

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54660 / October 27, 2006

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2565 / October 27, 2006

Admin. Proc. File No. 3-11972

In the Matter of

PHILIP A. LEHMAN
c/o William B. Fecher, Esq.
Statman, Harris, Siegel & Eyrich, LLC
2900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202-2912

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING
INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Fraudulent Sale of Securities

Former president and sole shareholder of registered broker-dealer and investment adviser engaged in a fraudulent scheme that purported to make high-yield, riskless-principal investments in violation of antifraud provisions of federal securities laws. Held, it is in the public interest to bar respondent from association with any broker, dealer, or investment adviser and to impose a civil money penalty.

APPEARANCES:

William B. Fecher, Esq., for Philip A. Lehman.

Jerrold H. Kohn and Thomas J. Meier, for the Division of Enforcement.

Appeal filed: April 11, 2006
Last brief received: June 30, 2006

I.

Philip A. Lehman, formerly associated with Tower Equities, Inc., 1/ a broker-dealer and investment adviser registered with the Commission, appeals from a decision of an administrative law judge that he had not demonstrated an inability to pay a civil money penalty. 2/ Based on an unopposed motion for partial summary disposition, the law judge found that Lehman violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder 3/ by falsely representing to investors in two limited liability companies that they could earn high rates of return in a short period of time with no risk to principal. Also based on that motion, the law judge barred Lehman from association with any broker, dealer, or investment adviser, and determined that a \$55,000 civil penalty was warranted. After a hearing to determine the sole issue of Lehman's ability to pay a penalty, the law judge reiterated his findings of violation, imposition of a bar, and assessment of a penalty. Lehman does not dispute any of these findings or any of the facts supporting the findings of violation. He does not dispute that his misconduct warrants an associational bar. The law judge declined to reduce the amount of the penalty on the basis that Lehman failed "to satisfy his burden of producing a complete and accurate financial disclosure statement" and "to provide credible supporting testimony." That determination is the sole basis for Lehman's appeal. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

Although the facts underlying the violative conduct are not in dispute, we discuss them to the extent that they are relevant to our determination on appeal.

A. Lehman was associated with Tower Equities from 1984 until September 2000 and from June 2001 until August 2002. 4/ Lehman created, operated, and controlled Ashar Endeavor I,

1/ On October 31, 2005, Lehman testified that Tower Equities currently is known as Sicom Securities Inc. It is unclear on which date the name change occurred. However, we use the term "Tower Equities" to refer to both entities.

2/ Philip A. Lehman, Initial Decision Rel. No. 309 (Mar. 20, 2006), 87 SEC Docket 2140.

3/ 15 U.S.C. §§ 77q, 78j(b); 17 C.F.R. § 240.10b-5.

4/ From September 2000 through June 2001, Lehman served a nine-month suspension imposed in a separate Commission proceeding against Lehman and Tower Equities involving two alleged fraudulent schemes. Philip A. Lehman, Securities Act Rel. No. 7889 (Sept. 7, 2000), 73 SEC Docket 580 ("2000 settled case"). In that case, without admitting or denying the findings, Lehman consented to the entry of our order that he be

(continued...)

LLC (“Ashar”) and Oberland Endeavor I, LLC (“Oberland”), Ohio limited liability companies, beginning in May 1999 and July 2000, respectively.

Between 1999 and 2002, Lehman sold, or directed others to sell, membership interests in Ashar and Oberland. Beginning in 1999, Stephen E. Cividino, a registered sales representative associated with Tower Equities, sold interests in Ashar to at least four individuals at Lehman’s direction. Also at Lehman’s direction, Cividino represented to potential investors that Ashar would attempt to enter into a “reserved funds transaction” ^{5/} and told them that these investments would yield high returns of up to 100%, in a very short period with no risk to their principal. The Ashar operating agreement, prepared by Lehman, with the assistance of an attorney named John L. Runft, also indicated that returns would be as high as 100% within sixty days. At Lehman’s direction, Cividino distributed the operating agreement to investors.

Ashar never made any “reserved funds transactions.” Moreover, the record includes a report by the Division’s expert that concluded that investment schemes that predict a return of 100% or more within sixty days without a risk to principal are not economically viable. The report also concluded that “any person experienced in finance would have immediately been aware of [the] fraudulent character [of the representations made in the materials],” that “this fraudulent character would have been readily apparent to any person conducting a minimum amount of diligent research into these investments,” and “so patent is the fraudulent character of these schemes that any person who indicates that they have knowledge of such transactions and their legitimacy is either making a fraudulent statement or acting in reckless disregard of its patently fraudulent character.” Lehman raised a total of approximately \$10 million on behalf of Ashar from twenty-six investors.

^{4/} (...continued)
suspended from associating with any broker, dealer, investment adviser, or investment company, that he cease and desist from future violations of the antifraud provisions (including the provisions at issue here, as well as Sections 206(1) and 206(2) of the Investment Advisers Act of 1940), and that he pay a civil penalty of \$10,000. Tower Equities was censured and ordered to cease and desist from future violations of the antifraud provisions (including the provisions at issue here, as well as Advisers Act Sections 206(1) and 206(2) and Exchange Act Section 15(c)(1) and Rule 15c1-2 thereunder). As a result of our order, the State of Ohio revoked Lehman’s securities sales and investment adviser representative licenses, and the State of Arizona revoked Lehman’s registration as a securities salesman. Philip Allen Lehman, 2002 WL 518622 (Ohio Dept. Comm. Jan. 17, 2002); Philip Allen Lehman, 2002 WL 417265 (Ariz. Corp. Comm. Feb. 22, 2002).

^{5/} The term “reserved funds transaction” is referred to, but not defined, in the record. The report filed by the Division’s expert describes the transaction as the purported “trading of medium term notes in the course of which the original investment [i.e., cash] was to be leverage[d] . . . without any encumbrance to the invested funds.”

Beginning in July 2000, at Lehman's direction, Cividino told at least one Ashar investor that "the confidentiality of Ashar had been compromised and that it was necessary to transfer [his] investment to a new entity, known as Oberland" At Lehman's direction, Cividino represented to certain Ashar investors that, as with Ashar, they could earn a large return on their investment in a very short period with no risk to their principal and gave them a copy of Oberland's operating agreement that represented that investors could receive a return of up to 200%. All of the investors in Ashar transferred their funds to Oberland. With respect to at least two investors, Lehman failed to disclose his involvement in the 2000 settled case that resulted in Lehman's nine-month suspension, a cease-and-desist order, and a civil penalty of \$10,000. Like Ashar, Oberland never executed a "reserved funds transaction" or any other investment.

On October 17, 2002, the United States Attorney for the Southern District of Ohio filed a complaint for civil forfeiture against the Oberland account at Key Bank. ^{6/} The case, which implicated federal antifraud statutes, was dismissed after the parties, including all of the Oberland investors, agreed to a settlement in which all the funds in the account would be disbursed to the investors, resulting in a full refund of their investments.

B. Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder prohibit the making of misleading statements in connection with the purchase, offer, or sale of any security. ^{7/} Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5 thereunder require a showing of scienter. ^{8/} Scienter may be established by a showing of recklessness. ^{9/}

Lehman represented orally and in writing that Ashar's and Oberland's investments in "reserved funds transactions" would earn a large return, up to 100% in Ashar and up to 200% in

^{6/} United States v. Contents of Key Bank, N.A., Account Number 353901001365, No. C-3-02-481 (S.D. Ohio Oct. 17, 2002).

^{7/} See, e.g., IFG Network Secs., Inc., William Kissinger, and David Ledbetter, Exchange Act Rel. No. 54127 (July 11, 2006), ___ SEC Docket ___, ___ (finding violation of antifraud provisions where misleading statement made regarding recommended investment in certain class shares).

^{8/} Robert M. Fuller, Securities Act Rel. No. 8273 (Aug. 25, 2003), 80 SEC Docket 3539, 3545. However, scienter is not necessary to prove a violation of Securities Act Sections 17(a)(2) and 17(a)(3). Id. at 3545-3546 (citing Aaron v. SEC, 446 U.S. 680, 697 (1980)).

^{9/} E.g., Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1284 (11th Cir. 1999). Recklessness is an "extreme departure from the standards of ordinary care . . . present[ing] a danger of misleading buyers and sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it." Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1045 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1977).

Oberland, in a short period of time with no risk to principal. We have stated repeatedly that promises of a high return on an investment in a short period of time with little or no risk to principal are inherently misleading. 10/ With respect to at least two investors, Lehman failed to disclose his involvement in the antifraud proceeding that resulted in his nine-month suspension, a cease-and-desist order, and a civil penalty of \$10,000. These omissions were material 11/ because a reasonable investor would want to know about recent disciplinary history involving fraud of someone managing his or her investments. 12/

As demonstrated by the Division's expert, any securities professional could be expected to know that making promises of risk-free, rapid, high returns on investments is inherently misleading. 13/ Lehman, who had more than twenty years of experience in the securities industry, was at least reckless in his disregard for the risk of misleading investors that was created by his promises of high returns. 14/ Moreover, the 2000 settled case involved similar allegations that Lehman fraudulently represented to investors that they would receive high returns on their investments in a short period of time with minimal risk to principal. Hence, by at least

10/ See Dane E. Faber, Exchange Act Rel. No. 49216 (Feb. 10, 2004), 82 SEC Docket 530, 539 (“We have held that it is inherently fraudulent to predict specific and substantial increases in the price of a speculative security.”); Brian Prendergast, 55 S.E.C. 289, 306 (2001) (“The June 6 letter’s prediction that investors would recover their losses was (like guarantees of profit and predictions of sharp increases in the price of speculative stocks) inherently fraudulent.”); John Montelbano, Exchange Act Rel. No. 47227 (Jan. 22, 2003), 79 SEC Docket 1474, 1482 (“[A]pplicants energized Monitor’s sales force with . . . inherently fraudulent price predictions.” (citing C. James Padgett, 52 S.E.C. 1257, 1265 (1997), petition denied sub nom. Sullivan v. SEC, 159 F.3d 637 (D.C. Cir. 1998) (Table), cert. denied, 525 U.S. 1070 (1999)); Lester Kuznetz, 48 S.E.C. 551, 553 (1986), aff’d, 828 F.2d 844 (D.C. Cir. 1987) (Table))).

11/ See Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988). A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in determining how to act.

12/ See SEC v. Bolla, 401 F. Supp. 2d 43, 68 (D.D.C. 2005) (finding that failure to disclose to investors disciplinary history of investment adviser was material omission); Michael Batterman and Randall B. Batterman III, Investment Advisers Act Rel. No. 2334 (Dec. 3, 2004), 84 SEC Docket 1349, 1353 (noting that district court, in underlying injunctive proceeding, found that disclosure of disciplinary record of investment adviser “undoubtedly would have been material to an investor”), aff’d, No. 05-0404 (2d Cir. 2005).

13/ See supra note 10.

14/ E.g., Sundstrand Corp., 553 F.2d at 1045. See also supra note 10.

2000, Lehman knew that making similar representations was materially misleading and yet continued to do so. We therefore find that Lehman acted at least recklessly in making the material misrepresentations and omissions described above, and that after the 2000 settled case, he acted knowingly.

Based on the record described above, we find that Lehman willfully violated Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder.

III.

We have broad discretion to set sanctions in administrative proceedings. ^{15/} Exchange Act Section 15(b)(6)(A) and Advisers Act Section 203(f) authorize the Commission to bar a person from association with a broker, dealer, or investment adviser if the person willfully violated federal securities laws while associated with a broker, dealer, or investment adviser, and the bar is in the public interest. ^{16/} In determining whether a sanction is in the public interest, we consider the factors articulated in Steadman v. SEC. ^{17/} These factors include the egregiousness of the respondent's actions, the isolated or recurrent nature of the violation, the degree of scienter involved, the sincerity of any assurances against future violations, the respondent's recognition that the conduct was wrongful, and the likelihood of recurring violations. ^{18/} Lehman is a recidivist whose egregious actions evidence a high degree of scienter. Because Lehman's misconduct is so similar to that for which he was recently sanctioned, we can only conclude that the sanctions imposed on him in the earlier proceeding failed to imbue him with any appreciation for the wrongfulness of his actions or to deter him from future violations. ^{19/} Lehman did not below, and does not here, challenge the bar imposed on him by the law judge. Based on these considerations, we find that a bar is in the public interest.

^{15/} See e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 188-189 (1973) ("The fashioning of an appropriate and reasonable remedy is for the Secretary [of Agriculture], not the court. The court may decide only whether under the pertinent statute and relevant facts, the secretary made 'an allowable judgement in [his] choice of remedy.'") (quoting Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946)).

^{16/} 15 U.S.C. §§ 78o(b)(6)(A), 80b-3(f).

^{17/} 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

^{18/} Steadman, 603 F.2d at 1140.

^{19/} Cf. First Secs. Transfer Systems, Inc. and Steven Telsey, 52 S.E.C. 392, 397 (1995) (determining that a more severe sanction was necessary because "[t]he past sanctions . . . have proven ineffective to induce Telsey to comply with the law").

Exchange Act Section 21B and Advisers Act Section 203(i) authorize the Commission to impose a first-tier civil money penalty where a respondent has willfully violated any provision of the Securities Act, the Exchange Act, or the rules and regulations thereunder, and where such civil penalty is in the public interest. 20/ A first-tier penalty of up to \$5,500 for each act or omission may be elevated to a second-tier penalty of up to \$55,000 if the act or omission “involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.” 21/

The factors we may consider in determining whether a penalty is in the public interest include whether the act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement and the harm to other persons resulting from the conduct. 22/ We also may consider the extent to which any person was unjustly enriched and whether the respondent previously has been found by the Commission or other regulatory agency to have violated the securities laws. 23/ Further, we may consider the need to deter the respondent and other persons from committing such acts and other matters as justice may require. 24/

Lehman’s representations regarding purported high-yield, riskless-principal investments and his omission regarding his involvement in an earlier antifraud proceeding that resulted in sanctions were fraudulent, thus triggering the second-tier penalty option. His recidivism occurred almost coincident with the imposition of sanctions in the earlier Commission proceeding for violations based on similar misconduct. Because of the bar we impose today, Lehman will no longer be active in the securities industry. However, we find that his actions are egregious enough that a penalty will assist in impressing on Lehman the seriousness of his obligation to comply with the law. We further find that the need to deter other persons from committing similar acts is high. Based on all these factors, we find that a second-tier penalty in the amount of \$55,000 is warranted.

20/ 15 U.S.C. §§ 78u-2(b), 80b-3(i).

21/ 15 U.S.C. § 78u-2(b); see also 17 C.F.R. §§ 201.1001, 1002. A third-tier civil penalty of \$110,000 may be warranted if the act or omission also “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.” 15 U.S.C. § 78u-2(b). Lehman’s fraudulent misconduct was followed by a full refund to all Oberland investors of their investments. See supra note 6 and accompanying text.

22/ 15 U.S.C. § 78u-2(c).

23/ Id.

24/ Id.

Lehman does not contest the finding that a second-tier penalty is warranted but has maintained throughout this proceeding that he is unable to pay the amount imposed. We may, in our discretion, consider evidence of the respondent's ability to pay. 25/ The evidence "may relate to the extent of such person's ability to continue in business and the collectability of a penalty." 26/ Even when a respondent demonstrates an inability to pay, we have discretion not to waive the penalty, particularly when the misconduct is sufficiently egregious. 27/

Lehman argues that the law judge should not have imposed the penalty because the Division has the "burden of proof with respect to his inability to pay" but did not meet its burden. Lehman is not correct that the Division has the burden of proof on his ability to pay. The statute states that "a respondent may present evidence of the respondent's ability to pay such penalty." 28/ Our decisions have consistently interpreted this to mean that the respondent has the burden of demonstrating an inability to pay. 29/ This allocation makes sense given a respondent's superior knowledge of his or her own financial situation. 30/

25/ 15 U.S.C. § 78u-2(d).

26/ Id.

27/ See Charles Trento, Securities Act Rel. No. 8391 (Feb. 23, 2004), 82 SEC Docket 785, 793 (finding that respondent's fraudulent misconduct "far outweigh[ed] any consideration of his present ability to pay a penalty").

28/ 15 U.S.C. § 78u-2(d).

29/ Vladlen "Larry" Vindman, Securities Act Rel. No. 8679 (Apr. 14, 2006), ___ SEC Docket ___, ___ ("As the respondent, Vindman had the burden of demonstrating inability to pay."); Brian A. Schmidt, 55 S.E.C. 576, 597 (2002) ("[T]he respondent carries the burden of demonstrating inability to pay."); Terry T. Steen, 53 S.E.C. 618, 627 (1998) ("The burden of proving financial inability to pay disgorgement falls upon the respondent.").

30/ See H.R. Rep. No. 101-616, at 39 (1990), reprinted in 1990 U.S.C.C.A.N. 1379, 1402 ("It is appropriate for respondents to have the burden of proof as to their ability to pay because they have better knowledge concerning their financial condition and access to their financial records than does the Commission."). Even where an agency, by statute, is required to consider the ability to pay and to produce evidence of respondent's financial condition, the respondent still bears some of the burden of proving an inability to pay. See Stanley v. Bd. of Gov. of Fed. Reserve Sys., 940 F.2d 267, 274 (7th Cir. 1991) ("An awkward state of affairs would arise if the [agency] was required to bear full responsibility for proving the financial condition of the individual Directors who

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At the hearing, Lehman submitted a sworn financial statement dated October 24, 2005 (“2005 SFS”) and eight exhibits. The 2005 SFS listed assets of approximately \$192,537 and liabilities of approximately \$135,715 for a net worth of \$56,822. Lehman was the sole witness and testified under oath about his financial circumstances. The Division cross-examined him on that subject and submitted fourteen exhibits. On appeal, Lehman submitted a revised SFS dated April 10, 2006 (“2006 SFS”) and two affidavits. The 2006 SFS listed assets of approximately \$789,752 and liabilities of approximately \$900,501 for a net worth of (\$110,749), which is \$167,571 less than the net worth given in the 2005 SFS.

We discuss the items whose values are in dispute below.

Real Estate. Lehman is a member of Cundiff Investments LLC (“Cundiff”), a limited liability company that owns two properties on North Main Street in Dayton, Ohio (“Cundiff Properties”). In the 2005 SFS, Lehman did not include any information about Cundiff. In the 2006 SFS, Lehman included Cundiff as an asset worth \$612,800 and a liability worth \$765,256. ^{31/} The values in the 2006 SFS that are associated with the Cundiff Properties thus account for \$152,459 of the \$167,571 difference in Lehman’s claimed net worth as compared to the 2005 SFS. ^{32/} Lehman and his wife listed rental income and depreciation expenses from the properties on their 2003 and 2004 federal income tax returns. Lehman did not, however, list the Cundiff Properties as an asset in his 2005 SFS. At the hearing, the Division submitted an undated local county property summary that lists the combined tax-assessed value of the Cundiff Properties as \$655,690. ^{33/} Lehman objected to the Division’s proffered fair market value, stating that “Cundiff does not have any net value.” He offered no evidence, such as an appraisal or an appeal of the assessed valuations, to support his assertion. Rather, Lehman contends that

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- ^{30/} (...continued)
obviously oppose higher penalties and whose self-interest is served by painting as grim a picture as possible of their respective financial conditions.”).
- ^{31/} The record is unclear as to whether Lehman was the sole member of Cundiff during the period at issue. Division Exhibit 9 includes a document dated May 1, 1999 that appoints Lehman as Cundiff’s agent to receive service. The document requires the signators to comprise at least a majority of the members of Cundiff. Lehman is the sole signator on the document. Lehman has not indicated at any time during the proceeding that any of the values associated with Cundiff do not accurately reflect his ownership interest.
- ^{32/} The remaining difference of \$15,115 is accounted for by undisputed updates to other assets and liabilities.
- ^{33/} The undated local county property summary offered by the Division also shows that the combined taxes owed on the Cundiff Properties as of 2005 are delinquent in the amount of \$29,444. Lehman does not list this amount of taxes owed in his 2006 SFS.

his testimony on this point was sufficient to establish the net value of the properties and that the law judge, “by impermissibly making adverse credibility findings, rejected [his] testimony.”

For the first time on appeal, Lehman claims that the Cundiff Properties are encumbered by mortgages. Lehman’s motion to adduce additional evidence, filed in connection with this appeal, claimed that the Cundiff Properties “have negative equity,” based on “the indebtedness secured by mortgages on [the properties.]” Specifically, Lehman’s 2006 SFS estimated the Cundiff Properties to be an asset worth \$612,800 with a corresponding liability worth \$765,256, for a net value of (\$152,456).

We granted Lehman's motion to adduce evidence pursuant to Rule 452 of our Rules of Practice. ^{34/} Lehman’s evidence included two affidavits. His own affidavit, which did not contain any supporting documentation, stated that the Cundiff Properties have “a value of \$613,700.00” and are “encumbered by mortgages totaling \$627,464.91,” not \$765,256. The affidavit also stated that “Cundiff has been unable to make the required payments on the mortgages and is delinquent on the real estate taxes,” but does not specify the amounts or duration of these alleged delinquencies. The second affidavit, by his counsel, William B. Fecher, attached three exhibits. One exhibit purportedly is a May 26, 2006 local county recorder summary of instruments recorded in the name of Cundiff. Two of the five entries appear to be for mortgages on land described only in legal terms and not by address. ^{35/} The second exhibit purportedly is a promissory note for \$145,136.32, entered into by Cundiff on April 1, 2002, that is secured by “a second-priority mortgage granting [the lender] a security interest in [the Cundiff Properties].” The third exhibit purportedly is a promissory note for \$340,153.43, entered into by Cundiff on April 1, 2002, that is secured by “a first-priority mortgage granting [the lender] a security interest in [the Cundiff Properties].” These original principal amounts total \$485,289.75. None of the exhibits includes any information about the current balance owed on the mortgages purportedly associated with the Cundiff Properties.

Lehman has not provided adequate or credible evidence that the Cundiff Properties have no net value or a negative net value. His various assertions about the values of Cundiff as an asset and the corresponding liabilities are inconsistent, conflict with the values set forth in the supporting documentation provided by his own attorney, and are therefore unsupported. Even if we accept Fecher’s documentation regarding the combined value of the mortgages, we are left with an asset of \$655,690 less a liability of \$485,289.75 for a net value of \$170,400.25. However, even Fecher’s documentation regarding the combined value of the mortgages is incomplete and unpersuasive because it fails to indicate how much of the original principal amount of the mortgages has been paid down in the four years since the mortgages were entered into. The record provides no information about whether taxes or interest are owed on the

^{34/} 17 C.F.R. § 201.452.

^{35/} The other three entries appear to be for two deeds and one easement related to these properties.

mortgages. Our conclusion, therefore, is that the Cundiff Properties should be considered at a net value of \$170,400.25.

Lehman owns two buildings on Lexington Avenue in Dayton, Ohio (the “Lexington Avenue Properties”). A local county property summary, submitted by Lehman at the hearing and dated October 24, 2005, lists the combined tax-assessed value of the Lexington Avenue Properties as \$121,900. Lehman did not submit an appraisal nor did he ever appeal the assessed valuations on the Lexington Avenue Properties. However, Lehman testified, and claimed in both the 2005 SFS and 2006 SFS, that the combined fair market value of the Lexington Properties is \$60,000. Lehman offered no evidence to substantiate his personal opinion or to refute his own contradictory evidence of the county’s valuations. He contends that his testimony on this point was sufficient to establish the fair market value of the properties and that the law judge impermissibly rejected it.

Lehman argues that the local county property valuations cannot be relied upon to establish actual value because “[a] tax valuation is not an appraisal or a determination of actual value.” However, under Ohio law, the tax-assessed value of real estate is intended to represent fair market value. ^{36/} Lehman offered no evidence to indicate that the Lexington Avenue Properties are an exception to this principle regarding Ohio property. We find that Lehman has not presented any credible evidence to counter his own submission showing that the value of the Lexington Avenue Properties is \$121,900. We therefore reject his contentions.

The credible evidence in the record regarding the net value of the Cundiff Properties (an asset worth \$655,690 less a liability worth at most \$485,289.75 for a net value of \$170,400.25) and the value of the Lexington Avenue Properties (an asset worth \$121,900) establishes that Lehman’s net worth is at least \$274,007.25 on the basis of these adjustments alone (total assets worth \$894,542 less total liabilities worth \$620,534.75), rather than the (\$110,749) he claims in his 2006 SFS.

Byers Note. Lehman, doing business as Byers Acquisition Group, Inc. (“Byers”), is the creditor with respect to a promissory note (“Byers Note”). BriMic, LLC, a limited liability company that purchased the assets of a tavern in connection with the Byers Note, is the debtor on that note. The Byers Note lists an original balance of \$170,000 as of May 1999. Lehman testified that the actual original amount was only \$160,000, but he provided no evidence to substantiate this claim.

Lehman claims that the Byers Note is worthless. In one section of his 2005 SFS, Lehman lists the value of the Byers Note as “To Be Determined.” In another section of the 2005 SFS, Lehman indicates that he received “\$950 - subject to change” per month as income on the Byers

^{36/} See Ohio Rev. Code §§ 5713.01, 5713.03; Estate of Thomas L. Kaplin v. Commissioner of Internal Revenue, 815 F.2d 32, 33 (6th Cir. 1987) (finding that Tax Court erred in rejecting the tax-assessed value of Ohio property as probative of fair market value).

Note. At the hearing, Lehman testified that he was concerned about the collectability of the note because he “had several people go down there and tell [him] that they’re not doing very well.” He testified that he verbally agreed with BriMic, LLC that the balance on the Byers Note currently is \$112,000, although he had no signed agreement to that effect, and nothing else in the record supports this amount. He further testified that, although he previously received monthly payments of \$1,600, he currently received \$700 less. There is no substantiation in the record concerning monthly payments. In his 2006 SFS, Lehman listed the value of the Byers Note as “0” and, unlike his 2005 SFS, did not indicate that he received any income on the note.

Pursuant to our May 2006 order granting Lehman’s motion to adduce additional evidence, Lehman submitted evidence that he claimed would establish “the true value of the Byers Note,” including “notice that [BriMic, LLC] was being evicted from the business premises and, if evicted, that [BriMic, LLC] would be unable to make payments on the [Byers] Note.” Lehman’s affidavit, previously mentioned in our discussion of the Cundiff Properties, states that BriMic, LLC informed him that “the landlord for the premises at which the Byers Inn operates has terminated their lease and expects them to vacate the premises on or before May 15, 2006 . . . [and] that, if the lease is terminated, BriMic, LLC will be forced to cease operations and be unable to make any further payments on the Note.”

Fecher’s affidavit, also previously mentioned in our discussion of the Cundiff Properties, attaches a purported notice of BriMic, LLC’s lease termination sent to Fecher by facsimile. The transmittal sheet is from a Dayton law firm and includes “Bri-Mic, LLC” in the subject line. The “lease termination,” dated May 21, 2006, but showing a machine-generated transmittal date of May 19, 2006, is a one-paragraph, unsigned letter purportedly from BriMic, LLC to Lehman that states, among other things, that BriMic, LLC was notified of “the termination of possessory rights” to the tavern. The document is silent as to whether payments to Byers will continue.

According to the Byers Note, “the entire unpaid principal balance of [the] Note, together with any accrued interest thereon, any late fees and any expenses, shall become due and payable in full, at [Lehman’s] sole option, upon the occurrence of,” among other things, BriMic, LLC’s failure to make timely payments to Lehman following the termination of BriMic, LLC’s lease. Other provisions of the Byers Note state that (1) the note is secured by “all of [BriMic, LLC’s] property and assets,” (2) the note is guaranteed by the principals of BriMic, LLC, and (3) the obligations of BriMic, LLC to any “member, shareholder, and/or insider of BriMic, LLC” are subordinated to the obligations to Lehman.

Lehman’s adduced evidence concerning the purported termination of the tavern lease is vague and of questionable authenticity. At best, it fails to substantiate his claim that payments from BriMic, LLC would cease, or that Lehman would have no recourse to recover the balance owed on the note if payments did cease. We find that it adds little, if anything, to Lehman’s burden of proving that he is unable to pay the penalty, and as a discretionary matter do not consider it.

IRS Letter. Lehman argues that he owes the IRS certain tax amounts and that the law judge should have considered these amounts in determining whether Lehman had the ability to pay the civil penalty. 37/ The record contains a letter from the IRS to Lehman and his wife dated October 24, 2005 that shows proposed deficient amounts on their joint income tax returns for the periods ending December 31, 2002, 2001, and 2000, which, together with further penalties for alleged tax fraud, total approximately \$325,536. This amount was not included in the calculation of Lehman's net worth in either the 2005 or 2006 SFS. The 76-page letter contains a detailed explanation about why the IRS preliminarily determined that certain information in the tax returns was inaccurate, disclosed fraudulently, and warranted repayment and penalties. Lehman concedes that the IRS Letter is a preliminary report that Lehman may challenge, and, in fact, Lehman claims he has challenged. 38/ However, there is no evidence that would indicate when his challenge to the IRS Letter will be resolved. Under the circumstances, in our discretion, we are not considering this information in considering Lehman's ability to pay the civil penalty.

* * *

Lehman also claims that the law judge "improperly criticized the Respondent for not supplying information related to his wife[, Sarah Merrick]" Lehman claims that "her financial condition cannot be the subject of any determination of the appropriate financial penalty" because it amounts to a "denial of her due process rights" Lehman does not explain how the law judge's observations about the lack of financial information regarding Ms. Merrick might impact our assessment of his ability to pay the \$55,000 penalty. Nor does he explain how it is a denial of his wife's due process rights to include her assets when he readily admits that she shares the liabilities listed on his 2005 and 2006 SFSs. However, we note that, throughout the proceeding, the law judge repeatedly informed Lehman of his obligation to "provide the full range of supporting evidence addressed in Rule 630 of [our] Rules of Practice[,] " including the sworn financial statement, which explicitly requires disclosure of a spouse's information, including both assets and liabilities. 39/ Disclosure of a spouse's

37/ Exchange Act Section 21B(d) states, among other things, that evidence of "any other claims of the United States . . . upon such person's assets" may be taken into account when considering a respondent's ability to pay a civil penalty. 15 U.S.C. § 78u-2(d).

38/ Lehman testified that he disputed the proposed findings of the IRS and that, although he had met with IRS staff, nothing had been finalized.

39/ Lehman testified that his wife did not receive Social Security, a pension, alimony, any annuities, or interest or dividends, but did share the monthly expenses listed on his 2005 SFS and 2006 SFS. Regarding any other financial circumstances of his wife, Lehman testified that he had "no clue." The record suggests otherwise. The two promissory notes that Lehman's attorney submitted in support of Lehman's argument that Cundiff is encumbered by mortgages were signed by Sarah Merrick. Further, the law judge found

(continued...)

information may be useful in determining whether, and to what extent, such spouse's assets or liabilities offset the assets and liabilities of the individual submitting the sworn financial statement. Thus, we reject Lehman's claims.

* * *

We conclude that Lehman has not demonstrated that he is unable to pay a second-tier penalty of \$55,000. The credible, reliable record evidence suggests that his net worth is well in excess of that amount. We recognize that the record as presented creates some uncertainty about the collectibility of the penalty, and we are "cognizant of the inadvisability of assessing penalties so heavy that the persons against whom they are assessed are unable to pay them. Such a situation results in the expenditure of agency resources in unsuccessful attempts to collect the penalties. Moreover, the imposition of a [penalty] that cannot be enforced may ultimately render the deterrent message intended to be communicated by the [penalty] less meaningful. For these reasons, consideration of adequate, credible evidence of inability to pay is appropriate for us to consider as a discretionary matter." 40/

Lehman's evidence of inability to pay, however, does not meet this standard. The evidence he presents with respect to the value, or lack thereof, of the disputed items is neither adequate nor credible because his assertions variously are vague, unsubstantiated, inconsistent, or contradicted by reliable evidence, some of which Lehman himself provides. Indeed, to the extent there are uncertainties as to Lehman's true net worth, they exist because of the confusion created by Lehman's submission of deficient documentation in support of his claim.

Further considerations affecting our decision not to reduce or waive the penalty include his recidivism and our view that his misconduct is egregious. Lehman directs our attention to three disciplinary actions involving violations of purportedly greater egregiousness that resulted in waivers or significant reductions in civil penalties. 41/ Appropriate remedial action depends

39/ (...continued)
that cross-examination revealed that Lehman knew, but failed to disclose, that his wife had an ownership interest in S & P Business Trust, which owns the holding company that owns at least 75% of Tower Equities. Based on the record, however, we are unable to determine the value of Ms. Merrick's assets, and we therefore do not consider such information in our determination of Lehman's claimed inability to pay.

40/ First Secs. Transfer Systems, Inc., 52 S.E.C. at 397 (finding evidence not adequate or credible where current financial situation was neither documented nor substantiated).

41/ See SEC v. Frank Bergonzi, Martin L. Grass, and Franklin C. Brown, Lit. Rel. No. 19409 (Sept. 30, 2005); Uniprime Capital Acceptance, Inc. and Alfred J. Flores, Lit. Rel. No. (continued...)

on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with the actions taken in other proceedings. ^{42/} We note that the matters to which Lehman refers are settled cases whose sanctions may understate the sanctions that would be imposed in litigated cases because settled sanctions reflect pragmatic considerations such as the avoidance of time-and-manpower-consuming adversarial litigation. ^{43/} In any event, the cases are easily distinguishable. Unlike Lehman, none of those respondents was found to be a recidivist, let alone one who engaged in the fraudulent misconduct at issue almost coincident with the imposition of sanctions in an earlier proceeding for violations based on similar misconduct. Lehman's recidivism, which we are explicitly entitled to consider under the relevant statutory scheme, weighs heavily in our determination that a civil penalty is in the public interest and that reduction or waiver of the penalty is not appropriate. ^{44/} Further, all of the respondents in the cases to which Lehman cites were found to have demonstrated an inability to pay. We make no such finding here.

^{41/} (...continued)

19371 (Sept. 12, 2005), 86 SEC Docket 698; and Marketxt, Inc. and Irfan Mohammed Amanat, Exchange Act Rel. No. 51864 (June 17, 2005), 85 SEC Docket 2665.

^{42/} See Mark F. Mizenko, Exchange Act Rel. No. 52600 (Oct. 13, 2005), 86 SEC Docket 1515, 1523 n.23; Davrey Financial Services, Inc., Exchange Act Rel. No. 51780 (June 2, 2005), 85 SEC Docket 2057, 2068 n.27 (citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973)).

^{43/} See, e.g., Anthony A. Adonnino, Exchange Act Rel. No. 48618 (Oct. 9, 2003), 81 SEC Docket 981, 999 (noting that settled cases may result in lesser sanctions), aff'd, 111 Fed. Appx. 46 (2d Cir. 2004) (unpublished); Richard J. Puccio, 52 S.E.C. 1041, 1045 (Oct. 22, 1996) (noting that "respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings").

^{44/} 15 U.S.C. § 78u-2(c).

For all of these reasons, we find it in the public interest that the penalty remain at \$55,000. An appropriate order will issue. 45/

By the Commission (Chairman COX and Commissioners ATKINS, NAZARETH, and CASEY; Commissioner CAMPOS not participating).

Nancy M. Morris
Secretary

45/ We have considered all of the parties' contentions. 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

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54660 / October 27, 2006

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2565 / October 27, 2006

Admin. Proc. File No. 3-11972

In the Matter of

PHILIP A. LEHMAN
c/o William B. Fecher, Esq.
Statman, Harris, Siegel & Eyrich, LLC
2900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202-2912

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Philip A. Lehman be, and he hereby is, barred from association with any broker, dealer, or investment adviser; and it is further

ORDERED that Lehman pay a civil money penalty of \$55,000.

Payment of the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

A copy of the cover letter and check shall be sent to Jerrold H. Kohn, Division of Enforcement, Securities and Exchange Commission, Midwest Regional Office, 175 W. Jackson Boulevard, Suite 900, Chicago, Illinois 60604.

By the Commission.

Nancy M. Morris
Secretary