BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Meyers Associates, L.P. New York, NY, Respondent.	DECISION Complaint No. 2013035533701 Dated: December 22, 2017

Respondent firm failed to adequately supervise its Chicago office and failed to establish and implement adequate AML policies and procedures. Held, findings affirmed and sanctions modified.

For the Complainant: Leo Orenstein, Esq., Jessica Brach, Esq., Samuel Barkin, Esq., Lara Thyagarajan, Esq., and Miki Vucic Tesija, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Robert Rabinowitz, Esq. and Sarah Klein, Esq., Becker & Poliakoff, LLP

Decision

Meyers Associates, L.P. ("Meyers" or the "Firm") appeals a November 11, 2016 Extended Hearing Panel decision pursuant to FINRA Rule 9311. The Extended Hearing Panel found that Meyers violated NASD Rule 3010(a) and FINRA Rule 2010 by failing to adequately supervise its Chicago office and FINRA Rules 3310(a) and 2010 by failing to establish and implement adequate anti-money laundering ("AML") policies and procedures. The Extended Hearing Panel fined Meyers $350,000, ordered it to retain an independent consultant to conduct a comprehensive review of the Firm's policies, systems, and training to matters related to review of emails, communications with the public, low-priced securities, monitoring customer accounts for suspicious activities, reviewing transactions in the accounts of its registered representatives and their family members, and the Firm's AML policies and procedures, and ordered the Firm to pay costs. The Extended Hearing Panel further found that Meyers is subject to statutory disqualification because the Firm failed to supervise an employee who engaged in securities fraud in violation of the Securities Exchange Act of 1934 while employed at the Firm.

Meyers' appeal does not challenge the Extended Hearing Panel's findings that it violated NASD Rule 3010(a)[1] and FINRA Rule 2010 by failing to adequately supervise its Chicago office or FINRA Rules 3310(a) and 2010 by failing to establish and implement adequate AML policies and procedures. Rather, Meyers challenges the Extended Hearing Panel's determination that it is subject to statutory disqualification and the amount of the fine imposed. The Firm also asserts due process challenges related to a denial of Meyers' requests to postpone the hearing below, as well as to FINRA's Department of Enforcement's ("Enforcement") use of the on-the-record testimony ("OTR") of George Johnson, the Firm employee whose underlying misconduct was the primary factor giving rise to this litigation.

I. Factual Background

A. Meyers Associates

Meyers has been a member of FINRA since 1994.[2] The Firm engages in a general securities business and is headquartered in New York City. From approximately December 2011 through June 2012, Donald Wojnowski was the Firm's president, and Wayne Ellison served as the Firm's chief compliance officer ("CCO") and AML compliance officer.

B. Meyers' Chicago Office

In December 2011, Meyers opened an office of supervisory jurisdiction in Chicago. Wojnowski recruited several registered representatives with whom he had previously worked to join the Chicago office. These employees included George Johnson, Christopher Wynne, and Joseph Mahalick.

Wojnowski hired Wynne as the Chicago branch manager and supervisor. Johnson was the highest producing broker at the Firm's Chicago office. The bulk of his business consisted of sales of microcap securities through private offerings and over-the-counter transactions. Wynne started out his career in the securities industry as Johnson's sales assistant, and the two of them worked together for more than a decade before joining Meyers. This relationship continued at the Firm, where many of Wynne's daily activities at the Chicago office involved serving as Johnson's sales assistant and entering trades for Johnson's customers on Meyers' order entry system.

Wynne and Johnson had a commission-sharing agreement where Johnson gave Wynne 15% of all commissions Johnson earned.[3] The Firm was aware of this arrangement and the

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[1] FINRA Rule 3110 superseded NASD Rule 3010 in December 2014.

[2] On November 30, 2016, Meyers changed its name to Windsor Street Capital, LP.

[3] Wynne also received compensation in the form of a salary equal to the greater of $5,000 or five percent of the Chicago office revenues, and commissions on Wynne's own production, which was *de minimis*.

payments ran through the Firm. More than half of Wynne's actual compensation came from his share of Johnson's commissions.

C. Johnson's Campaign to Increase IceWeb, Inc.'s Share Price

One of the microcap companies Johnson recommended to his customers was a financially distressed company called IceWeb, Inc. ("IWEB"). IWEB manufactured and marketed network and cloud-attached storage solutions and delivered online cloud computing application services. Because IWEB consistently sustained operating losses, it relied upon outside financing to fund its operations. Johnson had been involved in a private offering for IWEB prior to joining Meyers. When Johnson first began soliciting purchases of IWEB stock in 2011, and purchasing the stock for himself and his wife, the share price was between 25 and 30 cents. In early 2012, when Johnson and his customers owned millions of shares of IWEB stock and the share price of IWEB stock had fallen to about 12 cents, Johnson began taking steps to increase its share price. Shortly after joining the Firm, in December 2011, Johnson and JS, IWEB's president, discussed conducting a PIPE offering with Meyers serving as the placement agent.[4]

In January 2012, at Johnson's request, Wynne introduced JS to JF, a stock promoter. Early in February 2012, IWEB forwarded to Johnson a proposal from JF, in which JF proposed that IWEB pay him stock and $6,000 per month for six months to "[w]ork to gain favorable analy[sis] and media support" for IWEB and "assist in gaining financial backing in the form of equity or debt if needed." During the next six months, JF published five reports regarding IWEB stock (the "JF Reports"). On or about February 29, 2012, JF published the first of these reports, "IWEB -- Turnaround Stock of the Year – On Balance Volume* is saying, 'Buy me!' Part A." JF wrote four other reports regarding IWEB, all similarly touting IWEB's promise.

Beginning around April or May of 2012, JS, Johnson, and DC, a consultant, discussed obtaining another cash infusion for IWEB through a proposed PIPE offering and the conversion of warrants (the "Warrants") that were convertible at $.17 a share. At the time, IWEB's shares were trading at or below $.15, below the conversion price of the Warrants. In an effort to raise IWEB's stock price, Johnson encouraged JS to hire TS, another stock promoter, to engage in a vigorous stock promotion campaign.

In mid-May 2012, IWEB, through DC's consulting firm, retained TS's company, NBT Communications, to conduct a web-based and email "advertorial campaign" from May 22 through May 25, 2012. The campaign was intended to generate increased trading volume for IWEB's stock and raise the price to at least $.17-$.18, which JS and Johnson believed would increase demand for IWEB's planned PIPE offering and induce holders of IWEB's Warrants to exercise them.

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[4] In a PIPE, or "private investment in public equity" offering, "investors commit to purchase a certain number of restricted shares from a company at a specified price. The company agrees, in turn, to file a resale registration statement so that the investors can resell the shares to the public." *See* SEC Fast Answers, PIPE Offerings, www.sec.gov/answers/pipeofferings.htm. (last visited 11/11/17)

1. Email Exchanges and Stock Promoter Reports

During this time period, Johnson exchanged multiple emails with TS and JS discussing their manipulation of IWEB's shares.

On May 16, 2012, Johnson had an email exchange with TS confirming that May 24, 2012 was the day on which IWEB's stock price needed to peak:

> Johnson: How confident are you on the webber?
>
> TS: Confident on the web campaign? It will be VERY intense 2 million high quality opted in subscribers and compounded with blog support[.] What is the day you need it to peak to convert the warrants at .17? I also have some other support coming in … Thursday is best for you to convert warrants…$2 million right?
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> Johnson: Yep….let's go my friend.

Later that day, Johnson (and Wynne, at Johnson's request) circulated a new JF Report, "Turnaround Stock of the Year Reports 49% Revenue Increase-Inflection point is now defined" to more than 35 Firm customers. Johnson knew by then that IWEB planned to retain the Firm as the placement agent for a private offering, but Johnson and Wynne did not disclose that Johnson expected the Firm to receive compensation from IWEB in the next three months.

At 3:00 p.m. on May 18, 2012, Johnson emailed TS, again asking how confident TS was about successfully increasing the price of the IWEB stock. TS responded that he was "110% confident . . . we added a $100 million trading group to the mix . . . you WILL be where u want to be[.]"

Another email exchange between Johnson and TS on Monday, May 21, 2012 further reflects their goal of significantly increasing the reported price of IWEB stock by Thursday, May 24, 2012. After seeing a tweet about IWEB from TS, Johnson emailed TS, asking whether the results were "better/worse or as expected." TS responded, "We have not begun [as] yet. . . we only put out simple message to our subs and social media guys as a warm up. . . the fireworks start tomorrow and climax on Thursday." TS then indicated that he shared with Johnson the goal of pushing IWEB's share price up to about 20 cents:

> We are getting the biggest bang for our buck with dedicated emails that crescendo with 1.5 million emails of Thursday morning. . . WITH some of the PIPE money you raise. . . we can expand our program. . . this campaign is short lived and its goal is to get stock in the 20 cent range so [JS] can convert enough warrants to fill his war chest.

Later that day, on May 21, 2012, TS again sent Johnson an email reflecting the goal of increasing the price at which IWEB stock would trade on Thursday: "We got 3.5 million shares

today with a water pistol. . . The bazookas come out starting tomorrow. . .You close your PIPE deal for them at .17 on Thursday? Stock will be at .20 or more on Thursday. . . Bet you steak at Gibson's." Johnson responded that if IWEB's stock "closes in the 20s, I will buy you two steaks at Gibson's!!"

On May 22, 2012, TS also issued a report entitled, "By Dumb LUCK I Just Discovered the PERFECT Tech Stock. . . In My Backyard!" (the "TS Report"). TS sent an email to Johnson with a link to the TS Report, suggesting to Johnson that he widely circulate the TS Report. The TS Report described IWEB as "perfectly positioned with a low cost/high efficiency unified data storage solution in the commoditized unstructured data storage market" and set forth an initial target of $2.25 for the stock, which was about 15 times the current price. In the early afternoon, Johnson circulated a link to the TS Report to more than 35 customers.

That same day, Johnson emailed TS and JS about the lack of demand for IWEB's stock, stating that "[b]uy volume has dried up. . . I've been supporting the .16 bid for the last two hours." The email discussion continued, and on May 24, Johnson and TS had the following exchange:

TS: my orders were to get huge volume and .17-.18 cents. . . .

Johnson: .165 now. . . I need it at .17 to .18 for a couple days at least

As hoped, by May 24, 2012, IWEB's trading volume had substantially increased and the stock was trading at $.17. On that day after the market closed, Meyers placed IWEB on its restricted list and Johnson stopped trading in the stock in anticipation of the upcoming PIPE. The PIPE concluded in July 2012 and raised $1,614,715.00, with Johnson and Wynne earning a commission of $104,965.15. Today, IWEB's stock is worthless, with at least one customer losing approximately $200,000.

2. Johnson Aggressively Trades IWEB Shares

Johnson furthered his scheme to increase IWEB's share price by aggressively trading IWEB in his customers' accounts through cross-trades, matched trades, and wash sales. Between May 15 and May 24, 2012, Johnson's customers effected over 90 transactions in IWEB stock at prices that increased from $.12 to $.17 per share.[5] Approximately one-third of the trades were matched orders or cross trades between his customers (a limit order to purchase and a limit order to sell the same or similar number of shares, placed at the same time, for the same price resulting in the shares of one customer being purchased by another customer on the open market). Wynne testified that Johnson told Wynne that his customers' sales were unsolicited, when in fact, it is

[5] Prior to May 15, there were almost no purchases of IWEB stock by Johnson for nearly two-and-one-half months.

clear that Johnson actually solicited several customers to sell their IWEB shares at the same time Johnson was soliciting other customers to purchase IWEB.[6]

Johnson was able to create the appearance of volume in IWEB stock. For example, on May 21, 2012, Johnson solicited one customer, HB, to purchase IWEB shares. Beginning at 9:49 a.m., Johnson purchased 170,000 shares in HB's Meyers accounts. Ten minutes later, HB began buying large blocks of IWEB shares through his E*Trade account. Johnson had a Level II screen, which gave Johnson real-time access to the quotations of individual market makers registered in every Nasdaq-listed security as well as the offering or bidding lots for which they are looking for. Thus, Johnson was able to match sales for other customers with HB's E*Trade purchases. On that same day, Johnson solicited customer JK to sell 721,000 IWEB shares in three installments, which Johnson matched with three sales to another customer DT which he also solicited. Johnson told Wynne to mark the JK sale as unsolicited.[7]

Johnson's manipulations were not limited to his customers' accounts. Johnson's wife owned IWEB stock in her personal account at Meyers. At 9:31 a.m. on May 23, 2012, Johnson placed a sell order for 100,000 of his wife's IWEB shares at $.17, which he crossed with a 160,000 buy share order from another customer, who happened to be director of IWEB. At 9:38 a.m., Johnson sent a message to HB asking him to "CALL ME ASAP!!!!!!!!!!!!" Beginning at 9:48 a.m., Johnson placed several large sell orders in HB's Meyers account, while HB placed buy orders in his E*Trade account, resulting in wash trades.

Between May 15 and May 24, 2012, Johnson's trading in IWEB generated between 30-70% of the daily market volume for IWEB. During this period, Johnson's trading volume in IWEB stock totaled around 7,328,089 shares – an average daily volume of over 916,000 shares. This far exceeded the average daily market volume of 272,862 prior to this period.

D. Johnson's Sale of Snap Interactive, Inc. Shares

In May and June 2012, Johnson purchased 250,000 shares of Snap Interactive, Inc. ("STVI") through his and his wife's Meyers accounts. Between July 12 and August 31, 2012, Johnson sold approximately fifty percent of their STVI holdings to his own customers in 11 different transactions. On each occasion, Johnson first placed a limit order to sell his or his wife's shares, followed by a market order to purchase a somewhat larger amount of the STVI shares for a customer. Johnson was aware that STVI was very thinly traded, and that by placing

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[6] Johnson placed multiple trades for several customers residing in Ohio or North Carolina – states where Johnson was not registered. When Wynne entered Johnson's trades for these customers, Wynne falsified trading records by designating Mahalick, who was registered in those two states, as the broker of record for the trades.

[7] The following day, Wynne received an email from JK complaining about the commissions that Johnson had charged on the sale of JK's IWEB stock. JK wrote: "I don't think I should be charge[d] 2350 for commissions. I was doing a favor for [G]eorge." When Wynne saw this complaint, he did nothing about it.

a limit order to sell from his or his wife's account, immediately followed by a market order to buy for his customer, Johnson was almost assured that his sell order would be filled at the price he wanted. This scheme netted Johnson and his wife profits of approximately $18,000 in just a few months. Johnson also charged his customers commissions on these transactions of close to $4,400.

Johnson's sales of his STVI shares from his personal accounts while at the same time recommending that his customers purchase the same stock is a clear conflict of interest. Moreover, Johnson never informed his customers that he was selling his or his wife's STVI shares at the same time he was soliciting those customers to purchase STVI, which was material information.

II. Procedural Background

Enforcement filed the complaint on April 8, 2015. In addition to Meyers, the complaint initially named Johnson, Wynne, and Mahalick as respondents. The Complaint contained seven causes of action: (1) market manipulation in willful violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010 against Johnson; (2) misleading or false communications with the public in third-party research reports in violation of NASD Rules 2210(d) and 2711(h), and FINRA Rule 2010 against Johnson and Wynne; (3) omissions of material facts in willful violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010 against Johnson; (4) disclosures of non-public information in violation of FINRA Rule 2010 against Johnson; (5) falsification of firm books and records in violation of FINRA Rules 4511 and 2010 against Johnson, Wynne, and Mahalick; (6) failure to supervise Johnson in violation of NASD Rule 3010 and FINRA Rule 2010 against Meyers and Wynne; and (7) failure to adopt and implement an adequate AML program in violation of FINRA Rules 3310(a) and 2010 against Meyers. Among other relief requested, the complaint requested that the Hearing Panel make the specific finding that Meyers is statutorily disqualified.

On May 14, 2015, Meyers filed a Motion to Sever Claims, arguing that the evidence Enforcement would need to present a case against the individual respondents involved different facts and circumstances than the allegations against the Firm, that severance of the claims would conserve time and resources, and that Meyers would be unfairly prejudiced if severance is not granted (arguing that the severity of the allegations against the individual respondents would unfairly taint the Hearing Panel's perception of Meyers). Enforcement opposed Meyers' motion, and on June 4, 2015, the Chief Hearing Officer denied the Motion to Sever Claims.

In February 2016, prior to the start of the hearing, Johnson, Wynne, and Mahalick settled with Enforcement, each entering into a Letter of Acceptance, Waiver, and Consent ("AWC"). Each AWC explicitly notes that the respondents consent, "without admitting or denying the allegations in the Complaint . . . to the entry of findings and violations consistent with the allegations of the Complaint[]." The AWCs go on to state that the findings "are not binding on any other person or entity named as a respondent in this or any other proceeding."

During a pre-hearing conference on February 17, 2016, Meyers orally moved for an adjournment of the hearing, seeking a postponement of three weeks. Meyers argued that since it

had expected the individual respondents to take the lead in defending against the allegations in the first five causes of action, Meyers had not prepared to contest those allegations.[8] The Hearing Officer denied Meyers' motion, stating that it was foreseeable that the other respondents would settle, and that Meyers did not show good cause.

A five-day hearing was held beginning on February 24, 2016. Johnson, after entering into his AWC in which he accepted a bar, refused to testify. In lieu of his live testimony, and over Meyers' objections, Enforcement offered into evidence excerpts from Johnson's May 5-6, 2014 OTR, which were read into the record during Enforcement's case in chief.

The Extended Hearing Panel issued its decision on November 11, 2016, finding that Meyers engaged in the alleged misconduct. In addition, the Extended Hearing Panel determined that Meyers is subject to statutory qualification because it failed to supervise Johnson with a view to preventing violations of the Exchange Act. The Extended Hearing Panel fined Meyers $350,000, ordered it to retain an independent consultant to conduct a comprehensive review of the Firm's policies, systems, and training related to the review of emails, communications with the public, low-priced securities, monitoring customer accounts for suspicious activities, reviewing transactions in the accounts of its registered representatives and their family members, and the Firm's AML policies and procedures, and ordered it to pay costs. This appeal followed.

III. Discussion

A. Meyers Fails to Supervise Johnson's Involvement with IWEB[9]

The Extended Hearing Panel concluded that Meyers' supervision of Johnson's activities in connection with IWEB stock was deficient in three areas: (1) Meyers did not adequately review emails sent to and received by the Chicago office; (2) Meyers did not adequately review Johnson's trading in IWEB stock; and (3) Meyers did not adequately review third-party research reports and other public communications disseminated by Johnson (and Wynne, at Johnson's request), in violation of NASD Rule 3010(a) and FINRA Rule 2010.[10] Meyers did not appeal the Extended Hearing Panel's findings, and because they are well supported by the record, we adopt these findings as our own.

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[8] Enforcement represented that it planned to try to prove the allegations contained in causes one, two, three, and five of the Complaint, in an effort to support its request that the Firm be statutorily disqualified, as well as to support its request for substantial monetary sanctions.

[9] Although the Firm does not appeal the Extended Hearing Panel's liability findings concerning its supervisory and AML violations, we address these deficiencies for a complete and robust analysis of the sanctions imposed.

[10] It is well settled that a violation of another NASD or FINRA rule is a violation of FINRA Rule 2010. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *26 (July 2, 2013), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

NASD Rule 3010(a) requires member firms to establish and maintain a supervisory system, to supervise the activities of its registered representatives, principals, and associated persons, "that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD [and FINRA] rules." "It is well established that the presence of procedures alone is not enough. Without sufficient implementation, guidelines and strictures do not ensure compliance." *KCD Fin. Inc*., Exchange Act Release No. 80340, 2017 SEC LEXIS 986, at *34 (Mar. 29, 2017). Furthermore, "the duty to supervise includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation." *Michael T. Studer*, 57 S.E.C. 1011, 1023 (2004).

Meyers failed to take basic steps to ensure that Wynne was adequately supervising the Chicago office. Meyers' written supervisory procedures ("WSPs") dictated that as the supervisor of the Chicago office, Wynne was responsible for, among other things, reviewing email correspondence, reviewing trades for potential manipulative activity, reviewing communications with the public to ensure compliance with FINRA rules, and supervising brokers' personal accounts at Meyers. Wynne did not receive any training related to his responsibilities as supervisor, nor was he familiar with the fundamental aspects of compliance, including disclosure obligations concerning conflicts of interests or FINRA's rules concerning communications with the public. The Firm did not provide Wynne with any exception reports for trading, and Wynne reviewed the daily blotter each day but did not specifically review trading for wash or matched trades.

As Johnson's trading assistant, Wynne entered all of the trades for Johnson on Meyers' order entry system. Although Wynne reviewed Johnson's trades manually, Wynne testified that he did not necessarily review Johnson's trading to ensure that Johnson was not engaging in any sort of manipulative trading.

Wynne was also responsible for reviewing the communications of the representatives in the Chicago office to the public, but admitted that he never reviewed the TS or JF reports that were distributed to customers to ensure that the reports complied with FINRA's rules concerning communications with the public and research. In fact, Wynne acknowledged that he understood that the reports were not intended to be independent since they were created by stock promoters to drum up in interest in IWEB. Wynne should have known that the reports omitted material information concerning IWEB's true financial condition, the risks associated with its business, and contained exaggerated or baseless statements and predictions concerning IWEB's future prospects and success.

In addition, as the designated individual responsible for reviewing email correspondence for all the registered representatives in the Chicago office, Wynne was required under the WSPs to review emails within 30 days of transmission. The Firm used its email archival system, Global Relay, to retain and review emails. Global Relay generated a random sample of emails for review, and it also flagged emails containing certain keywords specified by the Firm. On several occasions between December 2011 and March 2012, Wynne emailed Wojnowski and another Firm employee requesting access, through Global Relay, to the Chicago emails. The Firm, however, never submitted a request to Global Relay to provide Wynne with access to emails. Wynne never gained access to the Chicago emails.

There were numerous red flags that the Firm ignored that would have alerted it to Johnson's illicit trading activities. For example, Wynne was aware that Johnson was placing simultaneous, identical limit orders to buy and sell large blocks of IWEB shares in the open market. Despite this clearly suspicious trading activity, Wynne never questioned any of the trades. Wynne knew that Johnson was selling IWEB from his wife's account while simultaneously soliciting a director of IWEB to purchase her shares. Wynne also ignored red flags concerning Johnson's instructions to mark as unsolicited transactions in IWEB that were in fact solicited. Moreover, Wynne's repeated falsification of trading reports to conceal Johnson's state registration violations is further evidence that Wynne, if not complicit in Johnson's fraudulent schemes, intentionally turned a blind eye to them.

Wojnowksi and Ellison also disregarded red flags concerning Johnson's manipulation.[11] They received daily commission reports showing all trades placed by each broker at the Firm. On more than one occasion, Wojnowski reached out to Wynne because he saw that Johnson was actively trading low-priced securities in his wife's account that he was also recommending to customers. Wojnowski told Wynne that Johnson should stop engaging in that activity. Wojnowski also discussed the issue with Ellison, but the line of inquiry died there – there was no additional follow-up, no additional supervision of Johnson's activity, and no attempts to discern whether or not the activity was suspicious or illegal.

The Firm provided Wynne with limited tools to detect, and the Firm took almost no steps to detect, whether registered representatives in the Chicago office were manipulating any stocks. We conclude that the record supports the Extended Hearing Panel's finding that Meyers' failures to supervise Johnson's IWEB transactions violated NASD Rule 3010(a) and FINRA Rule 2010.

B. Meyers' Failure to Supervise Johnson's Snap Interactive Transactions

There is no dispute that Wynne was aware that Johnson was selling his and his wife's STVI shares at the same time he was soliciting his customers to purchase the stock, since Wynne was the individual entering the trades. Nevertheless, Wynne never inquired whether Johnson had informed his customers at the time he solicited the sales that he was also selling his own personal shares of STVI. In addition, Meyers' daily commission reports contained numerous red flags, which Meyers ignored, showing instances where Johnson was trading in his own account in a manner contrary to the recommendations he was making to customers. Therefore, Meyers' failure to supervise Johnson's STVI trades violated NASD Rule 3010(a) and FINRA Rule 2010.

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[11] The record is unclear as to whom Meyers assigned responsibility for ensuring that Wynne carried out his supervisory duties at the Chicago office. Both Wojnowski and Ellison denied responsibility for supervising Wynne's activities, and in fact, no one at Meyers actually supervised Wynne's activities to determine if he was performing his duties as Chicago branch manager.

C. Meyers Is Statutorily Disqualified

Article III, Section 4 of FINRA's By-Laws, and Exchange Act Sections 3(a)(39)(F), and 15(b)(4)(E) provide that a member firm is subject to statutory disqualification by operation of law if it fails to reasonably supervise an individual subject to its supervision with a view to preventing violations of the Exchange Act, and that individual violates the Exchange Act.

The Extended Hearing Panel found that Meyers is subject to statutory disqualification because of its failures to supervise Johnson with a view to preventing Johnson's violations of the Exchange Act. The Extended Hearing Panel based its findings on the record as well as the findings set forth in Johnson's settlement agreement. We agree with Meyers that the Extended Hearing Panel erred in relying on the settlement agreement, but nevertheless find that the record, excluding any reliance on the settlement agreement, supports a finding that the Firm is statutorily disqualified. The Firm failed to supervise Johnson, who violated the Exchange Act through his market manipulation of IWEB and his material omissions concerning the STVI transactions.

1. The Record Supports a Finding that Johnson Willfully Engaged in Market Manipulation of IWEB in Violation of the Exchange Act

a) Relevant Law

Section 10(b) of the Exchange Act makes it "unlawful for any person . . . [t]o employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may presecribe[.]" Rule 10b-5 makes it unlawful, in connection with the purchase or sale of a security, "(a) to employ any device, scheme, or artifice to defraud, . . . or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5(a), (c). Market manipulation is a well-established violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5.

The Commission has characterized market manipulation as "the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand." *Kirlin Sec., Inc*., Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *42 (Dec. 10, 2009) (citing *Swartwood, Hesse, Inc*., 50 S.E.C. 1301, 1307 (1992)). Manipulation refers generally to practices such as wash sales, cross-trades, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity. *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977).

b) Standards of Proof

To establish a violation under Exchange Act Rule 10(b) and Exchange Act Rule 10b-5, a preponderance of the evidence must demonstrate that an individual acted with scienter, which has been defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. *Pagel, Inc*., 48 S.E.C. 223, 228

(1985), *aff'd*, 803 F.2d 942 (8th Cir. 1986). Proof of scienter in manipulation cases may be inferred from circumstantial evidence, "including evidence of price movement, trading activity, and other factors." *See Carole L. Haynes*, Initial Decision Release No. 78, 1995 SEC LEXIS 3134, at *35 (Nov. 24, 1995) (*citing Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983)). Manipulative intent establishes scienter for purposes of proving a violation of Rule 10b-5. *Swartwood, Hesse, Inc*., 50 S.E.C. at 1307 n.16. A finding that an individual acted with scienter in violating the antifraud provisions demonstrates that his or her misconduct was willful. *See David F. Bandimere*, Exchange Act Release No. 76308, 2015 SEC LEXIS 4472, at *109 (Oct. 29, 2015); *see also Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (willfulness does not require intent to violate the law, but merely intent to engage in the act that constitutes a violation of the law).

c) The Record Supports the Finding that Johnson Acted with Scienter in the IWEB Transactions

Meyers argues that there is insufficient evidence in the record to find that Johnson acted with scienter, particularly in light of the Extended Hearing Panel's improper reliance on the Johnson settlement agreement. Meyers maintains that without Johnson's live testimony at the hearing, it is "virtually impossible to know what his intent was regarding his transactions in IWEB." We disagree and conclude that the record contains sufficient evidence to support a finding that Johnson acted with scienter.

Even without relying on Johnson's settlement agreement, which we do not, the record evidence supports the Extended Hearing Panel's determination that from May 15 through May 24, 2012, Johnson engaged in a scheme to manipulate the volume and price of IWEB's stock. Johnson actively solicited his customers to buy and sell millions of shares of IWEB at steadily increasing prices in order to make the stock look attractive to the warrant holders and the prospective purchasers of IWEB's future PIPE offering. Johnson repeatedly managed matching trading of IWEB in his customers' accounts to create the appearance of genuine market activity. Johnson would benefit significantly if IWEB's anticipated PIPE was successful.

In addition, the emails between Johnson, TS, and JS, in which they discuss the desire to drastically increase volume and to raise the share price, provide clear evidence of Johnson's intent to manipulate the market. Furthermore, Johnson circulated misleading and inaccurate reports from two stock promoters in an effort to further bolster the profile of IWEB.

Therefore, we agree with the Extended Hearing Panel that Johnson violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 with respect to the IWEB transactions.

2. The Record Supports the Finding that Johnson Violated the Exchange Act by Omitting Material Information Related to His STVI Transactions

We further find that the record supports that Johnson made material omissions with respect to Johnson's STVI transactions, in violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 make it unlawful for any person acting with scienter in connection with the purchase or sale of a

security, directly or indirectly to make an untrue statement of material fact or omit a material fact necessary to make a statement not misleading. *See* 17 C.F.R. § 240.10b-5(b); *SEC v. First Jersey Sec., Inc*., 101 F.3d 1450, 1467 (2d Cir. 1996). An omitted fact is material if "there is a substantial likelihood that a reasonable investor would have considered the fact important in making an investment decision." *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *20 (Mar. 31, 2016), *aff'd sub nom. Harris v. SEC*, No. 16-1739, 2017 U.S. App. Lexis 21318 (2d Cir. Oct. 25, 2017).

In the case of a material omission, "scienter is satisfied where, [as here], the [respondent] had actual knowledge of the material information." *Dep't of Market Regulation v. Burch*, Complaint No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *33-34 (FINRA NAC July 28, 2011) (internal citations omitted). Johnson solicited customers to purchase STVI on 11 different occasions without disclosing that he was simultaneously selling that same stock from his and his wife's accounts. We find that Johnson's customers would have considered his self-serving trading material. Johnson obviously knew that he was selling from his and his wife's accounts at the same time he was soliciting his customers to purchase STVI, and therefore acted with scienter. Moreover, Johnson admitted at his OTR that he did not disclose his trading activity to his customers.[12]

Accordingly, we find that by recommending that his customers purchase STVI without disclosing his and his wife's concurrent sales, Johnson omitted material information. We affirm the Extended Hearing Panel's findings that Johnson willfully violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5.

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In light of our finding that Johnson violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, coupled with the Extended Hearing Panel's findings that Johnson was subject to Meyers' supervision, and that Meyers failed reasonably to supervise Johnson with a view to preventing violations of the Exchange Act and Exchange Act rules, we affirm the Extended Hearing Panel's determination that Meyers is subject to statutory disqualification.

D. Meyers' Inadequate AML Procedures

Meyers does not appeal the Extended Hearing Panel's findings that it failed to establish and implement adequate controls and written procedures in violation of FINRA Rules 3310(a) and 2010.

FINRA Rule 3310 requires each member "to develop and implement a written AML program reasonably designed to achieve and monitor compliance with the requirements of the Bank Secrecy Act and its implementing regulations. FINRA Rule 3310 requires that AML programs, at a minimum, "establish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of" suspicious transactions; "[e]stablish

[12] Johnson's testimony that he did not disclose his personal sales of STVI was corroborated by several of his customers, who were interviewed by FINRA during its investigation.

and implement policies, procedures, and internal controls reasonably designed to achieve compliance with the Bank Secrecy Act" and its implementing regulations; provide independent testing by qualified persons of the AML program; designate and identify to FINRA an individual responsible for implementing and monitoring the AML program; and "[p]rovide ongoing training for appropriate personnel." FINRA Rule 3310(a)–(e).

The Extended Hearing Panel concluded that the Firm violated FINRA rules because its AML manual did not describe in sufficient detail the policies and procedures that Meyers should follow to monitor accounts for suspicious activity. These deficiencies are compounded by the fact that the Firm did not provide any AML exception reports to Wynne, and no one at the Firm used AML exception reports for at least the first eight months of 2012. In addition, the Firm did not adequately prepare Wynne for his AML responsibilities.[13] We find that the record supports the Extended Hearing Panel findings that Meyers failed to establish and implement adequate controls and written procedures in violation of FINRA Rules 3310(a) and 2010 and adopt those findings.

E. Meyers' Procedural Arguments

Meyers makes several arguments on appeal that relate to perceived due process violations. Meyers argues that it was unfair for the Extended Hearing Panel to permit Enforcement to introduce and rely upon portions of Johnson's OTR because Meyers was denied the opportunity to cross-examine him. Meyers also argues that it was prejudiced when the Hearing Officer denied its motion for an adjournment. We find that Meyers' fair procedure was not compromised and address each argument in turn.

1. The Extended Hearing Panel Properly Admitted Johnson's OTR

Meyers argues that the Extended Hearing Panel erred in permitting Enforcement to introduce and rely upon excerpts from Johnson's OTR and that it was prejudiced by its inability to cross-examine Johnson. We conclude that the Extended Hearing Panel did not err in admitting the OTR.

As even Meyers has conceded, hearsay evidence, such as testimony at an OTR, is generally admissible in FINRA adjudications. "It is well-established that hearsay evidence is admissible in administrative proceedings and can provide the basis for findings of violation, regardless of whether the declarants testify." *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *46 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (2d Cir. 2016). "[H]earsay statements may be admitted in evidence and, in an appropriate case, may form the basis for findings of fact." *Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992). "[H]earsay evidence

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[13] Ellison, as Meyers' AML control person, was responsible for the Firm's AML program, but he did not monitor any account activity from the Chicago office for possible manipulation. Ellison claimed to have delegated that responsibility to Wynne. Wynne, however, testified that he was unaware that he was the AML designee for the Chicago office, had never seen the Firm's AML procedures, had not received any training for his AML duties, and had no access to AML specific tools – such as the exception reports.

is admissible in administrative proceedings, if it is deemed relevant and material." *SEC v. Otto*, 253 F.3d 960, 966 (7th Cir. 2001); *Dillon Sec., Inc.*, 51 S.E.C. 142, 150 (1992).

Hearsay should be evaluated for its probative value, reliability, and the fairness of its use. *See Tom*, 50 S.E.C. at 1145 n.5. Meyers argued below, as it does on appeal, that use of the OTR is fundamentally unfair since the Firm was precluded from cross-examining Johnson. The Hearing Panel weighed these factors along with Meyers' objections and determined that Johnson's OTR was admissible.

Our review of the admission or exclusion of evidence is only for an abuse of discretion. *See Dep't of Enforcement v. North*, Complaint No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at *26 (FINRA NAC Aug. 3, 2017) (citing *Robert J. Prager*, 58 S.E.C. 634, 664 (2005), *appeal docketed*, SEC Admin. Proceeding No 3-18150 (Sept. 7, 2017). "Because this discretion is broad, the party arguing abuse of discretion assumes a heavy burden that can be overcome only upon showing that the Hearing Officer's reasons to admit or exclude the evidence were so insubstantial as to render . . . [the admission or exclusion] an abuse of discretion." *Dep't of Enforcement v. North*, Complaint No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *34 (FINRA NAC Mar. 15, 2017) (internal quotation marks omitted), *appeal docketed*, Admin. Proceeding No. 3-17909 (Apr. 6, 2017).

Here, the Extended Hearing Panel properly admitted Johnson's OTR because Johnson's testimony was probative of essential elements of the case, including Johnson's failure to disclose his personal sales of STVI.[14] It was also reliable, because his admissions concerning his failure to disclose were against his own interest, and was corroborated by Johnson's customers. *See, e.g., Dep't of Enforcement v. Lee*, Complaint No. C06040027, 2007 NASD Discip. LEXIS 7, at *44 (NASD NAC Feb 12, 2007), *aff'd*, Exchange Act Release No. 57655, 2008 SEC LEXIS 819 (Apr. 11, 2008) (admitting OTR testimony and consistent emails); *John Montelbano*, Exchange Act Release No. 47227, 2003 SEC LEXIS 153, at *22 (Jan. 22, 2003) (crediting OTR testimony admitted during NASD proceeding). Meyers does not articulate any specific basis, or give any specific examples, of how the inclusion of excerpts was an abuse of discretion. We therefore find that the Extended Hearing Panel did not abuse its discretion in admitting Johnson's OTR.

2. The Hearing Officer Did Not Abuse Its Discretion in Denying Meyers' Motion for a Continuance

Meyers also contends that the Hearing Officer's decision to deny its request for a continuance of the hearing was fundamentally unfair. This argument lacks merit.

The hearing officer has broad discretion in determining whether a request for a continuance should be granted, based upon the particular facts and circumstances presented. *Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 560 (1995), *aff'd*, 102 F.3d 579 (D.C. Cir. 1996).

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[14] We note that we, like the Extended Hearing Panel, do not need to rely on Johnson's OTR to conclude that he acted with scienter in manipulating the market for IWEB. There is sufficient evidence in the record exclusive of the OTR, including Johnson's trading activity and emails, to conclude that he acted with scienter.

We review the denial of a request for a continuance for abuse of discretion – whether the denial was the sort of "unreasoning and arbitrary insistence upon expeditiousness that invalidates a refusal to postpone a hearing." *Dep't of Enforcement v. Ricupero*, Complaint No. 2006004995301, 2009 FINRA Discip. LEXIS 36, at *23 (FINRA NAC Oct. 1, 2009) (*citing Dist. Bus. Conduct Comm. v. Bozzi*, Complaint No. C10970003, 1999 NASD Discip. LEXIS 5, at *11 (NASD NAC Jan. 13, 1999), *aff'd*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988 (Sept. 10, 2010), *aff'd*, 436 F. App'x 31 (2d Cir. 2011). We find no such arbitrary insistence here.

In his denial of Meyers' motion, the Hearing Officer stated that it was foreseeable that the other respondents would settle, and that Meyers did not show good cause for delaying the start of the proceedings. Indeed, it is proper to deny a continuance where the respondent either has not shown how it will be prejudiced or what additional defenses it would assert. *See Dep't of Enforcement v. Busacca*, Complaint No. E072005017201, 2009 FINRA Discip. LEXIS 38, at *35-36 (FINRA NAC Dec. 16, 2009), *aff'd*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787 (Nov. 12, 2010). Meyers did not show how it would be prejudiced or what additional defenses it would assert. We therefore find that the Hearing Officer did not abuse his discretion in denying the Firm's request.

IV. Sanctions

The Extended Hearing Panel found Meyers' misconduct was egregious, fined it $350,000, and ordered that it retain an independent consultant. The Extended Hearing Panel imposed a unitary sanction for the Firm's failure to adequately supervise its Chicago office and failure to establish and implement adequate AML policies and procedures, reasoning that "[b]oth [violations] reflect the Firm's failure to appreciate and adhere to its fundamental obligation to clients and the investing public by establishing and following procedures reasonably designed to detect misconduct by retail brokers." While we agree with the Extended Hearing Panel that a significant unitary fine is necessary, we conclude that a fine higher than that imposed by the Extended Hearing Panel is needed to adequately address Meyers' troubling and egregious violations. We therefore impose a $500,000 fine.

On appeal, Meyers argues that the amount of the fine should be lower than $350,000, which was the total fine recommended by Enforcement at the hearing.[15] Meyers seems to imply that, because the Extended Hearing Panel batched or aggregated the sanctions, there should be some sort of reduction of the overall monetary sanction imposed. This argument is without merit. There is nothing in the Sanction Guidelines or case law that supports the Firm's argument.

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[15] Enforcement recommended a fine of $250,000 for Meyers' supervisory violations and $100,000 for Meyers' AML violations. Meyers does not argue that there are any mitigating factors present that would warrant a lower sanction.

We find that the Guideline for Systemic Supervisory Failures appropriately captures Meyers' myriad supervisory failures.[16] The Guideline directs that:

> Adjudicators should use this Guideline when a supervisory failure is significant and is widespread or occurs over an extended period of time. While systemic supervisory failures typically involve failures to implement or use supervisory procedures that exist, systemic supervisory failures also may involve supervisory systems that have both ineffectively designed procedures and procedures that are not implemented.[17]

Meyers' egregious failures to supervise allowed Johnson to engage in securities fraud that enriched Johnson, harmed customers, and compromised market integrity. We believe the Guideline reflects the severity of Meyers' supervisory shortcomings, as well as its inadequate and flawed AML policies and procedures.

The Guideline for systemic supervisory failure recommends fining a firm $10,000 to $292,000. Where aggravating factors predominate, as they do here, the adjudicator is directed to consider a higher fine.[18] We are also directed to consider imposing undertakings, ordering the firm to revise its supervisory systems and procedures, or ordering the firm to engage an independent consultant to recommend changes to the firm's supervisory systems and procedures.[19]

The Principal Considerations specific to the systemic supervisory failure Guideline aggravate Meyers' misconduct. Meyers' supervisory deficiencies allowed Johnson's violative conduct to occur or to escape detection.[20] The Firm also failed reasonably to respond to numerous "red flag" warnings.[21] Wynne sent emails to Wojnowski regarding his lack of access to the Chicago emails, but the Firm did not provide Global Relay access to Wynne. Wynne was aware of Johnson's trading activity which strongly indicated that Johnson was manipulating IWEB stock, but took no steps to investigate. Wynne also read the JF Reports and the TS Report

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16 *See FINRA Sanction Guidelines*, 4 (2017) http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*]. We look to the most recent Guidelines in effect during the pendency of this appeal. The 2017 Guidelines "are effective as of the date of publication, and apply to all disciplinary matters, including pending matters." *Id*. at 8.

17 *Id.* at 105.

18 *Id*.

19 *Id*. at 106.

20 *Id.* at 105 (Principal Considerations in Determining Sanctions, No. 1).

21 *Id.* (Principal Considerations in Determining Sanctions, No. 2).

but did not consider whether the reports complied with applicable regulatory requirements. In addition, Wynne knew that Johnson was soliciting purchases of STVI at the same time that he was selling it (both in his account and his wife's account) but took no steps to investigate whether Johnson was disclosing his conflict of interest.

Meyers did not allocate its resources to prevent or detect the Johnson's violations, which resulted in harm to both customers and markets.[22] The Firm provided Wynne with no AML support or training and did not provide Wynne with the supervisory tools to review the Chicago emails, which would have revealed Johnson's manipulative scheme. In fact, no one at Meyers was supervising Wynne. Furthermore, the number and type of customers, investors or market participants affected by the deficiencies, the number and dollar value of the transactions not adequately supervised as a result of the deficiencies, and the nature, extent, size, character, and complexity of the activities or functions not adequately supervised is also aggravating.[23] At least one of Johnson's customers lost $200,000, and others were induced to exercise the Warrants or participate in the PIPE offering based on inflated share prices and misleading stock reports as a result of the deficiencies. Customers also paid commissions on Johnson's self-serving trading of both IWEB and STVI.

Meyers' supervisory and AML deficiencies affected market integrity and market transparency.[24] The alarming lack of quality controls and procedures available to Wynne, coupled with the fact that Wynne's self-interest and lack of training prevented him from even implementing the sub-par supervisory tools available to him, are additionally aggravating.[25]

Finally, in addition to the violation-specific Principal Considerations discussed above, the General Principles Applicable to All Sanction Determinations further support the imposition of a significant sanction. Meyers has a lengthy and troubling disciplinary history, and we are directed to consider its relevant disciplinary history and impose progressively escalating sanctions on recidivists.[26] Meyers has been the subject of 17 final disciplinary actions since 2000, nine of which involved supervisory failures. This relevant disciplinary history is disconcerting, and together with the other considerations warrants the $500,000 fine. Such a fine, as well as the hiring of an independent consultant, will serve the remedial purpose of compelling Meyers to take its supervisory and compliance responsibilities seriously.

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22 *Id.* (Principal Considerations in Determining Sanctions, No. 3).

23 *Id.* (Principal Considerations in Determining Sanctions, Nos. 4, 5, 6).

24 *Id.* (Principal Considerations in Determining Sanctions, No. 7).

25 *Id.* (Principal Considerations in Determining Sanctions, No. 8).

26 *Id.* at 2 (General Principles Applicable to All Sanction Determinations, No. 2).

V. Conclusion

Meyers violated NASD Rule 3010(a) and FINRA Rule 2010 by failing to adequately supervise its Chicago office and FINRA Rules 3310(a) and 2010 by failing to establish and implement adequate AML policies and procedures. We affirm the Extended Hearing Panel's findings, including the determination that Meyers is subject to statutory disqualification, and increase the fine imposed to $500,000. We also affirm the Extended Hearing Panel's order that Meyers retain an independent consultant[27] and pay $12,802.72 in hearing costs, and we order the Firm to pay $1,505.38 in appeal costs.[28]

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

[27] Meyers is directed to retain, within 60 days of this decision becoming FINRA's final disciplinary action, an independent consultant, acceptable to FINRA staff, to conduct a comprehensive review as ordered in the Extended Hearing Panel Decision. Meyers is further ordered to comply with all other procedures relating to the independent consultant detailed in the Extended Hearing Panel Decision.

[28] Pursuant to FINRA Rule 8320, the membership of any firm that fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.