

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 8990 / December 17, 2008

SECURITIES EXCHANGE ACT OF 1934

Release No. 59115 / December 17, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-13312

In the Matter of

**MILKIE/FERGUSON
INVESTMENTS, INC., and
DANIEL EDWARD LEVIN,**

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER PURSUANT TO
SECTION 8A OF THE SECURITIES ACT OF
1933 AND SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and Section 15(b)(6) of the Securities Exchange Act of 1934 (“Exchange Act”) against Daniel Edward Levin (“Levin”), and pursuant to Section 15(b) of the Exchange Act against Milkie/Ferguson Investments, Inc. (“Milkie”) (collectively, “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 15(b) of the Securities Exchange Act of 1934 (“Order”).

III.

On the basis of this Order and Respondents' Offer, the Commission finds that:

RESPONDENTS

1. Milkie is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, with its principal offices in Dallas, Texas. Milkie has approximately 50 registered sales representatives located in two offices in Dallas and Las Colinas, Texas. Milkie primarily conducts retail brokerage business.

2. Levin has been a registered representative associated with Milkie since December 2004. Levin, 51, is a resident of Dallas, Texas, and has been associated with six registered broker-dealers since 1980. He currently holds series 7, 63, and 65 securities licenses.

FACTS

Background

3. Purchases of mutual fund shares may include the payment of sales loads or commissions paid by the shareholder upon purchases or redemptions. These payments are typically collected by a fund's distributor which, in turn, pays the load to the selling brokers. A "front-end load" is an industry term for a sales charge that certain fund principal underwriters or distributors charge at the time an investor buys shares. When an investor buys shares with a front-end load, the front-end load portion of the offering price is not invested in the fund, but instead is paid to the fund's principal underwriter or distributor. The front-end load usually is expressed as a percentage of the investment amount. Often, front-end loads for shares of equity funds start at 4% to 5.75% of the investment amount.

4. When an investor purchases a mutual fund that charges a front-end load through a broker-dealer, the fund's principal underwriter or distributor pays a part of the front-end load amount to the broker-dealer that sold the fund shares to the investor. The broker-dealer may pay a portion of the front-end load that it receives to the registered representative assigned to the investor's account.

5. Mutual funds that sell shares charging front-end loads typically offer discounts on the front-end load at certain pre-determined levels of investment, which are called "breakpoints." Breakpoints can vary among funds within a mutual fund complex or across fund complexes. In general, an investor can usually procure discounts on sales charges at "breakpoints," or investment levels, of \$50,000, \$100,000, \$250,000, and \$500,000. The discounts on sales charges typically increase at each breakpoint level. At the \$1 million investment level, there often is no sales charge.

6. The specific terms and conditions under which breakpoint discounts may become available are determined by the mutual funds. Generally, an investor can procure a breakpoint discount through either a single purchase large enough to reach a breakpoint or multiple purchases in a single mutual fund or any of the funds in a fund complex, the aggregate value of which is large enough to reach a breakpoint. An investor may aggregate purchases over time to meet applicable breakpoints through a “right of accumulation” (“ROA”) or “letter of intent” (“LOI”). An investor may be eligible for a discount through an ROA by aggregating current purchases with certain prior purchases. An LOI is a written statement of intent by the investor to purchase a certain amount of mutual fund shares over what is usually a thirteen-month period.

7. Mutual funds are required to disclose a schedule of available breakpoints in their prospectuses. Mutual funds must also disclose how an investor may qualify for breakpoints in either the prospectuses or in their statements of additional information, both of which are filed with the Commission on Form N-1A.

8. Securities professionals owe a special duty of fair dealing to their customers. Accordingly, broker-dealers and registered representatives who recommend mutual fund shares must disclose information concerning available breakpoint discounts to their retail customers so that customers may evaluate the desirability of making a qualifying purchase. A failure to do so can result not only in the customer being deprived of the benefit of lower costs, but also in the broker-dealer and representative receiving increased compensation at the customer’s expense. Mere delivery of a prospectus containing information about available breakpoint discounts is insufficient to satisfy this duty.

Levin Failed to Disclose Material Breakpoint Information

9. In at least seven instances from March 2006 to September 2006, Levin offered and sold mutual fund class “A” shares to retail customers without adequate disclosure of material information about the availability of breakpoint discounts for which customers could have qualified. Specifically, Levin recommended that his customers allocate their investments among seven to ten different fund families. In those instances where Levin’s recommended allocation qualified customers for breakpoint discounts, he sometimes advised them that they had received discounts. However, Levin did not adequately disclose, before customers made investment decisions, all breakpoint discounts for which the customers could qualify in the fund families he recommended, nor did he adequately disclose the breakpoint discounts customers could have received by investing larger amounts in fewer fund families. Levin’s customers could have qualified for breakpoint discounts totaling up to \$79,981.74. Levin also failed to adequately disclose the financial impact those additional breakpoint discounts could have on the customers’ contemplated transactions, and that purchases below the additional breakpoints would result in a greater profit to him. As a result, the customers were not afforded the opportunity to evaluate the desirability of making a qualifying purchase to take advantage of all breakpoint discounts available to them.

10. Securities Act Sections 17(a)(2) and 17(a)(3) make it unlawful for any person in the offer or sale of any securities to obtain money or property by means of a material misrepresentation or omission, or to engage in any transaction, practice, or course of business that operates as a fraud or

deceit on the purchaser. Negligence is sufficient to establish violations of these provisions.¹ As a result of the conduct described above, Levin willfully violated Section 17(a)(2) and (3) of the Securities Act.²

Milkie's Supervisory Procedures over Breakpoint Disclosures were Inadequate

11. Section 15(b)(4)(E) of the Exchange Act provides for the imposition of a sanction against a broker or dealer who has failed reasonably to supervise, with a view to preventing and detecting violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision.³ This section also provides an affirmative defense to anyone who can show that (1) there were established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation, and (2) that person has reasonably discharged the duties and obligations incumbent upon them without reasonable cause to believe that the procedures and systems were not complied with.

12. During the relevant period, Milkie had written supervisory procedures ("WSP") that required all registered representatives, including Levin, to disclose all "possible breakpoints" and to "advise customers of the savings available in a purchase above" a breakpoint. Milkie's WSP stated that registered representatives were responsible for documenting that complete disclosure had been made to the customer. However, Milkie had inadequate systems in place to implement procedures to assure that registered representatives provided the required information about breakpoints to customers before they made an investment decision. Specifically, Milkie had no or inadequate systems in place requiring registered representatives to submit documentation of breakpoint disclosures for managerial review. Such systems could reasonably have been expected to have prevented and detected Levin's misconduct. Accordingly, Milkie failed reasonably to supervise Levin within the meaning of Section 15(b)(4)(E) of the Exchange Act.

IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest to impose the sanctions agreed to in Respondents' Offer.⁴

¹ See *Aaron v. SEC*, 446 U.S. 680, 697 & 701-07 (1980).

² A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

³ See *Matter of Smith Barney, Harris Upham & Co., Inc.*, Securities Exchange Act of 1934 Release No. 21813, 32 SEC Docket 999, 1004 (March 5, 1985).

⁴ As part of Respondents' settlement offer, they made appropriate reimbursement to the applicable customers.

Accordingly, pursuant to Section 8A of the Securities Act and Section 15(b) of the Exchange Act, it is hereby ORDERED that:

A. Levin cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and (3) of the Securities Act.

B. Milkie is censured.

C. Respondents shall each, within 10 days of the entry of this Order, pay a civil money penalty pursuant to Section 21B of the Exchange Act in the amount of \$25,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Milkie and Levin as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Stephen Korotash, Division of Enforcement, Securities and Exchange Commission, 801 Cherry Street, Suite 1900, Fort Worth, Texas 76102.

D. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that they shall not, after offset or reduction in any Related Investor Action based on Respondents' payment of disgorgement in this action, argue that they are entitled to, nor shall they further benefit by offset or reduction of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Florence E. Harmon
Acting Secretary