[CORRECTED]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No.49216 / February 10, 2004

Adm. Proc. File No. 3-11156

In the Matter of the Application of

DANE S. FABER
10 Libertyship Way #4133
Sausalito, California 94965

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDING

Fraudulent Sale of Securities

Unsuitable Recommendations

Registered representative of former member firm of registered securities association sold securities through fraudulent misrepresentations and omissions, and made unsuitable recommendations to his customer. Held, association's findings of violation and the sanctions it imposed are sustained.

APPEARANCES:

Phyllis E. Andelin, for Dane S. Faber.

Marc Menchel, Alan B. Lawhead, and Brian J. Woldow, for NASD.

Appeal filed: June 9, 2003
Last brief received: October 29, 2003

I.

Dane S. Faber, a former general securities principal, municipal securities principal, registered options principal, general securities sales supervisor, and general securities representative of Smith Culver, Inc. ("SC"), a former NASD member, appeals from NASD disciplinary action. NASD found that Faber violated Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and NASD Conduct Rules 2110 and 2120 by making misrepresentations and omitting material facts. NASD also found that Faber violated NASD Conduct Rules 2110 and 2310 by making an unsuitable recommendation to a customer. 1/

1/ Section 10(b) of the Exchange Act makes it unlawful for any person to "use or employ, in connection with the purchase or sale of any security . . ., any manipulative or deceptive device or contrivance in contravention of" the Commission's rules. 15 U.S.C. § 78j(b).

Rule 10b-5 makes it unlawful for any person to "employ any device, scheme, or artifice to defraud" or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

NASD Conduct Rule 2120 prohibits an NASD member from "effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive, or other fraudulent device or contrivance."

NASD Conduct Rule 2310 requires that, in making securities transaction recommendations to their customers, registered representatives have reasonable grounds for believing that the recommendations are suitable for their customers based upon the facts, if any, disclosed by their customers as to their other security holdings and their financial situation and needs. Registered representatives are required before effecting any transactions for their customers to make reasonable efforts to obtain information concerning their customers' financial status, tax status, investment objectives, and such other information used or considered to be reasonable by the registered representatives in making recommendations to their customers.

NASD Conduct Rule 2110 requires that registered representatives "observe high standards of commercial honor and just and equitable principles of trade."

NASD barred Faber from associating with any member firm in all capacities. NASD further ordered that he pay restitution totaling $82,220, plus interest, to two of his customers. 2/ We base our findings on an independent review of the record.

II.

A. Edward Durante and the Silicon Valley IPO Network

Interbet, Inc. was one of ten companies that comprised the Silicon Valley IPO Network ("SVIPON"). Edward Durante, through his company Diablo Associates, organized, controlled, and promoted SVIPON.

In January 1997, Thomas Smith and Wayne Culver, SC's co-owners, and Durante met with Terry Buffalo, SC's President, and Jonathan Worley, head of SC's Bond Trading desk, with respect to SC's offering SVIPON's convertible debentures to investors. Buffalo and Worley were skeptical of both SVIPON and Durante. Buffalo and Worley subsequently learned that NASD had barred Durante in 1983 and that he had been investigated by the FBI for fraud. 3/

Both Buffalo and Worley discussed Durante's disciplinary history with Faber. According to Buffalo, Faber responded that he had previously worked with Durante, knew that Durante had been barred, and believed that Durante was not "the most upstanding citizen." Worley testified that Faber described Durante as a "slick and sleazy person," and stated that Faber would not put any money into any deal that involved Durante.

Buffalo and Worley also spoke with Smith and Culver about Durante's bar and insisted that SC should avoid any business dealings with Durante. 4/ Nonetheless, in 1997, SC offered and sold SVIPON convertible debentures. SC and Durante subsequently

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2/ NASD also assessed costs.

3/ In 1983, NASD had barred Durante from the securities industry for publication of manipulative or deceptive quotations, entering into unauthorized transactions, and failing to respond to NASD's requests for information.

4/ SC fired Buffalo and Worley in March 1997.

developed a close working relationship. 5/ It appears that Faber and Durante also developed a close working relationship. At one point, Durante tried to appoint Faber to the position of SC's operation manager.

B. Interbet

Interbet was incorporated in 1996. The company planned to offer Internet casino gambling games to customers. However, none of Interbet's gambling games was operational. As of April 1997, Interbet had generated no revenue, had sustained net losses of approximately $196,552, and held only $3,600 in cash.

In June 1997, Interbet entered into a reverse merger with Bio-Chem, Inc. ("Bio-Chem"), a publicly-held shell corporation. Bio-Chem had never generated any revenue. Bio-Chem had $50,000 in cash that it had raised through the sale of 100,000 shares of its stock at $.50 per share. Interbet's reverse merger with Bio-Chem became effective on June 13, 1997. On June 20, 1997, Interbet issued a press release that announced the merger. 6/ SC's sales force began to sell shares of Interbet to retail customers. SC purchased this Interbet stock from SC customer accounts. Interbet, thus, did not receive any of the proceeds from the shares sold by SC.

C. Faber's Investigation of Interbet

Faber sold Interbet stock to at least 30 customers. Faber knew that Interbet was a development stage company. Before he sold Interbet to his customers, Faber reviewed Interbet's marketing materials and business plan. He nonetheless testified that he did not know that Interbet had not engaged in business, had only two full-time employees, and had lost approximately $200,000 since its inception. He did not recall whether he knew that Interbet had no revenue. Interbet's business plan, however, disclosed this information.

5/ Faber testified that, at some point, he understood that Durante had acquired an ownership interest in SC.

6/ Bio-Chem's stock had traded on the Over-the-Counter Bulletin Board ("OTCBB"). Bio-Chem's stock price typically had been trading below one dollar. However, during the month of June 1997 the stock rose to $6.25, even though the company still was not generating any revenue. On June 30, 1997, the stock resumed trading at $6.25 per share on the OTCBB under the new symbol EBET.

Faber did not review public filings, such as Interbet's June 24, 1997 Form 8-K, or Bio-Chem's most recent quarterly report. Faber was not aware whether Interbet had made such filings. He testified that he had no recollection of Biochem's press release announcing its acquisition of Interbet. He did not research Interbet or Bio-Chem on the Internet or do any independent research to find any information, news, trading data, public filings, or registration statements on these companies. 7/

Faber testified that he relied on Smith and Culver, who represented to Faber that SC had done "due diligence" on Interbet. Faber also claimed that Smith and Culver told him that SC had retained attorneys to review Interbet, and that those attorneys who assisted in the due diligence were buying Interbet shares for themselves.

Faber testified that he believed that the Interbet offering was an initial public offering ("IPO") and stated that he was unaware that Interbet had engaged in a reverse merger. Faber did not recall seeing a prospectus, but he testified that Interbet's "business plan" was "interchangeable in [his] mind" with a prospectus. In fact, there was no prospectus, and Interbet never filed a registration statement to sell securities. Buffalo, Worley, and David Cave (SC's trading manager between March 1997 and August 1997) all testified that there was readily available information that the Interbet offering was a reverse merger. Worley also told Faber that Interbet was involved in a reverse merger; Worley stated that Faber replied that he knew this and that he was "not going to do any of it." According to Cave, Durante held a meeting with all of SC's salespersons and advised them that "this is a reverse merger, not an IPO." At this meeting, Durante explained the mechanics of the reverse merger and Bio-Chem's role in the transaction.

D. Faber's Sales of Interbet

1. Donna McKinzie

At the time of the NASD hearing in November 2001, Donna McKinzie was 56 years old and had been a bookkeeper/office manager for the past 10 years. From 1995 through 1997, her

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7/ The press release was transmitted by Bloomberg. Faber testified that, as a broker, he did not have access to the SC Bloomberg terminal. However, Grace Stoneham, another SC broker who worked side-by-side with Faber, testified that she had access to the Bloomberg terminal.

income ranged from approximately $21,000 to $32,000 per year. McKinzie was an inexperienced investor. Before she opened her IRA account at SC, she had limited her investments to certificates of deposit and bank accounts. At the end of 1996, McKinzie had the following assets: (1) approximately $30,000 in an IRA; (2) approximately $26,000 in a savings account; and (3) an unencumbered house, valued at $175,000.

McKinzie was introduced to Faber by her mother, who also was Faber's client. During their initial conversation, which occurred around February 1996, McKinzie explained to Faber that she planned to retire in 12 years and that she wanted to purchase bonds so that she would earn higher interest than she was earning through her savings account and certificates of deposit ("CD's"). In February 1996, she took the proceeds of her pension fund and opened an IRA rollover account at SC with approximately $20,500.

At the hearing, McKinzie stated that she did not recall whether Faber had asked about her assets or income, and she did not recall providing him with that information. However, Faber testified that McKinzie had advised him of her modest income, her limited prior investment experience, her investment objectives, and the fact that the mortgage on her home had been fully paid.

Faber purchased corporate bonds for McKinzie's IRA rollover account. Pleased with the performance of the bonds, McKinzie opened a second account with Faber in May 1997, using the proceeds from a recently matured $29,000 CD. She asked Faber to buy additional bonds for this new account. Faber purchased corporate bonds for the account.

McKinzie testified that, in late June or early July 1997, Faber told her that he knew of an IPO stock she could purchase that could triple her money in a short period of time. Since McKinzie did not know what an "IPO" was, Faber explained the concept to her. McKinzie did not recall whether Faber told her the name of this stock (which, in fact, was Interbet and was not an IPO). Faber did not disclose the speculative nature of Interbet. Faber also did not disclose to McKinzie that Interbet had not generated any revenue since its inception and that it had only incurred losses. McKinzie testified that had these facts been disclosed, she would not have purchased Interbet.

Faber sold all the bonds in both of McKinzie's accounts. McKinzie subsequently received SC account statements for both of her accounts reporting purchases of Interbet stock in both accounts. McKinzie testified that she did not realize that the bonds had been sold until she received her confirmations. In

total, McKinzie purchased 8,700 shares of Interbet stock for $52,215.

Within just two months of her purchase, McKinzie had lost nearly her entire investment. 8/ As the price of the stock declined, Faber continuously encouraged McKinzie to keep the stock by making optimistic statements about Interbet. 9/ McKinzie lost a total of $52,215 on her Interbet purchases.

2. Robert Kinney

At the time he began investing with Faber, Robert Kinney was a retired federal government employee and attorney. According to Kinney, he and Faber had established a "friendship over the telephone," and Kinney relied upon Faber's recommendations. Kinney's account at SC initially held municipal bonds.

In June 1997, Faber telephoned Kinney and recommended that he purchase an Internet "IPO opportunity." Kinney testified that Faber presented Interbet "as something different and something perhaps a little more volatile, in the sense of making more money and probably in a shorter time frame than municipal bonds." According to Kinney, Faber told him that "it was a chance for us to double our money."

From his discussions with Faber, Kinney believed that Interbet was issuing common stock to expand its operations. Faber did not tell Kinney that the transaction was a reverse merger or that proceeds from the sale would not go to Interbet.

Faber did not disclose to Kinney the speculative nature of Interbet. Faber did not tell Kinney that Interbet had not generated any revenue since its inception and that it had only incurred losses. Faber did not tell Kinney that the stock of Interbet's predecessor had traded publicly prior to the alleged IPO date. Kinney testified that knowledge of Interbet's losses, its lack of revenue, and its involvement in a reverse merger would have been important factors that he would have considered in deciding whether to purchase shares of Interbet.

Kinney purchased the Interbet stock upon Faber's recommendation because he had "faith and confidence" in Faber.

8/ By August 28, 1997, Interbet's shares had dropped to $0.25 per share. As of September 28, 2001, Interbet (renamed Virtual Gaming) was listed at $0.01 per share.

9/ For example, McKinzie testified that Faber compared Interbet to Netscape, Inc. and advised her not to sell for less than $7 per share.

On July 8, 1997, Kinney purchased 5,000 shares of Interbet for a total cost of $30,005. As of the date of the NASD hearing, Kinney still owned his stock, which was nearly worthless. 10/

III.

A. Fraudulent Misrepresentations and Omissions

The NASD found that Faber made material misrepresentations and omissions of fact in violation of the federal and NASD antifraud provisions. The NASD further found that this conduct was inconsistent with just and equitable principles of trade. A violation of Exchange Act Section 10(b), Rule 10b-5 and NASD Conduct 2120 requires a showing that: (1) the misrepresentations or omissions were made in connection with the purchase or sale of a security; (2) the misrepresentations or omissions were material; and (3) the misrepresentations or omissions were made with scienter. 11/ Misrepresentations also are inconsistent with just and equitable principles of trade and violate NASD Conduct Rule 2110. 12/

A fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available. 13/ Faber did not disclose to either

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10/ As of September 28, 2001, Virtual Gaming was listed at $0.01 per share.

11/ S.E.C. v. First Jersey Sec. Inc., 101 F.3d 1450, 1467 (2d Cir. 1996).

12/ Robert Tretiak, Securities Exchange Act Rel. No. 47534 (Mar. 19, 2003), 79 SEC Docket 3166, 3180.

13/ See Basic v. Levinson, 485 U.S. 224, 240 (1988) ("materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information); Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1570 n.12 (9th Cir. 1990) (information is material if a reasonable investor would consider it important to her decision to do business with a registered representative); SEC v. Rogers, 790 F.2d 1450, 1458 (9th Cir. 1986) (deeming information material if "there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision" (quoting Caravan Mobile Home Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc.,

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McKinzie or Kinney that Interbet was a speculative security and that the company had no operations, had never generated revenue, and had incurred losses. Faber also represented that the Interbet offering was an IPO when it, in fact, resulted from a reverse merger. As a result of Faber's representations, Kinney thought Interbet was engaged in an offering that would raise funds for its operations. These facts would be important to a reasonable investor. 14/

We have held that it is inherently fraudulent to predict specific and substantial increases in the price of a speculative security. 15/ Faber made unwarranted price predictions to both McKinzie and Kinney. He told McKinzie that she would triple her money and he told Kinney that his investment would double. Particularly given Interbet's lack of operations and the company's financial status, he had no basis for these statements.

Faber denies that he ever made any price predictions concerning Interbet to either McKinzie or Kinney. Faber asserts that he had never in the 20 years of his investment career predicted that a stock's price would double or triple. Faber attacks McKinzie's testimony as "entirely self-serving and belied by her own notes which indicate that he 'did not recommend' that she purchase Interbet." Faber also claims that Worley's testimony that Worley told Faber that the Interbet offering was not an IPO before Faber recommended the stock to his customers was "perjured." 16/

13/ (...continued)
769 F.2d 561, 565 (9th Cir. 1985)).

14/ Hanly v. SEC, 415 F.2d 589, 595-7 (2d Cir. 1969); SEC v. Hasho, 784 F. Supp. 1059, 1109 (S.D.N.Y. 1992).

15/ See, e.g., Steven D. Goodman, Exchange Act Rel. No. 43889 (Jan. 16, 2001), 74 SEC Docket 707, 713; Joseph Barbato, 53 S.E.C. 1259, 1274 (1999); Cortlandt Investing Corp., 44 S.E.C. 45, 50 (1969). The fraud is not ameliorated where the positive prediction about the stock's future performance is cast as opinion or possibility rather than as a guarantee. Hasho, 784 F. Supp. at 1109.

16/ Faber states that his conversations with Worley occurred in December. He claims that Worley's testimony was not credible because the reverse merger was not announced until June. However, Faber does not claim that he did anything to check to
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The NASD Hearing Panel credited McKinzie's, Kinney's, Worley's, and Cave's testimony and rejected Faber's denials. Credibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference. We find no reason to disturb the Panel's credibility determinations. 17/

Faber also asserts that his actions were merely negligent and, therefore, he did not have scienter. 18/ As an initial matter, scienter is not required for a violation of just and equitable principles of trade under NASD Conduct Rule 2110. 19/ In any event, Faber's material misrepresentations and omissions were at least reckless. Faber knew that Durante was promoting Interbet. He admitted to Buffalo and Worley that he was aware of Durante's reputation, and Buffalo and Worley informed Faber of Durante's disciplinary history. Thus, he should have approached

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16/ (...continued)
see if the nature of the transaction had changed from a reverse merger to an IPO.

17/ John Montelbano, Exchange Act Rel. No. 47227 (Jan. 22, 2003), 79 SEC Docket 1474, 1484; Howard R. Perles, Exchange Act Rel. No. 45691 (Apr. 4, 2002), 77 SEC Docket 896, 907 n.20; Keith Springer, Exchange Act Release No. 45439 (Feb. 13, 2002), 76 SEC Docket 2726, 2734-35; Goodman, 74 SEC Docket at 714.

18/ The courts have concluded that scienter includes recklessness. They have defined recklessness as "'an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" Howard v. Everex Sys., Inc., 228 F.3d 1057, 1063 (9th Cir. 2000); Sunstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977) (quoting Franke v. Midwestern Okla. Dev. Auth., 428 F. Supp. 719, 725 (W.D. Okl. 1976)).

Scienter with respect to violations of NASD's antifraud rule may be established by demonstrating intentional or reckless conduct. Tretiak, 79 SEC Docket at 3178; Kevin Eric Shaughnessy, 53 S.E.C. 692, 696 and n.8 (1998).

19/ Jack H. Stein, Exchange Act Rel. No. 47335 (Feb. 10, 2003), 79 SEC Docket 2276, 2286 n.31; DWS Sec. Corp., 51 S.E.C. 814, 821 n.28 (1993).

the Interbet offering with great skepticism. Faber admits that he read Interbet's business plan and marketing materials. Although those materials disclosed Interbet's unprofitable financial status and lack of operations, Faber failed to inform McKinzie and Kinney about that information. Given the information he had about Interbet, Faber's price predictions to McKinzie and Kinney that Interbet would double or triple in price were clearly reckless.

Faber also exhibited scienter in his representations that Interbet was an IPO. Press releases and public filings disclosed that the Interbet transaction was a reverse merger, not an IPO. Worley told Faber that Interbet had engaged in a reverse merger. Moreover, Faber was in close contact with Durante (for example, Durante tried to make him SC's operations manager). Durante told the SC salespeople that Interbet had engaged in a reverse merger, not an IPO.

Even if we credited Faber's statement that he believed that Interbet was engaging in an IPO, Faber's recklessness would be evidenced by his failure to discover that there was no prospectus for Interbet. Although he testified at the hearing that he previously had been involved in only one IPO, the Hearing Panel did not credit this assertion, noting that, during NASD's investigation, Faber had testified that he had sold at least six IPO's. Faber claims that he thought the business plan was the same, or somehow served the same purpose, as a prospectus. In light of his lengthy experience in the industry and his prior experience with IPO transactions, we find that Faber was at least reckless.

Faber asserts that he cannot have scienter because he properly relied on SC's research on Interbet. 20/ Faber, as a registered representative, had an independent duty to investigate and could not simply rely on the views of his employer or

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20/ Faber also claims that he discussed SVIPON with three of his clients, including his father. Faber agreed with his father that SVIPON was a "unique and innovative debt-financing instrument." He also states that he drew comfort from the participation of another broker-dealer in that offering. Faber's contention that his discussions about SVIPON with three individuals or the participation of a broker-dealer constituted due diligence is without merit. Faber was recommending an investment in Interbet, not SVIPON convertible debentures.

others. 21/ Moreover, Faber himself testified that he read Interbet's business plan, which contained much of the material information he failed to disclose to McKinzie and Kinney.

Faber further charges that Smith, Culver, and Durante "were lying to him." He claims that they were the true culprits "who profited from the scheme." Whether or not Smith, Culver, and Durante engaged in violative activity does not relieve Faber of his duty to disclose the material information that he had in his possession. 22/

Faber also contends that his belief in Interbet is confirmed by the fact that he bought Interbet shares and that he recommended Interbet to his father. A registered representative's willingness to speculate with his own funds despite his knowledge of adverse financial information does not excuse his failure to disclose material information to his customer. 23/

B. Suitability of Securities Recommendations

Before recommending a transaction, NASD Conduct Rule 2310 requires that a registered representative have reasonable grounds for believing, on the basis of information furnished by the customer, and after reasonable inquiry concerning the customer's investment objectives, financial situation, and needs, that the recommended transaction is not unsuitable for the customer. 24/ A broker's recommendations must be consistent with his customer's best interests, and he or she must abstain from making

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21/ Hasho, 784 F. Supp. at 1107; Goodman, 74 SEC Docket at 713; Richard H. Morrow, 53 S.E.C. 772, 779 n.10 (1998); Donald T. Sheldon, 51 S.E.C. 59, 71, aff'd, 45 F.3d 1515 (11th Cir. 1995).

22/ See James L. Owsley, 51 S.E.C. 524, 531 (1993) (fact that others shared responsibility for violative conduct did not relieve respondent of his responsibility).

23/ Richard J. Buck & Co., 43 S.E.C. 998, 1008 (1968), aff'd sub nom., Hanley v. S.E.C., 415 F.2d 589 (2d Cir. 1969).

24/ James B. Chase, Exchange Act Rel. No. 47476 (Mar. 10, 2003), 79 SEC Docket 2892, 2897; Goodman, 74 SEC Docket at 712; J. Stephen Stout, Exchange Act Rel. No. 43410 (Oct. 4, 2000), 73 SEC Docket 1441, 1460; Maximo Justo Guevara, Exchange Act Rel. No. 42793 (May 18, 2000), 72 SEC Docket 1281, 1287, petition denied, 47 Fed.Appx. 198 (3rd Cir. 2002).

recommendations that are inconsistent with the customer's financial situation. 25/ A recommendation is not suitable merely because the customer acquiesces in the recommendation. Rather, the recommendation must be consistent with the customer's financial situation and needs. 26/

Faber's recommendation of Interbet stock to McKinzie was unsuitable. McKinzie was an inexperienced investor who previously had invested only in CDs and savings accounts. Faber knew that she had a modest income and net worth and was investing for her retirement. When she opened her account at SC, she instructed Faber to increase her retirement savings through the purchase of bonds. Because of her limited means and net worth, she could not afford the loss of substantially all of the assets she had invested in her account with Faber. All of these factors demanded an investment strategy that limited risk. 27/

Instead, Faber recommended that McKinzie purchase approximately $52,000 of Interbet shares. These funds constituted nearly all of her SC portfolio and more than two-thirds of her total liquid assets. Interbet had no revenues and had never showed any profits. Moreover, Faber recommended that McKinzie concentrate her entire portfolio at SC in one speculative security. This concentration created a substantial risk that McKinzie could lose all, or virtually all, of her account balance. We have repeatedly found that high concentration of investments in one or a limited number of speculative securities is not suitable for investors seeking limited risk. 28/

25/ See, e.g., Stein, 79 SEC Docket at 2280; Daniel Richard Howard, Exchange Act Rel. No. 46269 (July 26, 2002), 78 SEC Docket 427, 430; John M. Reynolds, 50 S.E.C. 805, 809 (1992).

26/ Stein, 79 SEC Docket at 2280; Howard, 78 SEC Docket at 430; Gordon Scott Venters, 51 S.E.C. 292, 295 n.8 (1993).

27/ See Chase, 79 SEC Docket at 2897; Guevara, 72 SEC Docket at 1287-88.

28/ Chase, 79 SEC Docket at 2897 (respondent violating NASD's suitability rule by recommending that his customer purchase shares in a highly speculative unprofitable start-up company until her entire portfolio comprised this one investment); Stephen Thorlief Rangen, 52 S.E.C. 1304, 1308 (1997) (respondent violated New York Stock Exchange rule requiring adherence to

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We conclude that Faber's recommendation of Interbet to McKinzie was unsuitable under the circumstances. Faber's conduct also was inconsistent with Conduct Rule 2110, which requires observance of "high standards of commercial honor and just and equitable principles of trade." 29/ We accordingly find that Faber violated NASD Conduct Rules 2110 and 2310.

IV.

Exchange Act Section 19(e) provides that we will sustain NASD's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 30/ The appropriate sanctions depend on the facts and circumstances of each case. 31/

NASD barred Faber and ordered him to make restitution. Faber's conduct was egregious. He withheld material negative information about Interbet from his customers. He made inherently fraudulent price predictions and mischaracterized the Interbet investment as an IPO. He recommended that a financially inexperienced customer of modest means preparing for retirement invest nearly all of her portfolio (which constituted more than two-thirds of her total liquid assets) in a single speculative

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28/ (...continued)
just and equitable principles of trade by recommending transactions so that, in one instance, one customer's entire net worth was invested in a single stock, and in another, 80 percent of the equity in a customer's account was concentrated in one stock); Venters, 51 S.E.C. at 293 (respondent violated NASD's suitability rule by recommending that a 75 year-old widow with no more than $35,000 net worth invest $2,300 in a company that was losing money, had never paid a dividend, and whose prospects were totally speculative).

29/ Chase, 79 SEC Docket at 2902 n.28; Larry Ira Klein, 52 S.E.C. 1030, 1031 (1996); Clinton Hugh Holland, Jr., 52 S.E.C. 562, 566 n.20 (1995), aff'd, 105 F.3d 665 (9th Cir. 1997) (Table).

30/ 15 U.S.C. § 78s(e)(2). Faber does not claim, and the record does not show, that NASD's action imposed an undue burden on competition.

31/ Michael Flannigan, Exchange Act Rel. No. 47142 (Jan. 8, 2003), 79 SEC Docket 1132, 1142; Donald R. Gates, Exchange Act Rel. No. 41777 (Aug. 23, 1999), 70 SEC Docket 1228, 1236.

security despite her instructions that she wanted conservative investments. The sanctions NASD has imposed for these violations are consistent with the relevant Sanction Guidelines. 32/

Moreover, Faber has prior disciplinary history. In 1995, NASD accepted Faber's consent, without admitting or denying the allegations of the complaint, to the entry of findings that he disseminated sales literature that was misleading and was not approved. In his settlement, Faber agreed to take certain corrective action, including providing written evidence to his employer concerning the basis for each securities recommendation and a brief statement as to the suitability of the securities and how it compared with the customer's stated account objectives. However, Faber did not take any of these required corrective actions when he recommended Interbet to McKinzie and Kinney. 33/

In light of the above factors, we find that NASD's sanctions are neither excessive nor oppressive.

An appropriate order will issue. 34/

32/ The NASD Sanctions Guideline for violations of NASD Conduct Rule 2110 and Rule 2310 involving making unsuitable recommendations suggests a suspension for a period of 10 business days to one year, and, in egregious cases, up to two years or a bar. The Guideline also recommends a fine of $2,500 to $75,000. NASD Sanctions Guidelines (2001 ed.) at 99.

The NASD Sanctions Guideline for violations of NASD Conduct Rule 2110 and/or Rule 2120 involving intentional or reckless misrepresentations or material omissions of fact recommends a suspension for a period of 10 business days to two years, and, in egregious cases, a bar. The Guideline also recommends a fine of $10,000 to $100,000. NASD Sanctions Guidelines (2001 ed.) at 96.

33/ Faber asserts that, when he discovered that Durante had been arrested, he undertook all efforts to stop a large purchase of SVIPON bonds by an Indian tribe. We do not believe that this action mitigates his violations here.

34/ We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS).

Jonathan G. Katz
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No.

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In the Matter of the Application of

DANE S. FABER
10 Libertyship Way #4133
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For Review of Disciplinary Action Taken by

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ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Dane S. Faber, and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary