INITIAL DECISION RELEASE NO. 243
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11010

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
	:	January 16, 2004
KEVIN H. GOLDSTEIN and JACKWEST CORPORATION	:	

APPEARANCES: James A. Howell and Craig M. Hughes for the Division of Enforcement, Securities and Exchange Commission.

Kevin H. Goldstein, pro se, and as President of Jackwest Corporation.

BEFORE: James T. Kelly, Administrative Law Judge.

The United States Securities and Exchange Commission (SEC or Commission) instituted this proceeding on January 15, 2003, pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Sections 15(b)(6)(A) and 21C of the Securities Exchange Act of 1934 (Exchange Act).

The Order Instituting Proceedings (OIP), as amended, alleges that, from August 1999 through December 2000, Kevin H. Goldstein (Goldstein) raised about $516,000 from investors by offering and selling the securities of Jackwest Corporation (Jackwest). According to the OIP, Goldstein described Jackwest to potential investors as an investment-banking firm that would raise private equity capital and invest in privately-held start-up companies. The OIP further alleges that, during his solicitation of potential investors, Goldstein made several fraudulent misrepresentations and omissions of material facts. Rather than using the investors' funds to capitalize and operate an investment firm as he had represented to investors, the OIP alleges that Goldstein diverted a substantial portion of the investors' funds for his personal use and to support a lavish lifestyle. The OIP charges that, by such conduct, Goldstein willfully violated and Jackwest violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5.

As relief for these alleged violations, the Commission's Division of Enforcement (Division) seeks an order requiring Goldstein and Jackwest (collectively, Respondents) to cease-and-desist from future violations, and an order barring Goldstein from associating with any broker or dealer. In addition, the Division seeks an order requiring Goldstein and Jackwest, jointly and severally, to disgorge $516,000 in ill-gotten gains, plus prejudgment interest. Finally, the Division seeks an order requiring Goldstein to pay a civil penalty of $120,000. Goldstein wants to remain in the securities business and claims that he is unable to pay financial sanctions.

I held a public hearing on July 28 and 29, 2003, in San Francisco, California.[1] The Division submitted its posthearing pleadings on September 11, 2003. Respondents' posthearing pleadings were due on October 14, 2003, but no such pleadings were filed or served.

FINDINGS OF FACT

I base my findings and conclusions on the entire record and on the demeanor of the witnesses who testified at the hearing. I applied "preponderance of the evidence" as the standard of proof. Steadman v. SEC, 450 U.S. 91, 97-104 (1981). I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this decision.

Respondents

Goldstein is thirty-five years old and resides in San Francisco (Tr. 7-8, 14). He earned an Associate of Arts degree from Delhi University in New York (Tr. 14). Goldstein began his career in the securities business in the autumn of 1995 (Tr. 15). He was associated with several different brokers and dealers on Long Island, New York, until the autumn of 1997, and moved to the San Francisco Bay area in early 1998 (Tr. 16-17).

As relevant to this proceeding, Goldstein was associated with Kirlin Securities, Inc. (Kirlin Securities), a registered broker and dealer, from September 1998 to November 1999, and with North Coast Securities, Inc. (North Coast), a registered broker and dealer, from April to December 2000 (Tr. 21-22, 24-26, 52-53, 273, 275). During 1999 and 2000, Goldstein held Series 7 and 63 licenses issued by the National Association of Securities Dealers, Inc. (NASD) (Tr. 14-15).

Goldstein incorporated Jackwest in the State of California on August 23, 1999 (Tr. 26-27; DX 29). He intended Jackwest to be an investment-banking firm that would raise capital for privately held start-up companies (Answer ¶ 5). Goldstein served as the president, vice president, secretary, and treasurer of Jackwest (Tr. 7; DX 30 at SEC 1634).

When Jackwest was first organized, the corporation identified Goldstein's apartment in Tiburon, California, as its principal office (Tr. 34; DX 30 at SEC 1635). From January through

[1] References in this initial decision to the hearing transcript, as amended by my Order of August 25, 2003, are "Tr. ___." References to the Division's exhibits are "DX ___." References to Respondents' only exhibit are "RX 1."

August 2000, Jackwest conducted business from 225 Bush Street in San Francisco's financial district (Tr. 34-35). From September through December 2000, Jackwest operated from the garage of Goldstein's new residence in San Rafael, California (Tr. 42-43, 70, 256, 342).

In retrospect, Jackwest was an ill-timed venture. The corporation began its operations just before the dot-com bubble burst in the spring of 2000 (Tr. 43-44, 501). In June 2000, Jackwest had approximately ten to fifteen employees at 225 Bush Street (Tr. 35-38, 322; DX 4 at ¶ 13, DX 36). Jackwest scaled back its operations in September 2000 (Tr. 26, 45). At the time, Jackwest was delinquent for one month's rent, and it abandoned its office in San Francisco's financial district very suddenly (Tr. 44, 341, 379-80). Jackwest employed only four individuals after moving to San Rafael and it soon reduced that number to two (Tr. 44-45, 342). By January 2001, Jackwest was conducting no operations and had no employees other than Goldstein (Tr. 69-70). At the time of the hearing, Jackwest was not doing business, although it remained a corporation in good standing (Division's Supplemental Prehearing Brief, filed July 17, 2003).

The Business Relationship Between Goldstein, Jackwest, And North Coast

On April 7, 2000, Goldstein became a registered representative of North Coast, a brokerage firm headquartered at 595 Market Street in San Francisco (Tr. 25, 50-51; DX 35). North Coast employed approximately twenty registered representatives, but only three of those representatives worked at 595 Market Street (Tr. 295-96). The others worked independently at various locations (Tr. 296). While Goldstein was associated with North Coast, he always worked at 225 Bush Street or at his house in San Rafael (Tr. 51). Goldstein never worked at North Coast's office at 595 Market Street (Tr. 51, 280).

Goldstein explained to James Fuller (Fuller), North Coast's managing director, that he was starting Jackwest to assist other companies in obtaining financing (Tr. 278-79). Goldstein gave Fuller Jackwest's business plan (Tr. 298-99). He also told Fuller that he wanted to associate with North Coast to effect occasional securities transactions in connection with Jackwest's financings. For example, when an accredited investor doing business with Jackwest wanted to liquidate a stock holding to obtain cash for financing, Goldstein would open a North Coast securities account to execute the transaction for that investor (Tr. 279-80, 300).

Jackwest's actual operations differed somewhat from the description provided to Fuller. Goldstein hired inexperienced personnel to make cold calls to prospective investors who were identified on "lead cards" that Jackwest purchased from a commercial vendor (Tr. 130-32, 321-25; DX 39). The object of these introductory calls was to determine whether the prospective investor met Jackwest's criteria for an "accredited investor" and to gauge interest in securities to be purchased through North Coast (Tr. 132-33, 324-26, 332). If the introductory calls were promising, Jackwest's cold callers sent prospective investors a brochure describing North Coast and Goldstein (Tr. 331-32).

Jackwest's cold callers used scripts specified by Goldstein for their telephone presentations (Tr. 282-83, 292-93, 329-30; DX 37). The scripts, which the cold callers used verbatim, contained certain misleading information (Tr. 349-50). For example, Goldstein

instructed the callers to identify themselves as calling from North Coast rather than Jackwest, and to tell prospective investors that they worked for "one of the top producing brokers in of [sic] San Francisco and our investments are outperforming every money manager on Wall Street!" (Tr. 132, 283; DX 37). In fact, Goldstein was not authorized to solicit business for North Coast (Tr. 287-88, 300, 310-12). The statements regarding the success of North Coast's business were also false (Tr. 294, 349-50).

Goldstein met with Jackwest's cold callers each evening to review the day's results and select prospective investors for follow-up calls by himself or another North Coast registered representative employed by Jackwest (Tr. 133, 332-33, 337).[2] Goldstein or the other registered representative then solicited sales of specific stocks to these customers (Tr. 333-34). Prospective customers were not solicited for Jackwest securities (Tr. 448).

Goldstein signed North Coast's registered representative agreement on April 7, 2000. Fuller's next contact with Goldstein came in late June 2000, after a recently terminated Jackwest employee visited North Coast's office, seeking redress (Tr. 280-82, 433; DX 36). Fuller advised the individual that she had never been a North Coast employee, and that there was nothing he could do for her (Tr. 282). The terminated Jackwest employee showed Fuller a copy of the script that Jackwest's cold callers were using (Tr. 282-83; DX 37). At that juncture, Fuller became upset (Tr. 283, 433). He visited Goldstein at 225 Bush Street and told Goldstein to stop using North Coast's name in connection with Jackwest's business (Tr. 283-85, 290-91, 305, 433).

In the autumn of 2000, Fuller said that he asked Goldstein to find another brokerage firm as a sponsor (Tr. 287-89, 312). Goldstein disputes this (Tr. 53-54, 431). Because North Coast was in the process of selling its retail operations to another firm, Fuller did not press Goldstein to leave (Tr. 289). Although Goldstein moved his base of operations from 225 Bush Street to San Rafael in September 2000, Fuller was unaware of the move until December 2000, when another discharged Jackwest employee told him about it (Tr. 344-45).

Goldstein Solicits His Childhood Friend And His Tiburon Neighbors

Between February and July 2000, Goldstein raised $98,000 for Jackwest from a childhood friend in New York and from three neighbors in Tiburon. Goldstein told one neighbor that she would be a "seed investor" in Jackwest and could gain a four-fold return within ninety days (Tr. 358-60). He also told this neighbor that he had other investors in place to buy out the seed investors when their notes came due (Tr. 371, 378-79).

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[2] Jackwest was never registered as a broker or dealer, and the OIP does not claim that it should have been so registered (Tr. 42, 272-73). The record is ambiguous as to whether Jackwest ever employed a second North Coast registered representative, in addition to Goldstein (Tr. 38-41, 286, 323-24, 454). The NASD's registration records show that Richard B. Williams, Jr. (Williams), a Jackwest employee, was associated with North Coast from June 20 to November 30, 2000 (Central Registration Depository No. 2183057) (official notice). There is testimony to the contrary (Tr. 286). However, I have given it little weight.

Eric Kronenberg (Kronenberg) of Syosset, New York, was a former classmate and long-term friend of Goldstein's (Tr. 84; DX 20). Kronenberg also executed securities transactions through Goldstein (Tr. 84). In 2000, while Kronenberg was working as a car salesman in New York, Goldstein told Kronenberg about his plans to operate Jackwest as an investment banking business (Tr. 85, 475-76). Goldstein thought highly of Kronenberg's sales skills, and encouraged Kronenberg to move to San Francisco and join Jackwest as vice president of sales (Tr. 85, 476).

Kronenberg agreed to invest $20,000, in exchange for the position as vice president and an unspecified amount of Jackwest stock (Tr. 85-86). On February 1, 2000, Kronenberg wrote a check to Jackwest for $20,000 (Tr. 84; DX 20). Ultimately, Kronenberg did not become an employee of Jackwest. Jackwest did not issue stock to Kronenberg and it did not refund his $20,000 contribution (Tr. 476, 501).

Gregory Bieck (Bieck) was Goldstein's neighbor in Tiburon (Tr. 95). He works in the music business (Tr. 354-55). On Goldstein's recommendation, Bieck had purchased stock that appreciated substantially in value (Tr. 172). Bieck was pleased with the favorable results and informed several of his neighbors in Tiburon about his good fortune (Tr. 172, 355-56).

Goldstein told Bieck that he was starting an investment-banking firm (Tr. 98). On February 17, 2000, Bieck wrote a check for $8,000 to Jackwest (Tr. 95-96; DX 21). In return, Goldstein gave Bieck a certificate for 1,000 shares of Jackwest common stock (Tr. 97-98; DX 17). Jackwest and Bieck also entered into a stock sales agreement. Under the agreement, Jackwest had an option to call the stock it had issued to Bieck and pay no more than a 500 percent premium (DX 16). The agreement assigned no value to the shares upon issuance (DX 16).

On May 8, 2000, Jackwest issued a convertible promissory note to Bieck in the amount of $8,000 to replace the stock certificate (Tr. 99-100; DX 18, DX 19). Goldstein signed the note on behalf of Jackwest (Tr. 99; DX 19). The note provided that Bieck would receive the return of his prinicipal plus interest by the maturity date of August 1, 2000. The note also recited that, if Jackwest issued preferred stock before the maturity date, the outstanding principal balance and all accrued interest would convert to preferred stock in an amount determined by the principal balance divided by the offering price (DX 19).

Jackwest did not pay the note or issue preferred stock before the maturity date. On August 30, 2000, Goldstein issued a personal note to Bieck, promising to pay $40,000 in consideration of the $8,000 that Bieck had provided earlier (Tr. 102-03; DX 22). The new note characterized the sum owed to Bieck as Goldstein's personal debt, and not as Jacckwest's corporate obligation (DX 22). Payment was due "as soon as possible" (DX 22). Goldstein never redeemed the personal note.

Gina DeVito (DeVito) was also Goldstein's neighbor in Tiburon (Tr. 87, 352, 358). DeVito is an attorney and law school instructor in San Francisco (Tr. 351-52, 398). She learned about Goldstein's plans to start an investment banking business from Goldstein and Bieck (Tr. 92, 353-54). DeVito testified that Goldstein was very persistent in soliciting an investment from

her (Tr. 357-59). I credit this testimony. I do not credit Goldstein's testimony that he never solicited funds from DeVito (Tr. 100, 169).

On April 21, 2000, DeVito wrote a check to Jackwest for $25,000 (Tr. 87; DX 6). In return, Jackwest gave DeVito a convertible promissory note with a maturity date of August 1, 2000 (Tr. 88, 369-70; DX 5). In May or early June 2000, Goldstein told DeVito that Jackwest was doing well and he asked her to invest more money (Tr. 371-72). Goldstein gave DeVito Jackwest's draft business plan and asked for her help in editing it (Tr. 92-94; DX 3). DeVito saw several versions of the Jackwest business plan at about this time (Tr. 363-64; DX 3, DX 10, DX 11, DX 12). DeVito also visited Jackwest's San Francisco office to observe its operations, at Goldstein's suggestion (Tr. 372). On June 6 and 7, 2000, DeVito wrote two more checks to Jackwest for $40,000 (Tr. 89-90; DX 8). In return, Jackwest gave DeVito a second convertible promissory note (DX 7).

The two convertible promissory notes stated that the principal balance of the notes and accrued interest would convert to preferred stock on August 1, 2000, if Jackwest had issued such stock by that date (DX 5, DX 7). If preferred stock was not issued, both notes were due and payable with interest on August 1, 2000 (DX 5, DX 7). Goldstein executed both notes on behalf of Jackwest. Goldstein also gave DeVito a business plan that referred to the conversion feature of the notes (DX 11).

Jackwest did not pay DeVito on the maturity date of the notes and did not issue any preferred stock. On August 30, 2000, Goldstein granted DeVito 100,000 shares of Jackwest common stock (Tr. 91-92; DX 9).

Goldstein later told DeVito that the convertible promissory notes were defective and that she would have to waive accrued interest under the notes in order to receive shares in Jackwest (Tr. 384-85). Goldstein also persuaded DeVito to execute new documents. By a letter agreement dated November 13, 2000, Goldstein agreed that any unpaid principal balance would be convertible into Series A preferred stock of Jackwest (Tr. 385; DX 14). Goldstein then issued on behalf of Jackwest a new, undated promissory note for $65,000 with a maturity date of December 31, 2000 (Tr. 385; DX 15). Jackwest never honored this obligation.

Ken Clifton (Clifton) and Kristen Fulcher (Fulcher) were also Goldstein's neighbors in Tiburon (Tr. 103-04). Clifton worked as a project manager in the construction industry (Tr. 376). At the end of July 2000, Clifton and Fulcher jointly gave Goldstein $5,000 in cash for use in his investment banking business (Tr. 104-05).

On July 31, 2000, Jackwest issued a convertible promissory note to Clifton and Fulcher (Tr. 104; DX 1). The note promised to repay principal and interest to Clifton and Fulcher by the maturity date of December 20, 2000. If Jackwest issued preferred stock before the maturity date, the note provided that the outstanding principal balance would convert to preferred stock in the amount of the note, divided by the offering price of the preferred shares (DX 1). Goldstein signed the note on behalf of Jackwest (DX 1). Jackwest never paid the note or issued preferred stock to Clifton and Fulcher (Tr. 500-01).

Goldstein Solicits Randy Blythe

OIP ¶ II.8 alleges that Goldstein obtained at least $418,000 of the total amount raised from a single investor who previously had been Goldstein's customer when Goldstein was associated with a brokerage firm. It further charges that Jackwest later issued promissory notes to this investor for some of his investments, while other investments were made solely on oral promises of repayment.

Randy Blythe (Blythe) is a successful businessman from Modesto, California (Tr. 205-06, 248). He is the sole shareholder and president of HBC Investment Group, Inc., which does business as All American Mortgage (HBC/All American) (Tr. 205, 262-63). HBC/All American arranges mortgage loans for single-family residences (Tr. 206).

Blythe became Goldstein's customer in 1998 and transacted business with Goldstein at three brokerage firms (Tr. 56-57, 231, 237). Over a one-year period, Goldstein recommended several securities to Blythe (Tr. 237). Some of the recommendations were profitable and some were not (Tr. 208).

In 1999, while Goldstein was acting as Blythe's broker at Kirlin Securities, Goldstein told Blythe about his plans to open his own company (Tr. 208-09, 241). Goldstein first spoke of opening his own brokerage firm (Tr. 209). Goldstein also asked Blythe to send him money so that Goldstein could make a venture capital investment (Tr. 242). At some point, Goldstein mentioned Jackwest (Tr. 209).

Beginning in August 1999 and continuing through December 2000, either Blythe or HBC/All American provided $418,000 to Goldstein or Jackwest (Tr. 57-67; DX 45). Blythe obtained the money from his personal and business checking accounts. He generally used whichever account was most convenient for him at the time (Tr. 252). There were fifteen separate fund transfers, ranging in size from $3,000 to $60,000 (DX 45). Ten of the payments were by check, and five were by wire (DX 45). Neither Goldstein nor Blythe distinguished between payments made to Goldstein or to Jackwest (Tr. 59-60, 64-65, 215-17). On some occasions, Goldstein told Blythe who the payee should be (Tr. 215-16). On other occasions, Blythe left blank the payee line on the check and gave Goldstein the discretion to complete it (Tr. 216-17, 254).

Sometime in 2000, Goldstein worked with an attorney, Alex Reichl, to prepare a capitalization sheet for Jackwest (Tr. 81-84; DX 48). Based on information that Goldstein provided, Reichl identified Blythe as a "seed investor" in Jackwest with a capital contribution of $500,000 (Tr. 81-84; DX 48).

Blythe provided funds based primarily on his confidence in Goldstein's abilities (Tr. 210, 246-47). Blythe explained: "I felt confident in Kevin's abilities and thought that it would be a good investment" (Tr. 210). Blythe did not intend to become a partner in Goldstein's business (Tr. 210). Blythe always expected repayment once Jackwest was "on its feet" and did not consider the funds to be a gift (Tr. 210, 261-62).

Blythe was rather casual about some financial matters. For example, although he received periodic statements from several brokerage firms, he did not open such mail (Tr. 246). His dealings with Goldstein were equally informal. At first, there were no written agreements between Blythe and HBC/All American, on the one hand, and Goldstein and Jackwest, on the other hand, describing the purpose of these fund transfers, the applicable rates of interest, or the due date for repayment. The absence of such documentation proved troublesome for HBC/All American when it underwent an outside audit of its financial statements in November 2000 (Tr. 218-19).

One purpose for the audit was to verify that HBC/All American had the appropriate net worth to enter into loans insured by the Federal Housing Authority (Tr. 220, 250). When HBC/All American's outside auditors asked Blythe and Jackwest about the proper characterization of the transfers of funds from HBC/All American to Jackwest, Goldstein and Blythe scrambled to create the necessary records (Tr. 220-23, 258).

On November 17, 2000, Jackwest issued two promissory notes to Blythe. I infer that Goldstein backdated both notes to help Blythe with HBC/All American's audit (Tr. 77-78, 176-77, 248-50). The first note, in the amount of $100,000, was dated August 2, 1999 (Tr. 221-22; DX 49). The second note, in the amount of $21,000, was dated October 13, 1999 (Tr. 76, 222; DX 50). Each note was payable with interest on December 31, 2000.

On November 28, 2000, HBC/All American's outside auditors also sent Goldstein a list of questions to answer (Tr. 77; DX 52). Among other things, the auditors asked Goldstein to describe the nature of HBC/All American's investment. The auditors also asked whether Jackwest would pay the notes and accrued interest by December 31, 2000. Finally, the auditors asked Goldstein to sign and date a positive confirmation for the amounts of the notes, which were shown as loans receivable on the books of HBC/All American (DX 52). On November 29, 2000, Goldstein signed and returned to the auditors a written confirmation that Jackwest owed the notes for $100,000 and $21,000 to HBC/All American (Tr. 78-79; DX 53). If Goldstein answered the auditors' other questions, his responses are not part of the record.[3]

[3] Four other documents are relevant to the evolving understanding between Goldstein and Blythe. Two of these documents are undated. They purport to extend the repayment dates of two additional Jackwest notes to June 30, 2001 (DX 62, DX 63). The third document, dated August 30, 2000, characterizes $500,000 that Blythe provided to Goldstein as a non-interest bearing personal loan, with no specific due date for repayment (DX 45 at SEC 3379). In the fourth document, dated October 11, 2001, Goldstein promised to pay Blythe $1,500,000 (DX 45 at SEC 3380).

The Division suggests that these documents were created after Goldstein knew he was under investigation and were backdated to throw the investigators off the trail (Tr. 228-31). Blythe's testimony was full of "I don't recall" answers on this issue (Tr. 227-31). I have given these documents very little weight in reaching this decision.

Neither Blythe nor HBC/All American have been repaid any of the money they provided to Goldstein or Jackwest (Tr. 232).

Goldstein Tells The Seed Investors He Is Soliciting Funds From Archie In Seattle

In the autumn of 2000, Goldstein told the Tiburon investors and Blythe that he was talking to Archie, a wealthy resident of Seattle, Washington, about investing in Jackwest. Goldstein advised the seed investors that, if the talks with Archie were successful, Jackwest would be able to repay them (Tr. 106-12, 223-24, 374, 386, 409). Although Goldstein spoke to Archie about ten times, Goldstein testified that he could not recall Archie's surname and no longer had any records with Archie's telephone number (Tr. 106-08).

While there is a certain degree of implausibility to Goldstein's testimony on this subject, the Division has never asked me to find that there was no Archie. I have given Goldstein the benefit of the doubt as to Archie's existence.

Goldstein's negotiations with Archie broke down in December 2000 (Tr. 108-10). Goldstein insists that he promptly alerted Blythe once he learned that the Archie would not be investing in Jackwest (Tr. 110-12). In contrast, Blythe testified that he did not learn of that information until nine months after their initial conversation about Archie (Tr. 224-25). I credit Blythe's testimony on this issue.

Goldstein Makes False Representations To Induce The Seed Investors To Purchase Jackwest Securities

The OIP alleges that Goldstein verbally represented to certain investors that he had an outside source of annual income of $250,000 with which to support himself and therefore he would not be taking a salary from Jackwest (OIP ¶ II.11). It further alleges that this representation was false, that Goldstein diverted a substantial portion of the investors' funds for his personal use, and that the funds he raised were his only source of income and support at the relevant times (OIP ¶¶ II.15, II.16, II.18).

Before DeVito invested in Jackwest in April 2000, Goldstein told her that he earned $250,000 per year from his work at a brokerage firm, and that any funds she invested would not be for his personal use because he had his own money (Tr. 367). Goldstein specifically told DeVito that he would not be taking a salary from Jackwest (Tr. 368). DeVito's testimony is consistent with Jackwest's corporate documents. Jackwest's bylaws provided that officer salaries would be fixed by resolution of the board of directors (Tr. 30-32; DX 31 at SEC 1628). Jackwest's board of directors fixed Goldstein's annual salary at zero (DX 30 at SEC 1634). I credit DeVito's testimony on these points and I reject Goldstein's testimony to the contrary (Tr. 94-95, 443, 467).[4]

[4] According to DeVito, Goldstein made similar representations to Bieck and Clifton (Tr. 355-56, 376-77). Bieck and Clifton were on the Division's witness list, but they did not testify at the hearing.

Between August and November 1999, Goldstein earned approximately $20,000 to $30,000 in commission income at Kirlin Securities (Tr. 113). After leaving Kirlin Securities, Goldstein did not have any "official" source of income through December 2000 (Tr. 113). Goldstein executed very few trades and earned no net income while he was affiliated with North Coast (Tr. 54-55, 286-87). Goldstein's only source of funds for his personal expenses and for Jackwest's business operations was the money he obtained from Kronenberg, Bieck, DeVito, Clifton, and Blythe (Tr. 500). By December 2000, Goldstein's personal bank account was overdrawn and closed (Tr. 117, 500; DX 27).

Goldstein did not use the invested funds to capitalize and operate Jackwest as an investment-banking firm. Rather, he used a substantial portion of these funds for his personal and family expenses. Nor did Goldstein distinguish between his own funds and Jackwest's corporate funds. He testified: "Kevin Goldstein's individual bank account was the same as the Jackwest Corporation bank account, in my mind. That may be ignorant, that may be irresponsible, okay. And I know, now, that it is." (Tr. 167). Between December 1999 and October 2000, Goldstein transferred approximately $160,662 from Jackwest's bank account to his personal bank account (Tr. 194-201, 423-24; DX 28).

From February to November 2000, Goldstein wrote $110,948 in checks on Jackwest's account to himself, to cash, to pay rent on his residence, and to pay his family's health insurance premiums (Tr. 118-47, 193, 469-70; DX 24, DX 25). Goldstein also used Jackwest's funds for daily limousine service between his home and Jackwest's office at 225 Bush Street (Tr. 151-52, 170), gifts for his children (Tr. 156), meals and beverages for himself and Jackwest employees (Tr. 339-40, 469), entertainment at a strip club (Tr. 152-53, 470-71), internet gambling (Tr. 153-54, 515-16), and airfare and limousine costs for a trip to Las Vegas, Nevada (Tr. 155, 157; DX 24, DX 34).

Goldstein paid bills in cash and avoided credit cards (Tr. 126, 147, 340, 344). In addition, he acknowledged that Jackwest's books and records were incomplete (Tr. 47-49; DX 34). For those reasons, I infer that Goldstein may have diverted even more of Jackwest's funds than is apparent from the corporate records offered into evidence at the hearing.

Goldstein wrote and then revised a business plan for Jackwest (DX 3, DX 10, DX 12). As early as April 2000, he provided copies of the business plan to Fuller and DeVito (Tr. 278-79, 298-99, 308, 365).[5] In June 2000, Goldstein distributed an updated business plan to the Tiburon investors (Tr. 365-67; DX 13). Goldstein did not provide any of the business plans to Blythe (Tr. 166, 176).

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[5] Goldstein testified that he provided a business plan to DeVito in June 2000, but not in April 2000 (Tr. 92-93, 172). DeVito's testimony on this point was ambiguous (Tr. 365). However, her testimony finds some support from Fuller, who received Jackwest's business plan in April 2000.

The OIP alleges that Jackwest's business plans falsely represented that Goldstein was "an experienced and gifted investment banker" (OIP ¶¶ II.14, II.19). It is undisputed that the business plans made this claim, and that Goldstein still believes the description to be accurate (Tr. 462-63, 510; DX 3, DX 11). The issue is whether the statement was misleading.

Goldstein had no financial background before he started in the securities business (Tr. 435). From 1995 to 1999, he was employed as a sales agent by a series of small brokerage firms for short periods of time. As a sales agent, Goldstein marketed newly issued securities to customers. He did not originate, negotiate, or underwrite offerings of securities (Tr. 15-24). Nor did he perform due diligence analyses of such securities (Tr. 20, 23). Goldstein offered a very expansive understanding of the term "investment banker" (Tr. 17-18, 462-64). However, the facts do not support the business plans' characterization of his experience.

Jackwest's business plans also claimed that Goldstein and his team had raised over $500 million for private and public companies from 1996 to 1999 (DX 3, DX 11). As it turns out, this assertion credited Goldstein for the accomplishments of others (Tr. 464-65). Goldstein's duties at two brokerage firms included recruiting and training individuals to become sales agents (Tr. 22, 435-36, 453). Goldstein explained: "I did not raise $500 million, but I didn't make that claim. I said 'along with [my] personally trained team,' and every one of those brokers I trained 100 percent and we did raise that kind of money" (Tr. 465). Goldstein offered no evidence, beyond his own testimony, to demonstrate that the $500 million claim was accurate. In any event, the artful wording of the business plans was undermined during Goldstein's verbal solicitation of DeVito. DeVito testified: "He specifically told us that he had raised about $500 million [for] both public and private companies over the past couple of years" (Tr. 353) (emphasis added).

The business plans also stated that Jackwest had four registered representatives, a team of research analysts, and investment brokers working around the clock, seven days a week, to monitor client portfolios (DX 3, DX 12). Contrary to these claims, Goldstein and Williams were the only North Coast registered representatives ever to be employed by Jackwest (Tr. 38-41, 286, 298, 323-24, 454-55). See supra note 2. Jackwest did not employ its own team of research analysts (Tr. 158, 331, 458). Business hours at Jackwest's San Francisco office were 5:30 a.m. to 8:00 p.m., not "around the clock" (Tr. 158, 324-25).

The business plans represented that Jackwest was operational and growing quickly, that the firm had a current value of $5 million, that it was ready to train and graduate 100 or more brokers during its first year of operations, and that it had a quickly growing client base of accredited investors (DX 3, DX 10, DX 12).

None of these claims was true. It was always clear to Goldstein that Jackwest was not making money (Tr. 45, 158-59, 501). The only "growth" that Jackwest experienced was the amount of office space it rented at 225 Bush Street, as it brought aboard additional cold callers. When asked to justify his valuation of Jackwest at $5 million, Goldstein offered only a generalized discussion of a methodology and a multiplier (Tr. 460-61). However, Goldstein never offered a cogent rationale for the specific valuation figure he presented in Jackwest's business plans. I find as a fact that the $5 million valuation lacked any rational basis.

Jackwest employed 150 different people, but turnover was high (Tr. 35-37, 321). Some employees lasted less than an hour and others lasted only two or three days (Tr. 36-37, 46). Although Goldstein estimated that Jackwest had as many as thirty employees at one time, other evidence suggests that the number was much lower (Tr. 36, 284, 322; DX 4 at ¶ 13, DX 36).

Goldstein taught new hires how to use lead lists and read from scripts and rebuttal sheets when making cold calls to prospective investors (Tr. 324-26, 329-32, 431-32; DX 37, DX 38, DX 39). Goldstein instructed his trainees never to let prospective investors off the telephone but "to make them talk or not hang up on you" (Tr. 334). He also counseled: "If they object, go ahead and use rebuttals with them, and keep them on the phone as long as you possibly can" (Tr. 335). Goldstein also told his trainees that, if they met resistance, they should tell the prospective investors that Jackwest's research analysts were confirming that the stocks in question were about to take off (Tr. 331). Goldstein gave the trainees access to an out-of-date textbook to study for the NASD Series 7 examination (Tr. 46, 336, 438). Between April and December 2000, only one Jackwest employee actually took the examination, and that individual failed to pass (Tr. 41, 46, 317-18, 337).

From April through December 2000, Jackwest employees located 300 qualified investors (Tr. 157-58). Goldstein did not consider this number to be sufficient or substantial (Tr. 465-66). During this period, Goldstein executed only a small number of securities transactions for such investors through North Coast (Tr. 54, 158, 286-87, 338-39).

Finally, the business plans stated that Jackwest's goal was to generate $5 million per month after eight months of operation; that it was confident of achieving annual revenues in excess of $250 million after two years; and that it could be worth $100 million within two years, and $1 billion in two to four years (DX 3, DX 10, DX 12). These projections lacked any rational basis (Tr. 461-62). Moreover, they were contradicted by Goldstein's testimony (Tr. 173 ("[Jackwest] was not supposed to earn money for at least twelve months"), 501 ("it was always clear" that Jackwest had not earned any revenue when he wrote the business plans)).

Events After December 2000

Western International Securities, Inc., successor-in-interest to North Coast's retail operations, employed Goldstein for a few weeks before terminating him in January 2001 (Tr. 25-26, 52-53, 289-90). There is some evidence that Goldstein then returned for a brief period to Kirlin Securities, where he was also terminated (Tr. 414, 444-45, 480). Goldstein has not been associated with a registrant since the spring of 2001 (Tr. 26, 444). Goldstein attempted to start two venture capital consulting companies in 2001 and 2002 (Tr. 159-62). Neither business was successful.

On August 31, 2001, DeVito filed a civil action against Goldstein and Jackwest in San Francisco County Superior Court (Tr. 392-94; DX 4). Among other things, her verified complaint charged Goldstein and Jackwest with intentional and negligent misrepresentations, fraud, breach of contract, breach of fiduciary duty, and racketeering (DX 4). On June 24, 2003, DeVito obtained a default judgment against Goldstein and Jackwest (DX 75). The judgment

orders Goldstein and Jackwest to pay DeVito $65,000 in principal, $16,415 in interest, $300,000 in punitive damages, $36,291 in attorneys' fees, $649.25 in court costs, and $2,013 in sanctions (DX 75).

Witness Credibility

Goldstein argues that the charges in the OIP result from a vendetta by DeVito, acting in concert with Goldstein's former spouse and her divorce lawyer (Tr. 390-91, 405, 412, 441-42, 444, 446-47). Goldstein also blames DeVito for causing him to be terminated by Kirlin Securities in the spring of 2001 (Tr. 444-45, 480). This version of events is squarely rejected. It was Goldstein's misfortune to wrong an investor who was resourceful enough to dig out the facts and then take appropriate legal action. DeVito's successful civil action against Goldstein provides no basis for disbelieving DeVito's testimony in the case before me.

On the whole, I found DeVito to be a very credible witness. I have given reduced weight to the portions of her testimony that summarized the grievances of Bieck and Clifton. See supra note 4. The same is true for her account of the conversations she had with Kronenberg's lawyer and parents (Tr. 381-82). The remainder of her testimony was quite persuasive, as Goldstein acknowledges (Tr. 440 ("Gina is a great witness, clearly."), 477-78 ("Gina DeVito is an A-plus witness. She's good.")).

Blythe's easy-come, easy-go reaction to the loss of $418,000 contrasts sharply with DeVito's eye-for-an-eye reaction to the loss of $65,000. Blythe's casual business practices were somewhat surprising, and his "I don't recall" testimony about backdating documents in November 2000 was unpersuasive. In all other respects, however, I consider Blythe a reliable witness. Blythe earns his livelihood by evaluating mortgage applications and deciding whether the applicants are likely to repay loans his company grants (Tr. 206). Unfortunately, Blythe's evaluation of Goldstein proved to be wrong. The weight of the evidence shows that Goldstein deceived Blythe repeatedly.

Cory McBride (McBride) was a Jackwest employee from May to December 2000 (Tr. 317, 321). Goldstein hired McBride with promises of earning $100,000 per year, but he failed to deliver (Tr. 318-20, 437-40). McBride believes that Goldstein and Jackwest still owe him back salary and benefits (Tr. 319-20, 348). In addition, McBride admitted that he told prospective investors deliberate falsehoods because it was part of his job as a Jackwest cold caller (Tr. 349-50). McBride's lingering ill will for Goldstein and his broken ethical compass give me some concern for his veracity. Nevertheless, I consider McBride to be generally credible in his description of Jackwest's internal operations. His testimony was reliable in explaining Jackwest's superficial training program for cold callers, Goldstein's frequent expenditures of cash, and Goldstein's funding of meals and entertainment for Jackwest employees.

Goldstein argues that Fuller was motivated to offer testimony that separated North Coast from Jackwest because North Coast is in trouble with the Commission and the NASD (Tr. 430). It is not clear that North Coast has been the subject of regulatory action. On the other hand, Fuller has a disciplinary history. See James William Fuller, 70 SEC Docket 2461 (Oct. 4, 1999) (settlement) (imposing a cease-and-desist order, a censure, a civil penalty of $15,000, and a nine-

month suspension from association with an investment adviser); L.H. Alton & Co., 53 S.E.C. 1118, 1124-28 (1999) (affirming an NASD disciplinary action against a brokerage firm for permitting Fuller to act as its principal and representative while unregistered). In addition, Fuller's credibility as a witness was an issue in a prior proceeding. See Charles K. Seavey, 76 SEC Docket 2897, 2900 (Feb. 20, 2002) (Initial Decision) (finding Fuller's testimony to be "not completely reliable" and "not entirely credible"), aff'd on other grounds, 79 SEC Docket 3455 (Mar. 27, 2003), appeal pending, 9th Cir., No. 03-71565.

Fuller was a marginally credible witness. His efforts to portray North Coast as a by-the-book brokerage firm were unpersuasive. If North Coast did not know what Goldstein was doing at Jackwest, it was because North Coast did not want to know. I credit Fuller's testimony that Goldstein hoped some day to make Jackwest an Office of Supervisory Jurisdiction of North Coast (Tr. 308-10). I also credit Fuller's testimony that North Coast was content not to terminate Goldstein in the autumn of 2000 because of the pending sale of its retail operations to Western International Securities (Tr. 289). I do not credit Fuller's testimony that he asked Goldstein to leave North Coast and to associate with another brokerage firm (Tr. 288-89, 431). Nor do I give much weight to Fuller's testimony that Goldstein was the only North Coast registered representative to be employed by Jackwest (Tr. 286). See supra note 2.

Like Fuller, Goldstein has also been the subject of a prior regulatory action. In 1997, the Texas State Securities Board fined Goldstein $1,000 and entered an order of reprimand because of Goldstein's failure to disclose on his Form U-4 Application felony charges filed against him for attempted rape and burglary (OIP ¶ II.4; Answer ¶ 4). The felony charges in question, dating from 1990, were later dismissed. See Kevin Herbert Goldstein, 1997 Tex. Sec. LEXIS 10, at *2-3 (Apr. 18, 1997).

Goldstein was not a very credible witness. He tended to embellish even minor matters, including the number of Jackwest employees and the credit due to him for the success of registered representatives he had trained. He tended to minimize damaging testimony about certain matters by labeling them "standard practice in the industry." His testimony conflicted with the testimony of the other witnesses on many key points. In general, I have accepted the other witnesses' recollection of events as more accurate. Finally, Goldstein was unpersuasive in questioning the motives of his accusers and in testifying that any violations were the result of bad luck.

DISCUSSION AND CONCLUSIONS

Paragraph II.24 of the amended OIP alleges that Goldstein willfully violated and Jackwest violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5. Willfulness is shown where a person intends to commit an act that constitutes a violation. There is no requirement that the actor also be aware that he is violating any statutes or regulations. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976).

Section 17(a) of the Securities Act proscribes fraudulent conduct in the offer or sale of securities and Section 10(b) of the Exchange Act and Rule 10b-5 proscribe fraudulent conduct in

connection with the purchase or sale of securities. These provisions prohibit essentially the same type of conduct. See United States v. Naftalin, 441 U.S. 768, 773 n.4 (1979). To prevail under Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5, the Division must show: (1) misstatements or omissions of material facts or other fraudulent devices; (2) made in connection with the offer, sale, or purchase of securities; and (3) that Respondents acted with scienter. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). No scienter requirement exists for violations of Sections 17(a)(2) or 17(a)(3) of the Securities Act; negligence alone is sufficient. Aaron v. SEC, 446 U.S. 680, 701-02 (1980); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir. 1986).

Respondents made a series of misrepresentations to induce individuals to invest their funds in Jackwest. For example, Goldstein told DeVito that the money she invested would be used to capitalize and operate Jackwest. Contrary to this representation, Goldstein diverted a substantial portion of the invested funds for his personal and family expenses. Goldstein also told DeVito that he would not take a salary from Jackwest because he already had an annual income of $250,000 from another source. In fact, Goldstein's only source of funds for his personal expenses was Jackwest investor funds.

Goldstein also wrote and distributed business plans stating that Jackwest was operational and growing. Contrary to this representation, Jackwest was not conducting business as an investment-banking firm, had only a few employees, and earned no revenue from operations. The business plans said that Jackwest had four licensed registered representatives, a team of research analysts, and investment brokers working around the clock to monitor client portfolios. These claims were also untrue. The business plans further stated that Jackwest had a training program for brokers and was on course to graduate twenty brokers within three months and ten brokers per month thereafter. In fact, Jackwest's training program was superficial, at best. Only one Jackwest employee actually took the NASD's licensing examination.

The business plans falsely represented that Goldstein was an experienced and gifted investment banker. In fact, Goldstein had little or no investment banking experience. He had worked at a series of small brokerage firms, primarily as a sales agent and a trainer of sales agents. In these positions, Goldstein did not originate, negotiate, or underwrite new securities issuances, nor did he perform due diligence analyses for such securities.

Finally, the business plans recited that Jackwest had a goal of $5 million revenue per month in its first eight months and annual revenues in excess of $250 million after two years. The plans also claimed that Jackwest had a current value of $5 million and could be worth $100 million within two years. These estimates of current and future value were unrealistic and had no basis in fact.

A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision and would view disclosure of the omitted fact as having significantly altered the total mix of information made available. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); SEC v. First Jersey Secs., Inc., 101 F.3d 1450, 1466 (2d Cir. 1996). Materiality is a mixed question of law and fact. TSC Indus., 426 U.S. at 450.

Information about Jackwest's financial condition, solvency, and profitability is plainly material. See SEC v. Murphy, 626 F.2d 633, 653 (9th Cir. 1980). In addition, DeVito testified that Goldstein's representations concerning his experience, prior earnings, client base, plans for use of the funds, and outside source of income were important to her decision to invest (Tr. 368-69). I consider DeVito's testimony on these matters to be representative of the views of a reasonable investor. I conclude that all the misrepresented information would be important to the investment decision of a reasonable investor.

"Congress' purpose in enacting the securities laws was to regulate investments in whatever form they are made and by whatever name they are called." Reves v. Ernst & Young, 494 U.S. 56, 61 (1990). To that end, it enacted a broad definition of "security," sufficient "to encompass virtually any instrument that might be sold as an investment." Id.

The interests held by Kronenberg, the Tiburon investors, Blythe, and HBC/All American changed over time, but all the transactions between Respondents and these investors involved securities. Each of the investors provided funds to Goldstein or Jackwest with the expectation that they would be repaid and receive some gain on their investment through the successful operation of Jackwest. Such transactions are investment contracts and thus securities. See SEC v. Edwards, ___ U.S. ___, ___, 2004 U.S. LEXIS 659, at *9-11 (Jan. 13, 2004); SEC v. W.J. Howey Co., 328 U.S. 293, 297-301 (1946); SEC v. Rubera, 350 F.3d 1084, 1090 (9th Cir. 2003).

One investor, Bieck, received Jackwest stock in exchange for his funds. Stock is clearly a security. See Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act. Jackwest also issued various forms of promissory notes to Bieck, DeVito, Clifton, and Blythe. The promissory notes were also securities. See Reves, 494 U.S. at 61-67; McNabb v. SEC, 298 F.3d 1126, 1130-33 (9th Cir. 2002). Finally, Jackwest issued convertible promissory notes to DeVito, Bieck, and Clifton. The notes provided that they would be redeemed or converted to preferred stock. The statutory definitions of "security" include such instruments, as well.

Courts have interpreted broadly the requirement of Exchange Act Section 10(b) and Rule 10b-5 that violations must occur "in connection with" the purchase or sale of a security. See Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971); Ames Dep't Stores, Inc., Stock Litig., 991 F.2d 953, 964-65 (2d Cir. 1993). There is little doubt that the violations here occurred in connection with the purchase or sale of Jackwest securities.

The jurisdictional requirements of the antifraud provisions are also interpreted broadly, and are satisfied by intrastate telephone calls and even the most ancillary mailings. SEC v. Softpoint, Inc., 958 F. Supp. 846, 865 (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. 1998). Goldstein communicated by telephone with Blythe and Archie. Blythe transferred funds by wire and mail to Goldstein and Jackwest, and Goldstein used facsimile transmissions to respond to inquiries by HBC/All American's auditors. Goldstein also communicated with DeVito by electronic mail and telephone (Tr. 407, 416-17). The record is silent as to how Goldstein communicated with Kronenberg and the Tiburon investors other than DeVito. The Division has shown that a representative sample of Jackwest securities was offered, sold, or purchased in interstate commerce.

Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." Hochfelder, 425 U.S. at 193 n.12. It may be established by a showing of recklessness. David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997) (citing Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc)). The en banc Ninth Circuit adopted the standard of recklessness articulated by the Seventh Circuit in Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1044-45 (7th Cir. 1977): "[A] highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but 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." Scienter is a question of fact and can be proved by circumstantial evidence. SEC v. Hasho, 784 F. Supp. 1059, 1107 (S.D.N.Y. 1992) (collecting cases).

Goldstein had actual knowledge of Jackwest's financial condition and business operations. He knew that Jackwest was not fully operational, and not growing. Goldstein also controlled Jackwest's bank accounts and cash, and he knew that he was using Jackwest funds for his personal and family expenses. Goldstein hired and paid all Jackwest employees. He had actual knowledge that there were at most two licensed registered representatives, and no research analysts, affiliated with Jackwest. Each day, he reviewed the results of cold calls made by Jackwest employees, and he knew that Jackwest was not developing a substantial client base of qualified investors to participate in the financing of start-up businesses. Goldstein knew that Jackwest had no revenues from operations, yet he continued to represent that the firm would have substantial revenues in the foreseeable future.

Goldstein personally solicited Kronenberg, the Tiburon investors, and Blythe, and was personally responsible for the misrepresentations and omissions identified on this record. Goldstein was Jackwest's only officer and had complete control over its activities. "[T]he acts of a corporate officer that are intended to benefit a corporation to the detriment of outsiders are properly imputed to the corporation." In re Sunbeam Sec. Litig., 89 F. Supp. 2d 1326, 1340 (S.D. Fla. 1999). Thus, Goldstein's intent to defraud investors is properly imputed to Jackwest.

SANCTIONS

To protect the public interest, the Division seeks a cease-and-desist order against both Respondents and an order barring Goldstein from association with any broker or dealer. It also seeks an order requiring both Respondents, jointly and severally, to disgorge $516,000 plus prejudgment interest, and requiring Goldstein to pay a civil penalty of $120,000. Goldstein wants to remain in the securities business (Tr. 163). He also argues that he is unable to pay any financial sanctions (Tr. 480-98; RX 1).

As to cease-and-desist orders and associational bars, the public interest analysis requires that several factors be considered. These include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infractions; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. Steadman v. SEC, 603 F.2d 1126,

1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). The severity of sanctions depends on the facts of each case and the value of the sanctions in preventing a recurrence of the violative conduct. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963). Sanctions should demonstrate to the particular respondent, the industry, and the public generally that egregious conduct elicits a harsh response. See Arthur Lipper, 547 F.2d at 184. Registration or associational sanctions are not intended to punish a respondent but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

Cease-And-Desist Order

Section 8A(a) of the Securities Act and Section 21C(a) of the Exchange Act authorize the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Securities Act, the Exchange Act, or the rules and regulations thereunder.

In KPMG Peat Marwick LLP, 74 SEC Docket 384, 428-38 (Jan. 19, 2001), recon. denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002), the Commission addressed the standard for issuing cease-and-desist relief. It concluded that it would consider the Steadman factors in light of the entire record, noting that no one factor is dispositive. It explained that the Division must show some risk of future violations. However, it also ruled that such a showing should be "significantly less than" that required for an injunction and that, "absent evidence to the contrary," a single past violation ordinarily suffices to establish that the violator will engage in the same type of misconduct in the future. See KPMG, 74 SEC Docket at 430, 435.

Goldstein and Jackwest engaged in serious fraud that resulted in significant financial loss to investors who were Goldstein's brokerage customers, friends, and neighbors. The fraud was not isolated, but continued from August 1999 through December 2000. The proven violations involved a high degree of scienter.

Goldstein expressed little recognition of the wrongful nature of his conduct and provided no credible assurances that he would refrain from repeating such misconduct in the future. Although Goldstein has not been associated with a broker or dealer since the spring of 2001, he is relatively young and has many potentially productive years ahead of him. Goldstein expressed a strong interest in continuing to work in the securities business and recently attempted to start two venture capital consulting companies.

Jackwest has not operated as a business since early 2001 but it remains a California corporation in good standing under Goldstein's sole control. There is a realistic prospect that Goldstein could use Jackwest as a vehicle for future violations of the securities laws. Under the circumstances, a cease-and-desist order is plainly warranted against both Respondents.

Associational Bar

Section 15(b)(6) of the Exchange Act empowers the Commission to impose a sanction against a person associated with a broker or dealer if such a person willfully violated the

Securities Act, the Exchange Act, or the rules or regulations thereunder. Specifically, the Commission may censure an associated person, place limitations on the activities or functions of that person, suspend that person for a period not exceeding twelve months, or bar that person from being associated with a broker or dealer if the Commission finds, on the record and after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest.

Kirlin Securities and North Coast were registered as brokers and dealers at the times relevant to this proceeding. Because Goldstein willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 while he was associated with Kirlin Securities and North Coast, he is subject to a sanction under Section 15(b)(6) of the Exchange Act. My discussion of the Steadman factors in connection with a cease-and-desist order is equally applicable to the proposed associational bar. I conclude that it is in the public interest to bar Goldstein from association with any broker or dealer for his willful misconduct between August 1999 and December 2000.

Civil Monetary Penalty

Under Section 21B(a) of the Exchange Act, the Commission may assess a civil monetary penalty if the respondent has willfully violated the Securities Act, the Exchange Act, or the rules and regulations thereunder. It must also find that such a penalty is in the public interest. See Section 21B(c) of the Exchange Act. Six factors are relevant to the public interest determination: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. Not all factors may be relevant in a given case, and the factors need not all carry equal weight.

Section 21B(b) of the Exchange Act specifies a three-tier system identifying the maximum amount of a penalty. For each "act or omission" by a natural person, the maximum amount of a penalty is $5,000 in the first tier; $50,000 in the second tier; and $100,000 in the third tier.[6] A second-tier penalty is permissible if the act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. A third-tier penalty not only must have involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, but also must have "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission."

The statutory maximum is not an overall limitation, but a limitation per violation. Thus, each fraudulent misrepresentation to each investor constitutes a separate act or omission. See

[6] As required by the Debt Collection Improvement Act of 1996, the Commission increased the maximum penalty amounts for violations occurring after December 9, 1996, and, again, for violations occurring after February 2, 2001. 17 C.F.R. §§ 201.1001, .1002. For a natural person, the adjusted maximum penalty amounts for each violation occurring after December 9, 1996, and on or before February 2, 2001, were $5,500 (tier one), $55,000 (tier two), and $110,000 (tier three), respectively.

Mark David Anderson, 80 SEC Docket 3250, 3270 (Aug. 15, 2003) (imposing a civil penalty of $1,000 for each of the respondent's ninety-six violations); cf. United States v. Reader's Digest Ass'n., 662 F.2d 955, 966, 970 (3d Cir. 1981) (holding that each individual mailing constitutes a separate violation of an FTC consent order). Because multiple acts and omissions are involved here, the Division's request for a penalty of $120,000 is well within the statutory ceiling.

A third-tier penalty is warranted for Goldstein's multiple antifraud violations. The willful misconduct established on this record involved fraud and deceit. It also resulted in substantial losses to others and substantial pecuniary gain to Goldstein. Such a penalty will serve the interest of deterring others from committing similar violations in the future. On this record, I will impose upon Goldstein a civil penalty of $120,000, as requested by the Division.

Disgorgement

Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act provide that the Commission may enter an order requiring disgorgement, including reasonable interest. Disgorgement seeks to deprive the wrongdoer of his ill-gotten gains. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). It returns the violator to where he would have been absent the violative activity. An order to disgorge a certain amount need only be a reasonable approximation of the profits causally connected to the violation. Id. at 1231-32.

Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden of going forward shifts to the respondent to demonstrate clearly that the Division's disgorgement figure is not a reasonable approximation. SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995). Any risk of uncertainty as to the disgorgement amount falls on the wrongdoer whose illegal conduct created that uncertainty. First City, 890 F.2d at 1232. The Commission has not permitted the wrongdoer to reduce the amount of disgorgement to reflect taxes paid or expenses incurred. See Richmark Capital Corp., ___ SEC Docket ___, ___, Exchange Act Release No. 48,758 at 15 (Nov. 7, 2003), appeal pending, 5th Cir., No. 03-60984; Laurie Jones Canady, 69 SEC Docket 1468, 1486-87 (Apr. 5, 1999), recon. denied, 70 SEC Docket 905 (Aug. 6, 1999), pet. denied, 230 F.3d 362 (D.C. Cir. 2000); L.C. Wegard & Co., 53 S.E.C. 607, 617 (1998), aff'd, 189 F.3d 461 (2d Cir. 1999).

Joint and several liability for disgorgement of all ill-gotten gains is not the default rule in all cases where two or more individuals or entities have collaborated or have close relationships in engaging in illegal conduct. "The division of liability [for disgorgement] is an intensely factual determination . . . ." SEC v. Hughes Capital Corp., 124 F.3d 449, 456 (3d Cir. 1997). It is inappropriate simply to assume that the amount of unjust enrichment cannot be reasonably approximated and measured as to each individual respondent; rather, it is necessary for the fact-finder to determine the issue of impossibility on a case-by-case basis after a hearing. Cf. CFTC v. Am. Metals Exch. Corp., 991 F.2d 71, 77-78 (3d Cir. 1993) ("Without holding a hearing, . . . the district court . . . had no basis upon which to conclude that it would be inordinately difficult to measure unlawful profits."). However, joint and several liability for disgorgement of ill-gotten gains is appropriate in certain circumstances. For example, in SEC v. First Pac. Bancorp, 142 F.3d 1186, 1191-92 (9th Cir. 1998), the "close relationship" warranting joint and several

liability existed because the individual defendant was chairman of the board, chief executive officer, and majority shareholder of the corporate co-defendant. Likewise, in First Jersey, 101 F.3d at 1475-76, joint and several liability for disgorgement rested on Section 20(a) of the Exchange Act (which provides that a controlling person shall be jointly and severally liable with and to the same extent as the controlled person), and on the finding that the controlling individual owned 100 percent of the controlled corporation's stock.

Goldstein and Jackwest raised $516,000 through the fraudulent offer and sale of securities. Kronenberg invested $20,000; Bieck invested $8,000; DeVito invested $65,000; Clifton and Fulcher jointly invested $5,000; and Blythe and HBC/All American invested $418,000. The entire amount was spent on Goldstein's personal and family expenses, or in an effort to support Goldstein's sales of equity securities through North Coast. None of the funds was returned to investors. No funds remained in Respondents' control by January 2001.

Respondents will be required to disgorge $516,000. At the time of payment, Goldstein and Jackwest may petition for a credit of up to $65,000 if they can show that they have previously satisfied the principal amount due to DeVito for her civil judgment (DX 75). Any such petition must be served upon the Division and DeVito. In that fashion, any issue of double counting can be addressed.

Goldstein made no real effort to distinguish between his own funds and those of Jackwest. Goldstein used funds in both Jackwest's account and his personal bank account to pay for both business and personal expenses. Goldstein also transferred amounts between these accounts at will. Goldstein organized Jackwest and was its only officer. His efforts to observe corporate formalities were spotty, at best. Respondents were "inextricably linked" and Goldstein acted as Jackwest's alter ego. Under the circumstances, joint and several liability for disgorgement is appropriate. See Daniel R. Lehl, 77 SEC Docket 2153, 2177-78 (May 17, 2002), aff'd, No. 02-1228 (D.C. Cir. 2003); cf. SEC v. Hickey, 322 F.3d 1123, 1128-29, amended by 335 F.3d 384 (9th Cir. 2003).

Prejudgment Interest

Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act provide that the Commission may order disgorgement, "including reasonable interest," in any administrative proceeding in which a cease-and-desist order is sought or a civil monetary penalty could be imposed. These statutory provisions also authorize the Commission to adopt rules and regulations and issue orders concerning rates of interest and periods of accrual. The Commission promulgated Rule 600 of its Rules of Practice, Interest On Sums Disgorged, in 1995.

Prejudgment interest is appropriate because Goldstein and Jackwest have had continuous (and, thus far, interest free) use of the money they raised from investors. The Division presented a calculation of prejudgment interest running from the approximate date of each investment by each investor through the end of the month in which the hearing occurred (DX 76). This is a reasonable approach to determining when each violation should be "deemed to have occurred"

under Rule 600(a) of the Commission's Rules of Practice.[7] The Division then made its calculations using the interest rate charged by the Internal Revenue Service for the underpayment of taxes, as specified in Rule 600(b) of the Commission's Rules of Practice. The Division used a floating rate of interest that changed each quarter when the interest was compounded. Goldstein and Jackwest have not contested the Division's methodology or its calculations. I find the Division's approach to be reasonable and I adopt it as my own for purposes of this case.

The only changes that are needed to the Division's chart are extrapolations to make the prejudgment interest figures current through the date of the initial decision. For these purposes, I have accepted the Division's calculation of interest and principal through the end of the second quarter of calendar year 2003 (June 30, 2003). At that time, accrued prejudgment interest was $126,711.96 and the beginning balance (principal plus accrued interest) as of July 1, 2003, was $642,711.96 (DX 76).

I have first calculated the prejudgment interest that Goldstein and Jackwest owe for the third quarter of calendar year 2003 (July 1-September 30, 2003), using 5% as the appropriate rate of interest. See Rev. Rul. 2003-63. Prejudgment interest for the third quarter of 2003 was $8,033.90, and the beginning balance as of October 1, 2003, was $650,745.86.

I have next calculated the prejudgment interest that Goldstein and Jackwest owe for the fourth quarter of calendar year 2003 (October 1-December 31, 2003), using 4% as the appropriate rate of interest. See Rev. Rul. 2003-104. Prejudgment interest for the fourth quarter of 2003 was $6,507.46, and the beginning balance as of January 1, 2004, was $657,253.32.

Finally, I have calculated the prejudgment interest that Goldstein and Jackwest owe for the fractional period of the first quarter of calendar year 2004 at issue here, using 4% as the appropriate rate of interest. See Rev. Rul. 2003-126. For this fractional period, I have used simple interest.[8] Interest for the entire first quarter of 2004 (January 1-March 31, 2004, or 91 days) would be $6,572.53. That equates to $72.23 per day, or $1,155.68 from January 1, 2004, through the date of this initial decision.

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[7] There is one unexplained discrepancy in Division Exhibit 76. Both Kronenberg and Bieck invested in Jackwest during February 2000. The Division's chart shows prejudgment interest on Kronenberg's investment as starting to run on March 1, 2000. However, the chart shows prejudgment interest on Bieck's investment as starting to run only on June 1, 2000. Because the discrepancy is minor and favors Respondents, I have ignored it.

[8] Rarely will the beginning or the end of the prejudgment period coincide precisely with the beginning or the end of Rule 600(b)'s quarterly compounding periods. Thus, to calculate interest for the entire prejudgment period, it may be necessary to calculate interest for fractional periods at the beginning or the end of the prejudgment period. The academic literature finds it permissible to use simple interest within each compounding period. See J.W. Barclay & Co. (Mayer Dallal), 80 SEC Docket 2536, 2545 (Jul. 23, 2003) (citing Michael S. Knoll, A Primer On Prejudgment Interest, 75 Tex. L. Rev. 293, 334 (Dec. 1996)), final, 80 SEC Docket 3727 (Sept. 4, 2003).

I thus compute the amount of prejudgment interest owed by Goldstein and Jackwest as of the date of this initial decision at $142,409. When the sum to be disgorged ($516,000) is added to the accrued prejudgment interest ($142,409), the total amount owed by Goldstein and Jackwest for disgorgement and prejudgment interest is $658,409.

Postjudgment Interest

Postjudgment interest on disgorgement, running from the date of this initial decision through the date of payment, will be imposed in accordance with 28 U.S.C. § 1961(a). Under that provision, the postjudgment interest rate is the weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of entry of judgment. The applicable rate of interest for the week ending January 9, 2004, is 1.29% (official notice). Simple interest and a fixed rate are appropriate. The reasoning of J.W. Barclay & Co. (Mayer Dallal), 80 SEC Docket at 2552-57, is incorporated by reference on these issues.

Ability To Pay

Under Section 21B(d) of the Exchange Act, in any case in which the Commission may impose a civil penalty, a respondent may present evidence of his ability to pay the penalty. The Commission may, in its discretion, consider such evidence in determining whether a civil penalty is in the public interest. Such evidence may relate to the extent of the respondent's ability to continue in business and the collectability of the penalty, taking into account any other claims of the United States or third parties upon the respondent's assets and the amount of the respondent's assets.

Although no statutory requirement addresses inability to pay disgorgement or interest, the Commission may also consider evidence of ability to pay as a factor in determining whether a respondent should be required to pay disgorgement and interest. See Rule 630(a) of the Commission's Rules of Practice.

Well before the hearing, I advised Respondents that, if they were going to claim inability to pay disgorgement or civil penalties, they would have to submit detailed financial statements, as well as supporting income tax returns, at the hearing (Prehearing Conference of Feb. 12, 2003, at 10; Order of Feb. 13, 2003). See Rule 630 of the Commission's Rules of Practice; Terry T. Steen, 53 S.E.C. 618, 626-28 (1998) (holding that an ALJ may require the filing of sworn financial statements).

I decline to place much reliance on Goldstein's financial disclosure statement (RX 1). The Division demonstrated that the exhibit is inaccurate and incomplete in several respects (Tr. 516-18). The absence of supporting documentation also detracts from the weight to be accorded the exhibit. Goldstein earned at least some income during 1999 and 2001, but maintains that he had no income during 2000 (Tr. 54-55, 113, 286-87, 493). Goldstein contends the sums he and Jackwest received from investors during 1999 and 2000 were loans, not income. Goldstein views those sums as liabilities that he and Jackwest intend some day to repay (Tr. 500-01, 520). Although Goldstein filed an income tax return for 1999, he did not produce it. He has not filed

income tax returns for 2000, 2001, or 2002 (Tr. 495). Goldstein claims that an unnamed accountant, whom he has not contacted in more than one year, obtained extensions of the deadlines for filing those returns (Tr. 495-96).[9] Goldstein has no idea if the extended deadlines have expired. In essence, Goldstein is waiting for the Internal Revenue Service to make the first move.

Goldstein testified that he has not worked steadily since 2001 (Tr. 490, 494). His sister has provided him with money for rent, and friends have also given him food and shelter (Tr. 490-91, 493-94). He is in arrears on his child support obligations and his car has been repossessed (Tr. 492). He owes a judgment of more than $420,000 to DeVito (Tr. 395-96; DX 75). While Goldstein's current financial circumstances are bleak, he is young and in good health. There is no valid reason why Goldstein could not work and begin to honor his financial obligations. I conclude that the affirmative defense of inability-to-pay has not been established here.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on August 29, 2003.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Kevin H. Goldstein and Jackwest Corporation shall cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder.

IT IS FURTHER ORDERED THAT, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Kevin H. Goldstein is barred from association with any broker or dealer.

IT IS FURTHER ORDERED THAT, pursuant to Section 21B of the Securities Exchange Act of 1934, Kevin H. Goldstein shall pay a civil penalty of $120,000.

IT IS FURTHER ORDERED THAT, pursuant to Section 8A of the Securities Act of 1933 and Sections 21B and 21C of the Securities Exchange Act of 1934, Kevin H. Goldstein and Jackwest Corporation shall disgorge $516,000, plus prejudgment interest of $142,409, computed as set forth in Rule 600 of the Commission's Rules of Practice, as interpreted herein. Liability for disgorgement and prejudgment interest shall be joint and several. Prejudgment interest shall run from the dates specified in Division of Enforcement Exhibit 76 through the date of this initial decision.

[9] For purposes of resolving this proceeding, I have assumed that the unnamed accountant, like Archie in Seattle, actually exists.

IT IS FURTHER ORDERED THAT Kevin H. Goldstein and Jackwest Corporation shall pay postjudgment interest on all funds owed ($658,409). Liability for postjudgment interest shall be joint and several. Postjudgment interest shall be computed at 1.29%, the rate set forth in 28 U.S.C. § 1961(a). Postjudgment interest shall start to accrue as of the date of this initial decision. Postjudgment interest shall be computed as simple interest, consistent with 31 U.S.C. § 3717(c)(2) and 31 C.F.R. § 901.9(b)(3), and shall continue to accrue on all funds owed until they are paid.

Payment of the disgorgement, interest, and civil penalty shall be made on the first day following the day this initial decision becomes final. Payment shall be made by certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying the Respondents and the proceeding designation, shall be delivered to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that rule, a petition for review of this initial decision may be filed within twenty-one days after service of the initial decision. It shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 360(d)(1) within twenty-one days after service of the initial decision upon that party, unless the Commission, pursuant to Rule 360(b)(1), determines on its own initiative to review this initial decision as to that party. If a party timely files a petition for review, or the Commission acts to review on its own motion, the initial decision shall not become final as to that party.

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James T. Kelly
Administrative Law Judge