

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51780 / June 2, 2005

Admin. Proc. File No. 3-11698

In the Matter of the Application of
DAVREY FINANCIAL SERVICES, INC.
and
PRAVIN R. DAVREY

c/o H. Troy Romero, Esq.
Romero Montague P.S.
155-108th Avenue, Suite 202
Bellevue, Washington 98004-5901

For Review of Disciplinary Action Taken by
NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF ASSOCIATION
ACTION

Failure to Maintain Accurate Books and Records

Operating With Insufficient Net Capital

Failure to Comply With Advertising Rules

Conduct Inconsistent With Just and Equitable Principles of Trade

Registered securities association found that former member and associated person of former member violated recordkeeping rules, allowed former member to operate without sufficient net capital, and violated advertising rules. Held, association's findings of violations and sanctions it imposed are sustained.

APPEARANCES:

H. Troy Romero, Esq., of Romero Montague P.S., for Davrey Financial Services, Inc. and Pravin R. Davrey.

Marc Menchel, Alan Lawhead, Carla J. Carloni, and Jennifer C. Brooks, for NASD.

Appeal filed: October 7, 2004

Last brief received: February 1, 2005

I.

Davrey Financial Services, Inc. ("DFSI" or "Firm"), a former NASD member, and Pravin Davrey, formerly president, chief executive officer, chief financial officer, limited principal -- financial and operations ("FINOP"), and compliance officer of DFSI, appeal from NASD disciplinary action. 1/ NASD found that DFSI and Davrey (collectively "Applicants") failed to maintain accurate books and records and conducted a securities business with insufficient net capital in violation of Exchange Act Rules 17a-3, 17a-4, and 15c3-1 2/ and NASD Conduct Rules 2110 and 3110. NASD also found that Applicants violated NASD Conduct Rules 2110 and 2210 when Davrey made exaggerated, misleading, and unwarranted statements, omitted required disclosures, and made unwarranted promises of specific results when he appeared on a television program promoting DFSI. NASD also found that Applicants failed to submit the material on which the program was based to NASD for pre-use approval and otherwise failed to comply with rules governing advertising involving options in violation of NASD Conduct Rules 2220 and 2110.

For the recordkeeping and net capital violations, NASD suspended Davrey for two years from associating as a FINOP and as a general securities principal and required him to requalify in both capacities. NASD censured DFSI and fined it \$15,000. For the advertising violations, NASD suspended Davrey for two years from associating as a general securities principal and as a general securities representative. NASD censured DFSI and fined it \$20,000. NASD also ordered Applicants to submit all advertising to NASD's Advertising Department for pre-use

1/ NASD suspended DFSI's membership in May 2003 for failing to file an annual audit report. According to the Central Registration Depository, in March 2005, NASD cancelled DFSI's membership for failure to pay fees. Davrey is no longer associated with an NASD member.

2/ 17 C.F.R. §§ 240.17a-3, 240.17a-4, and 240.15c3-1.

approval for a period of two years. ^{3/} We base our findings on an independent review of the record.

II.

Although Applicants have not appealed NASD's findings of violation, they dispute the gravity of the violations and appeal the sanctions imposed by NASD. We therefore review the facts and the nature of the violations.

III.

Recordkeeping and Net Capital Violations.

A. NASD charged that Applicants violated recordkeeping and net capital rules. Exchange Act Rule 17a-3 specifies the books and records broker-dealers must keep and maintain, and Exchange Act Rule 17a-4 specifies the reports broker-dealers must file. NASD Conduct Rule 3110 requires members to keep and preserve their books and records in conformity with all applicable laws, rules, and regulations. Exchange Act Rule 15c3-1 requires broker-dealers to maintain their net capital above an applicable minimum. NASD Conduct Rule 2110 requires NASD members to observe high standards of commercial honor and just and equitable principles of trade. Violations of Commission rules are violations of NASD Conduct Rule 2110. ^{4/}

On April 1, 1999, DFSI concluded separate stock-repurchase agreements ("Agreements") with two DFSI shareholders. Although Davrey was DFSI's FINOP, he testified that in 1999 he worked exclusively on promoting DFSI's growth. Davrey asserted that, because he did not have time to do it himself, he assigned the drafting of the Agreements to an outside accountant whose name he chose out of the telephone directory. Davrey claimed that he directed the accountant to draft a stock-repurchase agreement under which the debt would be Davrey's and not DFSI's.

However, DFSI and the shareholders were the sole parties to the resulting Agreements. Pursuant to the Agreements, the shareholders sold their shares to DFSI in return for a negotiated purchase price paid in regular monthly installments, plus interest. ^{5/} DFSI made the monthly payments from its operating account. Davrey testified that he thought that the payment

^{3/} NASD directed Davrey to serve all of the suspensions concurrently. NASD also imposed costs on the Firm. Davrey was not fined because he had filed for bankruptcy.

^{4/} Pacific On-Line Trading & Sec., Inc., Securities Exchange Act Rel. No. 48473 (Sept. 10, 2003), 81 SEC Docket 106, 111.

^{5/} Davrey asserts that the Agreements were intended to provide that he would become the owner of the DFSI stock. However, the Agreements did not provide for transfer of the stock to Davrey.

obligations under the Agreements were his personal obligations. 6/ Davrey admitted that the accountant did not tell him that the resulting liability under the Agreements would be Davrey's.

On April 19, 1999, Davrey executed personal guarantees in favor of the shareholders as addenda to the Agreements. The guarantees provided that Davrey would assume DFSI's obligations only if DFSI "should cease to exist in the future or is unable to fulfill" the terms of the Agreements. At that time, the guarantees provided that "a personal note will immediately be negotiated and executed by the parties involved."

On May 18, 1999, NASD staff issued to DFSI a letter of caution that addressed recordkeeping and net capital violations caused by DFSI's treatment of a December 1997 stock-repurchase agreement between DFSI and two shareholders. DFSI had failed to enter DFSI's debt under the 1997 repurchase agreement on its books, or account for the debt in calculating its net capital position, resulting in net capital deficiencies on December 31, 1997 (a deficiency of \$17,984), January 31, 1998 (a deficiency of \$17,562), and February 27, 1998 (a deficiency of \$18,118). The letter of caution stated that "a liability should have been recorded on the Firm's books and records." In DFSI's May 25, 1999 response, Davrey stated that, although "I disagree with your position on the [stock-repurchase agreement], I am appreciative of the fact that this matter is now behind us" and also gave assurances that DFSI had retained an accountant to assist in achieving future compliance.

Notwithstanding the letter of caution, DFSI failed to record the debts created by the April 1999 Agreements as liabilities in its records, reports, and net capital calculations. Neither Davrey nor DFSI contacted NASD with respect to this determination. Consequently, DFSI's books, records and net capital calculations were inaccurate on April 1999 and remained inaccurate until the error was corrected in August 2000. During the sixteen months the error remained uncorrected, DFSI had at least eight unreported net capital deficiencies on June 30, and September 30, 1999, and January 31, May 31, June 30, July 31, August 16, and August 31, 2000. The deficiencies ranged from \$10,047 to \$51,122. DFSI incurred two subsequent net capital deficiencies on November 30 and December 31, 2001, amounting to \$8,990 and \$16,436 respectively, resulting from DFSI's operating losses that also went unreported. 7/ DFSI did not report itself in a net capital deficiency and continued to operate in violation of NASD and Commission rules.

6/ Davrey testified that he was to receive the repurchased shares and that the payments to the shareholders were funded by Davrey's receipt of reduced commissions. Davrey did not provide any documentation of this arrangement or evidence of the amount by which his commissions were reduced.

7/ While there may have been net capital deficiencies in the interim, these are the dates on which NASD found DFSI was without sufficient net capital.

DFSI had other problems relating to recordkeeping and net capital rules. DFSI had received two letters of caution for violations of recordkeeping and net capital rules in addition to the May 1999 letter discussed above. In November 1996, NASD staff issued a letter of caution for inaccurate records and net capital computations. In September 1997, NASD staff issued a letter of caution for recordkeeping violations.

B. NASD found that Applicants' violations of NASD and Commission recordkeeping and net capital rules were "egregious." Applicants characterize their violations as "a clerical error." Davrey contends that he believed in good faith that the debt was not a DFSI liability. However, the plain language of the Agreements made clear that DFSI was liable for payments to the shareholders arising from the Agreements. Davrey's April 19, 1999 execution of personal guarantees in favor of the shareholders further undercuts Davrey's assertion that he was acting in good faith. The guarantees made Davrey's obligation contingent on a DFSI default, which suggests that Davrey understood that the debt was -- and intended that it should remain -- DFSI's.

Davrey received and answered the NASD May 18, 1999 letter of caution. The letter of caution stated that a stock-repurchase agreement very similar to the recently executed Agreements should have been recorded as a liability on DFSI's books. At a minimum, Davrey should have reexamined DFSI's treatment of the Agreements. Davrey did not record the Agreements as a DFSI liability or ask NASD staff for advice regarding the proper accounting treatment of the Agreements. 8/

Davrey claims he relied on his accountant's advice regarding the proper drafting and accounting treatment of the Agreements. Applicants have not established that they received, much less relied on, accounting advice. Davrey admitted that the accountant did not tell him that the debt resulting from the Agreements would be Davrey's personal obligation. Moreover, we have stated that "advice of a certified public accountant does not shift [a FINOP's] ultimate burden for compliance" with the net capital and recordkeeping requirements. 9/

Davrey, DFSI's president and FINOP among his many other responsibilities, was responsible for ensuring that DFSI complied with NASD financial reporting and net capital rules. 10/ Davrey's statement that he paid insufficient attention to the Agreements does not

8/ Applicants assert that NASD has created a new obligation for broker-dealers to consult with NASD staff regarding stock redemption agreements. However, NASD's opinion merely noted that advice was available to Davrey in a questionable situation.

9/ Townsley Assocs. & Co., 50 S.E.C. 755, 759 (1991) (FINOP cannot shift responsibility for compliance by putative reliance on advice of certified public accountant).

10/ "The president of a corporate broker-dealer is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular

(continued...)

excuse his failure to fulfill his duties as a FINOP. 11/ The time required to promote a growing business may require a principal to delegate compliance tasks, but a FINOP's job is ensuring the compliance of the employing broker-dealer with recordkeeping, reporting, and net capital rules. 12/

We find that DFSI violated Exchange Act Rules 17a-3 and 17a-4, and NASD Conduct Rules 2110 and 3110 by failing to keep accurate books and records. We find that Davrey, who as DFSI's principal and FINOP was responsible for DFSI's violations, also violated NASD Conduct Rule 2110. We further find that, by conducting a securities business with insufficient net capital, DFSI violated Exchange Act Rule 15c3-1 and NASD Conduct Rule 2110. 13/ We also find that Davrey, in his capacities as principal and FINOP, was responsible for DFSI's net capital violations and thereby violated NASD Conduct Rule 2110.

Section 19(e) of the Exchange Act provides that we review sanctions imposed by a self-regulatory organization such as NASD to determine whether those sanctions are excessive, oppressive, or an unnecessary burden on competition. 14/ The proper sanction depends on the unique facts and circumstances of each case, and it cannot be determined by comparison with other cases. 15/

We find the sanctions imposed are neither excessive nor oppressive. Given the language of the Agreements and the guarantees, and the concern expressed in the May 1999 letter of caution, we agree with NASD's determination that the recordkeeping and net capital violations were egregious. 16/ The recordkeeping violations in connection with the Agreements continued

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- 10/ (...continued)
functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient." Thomas F. White, 51 S.E.C. 1194, 1197 (1994). A FINOP is responsible for the employing firm's compliance with applicable financial reporting and net capital requirements. George L. Freeland, 51 S.E.C. 389, 392 (1993).
- 11/ See NASD Membership and Registration Rule 1022.
- 12/ Freeland, 51 S.E.C. at 392.
- 13/ Exchange Act Rules 15c3-1, 17a-3 and 17a-4, by their terms, apply to broker-dealers, not to persons associated with broker-dealers.
- 14/ Exchange Act § 19(e)(2), 15 U.S.C. § 78s(e)(2).
- 15/ Butz v. Glover Livestock Comm'n Corp., 411 U.S. 182, 187 (1973).
- 16/ NASD's Sanction Guidelines recommend that net capital violations receive a fine between \$1,000 and \$50,000 and a suspension of up to thirty days. NASD Sanction
(continued...)

for sixteen months and caused repeated net capital violations. ^{17/} Davrey and DFSI failed to account for operating losses resulting in two additional net capital violations. Applicants received letters of caution in 1996 and 1997 addressing violations of books and records provisions. ^{18/}

IV.

Advertising Violations

A. NASD regulates the communications, including advertising, that its members have with the public. ^{19/} NASD Conduct Rule 2210 sets out NASD's advertising rules, requiring that advertisements, in general, must provide a sound basis for evaluating the facts regarding the investment or service offered and must not omit any material fact or qualification if to do so would cause the advertisement to be misleading. Conduct Rule 2210 prohibits any exaggerated, unwarranted, or misleading statements or claims.

NASD Conduct Rule 2220, which governs its members public communications regarding options, requires that all options advertising must be submitted to NASD at least ten days prior to use. Conduct Rule 2220 prohibits false statements, omissions of material facts, exaggerated, unwarranted, and misleading statements or claims. The rule also requires a specific statement in advertisements that options are not suitable for all investors and prohibits any suggestion that options may be suitable for all investors. Any statement referring to the potential advantages of options must be balanced by an equally specific statement of the corresponding risks. A public communication with respect to options must also contain the name and address of a person from whom the appropriate current options disclosure document can be obtained.

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- ^{16/} (...continued)
Guidelines, 33 (2001). The Sanction Guidelines recommend that egregious net capital violations receive suspensions of up to two years, expulsion of the firm, or a bar of the responsible person. Id. The Sanction Guidelines do not define "egregious."
- ^{17/} William H. Gerhauser, 53 S.E.C. 933, 946 (1998) (long duration of continuing violation aggravates offense).
- ^{18/} For reasons that are not clear in the record, NASD did not consider the 1999 letter of caution part of Applicants' disciplinary history because Applicants disputed NASD's interpretation of the 1997 repurchase agreement. However, NASD did find that the letter gave Applicants notice of the proper accounting treatment for the Agreements.
- ^{19/} Under NASD Rules 2210(a)(1) and 2220(a)(1), advertisements include any material that is published in electronic media, including television.

On November 9, 1999, Davrey appeared on a Los Angeles area cable television program. The program aired in a thirty-minute time slot for which DFSI paid \$4,000. 20/ Davrey spoke briefly about stocks, options, and options trading, answered DFSI-scripted questions from the program's host, and answered questions called in by viewers. Davrey testified that the program on which he appeared did not generate any business for DFSI or any new customer accounts. 21/

During the broadcast, Davrey claimed that he would provide callers with a "Stocks to Watch" list. He claimed that this list identified stocks that, Davrey claimed, would "rise substantially" and "really, really take off." 22/ Davrey did not mention during the broadcast the possibility that the stocks included in the list could lose value, although he admitted at the hearing that this was possible. Davrey also discussed a "million dollar plan," an investment strategy that, Davrey claimed, would turn a \$15,000 initial investment into \$1 million after seven years. Davrey did not explain that this plan depended on aggressive use of margin and options trading, which is not suitable for every investor, and failed to disclose the risks in this strategy. While Davrey noted that the plan might not be fully successful, he asked viewers if making only \$200,000 to \$300,000 on that investment would be "any harder to take." Although Davrey claimed that the plan was already being used, it is not clear how many DFSI customers were participating, what results they achieved, or if the plan existed at all.

Davrey also promised to provide viewers who called DFSI several items that, he claimed, would improve their investment success. These items included the "Davrey Master Key," which he stated was an aid to picking stocks, and his book, which he described as containing techniques used by DFSI's most successful clients to make large amounts of money starting from small initial investments. He also promised to provide testimonials from successful clients. In fact, the "Master Key" was a skeletal outline of technical terms and jargon that would be useless to a reasonable investor. Davrey was unable to provide any documentary evidence that either the book or the testimonials had ever existed. Davrey claimed they were lost during an office move. 23/

20/ The station showing the program claimed to reach 5 million households. However, there is nothing in the record indicating the number of viewers who watched the television program in general or on the day that Davrey appeared.

21/ NASD does not dispute Davrey's assertion.

22/ He did not identify these stocks during the broadcast.

23/ The Hearing Panel did not credit Davrey's testimony that the testimonials existed. Credibility determinations by a fact-finder are given considerable weight. Anthony Tricarico, 51 S.E.C. 457, 460 (1993). We see no reason to make a different determination than the Hearing Panel.

Although Davrey spent much of the program discussing the use of options, the program failed to comply with NASD rules with respect to options advertising. The broadcast did not include a statement that options were not a suitable investment for all investors. In fact, the advertisement implied that options were appropriate for even small investors. Davrey mentioned that his customers came from "every walk of life." Davrey also gave several examples of options purchases with very small initial investments, implying that options could be a suitable investment for an investor of modest means without mentioning any specific corresponding disadvantages that options could pose for such investors.

Although Davrey stated generally that customers should invest only funds they could afford to lose in options strategies, his descriptions of the opportunities offered by options investing were not accompanied by equally specific assessments of the risks faced by options investors. For example, Davrey described the purchase of an option on a stock selling for \$90 per share. As Davrey explained the transaction, buying one hundred shares of the stock would cost \$9,000, while the customer could purchase an option for one hundred shares of the same stock for only \$900. Davrey then stated that, if the price of the stock moved from \$90 per share to \$140 per share, the profit on either transaction would be about the same, \$50 per share. Davrey did not mention that a decline in the price of the stock could cost the option purchaser the entire amount of the investment. Nor did Davrey mention that the loss could occur very rapidly. 24/

During a February 2000 routine NASD examination of DFSI, the examiner asked if DFSI had engaged in any advertising in the past twelve months. Davrey stated that the Firm had not. When shown DFSI accounting documents reflecting a payment from DFSI to the television station in connection with the November 1999 broadcast, Davrey claimed that he had forgotten about it. During NASD's subsequent investigation, Davrey gave investigative testimony stating that he was not sure why he failed to submit the materials related to the program for review. Later, at the hearing, Davrey stated that he thought submission of the program-related material was unnecessary because DFSI had previously submitted advertising dealing with similar issues that had been approved. NASD staff testified that DFSI had not submitted any such material to NASD. Still later in the hearing, Davrey stated that he believed that the broadcast material had been submitted. Davrey ultimately admitted that the material should have been submitted, was not submitted, and that the failure to do so was his responsibility.

DFSI had previous problems with advertising compliance. On November 25, 1996, NASD staff issued to DFSI a letter of caution regarding some of its advertisements. NASD found that the examined materials had not been submitted for pre-use review, omitted disclosures appropriate for options advertising materials, and lacked a balanced presentation of options trading risks. The letter of caution also indicated that DFSI distributed sales literature that failed to include an options disclosure document, failed to include a statement warning that options

24/ The program also failed to provide viewers with the name and address of a person from whom they could obtain the current appropriate options disclosure document.

were not suitable for all investors, failed to include any specific statements of the risks of options investing to balance statements of the advantages provided by options, and gave an exaggerated statement regarding the returns to be expected from a specific type of options investment. NASD also found that an internet advertisement had not been submitted to NASD as required, failed to make a balanced presentation of the risks of options investing, and did not include the name and address of a person from whom potential customers could obtain a current copy of the relevant options disclosure document.

B. In imposing sanctions for Applicants' advertising, NASD determined that Applicants' failure to pre-file the advertising material was reckless and that Davrey intentionally or recklessly presented information that was misleading and exaggerated and failed to provide required disclosures. ^{25/} Although Applicants have not appealed these findings, they characterize their violations of NASD advertising and options advertising rules merely as "ineffective advertising," apparently because the broadcast did not result in additional business for DFSI.

We agree with NASD that Davrey's appearance on the program contained numerous statements that were exaggerated, unwarranted, and misleading. His statements failed to disclose potential risks and made unwarranted promises of specific results.

Davrey's discussion of the "Stocks to Watch" list included unwarranted promises of future performance, that the stocks were expected to "rise substantially" and "really, really take off" in violation of NASD Conduct Rule 2210. Davrey knew, but did not disclose, that their prices could also fall. Davrey's discussion of the "million dollar plan" contained no risk disclosure, no description of the risky strategies on which it was based, and promised specific results without a reasonable basis in violation of NASD Conduct Rule 2210.

Davrey's description of his other services was misleading. The description of the "Master Key" was misleading; Davrey described it as an analytical tool that could help an inexperienced investor make better stock picks, when it was no more than a sketchy outline filled with technical jargon and useless to a reasonable investor. Promises to provide copies of a non-existent book and testimonial letters also were misleading. The description of the book as a collection of techniques used by successful DFSI customers was an unwarranted promise of success, and the

^{25/} NASD's Sanction Guidelines recommend that inadvertent use of misleading communications receive a fine of between \$1,000 and \$20,000. NASD Sanction Guidelines, 88 (2001). For intentional or reckless use of misleading communications, however, NASD's Sanction Guidelines recommend imposition of fines between \$10,000 and \$100,000 and suspensions of the firm or the responsible person, or both, for up to two years. Id. at 89.

reference to non-existent testimonials suggested both that there were satisfied customers and that Davrey and DFSI were responsible for their satisfaction. 26/

Because the script dealt with options, under Rule 2220(c)(1) DFSI should have submitted the program script and other materials to NASD for review and approval before use, but DFSI did not do so. Late in the proceedings Davrey finally admitted that he should have submitted the material for review; his earlier multiple inconsistent attempts to excuse his failure to submit the material were unpersuasive.

Although Davrey did mention several times that the options strategies he was describing were for investing money the viewer could afford to lose, at no point in the advertisement was there a statement, required by NASD Conduct Rule 2220(d)(2)(A), that options were not a suitable investment for all investors. In fact, several of the examples of options strategies Davrey mentioned were described in terms of small initial investments, making a suggestion prohibited by NASD Conduct Rule 2220(d)(2)(A)(ii) that options investing was suitable for all investors. NASD Conduct Rule 2220(d)(2)(A)(i) requires that every mention of the advantages of options investing must be balanced by a similarly specific statement of the risks accompanying the described advantages. In several instances Davrey made no mention of the risks at all, and he did not provide the specific balancing disclosure called for by NASD Conduct Rule 2220(d)(2)(A)(i). NASD Conduct Rule 2220(d)(2)(B)(i) requires that every options advertisement provide the public with the name and address of a person from whom a copy of the current appropriate options disclosure document may be obtained; DFSI's advertisement did not provide viewers with the necessary information. The record supports the conclusion that Applicants, during the broadcast, intentionally or recklessly presented information that was misleading and exaggerated and failed to provide required disclosures.

26/ During the television program, Davrey referred to Wade Cook, a lecturer on investment topics, and stated that investors seeking to follow Cook's strategy should employ a broker who was familiar with that strategy. Applicants object to NASD's admission of evidence regarding Wade Cook and criticisms of Cook's investing techniques. Applicants argue that the evidence was irrelevant and had the intended effect of prejudicing the Hearing Panel by tying Applicants to Cook, who Applicants assert was extremely unpopular with NASD. However, Davrey made several references to Cook in the course of the advertisement. There was no unfairness in admitting the evidence. Applicants, in fact, offered one of the exhibits, the "Wall Street Workshop Manual," to which they now object.

Our review of the record did not detect any prejudice on the part of the Hearing Panel. Even if there were such prejudice, the review of the Hearing Panel decision by NASD's National Adjudicatory Council and our review attenuate any such prejudice. Frank J. Custable, 51 S.E.C. 855, 862 (1993) (de novo review by NASD appellate panel and Commission "dissipates any harm" that may have resulted from irregularities). In any event, we have not considered this evidence in assessing the sanctions here.

This was not the first time that NASD had warned Applicants about compliance with NASD advertising rules. DFSI had received a letter of caution on November 25, 1996 regarding the failure to submit options advertising material to NASD for review and approval before use. DFSI and Davrey, therefore, were on notice that they were required to file options advertising material. The November 1996 letter of caution and Davrey's repeatedly changing stories force the conclusion that the failure to file the materials related to the November 1999 television appearance was a reckless violation of NASD rules. 27/

Applicants' violations of NASD advertising and options advertising rules also constitute violations of NASD Conduct Rule 2110 requiring NASD members to observe just and equitable principles of trade. 28/

In imposing sanctions, NASD concluded that Davrey's attempt to conceal DFSI's advertising activity and his inconsistent explanations for his conduct were aggravating facts. NASD also cited the large audience reached by the advertisement in its sanctions determination. There is no evidence of the specific number of viewers who actually saw the advertisement, nor any evidence of the number of viewers who could be expected to see it. Nonetheless, by intentionally or recklessly presenting a misleading, and otherwise violative, advertisement where there was potential for wide public viewing, Applicants risked exposure of a large audience to their misleading statements. 29/

27/ As support for their arguments that the sanctions imposed by NASD should be modified, Applicants cite several cases in which purportedly similarly situated respondents received less severe sanctions than those imposed on Applicants. As we have often stated, the appropriate sanction to be imposed in a particular case cannot be determined by reference to the facts of other cases. Butz v. Glover Livestock Comm'n Corp., 411 U.S. 182, 187 (1973).

28/ Pacific On-Line Trading & Sec., Inc., 81 SEC Docket at 111.

29/ See e.g. Pacific On-Line Trading & Sec., Inc. 81 SEC Docket at 117 (internet posting of misleading statements had potential to be widely viewed by public). Applicants argue that the program failed to produce new business for DFSI. That DFSI gained no new customers is irrelevant. Higgs, Inc., 45 S.E.C. 318, 321 (1973).

We find that the sanctions for the advertising violations are not excessive or oppressive and sustain them.

An appropriate order will issue. 30/

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

Jonathan G. Katz
Secretary

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51780 / June 2, 2005

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Bellevue, Washington 98004-5901

For Review of Disciplinary Action Taken by

NASD

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 Davrey Financial Services, Inc. and Pravin R. Davrey, and NASD's assessment of costs be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary