53-54. The petitioners were to submit a letter to the DBCC containing their consent to a censure and

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14/ The DBCC complaint against the petitioners included two causes of action. In the second cause, which is not at issue in this appeal, Cambridge was charged with employing Hateley as its president while the firm was conducting a general securities business, although he was registered only as a "limited principal -- direct participation programs" and not as a "general securities principal," in violation of the registration requirements of Schedule C. R. 9. The NASD Board of Governors dismissed this charge.

Hold was charged in a separate complaint with engaging in private securities transactions outside the regular course or scope of his employment at Private Ledger without notifying that firm, in contravention of Article III, Sections 1 and 40 of the Rules of Fair Practice. R. 580. Hold was found by the NASD and the Commission to have committed this violation. He has not appealed to this Court.

$7,500 fine for Cambridge, a censure and $5,000 fine for Hateley, and a censure and $2,500 fine for Seretan. R. 355. Although it is not entirely clear from the record, it appears that the petitioners agreed to prepare the letter, but there was a dispute over its terms and the NASD settlement proposal was subsequently withdrawn. R. 53-54; Br. 9-11. 15/

Between May 1988 and the hearing before the DBCC panel in January 1989, the petitioners made several requests to the NASD. First, petitioner Seretan requested that the hearing before the DBCC, which had initially been set for October 1988, when she was due to give birth, be rescheduled to a date after February 1, 1989. R. 404. The District Director granted a continuance, but stated that the DBCC was "not prepared to postpone the hearing until February, 1989 without a doctor's statement that you have sustained a physical disability that incapacitates you from attending a hearing in November or December, 1988 or January, 1989." R. 409.

On October 18, 1988, Seretan sent the District Director a letter enclosing a note from her doctor stating that she "would be physically incapable of appearing at a hearing until after Feb. 1, 1989." R. 411-412. Thereafter, on November 1, 1988, the NASD staff attorney handling the case sent Seretan a letter stating that her request for a continuance until after February

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15/ Much of the description of the settlement discussions in the petitioners' brief (pp. 9-11) is not documented in the record. See R. 53-54, 57.

1, 1989 "cannot be granted without further elaboration or description of your physical incapacity," particularly in light of the fact that the doctor had apparently authorized Seretan's appearance at a court hearing in the litigation with Hold on January 25, 1989. R. 416. The attorney stated in the letter that, without more specific information about Seretan's physical disability, the NASD would likely set a date of December 21, 1988 for the hearing. Id.

A notice was sent to the petitioners on November 17, 1988, informing them that the hearing would be held on December 21. R. 30-31. On November 23, 1988, after receiving the notice, Hateley sent a letter to the District Director protesting the hearing date. R. 414. That same day, the District Director sent a letter informing the petitioners that unless they provided a "clear and specific description of the medical condition that results in Ms. Seretan's being unable to attend a hearing until subsequent to next February," the hearing would be held on December 21 as scheduled. R. 415. Seretan refused to provide such specific information about her physical condition, claiming that it was a violation of her right to privacy. Br. 12-13. The hearing before the DBCC was held on January 18, 1989. R. 36.

In addition to the request that the hearing be postponed, Seretan asked that a member of the DBCC hearing panel be disqualified on the ground that Seretan had been involved in a dispute with a broker at a firm where the panel member was branch

manager. R. 401, 411; Br. 11. Although the DBCC did not believe that the incident was a ground for disqualification, the committee member did not participate in the consideration of the case against the petitioners. R. 579, n.2.

Seretan also requested that the NASD staff attorney handling the case be disqualified from the DBCC hearing on the ground that she had a bias against the petitioners. R. 404-405. The NASD District Director declined to disqualify the attorney, informing Seretan that the attorney "is not a party to the Committee's deliberations and cannot affect the outcome (other than through her powers of persuasion during the hearing, which you may, of course, confront)." R. 409. The District Director also informed Seretan that he had been assured by the attorney that she regarded Seretan no differently from any other respondent in an NASD proceeding and had no personal animosity towards her. Id.

The DBCC issued its decision on March 28, 1989. R. 577-584. In the decision, the DBCC noted that the petitioners admitted that Hold had referred investors to Cambridge between May 1985 and July 1986 and that they had paid him $49,437.50 for the referrals. R. 583. The DBCC found that Hateley and Seretan knew that he was soliciting for Cambridge without being registered with the firm. Id. The DBCC also found that Hateley had acted as a general securities principal of Cambridge without

being registered as such. R. 584. See supra, n.14. 16/ The DBCC censured the three petitioners and fined them $103,000, jointly and severally. R. 577. The DBCC explained that the amount was based upon approximately $58,000 in commissions 17/ plus $15,000 each as to Cambridge, Hateley, and Seretan. R. 577 & n.25. 18/

2. Proceedings Before the NASD Board of Governors

The petitioners appealed the Committee decision to the NASD Board of Governors ("Board"). R. 566-572. A hearing was held before a subcommittee of the Board on April 11, 1989 at which Hateley and Seretan appeared and were represented by counsel. R. 454-457. At the hearing the petitioners argued that the sanction imposed on them was too harsh and complained of hostility between the DBCC panel members and the petitioners. R. 465-466.

The Board issued a decision on October 20, 1989 in which it affirmed the DBCC's finding that Hateley and Seretan paid commissions to Hold for soliciting securities business for Cambridge without being registered with the firm. R. 571.

16/ Hold was found by the DBCC to have engaged in private securities transactions for Cambridge while he was associated with Private Ledger without notifying Private Ledger of the transactions. R. 582.

17/ Although the opinion does not expressly say so, the $58,000 was based upon the amount of commissions the DBCC believed Cambridge had received as a result of Hold's solicitations for the firm. See R. 469.

18/ Hold was censured and fined $64,000, an amount based upon approximately $49,000 in commissions paid to him plus $15,000. R. 577 & n.24.

However, the Board set aside the DBCC's finding that Hateley had acted as a general securities principal of Cambridge without being so registered, stating that there was insufficient evidence of activity by Hateley that would require such registration. Id. See supra, n.14.

As to sanctions, the Board noted it was "convinced that respondents knew or should have known of the impropriety of their actions." R. 572. The Board, "taking into consideration the gravity of the admitted registration violation and the recommended dismissal of cause two," affirmed the censures of the petitioners, but reduced their joint and several fine of $103,000 to $55,000. Id. 19/

3. Proceedings before the Securities and Exchange Commission

The petitioners appealed the Board's decision to the Commission. R. 562. After an independent review of the record below and consideration of briefs submitted by the petitioners and the NASD, the Commission affirmed both the Board's finding that the petitioners violated the registration requirement and the sanction imposed on them. R. 644-647.

19/ Although the Board decision does not state so expressly, the $55,000 represents the total amount of commissions received by Cambridge in connection with the 14 transactions Hold solicited for the firm. See supra, n.10.

The Board affirmed the censure and $64,000 fine imposed on Hold. R. 572.

The petitioners argued to the Commission that the $55,000 joint and several fine was excessive -- that their violations were unintentional and technical in nature, caused no harm to investors, and constituted an isolated incident that would not be repeated. R. 613-618. The Commission rejected these arguments, noting that the violations persisted for more than a year and "cannot be lightly dismissed as merely constituting 'technical' infractions." R. 647. The Commission explained that "the requirement that a firm register its associated persons provides an important safeguard for protecting the investing public." Id. Under these circumstances, the Commission stated that it was "unable to conclude that the sanctions imposed by the NASD are excessive or oppressive." Id.

The Commission also rejected the petitioners' suggestion that the imposition of sanctions jointly and severally was unfair because if only one of them sought to remain in the securities industry, that person would be required to pay the entire $55,000 fine imposed on all three. R. 646. The Commission, noting that Hateley and Seretan were husband and wife and that Cambridge was their family-held corporation, concluded that a joint and several fine was not unfair. R. 646, n.4. With respect to the petitioners' contention that the $55,000 fine was so severe that it would have the effect of excluding them from the securities business, the Commission pointed out that the NASD has procedures

that would permit them to pay the fine on an installment basis. R. 647-648 & n.7.

Finally, the Commission rejected the petitioners' assertion that "[p]ersonal animosity * * * appears to have played a part" in the sanction imposed by the NASD. R. 618, n.6. In support of their assertion of bias, the petitioners pointed to the record of the hearing before the DBCC and the fact that the NASD staff had initially proposed a $15,000 total settlement, which was rejected by the DBCC. Id. The Commission, based on its review of the record, stated that it found "no evidence to support this claim." R. 646.

ARGUMENT

I. THE COMMISSION PROPERLY AFFIRMED THE SANCTION IMPOSED BY THE NASD.

A reviewing court should not disturb the Commission's determination with respect to a sanction unless the Commission has abused its discretion by imposing a remedy that is "'unwarranted in law or is without justification in fact * * *.'" Sartain v. SEC, 601 F.2d 1366, 1374 (9th Cir. 1979), quoting American Power & Light Co. v. SEC, 329 U.S. 90, 112-113 (1946). The sanction affirmed by the Commission was both warranted in law and justified by the facts of this case and thus should not be disturbed by this Court.

A. The Sanction Was Not Excessive.

In reviewing an NASD disciplinary proceeding, the Commission may reduce the sanction imposed by the NASD if the Commission,

"having due regard for the public interest and the protection of investors," finds the sanction to be "excessive or oppressive." Section 19(e)(2) of the Securities Exchange Act, 15 U.S.C. 78s(e)(2); Sartain v. SEC, 601 F.2d at 1374. The Commission properly concluded that the $55,000 fine imposed on the petitioners for permitting Hold to solicit securities business for Cambridge when he was not registered with the NASD as a representative of the firm was neither excessive nor oppressive.

The Commission has long stressed the importance of the registration requirement in protecting the investing public. As the Commission has explained: "The requirement of NASD approval of registration before a member's employee may engage in dealings with the public serves a significant purpose in the policing of the securities markets and in the protection of the public interest, and strict adherence to it is essential." L.B. Securities Corp., 42 S.E.C. 885, 889 (1966). See also Gary D. Cohee, 48 S.E.C. 917, 919 (1987) ("The requirement that an associated person's registration be approved by the NASD before he engages in transactions on behalf of his employer provides an important safeguard in protecting public investors.").

The investor protection afforded by the registration requirement is not achieved, as the petitioners suggest (Br. 30-31) by being registered as a representative of some other firm. The requirement that a person who engages in securities business with a firm be registered as a representative of that firm is

important both for the proper supervision of representatives by their firms and also for the proper oversight of the firms by the NASD. The requirement impresses upon the firm its supervisory responsibilities toward its representatives and provides background information that alerts the firm to potential supervisory problems. 20/ The NASD, in turn, is made aware of which persons are working with which firms and what their backgrounds are, enabling the NASD to oversee the activities of member broker-dealers and enforce its rules. 21/

It was entirely appropriate, in view of the seriousness of the violations, that the petitioners were assessed a fine of $55,000 -- an amount equivalent to the commissions received by Cambridge as a result of the improper solicitations by Hold.

20/ The registration form requires a representative to disclose, among other things: whether he or she has been the subject of a major complaint or proceeding; has been discharged or requested or permitted to resign for cause; has had a license or registration suspended, revoked or restricted; has been arrested or indicted for any felony or misdemeanor; or has been involved in bankruptcy proceedings. In addition, the form requires the representative to disclose any disciplinary actions or legal proceedings involving the securities laws. It is the firm's responsibility to submit a representative's registration form to the NASD, and an official of the firm must sign a statement attesting that he or she has "taken appropriate steps to verify the statements contained in this application and to inquire into the past record and reputation of the applicant." See Uniform Application for Securities Industry Registration, NASD Form U-4.

21/ For example, if the NASD becomes aware of questionable conduct by a representative of a firm, it can check to see if the person is registered with other firms and investigate the person's activities there.

See supra, n.10. Such a sanction deprives the petitioners of the proceeds of their wrongdoing and serves to deter others from engaging in similar misconduct. This Court, noting that "'the relation of remedy to policy is peculiarly a matter for administrative competence,'" has expressed a strong reluctance to substitute its judgment for that of the Commission on what constitutes an appropriate sanction. Hinkle Northwest, Inc. v. SEC, 641 F.2d 1304, 1310 (9th Cir. 1979), quoting American Power & Light Co. v. SEC, 329 U.S. 90, 112 (1946). There is no basis for this Court to modify the sanction affirmed by the Commission in this case.

The petitioners' assertion (Br. 39) that they did not know that their conduct constituted a violation of NASD rules does not excuse their conduct or justify a reduced sanction. See Carter v. SEC, 726 F.2d 472, 473-474 (9th Cir. 1983) (defense that registered representatives were unaware that their sales violated NASD rules "is inadequate. As employees, [the representatives] are assumed as a matter of law to have read and have knowledge of these rules and requirements"). In any event, the evidence shows that Hateley did know of the registration obligation. Cambridge had at least five other representatives before and during the time that Hold was an unregistered representative, and the petitioners saw to it that each of these other representatives was properly registered as associated with Cambridge. R. 477-478. Additionally, Hateley acknowledged NASD registration

requirements in correspondence with Hold. R. 335-336. See supra, n.11.

The petitioners mistakenly assert (Br. 29-33) that others have received lesser sanctions for what the petitioners view as more serious violations. The only cases that the petitioners cite that involved a similar registration violation are L.B. Securities Corp., supra, and Gary D. Cohee, supra. 22/ However, the sanction imposed in L.B. Securities Corp., which involved the failure of an NASD member to supervise or register a salesman who had engaged in fraudulent activities and violated net capital and recordkeeping requirements, was expulsion. 42 S.E.C. at 886, 891. The petitioners are wrong when they state (Br. 31) that in Gary D. Cohee the Commission imposed a $12,500 fine on an unregistered person who received $120,000 in commissions. The unregistered person in that case received a $120,000 consulting fee for structuring limited partnership offerings; the Commission noted that the record showed that at least part of the consulting fee was paid for placing clients in the partnerships. 48 S.E.C. at 918. Thus, these cases do not support the petitioners' assertion that they received a disproportionate sanction.

22/ The petitioners erroneously state (Br. 30) that the Commission in its opinion cited Allen S. Klosowski, 48 S.E.C. 954 (1988), Anthony J. Amato, 45 S.E.C. 282 (1973), and Sirianni v. SEC, 677 F.2d 1284 (9th Cir. 1982), as cases involving activities analogous to theirs. Those cases were cited by the Commission not in connection with the petitioners' conduct, but rather in connection with Hold's violation of the NASD ban on unreported private securities transactions. See R. 647 & n.8.

In any event, this Court has stated that the fact that a lesser sanction was imposed for a similar violation in another case is not a ground for overturning the sanction. Carter v. SEC, 726 F.2d at 474; Sartain v. SEC, 601 F.2d at 1375, quoting Butz v. Glover Livestock, 411 U.S. 182, 188 (1973).

Moreover, the sanction was consistent with the NASD rules in effect at the time, which authorized the imposition of a fine of $15,000 "for each and any violation" -- or a total fine of $210,000 for the 14 transactions Hold solicited for Cambridge without being registered with the firm. See NASD Manual (CCH) (January 1986 Reprint) ¶ 2301, at 2215; Sirianni v. SEC, 677 F.2d 1284, 1289 (9th Cir. 1982) (agreeing with the Commission that "each breach of a single duty constitutes a separate violation for purposes of calculating a maximum fine"). The petitioners were initially fined $103,000 by the DBCC, reflecting approximately $58,000 in commissions the DBCC believed they received as a result of Hold's activities and an additional $15,000 as to each of them. The NASD Board of Governors eliminated the $15,000 amounts, reducing the fine to the $55,000 in commissions Cambridge received.

In sum, the $55,000 fine affirmed by the Commission was both warranted in law and justified by the facts of this case. There is no basis for this Court to disturb the sanction imposed on the petitioners.

B. A Joint and Several Fine Was Appropriate.

The Commission acted within its discretion in affirming the NASD's imposition of a monetary sanction jointly and severally. The concerted action of the three petitioners resulted in Cambridge's obtaining $55,000 in commissions in violation of NASD rules. The petitioners' close relationship insured that each fully participated in the benefits of their wrongdoing, and each bears direct responsibility. There is no basis for disturbing the Commission's decision that the petitioners properly share in like measure the monetary burden of their misconduct.

All three petitioners acted together in violating the NASD's rules requiring registration of a member firm's representatives. Cambridge was a party to the agreement with Hold and accepted all of Hold's solicited securities business and the resulting commissions. R. 10. Hateley and Seretan each voted as directors of Cambridge to ratify that agreement (R. 47), accepting both the business Hold generated and the accompanying commissions.

Hateley and Seretan were also responsible for Cambridge's day-to-day business activity, Hateley as president and Seretan as the executive vice president directing registered representatives dealing with mutual funds. R. 364. Hateley and Seretan each signed checks paying Hold for the securities transactions he solicited for Cambridge, and between them signed all the checks to Hold. R. 161, 342. Through these cooperative efforts, the petitioners successfully obtained $55,000 in commissions for

Cambridge on Hold's solicitations. The NASD has often imposed joint and several liability for cooperative actions taken in violation of its rules, and the Commission has affirmed those sanctions. 23/

23/ See e.g., In re J.V. Ace & Company, Inc., 47 SEC Docket 1874 (December 21, 1990) (joint and several liability imposed on firm and its president for, inter alia, failure to employ a registered financial and operations principal); In re First Philadelphia Corporation, 47 SEC Docket 560 (September 25, 1990) (joint and several liability imposed on firm and its president for free-riding and withholding stock as part of the selling group in a public stock offering); In re W.N. Whelen & Co., Inc., 46 SEC Docket 1889 (August 28, 1990) (joint and several liability imposed on firm and its president for, inter alia, violating net capital, customer protection and reporting requirements for which the president had compliance responsibility); In re LSCO Securities, Inc., 43 SEC Docket 1354 (May 3, 1989) (joint and several liability imposed on firm, its president and its vice president for dissemination of misleading sales literature and for failure to endorse salesmen's correspondence); In re Shearson Lehman Hutton Inc., 43 SEC Docket 1322 (April 28, 1989) (joint and several liability imposed on firm, a branch manager and a vice president and registered representative for excessive trading in customer's discretionary account, failure to obtain necessary written authorization for such an account and failure to exercise proper supervision); In re Cosse International Securities, Inc., 42 SEC Docket 1079 (January 6, 1989) (joint and several liability imposed on firm and its owner/board chairman for improperly attempting to avoid liability for failing to safely store customers' bullion purchases); In re Bateman Eichler, 47 S.E.C. 692 (1982) and 47 S.E.C. 1025, 1030 (1984) (joint and several liability imposed on firm, its president, and a registered principal for failure to fully execute customer orders); In re Wedbush, Noble, Cooke, Inc., 30 SEC Docket 162 (March 29, 1984) (joint and several liability imposed on firm, senior vice president and firm's former salesman for free-riding and withholding stock in a public stock offering); In re G.L. Bartlett & Co., Inc., 24 SEC Docket 65 (November 24, 1981) (joint and several liability imposed on firm, its president and its secretary treasurer for failure to comply with net capital, customer protection and reporting

(continued...)

The petitioners' economic and business relationships insured that all three benefited jointly from their misconduct. While it was Cambridge that received the commissions, Hateley, as the sole shareholder of Cambridge (R. 485), benefited to the same extent as Cambridge. Hateley and Seretan are husband and wife (R. 483), sharing a common household. When Hateley benefits, Seretan benefits as well. Equally telling, the petitioners' attorney candidly admitted to the NASD that, since Hateley and Seretan were married, a fine asserted against either of them is "all going to come out of the same pocket." R. 539. Thus, since the economic benefits of the petitioners' wrongdoing went into the

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23/(...continued)
requirements); In re Charles E. Marland & Co., Inc., 45 S.E.C. 632 (1974) (joint and several liability imposed on firm and its former president and sole stockholder for improperly inducing customers to liquidate mutual fund shares and reinvest proceeds in other mutual funds and for improperly using sales literature); In re Fund Securities Inc., 45 S.E.C. 203 (1973) (joint and several liability imposed on firm and its president for failure to comply with net capital and recordkeeping requirements and to give required customer notices).

Courts have also imposed civil fines jointly and severally. See, e.g., Landman v. Royster, 354 F. Supp. 1292, 1301 (E.D. Va. 1973) (civil fine imposed jointly and severally on prison officials in contempt proceedings for violation of injunction relating to prison administration); Cromaglass Corp. v. Ferm, 344 F. Supp. 924, 928 (M.D. Pa. 1972), dismissed, 500 F.2d 601 (3d Cir. 1974) (civil contempt fine imposed jointly and severally on plaintiff and plaintiff's counsel for failure to obey an order directing pretrial discovery).

"same pocket," it is proper for the sanction to come out of the "same pocket." 24/

The petitioners assert (Br. 25-26) that joint and several liability cannot be imposed on them as control persons under Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78t(a), because they meet the good faith defense available under that provision. However, neither the NASD nor the Commission has relied on Section 20(a), a provision imposing secondary liability. It is each petitioner's own improper conduct, in concert with that of each other petitioner, and not control person secondary liability, that justifies joint and several liability in this case. 25/

The NASD disciplined each petitioner for violating that petitioner's direct responsibility under the NASD's rules. Cambridge, as a member firm, and Hateley and Seretan, who are associated with a member firm, each had an obligation to follow

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24/ Hateley ceased operating Cambridge, his wholly owned company, as a broker-dealer in 1988. R. 477. Since Cambridge is no longer in business, reversal of joint and several liability could result in part of the sanction never being paid. Without joint and several liability, NASD member firms and their owners could effectively reduce the impact of NASD sanctions by the simple expedient of causing the firm to cease doing business.

25/ And, even if Section 20(a) were available to the petitioners, they have not shown that they acted in good faith. See supra pp. 17-18.

the NASD Rules of Fair Practice. 26/ Thus, it was appropriate that the fine was imposed jointly and severally.

II. THE COMMISSION'S FINDING WITH RESPECT TO LACK OF PERSONAL ANIMOSITY IS SUPPORTED BY THE RECORD.

The Commission properly concluded that the evidence in the record did not support the petitioners' claim that personal animosity motivated the NASD's actions in this case. 27/ In support of their claim of bias on the part of the NASD, the petitioners cite (Br. 22) their dispute with the NASD staff about the hearing date and their requests that a DBCC panel member and the regional attorney handling the case be disqualified. The record shows, however, that the NASD handled each of these requests by the petitioners in a proper manner, with no evidence of animosity.

With respect to the hearing date, the record includes extensive correspondence between petitioner Seretan and the NASD staff. See supra, pp. 8-9. Seretan sought postponement of the hearing date until February 1989, after the birth of her child in

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26/ Article 1, Section 5 of the Rules of Fair Practice states: "These Rules of Fair Practice shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules of Fair Practice." NASD Manual (CCH) (January 1986 Reprint) ¶ 2005, at 2011.

27/ Under Section 25(a)(4) of the Securities Exchange Act, 15 U.S.C. 78y(a)(4), "[t]he findings of the Commission as to the facts, if supported by substantial evidence, are conclusive."

October 1988. The NASD staff sought a specific explanation from Seretan's doctor of why a postponement until February was required -- certainly a reasonable request for such an extended postponement. Seretan refused to provide such an explanation. The hearing was eventually held on January 18, 1989, and the transcript shows no evidence of hostility towards the petitioners on the part of the DBCC panel. 28/

With respect to the disqualification requests, the record also shows no evidence that bias affected the NASD's decision. The DBCC panel member whom Seretan believed had a conflict of interest did not participate in the consideration of the case against the petitioners. R. 579, n.2. Although the District Director refused Seretan's request for disqualification of the regional attorney, he discussed the matter with the attorney and received her assurance that she had no personal animosity towards Seretan. R. 404. In addition, the District Director pointed out to Seretan that the regional attorney would not be a party to the DBCC panel's deliberations. Id.

Thus, the record does not support the petitioners' assertion that the NASD proceedings were tainted by bias. And, even if there had been hostility, the Commission considered the case de novo, based on an independent review of the evidence adduced before the NASD and the briefs submitted by the parties. Shultz

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28/ See, e.g., R. 57-58; 468-469.

v. SEC, 614 F.2d 561, 568 (7th Cir. 1980). 29/ Accordingly, even if hostility towards the parties could somehow have affected the proceedings before the NASD, the Commission's review would have removed any possibility that the decision in the case reflected personal bias towards the petitioners. 30/

STATEMENT OF RELATED CASES

The Commission is aware of no related cases pending in this Court.

29/ It is the order of the Commission, not the decision of the NASD, that is subject to review by the court of appeals. Shultz v. SEC, 614 F.2d at 568.

30/ See Sorrell v. SEC, 679 F.2d 1323, 1326 (9th Cir. 1982) ("We review [NASD] errors only to determine if they infected the Commission's action and led to error on its part.").

CONCLUSION

For the foregoing reasons, the order of the Commission should be affirmed.

Respectfully submitted,

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