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BEFORE THE ARKANSAS SECURITIES COMMISSIONER
CASE NO. 12-0018
ORDER NO. S-12-0018-13-OR01

ARKANSAS SECURITIES DEPT.

IN THE MATTER OF:

J.D. NICHOLAS & ASSOCIATES, INC. f/k/a
A&F FINANCIAL SECURITIES, INC. and
GREGORY THOMAS DEAN

RESPONDENTS

CONSENT ORDER

This Consent Order is entered pursuant to the Arkansas Securities Act, codified at Ark. Code Ann. §§ 23-42-101 through 23-42-509 ("Act"), the Rules of the Arkansas Securities Commissioner ("Rules") promulgated under the Act, and the Arkansas Administrative Procedures Act, codified at Ark. Code Ann. §§ 25-15-201 through 25-15-219, in accordance with an agreement by and between the staff of the Arkansas Securities Department ("Staff"), J.D. Nicholas & Associates, Inc. f/k/a A&F Financial Securities, Inc. ("J.D. Nicholas") (CRD# 44791), and Gregory Thomas Dean ("Dean") (CRD# 4922996) (collectively "Respondents"), in full and final settlement of all claims that could be brought against the Respondents by the Staff on the basis of the facts set forth herein.

The Respondents admit the jurisdiction of the Act and the Arkansas Securities Commissioner ("Commissioner"), waive their right to a formal hearing, consent to the entry of this order, and agree to abide by its terms in the settlement of any possible violations committed by the Respondents concerning the matters detailed in this order.

RESPONDENTS

1. J.D. Nicholas is a Florida corporation with its principal place of business located in Syosset, New York. J.D. Nicholas has been registered with the Arkansas Securities Department ("Department") as a broker-dealer since March 13, 2007. During the time period

discussed herein, J.D. Nicholas was operating under its former name, A&F Financial Securities, Inc. ("A&F Financial").

2. Dean is a resident of Seaford, New York. Dean is registered as a broker-dealer agent in Arkansas with J.D. Nicholas and originally became registered as an agent in Arkansas with A&F Financial on November 6, 2008.

3. The Respondents have fully cooperated with the Staff throughout the investigations of the issues set forth herein and have assured the Staff that appropriate steps have been taken to prevent further violations of the Act and Rules.

FINDINGS OF FACT

Telemarketing Violations

4. On September 22, 2011, an Arkansas resident and Senior Examiner with the Arkansas Securities Department ("Department") ("ARI") received an unsolicited call from Dean on their home telephone. During the time period discussed herein, ARI's telephone number was registered on the United States Federal Trade Commission's ("FTC") National Do Not Call Registry ("Do Not Call Registry" or "Registry") and had been registered since June 28, 2003.

5. Dean called ARI at approximately 6:30 p.m. Central Standard Time from telephone number 516-802-2005, which displayed as A&F Financial on ARI's caller identification system. During the call with ARI, Dean specifically mentioned that ARI had a \$125,000.00 purge in their "National Securities" account. When ARI indicated to Dean that they needed to get a piece of paper and a pen to take notes during their call, Dean hung up the telephone on ARI. At no time during the call did Dean identify himself as an agent of A&F Financial. ARI has never had an established business relationship with Dean or A&F Financial and, until Dean's call, had never been contacted by Dean or A&F Financial.

6. On September 23, 2011, AR1 in their role as a Senior Examiner with the Department contacted A&F Financial's Chief Compliance Officer ("CCO") regarding Dean's unsolicited call to AR1's home telephone number registered on the Do Not Call Registry. The CCO confirmed that Dean had placed calls from an A&F Financial prospective-client list for telephone solicitation on September 22, 2011. AR1 also spoke with Dean who indicated that he had used a prospective-client "lead card" bearing AR1's name but with no telephone number and found AR1's contact information through an Internet search. Dean stated that he had hung up the telephone on AR1 when he determined that he had called AR1 in error, as he thought he was calling for an individual with the same name as AR1 but with a different gender. Dean claimed that he had previously spoken to an individual with the same name as AR1, at which time he had noticed a \$125,000.00 account at Pershing. Dean denied telling AR1 about a purge in their National Securities account.

7. As a result of the unsolicited call to AR1 and AR1's follow-up call with A&F Financial's CCO and Dean, the Staff requested that A&F Financial provide a list of all Arkansas residents who were on A&F Financial's prospective-client lists for telephone solicitation, including, but not limited to, Arkansas residents who had already been contacted by A&F Financial, and the demographic criteria used to create the prospective-client lists.

8. A&F Financial provided copies of approximately 936 lead cards with names, addresses, and telephone numbers for prospective clients in Arkansas, which were purchased from a third-party marketing company that specializes in creating telemarketing databases. The specific criteria used to create the lead cards included individuals who were principals, chief executive officers, and/or business owners of companies with revenues between \$2 million and

\$20 million per year. A&F Financial asserted that it believed the telephone numbers on the lead cards were business numbers not subject to Do-Not-Call-Registry restrictions.

9. A&F Financial later provided a confirmation letter from another third-party marketing company showing that it had purchased a list of prospective-client leads from the central time zone in November 2010, for which the specific criteria used to create the list of leads included businesses that were generating at least \$250,000.00 in annual revenues with more than one employee; and individuals with at least \$50,000.00 of liquid assets or mortgages/home values in excess of \$400,000.00. The marketing firms from which A&F Financial purchased its leads were supposed to “scrub” all the telephone numbers for individuals against the Do Not Call Registry and remove all numbers that were registered. After receiving lists of leads, A&F Financial did not independently verify whether the telephone numbers were registered on the Registry.

10. The Department is a member agency of the FTC’s Consumer Sentinel Network (“Sentinel”), a secure online database available to law enforcement agencies that provides access to consumer complaints regarding a variety of issues, including violations of Do-Not-Call-Registry restrictions. The Staff used Sentinel to search the Registry for all of the Arkansas telephone numbers on the A&F Financial lead cards. Of the approximately 936 Arkansas telephone numbers provided by A&F Financial, a large percentage of the numbers were on the Registry during the time set forth herein. However, A&F Financial could not confirm whether its agents had already placed calls to the telephone numbers on the lead cards before it provided copies of the lead cards to the Department.

11. In order to evaluate whether calls actually placed by A&F Financial included telephone numbers on the Do Not Call Registry, the Staff requested that A&F Financial provide

a list of all outgoing calls to Arkansas numbers from on or about January 1, 2011, through October 1, 2011. A&F Financial provided a list of approximately 3,414 outgoing calls to approximately 752 distinct Arkansas telephone numbers during the time period requested. The Staff used Sentinel to search for these telephone numbers, which showed that A&F Financial had placed calls to Arkansas residents whose numbers were on the Registry. Furthermore, a comparison of the telephone numbers on the previously-provided lead cards with the list of outgoing calls showed that several numbers on the lead cards had been called by A&F Financial before it provided the lead cards to the Department. Some of those numbers were on the Registry when called, as well.

12. The Financial Industry Regulatory Authority (“FINRA”), formerly known as the National Association of Securities Dealers (“NASD”), is the federal self-regulatory organization for securities firms in the United States. NASD Conduct Rule 2212 (Telemarketing), then in effect and since superseded by FINRA Conduct Rule 3230, outlines certain requirements for and standards applicable to telemarketing to the public by broker-dealers and their agents. Specifically, NASD Conduct Rule 2212 prohibits broker-dealers and their agents from contacting individuals whose telephone numbers are registered on the Do Not Call Registry. NASD Conduct Rule 2212 also outlines certain exceptions to Registry restrictions, including the existence of an established business relationship with the prospective client, the receipt of written permission from the prospective client to receive calls, and the existence of a personal relationship with the prospective client. In addition to the exceptions outlined in NASD Conduct Rule 2212, FTC guidance states that the Registry is only for personal telephone numbers, and that business-to-business calls are not covered.

13. With regard to telemarketing and telephone solicitation, A&F Financial's written supervisory procedures ("WSP's") state, in pertinent part, the following:

[']Telephone solicitation['] is defined as a telephone call initiated for the purposes of encouraging the purchase of or investment in property, goods, or services

The caller must provide the called party, at the beginning or in the introductory portion of the call, the name of the caller; the number of the person or entity on whose behalf the call is being made; a telephone number or address at which the caller may be contacted; and disclosure that the purpose of the call is to solicit the purchase of securities or related services

Telephone solicitations may not be made to phone numbers that are included in federal, state, or [A&F Financial's] internal [do] not call list

It is permissible to contact someone with whom the firm has an [']established business relationship;['] the person called has given express written permission to call outside the applicable time; or if the person called is a broker or dealer

[A&F Financial] and its employees must avoid solicitation calls to any number on the [Do Not Call Registry] unless the person has an 'established business relationship' [with A&F Financial]

Calls to the following [meet the criteria of established business relationships and] are not subject to do-not-call restrictions:

[A] person having made a financial transaction or having a security position, a money balance, or account activity with the firm (or its clearing firm if a clearing firm relationship exists) within 18 months immediately preceding a call; or

[T]he firm is the "broker/dealer of record" (identified on the customer's account application for accounts held directly at a mutual fund or variable insurance product issuer) for the account of the person within the previous 18 months immediately preceding the date of the call; or

[T]he person has contacted the firm to inquire about a product or service offered by the firm within the previous 3 months immediately preceding the call

14. A&F Financial provided the Staff with documentation showing that certain calls to Arkansas residents' telephone numbers on the Do Not Call Registry had met the established-business-relationship exception or were business-to-business calls not covered by Registry restrictions during the time period evaluated. While not all of the violative calls discovered by the Staff met exceptions to Registry restrictions, A&F Financial believed that the violative calls by its agents were unintentional.

15. In violation of NASD Conduct Rule 2212, A&F Financial, through its agent Dean, placed an unsolicited call to ARI, an individual Arkansas resident whose home telephone number was on the Do Not Call Registry. Furthermore, A&F Financial, through one or more of its agents, placed violative calls to additional Arkansas residents whose telephone numbers were on the Registry from on or about January 1, 2011, through October 1, 2011.

16. A&F Financial has assured the Staff that it has taken steps to improve its compliance with Do-Not-Call-Registry restrictions and relevant FINRA rules, and to end further violative telemarketing calls to prospective clients in Arkansas. In early 2012, A&F Financial implemented a new telephone system that screens any numbers dialed against the Registry and automatically blocks calls to registered numbers. Additionally, A&F Financial is able to add telephone numbers to the screening system for individuals who are not on the Registry but who ask to be placed on A&F Financial's internal do-not-call list.

Undisclosed Usage of Fees

17. For every completed transaction effected for Arkansas customers from on or about March 2008 through November 2011, A&F Financial charged a standard, non-discretionary "postage and handling" fee of \$65.00, which brought in a total of \$17,875.00. While A&F Financial did utilize \$3,347.40 of the postage and handling fees acquired during the

time period set forth herein to pay certain transaction-related business costs, A&F Financial retained \$14,527.60, which effectively served as an undisclosed, transaction-based commission to A&F Financial. The fact that A&F Financial intended to retain a portion of the postage and handling fees as a transaction-based commission was not disclosed to A&F Financial's customers.

18. On September 6, 2011, FINRA accepted a Letter of Acceptance, Waiver, and Consent submitted by A&F Financial in FINRA Case No. 2009016292001 regarding violations of certain FINRA rules, including, but not limited to, A&F Financial's charging of the unreasonable handling fees and improper and inaccurate disclosure of such fees to its customers, in violation of NASD Conduct Rule 2430 (Charges for Services Performed) and FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade). Without admitting or denying FINRA's findings, A&F Financial consented to the sanctions of a censure and a fine of \$125,000.00. Furthermore, A&F Financial was required to certify to FINRA within ninety days that it had implemented certain corrective action related to its charging of the undisclosed fees, including, but not limited to, identifying all the fees received and used as a commission; notifying its customers of the undisclosed fees on any account confirmations; and updating its written supervisory procedures and providing training to its agents related to reasonable fees and their appropriate disclosure to customers.

19. A&F Financial has assured the Staff that it no longer charges its customers any postage and handling fees in excess of those directly related to the postage and handling services provided by and for A&F Financial and discloses to its customers any and all additional costs associated with securities transactions as commissions.

APPLICABLE LAW

20. Whenever it appears to the Commissioner, upon sufficient grounds or evidence satisfactory to the Commissioner, that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of the Act, except the provisions of Ark. Code Ann. § 23-42-509, or any rule or order under the Act, he may summarily order the person to cease and desist from the act or practice. Ark. Code Ann. § 23-42-209(a)(1)(A).

21. The Commissioner may by order deny, suspend, make conditional or probationary, or revoke any registration if he finds that the order is in the public interest and the registrant has engaged in dishonest or unethical practices in the securities business or has failed reasonably to supervise the agents or employees of the broker-dealer. Ark. Code Ann. § 23-42-308(a)(1), (a)(2)(G) and (J).

22. Each broker-dealer and agent shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. Charging undisclosed, unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of monies due for principal, dividends or interest, exchange or transfer of securities, appraisals, safekeeping, or custody of securities and other services related to its securities business, except where the fees are negotiated or have been previously disclosed to the customer, shall be considered grounds for denial, suspension, or revocation of a broker-dealer or agent registration, in addition to such other unethical practices within the meaning of Ark. Code Ann. §§ 23-42-308 and 23-42-507. Rule 308.01(c) of the Rules.

23. A broker-dealer shall establish, maintain, and enforce a system to supervise the activities of its agents and employees that is reasonably designed to achieve compliance with the

Act, the rules and orders of the Commissioner, all other applicable state and federal securities laws, and the rules of self-regulatory organizations. Ark. Code Ann. § 23-42-301(f)(1).

24. Upon notice and opportunity for a hearing, the Commissioner may for each violation of the Act fine any broker-dealer or agent not to exceed \$10,000.00 or an amount equal to the total amount of money received in connection with each separate violation. Ark. Code Ann. § 23-42-308(g)(1).

25. Nothing in Ark. Code Ann. § 23-42-308 shall prohibit or restrict the informal disposition of a proceeding or allegations which might give rise to a proceeding by settlement or consent. Ark. Code Ann. § 23-42-308(h).

26. The Commissioner may apply to the Pulaski County Circuit Court to temporarily or permanently enjoin an act or practice that violates the Act and to enforce compliance with the Act or any rule or order under the Act without issuing an order under Ark. Code Ann. § 23-42-209(a)(1) or (a)(2). Ark. Code Ann. § 23-42-209(a)(3)(B).

CONCLUSIONS OF LAW

27. Dean, an agent of A&F Financial, violated Ark. Code Ann. § 23-42-308(a)(2)(G) when he placed a call to ARI, an individual whose telephone number was registered on the Do Not Call Registry, which did not comply with A&F Financial's WSP's and which was in violation of NASD Conduct Rule 2212, as detailed in paragraphs 4 through 16.

28. A&F Financial violated Ark. Code Ann. §§ 23-42-301(f)(1) and 23-42-308(a)(2)(J) when it failed to enforce its system to supervise the activities of its agents, including, but not limited to, Dean, in order to prevent its agents from violating Do-Not-Call-Registry restrictions and NASD Conduct Rule 2212, as detailed in paragraphs 4 through 16.

29. A&F Financial violated Ark. Code Ann. § 23-42-308(a)(2)(G) and Rule 308.01(c) of the Rules by charging its clients a total of \$14,527.60 in undisclosed fees, which effectively served as an undisclosed, transaction-based commission to A&F Financial, as detailed in paragraphs 17 through 19.

30. Pursuant to Ark. Code Ann. § 23-42-209(a)(1)(A), A&F Financial and Dean should be ordered to cease and desist from further violations of the Act and Rules, including, but not limited to, the violations of the Act and Rules detailed herein.

31. Pursuant to Ark. Code Ann. § 23-42-308(g)(1), A&F Financial and Dean should be fined \$10,000.00 or an amount equal to the total amount of money received in connection with each separate violation of the Act and Rules.

OPINION

32. This Order is in the public interest. The facts set out in paragraphs 4 through 19 support the violations of the Act and Rules set out in paragraphs 27 through 31.

ORDER

By agreement and with consent of the Staff, the Respondents, and the Respondents' authorized representatives, IT IS HEREBY ORDERED:

1. Respondents shall cease and desist from further violations of the Act and Rules;
2. J.D. Nicholas f/k/a A&F Financial shall pay a fine of \$17,500.00 to the Department within thirty days of the entry of this order for its failure to enforce its system to supervise the activities of its agents in order to prevent its agents from placing violative calls to Arkansas residents whose telephone numbers were registered on the Do Not Call Registry; and, within six months,

shall provide a written description to the Department of any and all additional steps it has taken to become compliant with Registry restrictions and relevant FINRA rules, including, but not limited to, copies of any modifications of its WSP's;

3. Dean shall pay a fine of \$10,000.00 to the Department within thirty days of the entry of this order for his unsolicited call to AR1, a Senior Examiner with the Department, whose home telephone number was listed on the Do Not Call Registry;

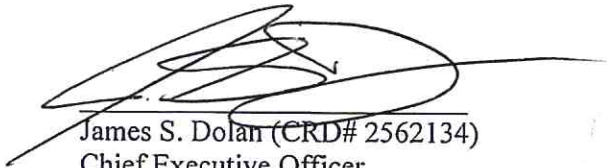
4. J.D. Nicholas f/k/a A&F Financial, within thirty days of the entry of this order, shall reimburse all Arkansas customers who were charged the undisclosed postage and handling fee, totaling \$14,527.60. With each reimbursement payment to Arkansas customers, J.D. Nicholas shall include a letter indicating its commitment to reimburse its Arkansas customers pursuant to this order. J.D. Nicholas shall provide the Department with satisfactory proof that the reimbursement payments have been made to its Arkansas customers; and

5. Any failure by the Respondents to adhere to this order shall be considered a violation of this order authorizing the Commissioner to apply to the Pulaski County Circuit Court to enforce compliance with this order, pursuant to Ark. Code Ann. § 23-42-209(a)(3)(B).

WITNESS MY HAND AND SEAL on this 27th day of February, 2013.


A. Heath Abshure
Arkansas Securities Commissioner

The Respondents hereby agree to the entry of this Consent Order, and consent to all terms, conditions, and orders contained therein, and waive any right to an appeal from this order.



James S. Dolan (CRD# 2562134)
Chief Executive Officer
J.D. Nicholas & Associates, Inc.

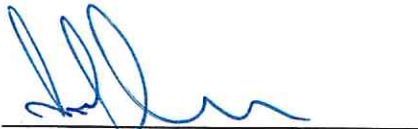
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Date



Gregory T. Dean (CRD# 4922996)
J.D. Nicholas & Associates, Inc.

2/13/13
Date

APPROVED AS TO FORM:



Ian J. Frimet
Counsel for J.D. Nicholas & Associates, Inc.
Burkhart Wexler & Hirschberg, LLP

2/19/13
Date

APPROVED AS TO FORM
AND CONTENT:



Amber E. Crouch
Staff Attorney
Arkansas Securities Department

2/27/13
Date