

NEW YORK STOCK EXCHANGE, INC.

**EXCHANGE HEARING PANEL DECISION 02-89**

April 24, 2002

MICHAEL ANTHONY FORTUGNO  
FORMER NON-REGISTERED EMPLOYEE

\* \* \*

**Misappropriated unclaimed securities belonging to customers and funds belonging to his employer, caused violations of SEC Rule 240.17a-3 and Exchange Rule 440 by causing books and records of his employer to contain false information and violated Rule 407 by maintaining a securities account at another firm without his employer's written consent – Consent to censure and permanent bar.**

**Appearances:**

For the Division of Enforcement  
Steven F. Korostoff, Esq.  
Neil T. O'Donnell, Esq.

For the Respondent  
Michael Anthony Fortugno  
*pro se*

**EXCHANGE HEARING PANEL DECISION 02-90**

MICHAEL JOSEPH ESPOSITO  
FORMER REGISTERED REPRESENTATIVE

\* \* \*

**Misappropriated unclaimed securities belonging to customers and funds belonging to his employer – Consent to censure and permanent bar.**

**Appearances:**

For the Division of Enforcement  
Steven F. Korostoff, Esq.  
Neil T. O'Donnell, Esq.

For the Respondent  
Brian Amery, Esq.

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An Exchange Hearing Panel met to consider a Stipulation of Facts and Consent to Penalty entered into between the Exchange's Division of Enforcement and Michael Anthony Fortugno, a former non-registered employee of Sterne Agee & Leach, Inc. (the "Firm") and Michael Joseph Esposito, a former registered representative with the Firm.

Without admitting or denying guilt, Mr. Fortugno consents to findings by the Hearing Panel that he:

- I. Engaged in conduct inconsistent with just and equitable principles of trade by misappropriating unclaimed securities belonging to customers of his member firm employer and funds belong to his member firm employer.
- II. Caused violations of SEC Rule 240.17a-3 and Exchange Rule 440 by causing the books and records of his member firm employer to contain false and inaccurate information.
- III. Violated Exchange Rule 407 by maintaining a securities account at another member organization without the prior written consent of his member firm employer, and without arranging for duplicate confirmations and monthly statements of said account to be sent to his member firm employer.

Without admitting or denying guilt, Mr. Esposito consents to findings by the Hearing Panel that he engaged in conduct inconsistent with just and equitable principles of trade by misappropriating unclaimed securities belonging to customers of his member firm employer and funds belonging to his member firm employer.

For the sole purpose of settling this disciplinary proceeding, the Division of Enforcement and Fortugno and Esposito stipulate to the following:

### **Background and Jurisdiction**

#### **Michael Anthony Fortugno**

1. Fortugno was born in April 1950. He entered the securities industry in a temporary position in 1968. He was employed by the Firm as Assistant Vice President – Operations Department from February 1995 to April 2001.
2. Fortugno was employed at the Firm until April 19, 2001, when he was terminated as a result of the matter involved herein. He is not currently employed in the securities industry.
3. On May 17, 2001, the Exchange received from the Firm a Form RE-3 (“Submission of Required Information Pertaining to ... Registered and Non-Registered Employees...”) reporting the Firm’s investigation into Fortugno’s participation in an apparent plan to appropriate unclaimed assets held by the Firm.
4. By letter dated May 24, 2001, which Fortugno received, Enforcement notified Fortugno that it was investigating the possibility that while he was employed at the Firm, he may have engaged in a scheme to misappropriate assets belonging to his member firm employer.

5. Thereafter, Fortugno appeared and testified in Enforcement's investigation in this matter.

### **Michael Joseph Esposito**

6. Esposito was born in April 1946. He entered the securities industry in January 1968. He was employed by the Firm as Senior Vice President and Managing Director from February 1992 to May 2001.
7. Esposito was employed at the Firm until May 2001, when he was terminated as a result of the matter involved herein. He is not currently employed in the securities industry.
8. On May 17, 2001, the Exchange received from the Firm a Form RE-3 reporting the Firm's investigation into Esposito's participation in an apparent plan to appropriate unclaimed assets held by the Firm.
9. By letter dated May 24, 2001, which Esposito received, Enforcement notified Esposito that it was investigating the possibility that while he was employed at the Firm, he may have engaged in a scheme to misappropriate assets belonging to his member firm employer.
10. Thereafter, Esposito appeared, and, represented by counsel, testified in Enforcement's investigation in this matter.

### **Summary of Violative Conduct**

11. During the period 1995-2001, Fortugno and Esposito engaged in conduct inconsistent with just and equitable principles of trade by misappropriating unclaimed securities belonging to customers of their member firm employer, and funds belonging to their member firm employer. In addition, Fortugno violated SEC Rule 17a-3 and Exchange Rule 440 by causing the books and records of his member firm employer to contain false and inaccurate information. Fortugno also violated Exchange Rule 407 by maintaining a securities account at another member organization without the prior written consent of his member firm employer, and without arranging for duplicate confirmations and monthly statements of said account to be sent to his member firm employer.

### **Violative Conduct**

#### **Unclaimed Securities**

12. At all relevant times, Fortugno was employed by the Firm as an Assistant Vice President in the Operations Department. As part of his job responsibilities, Fortugno was division manager of the Reconciliation Department. At all relevant times,

Esposito was employed by the Firm as a Senior Vice President and Managing Director in charge of the Operations Department.

13. In the regular course of business, the Firm would receive a block of securities, as a result of dividends, reorganizations and stock splits, from the Depository Trust Company (“DTC”) in the Firm’s name to be divided and credited to the entitled Firm customers. If the assets went unclaimed by customers, and the Firm was unable to determine their appropriate owner, the Firm transferred remaining unclaimed assets to the Firm’s operations suspense account controlled by the Reconciliation Department.
14. Beginning in 1995, the operations suspense account contained aged positions in securities and cash resulting from the sale of unclaimed securities. These aged positions were transferred into a securities awaiting claim account at the Firm in Esposito’s name controlled by Fortugno. With the cash, Fortugno purchased additional securities. After purchasing these securities, Fortugno, with Esposito’s knowledge, would transfer both the aged securities and the securities just purchased via the DTC participant system to an account he maintained at XYZ.
15. Fortugno himself would enter the instructions to make the delivery through DTC, enter the journal entries, clear the positions out of the securities awaiting claim account, and perform all bookkeeping entries.
16. The securities were transferred from the Firm to Fortugno’s XYZ account, which was opened without the Firm’s knowledge after he obtained employment with the Firm. Once the securities reached Fortugno’s XYZ account, the securities would be sold, with proceeds of the sale of the securities then being deposited into a checking account Fortugno maintained at UVW Bank.
17. The funds would remain in the UVW account where Fortugno would draw checks whenever he needed access to the money. If Esposito wanted money, he would request that Fortugno go to the bank and withdraw cash for him. Fortugno would then make out a check to cash, in amounts ranging from \$2,000 to \$5,000, cash it at the bank, and deliver the money to Esposito. On one occasion, Fortugno wrote a cashier’s check to ABC on Esposito’s behalf.
18. During the period 1995-2001, Fortugno and Esposito misappropriated approximately \$900,000 in unclaimed customer assets at the Firm. Fortugno and Esposito each received approximately half of this money,

### **Aged Outstanding Checks**

19. The Firm’s reconciliation department maintained the Firm’s checking account. Fortugno supervised the Firm’s checking account, which included a registry of outstanding checks. The outstanding check registry consisted of a list of all checks credited against the Firm that had aged and had not been cashed by the recipient.

20. Beginning in 1998, Fortugno would remove the aged outstanding check from the checking account balance, erasing a debit to the Firm's account. Fortugno would then transfer the funds resulting from the eliminated debt by journal entry into the operations suspense account.
21. Fortugno would then transfer the funds from the operations suspense account into the aforementioned securities awaiting claim account, purchase securities, and transfer the securities via DTC into his XYZ account. Once at the XYZ account, the funds would be transferred to the UVW bank account.
22. During the period January 1998 to December 2000, Fortugno performed approximately 16 journal entries removing funds totaling approximately \$240,000 from the aged outstanding checks balance. These funds would be accessed directly by Fortugno, while Esposito would obtain his share of the funds by requesting that Fortugno obtain cash for him from the UVW bank account. Fortugno and Esposito each received approximately one half of the \$240,000 misappropriated via elimination of aged outstanding checks.

#### **Books and Records Violation**

23. By wrongfully transferring funds and unclaimed securities from the Firm's operations suspense account to his account at XYZ via computer entries as described above, Fortugno improperly altered the Firm's books and records and caused such books and records to contain false and inaccurate information.
24. Furthermore, by removing aged outstanding checks from the Firm's list of debits, and by wrongfully transferring via computer entries the funds, created by the elimination of debits, to his account at XYZ as described above, Fortugno improperly altered the Firm's books and records and caused such books and records to contain false and inaccurate information.

#### **Maintaining an Account at Another Member Firm Without Approval**

25. Exchange Rule 407(b), *inter alia*, prohibits employees of member organizations from having a securities account with respect to which they have a financial interest at another member organization, without the prior written consent of their employer member organization. Furthermore, Rule 407(b) provides that employees who have such accounts must arrange for duplicate confirmations and monthly statements of said accounts to be sent to another person designated by their member firm employer to review such accounts.
26. During the entire relevant time period, Fortugno maintained a securities account at XYZ, without the prior written consent of the Firm, and without arranging for duplicate confirmations and monthly statements of said account to be sent to his member firm employer.

**DECISION**

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Msrs. Fortugno and Esposito guilty as set forth above by unanimous vote.

**PENALTY**

In view of the above findings, the Hearing Panel, by unanimous vote, imposed the penalties consented to by Messrs. Fortugno and Esposito of censures and permanent bars from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization.

For the Hearing Panel

Edward W. Morris, Jr.  
Chief Hearing Officer