BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of Department of Enforcement, Complainant, vs. Richard Steven Levitov Bayonne, NJ, and Ralph Joseph Angeline Katonah, NY, Respondents.	DECISION Complaint No. CAF970011 Dated: June 28, 2000

Firm's Director of Trading participated in market manipulation and excessive mark-ups, and Director of Compliance failed to supervise properly when he neglected to investigate evidence of possible market manipulation and excessive mark-ups. Held, Hearing Panel findings sustained, and sanctions affirmed in part and modified in part.

Respondent Ralph Joseph Angeline ("Angeline") appealed the June 18, 1999 decision of a Hearing Panel pursuant to NASD Procedural Rule 9310. We also called the decision as to Richard Steven Levitov ("Levitov") for review pursuant to NASD Procedural Rule 9312 to determine whether the sanctions imposed on Levitov by the Hearing Panel were appropriate in light of the violations. After a review of the entire record in this matter, we affirm the Hearing Panel's findings that Angeline knowingly or recklessly participated in a fraudulent scheme to manipulate the market for certain warrants and to charge retail customers excessive mark-ups in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Securities and Exchange Commission ("SEC") Rule 10b-5, and NASD Conduct Rules 2110, 2120 and

2440. We also affirm the Hearing Panel's finding that Levitov's failure to investigate evidence of possible market manipulation and excessive mark-ups constituted a failure to supervise properly in violation of Conduct Rules 2110 and 3010.

With respect to Angeline, we affirm the Hearing Panel's imposition of a bar in all capacities and a $600,000 fine ($500,000 for manipulation and $100,000 for excessive mark-ups). We modify the disgorgement order as follows: Angeline is not jointly and severally liable with the other defendants for the disgorgement sum of $3,156,930, but he is required to disgorge $203,000, which represents his salary and bonus for 1995, as a fine to the NASD. With respect to Levitov, we affirm the bar in all principal capacities, the one year suspension in all capacities, the requirement that he requalify by passing the Series 7 examination before re-associating with any member firm, and the $5,000 fine. We modify Levitov's suspension as follows: the suspension will run one year from the date of this decision, rather than from December 31, 1997, the date he left Monroe Parker Securities, Inc. ("Monroe Parker" or "the Firm").

Background

Angeline first entered the securities industry in 1968. He joined Monroe Parker in August 1994 as Director of Trading.[1] Angeline was not an officer of Monroe Parker, and he did not sit on Monroe Parker's Board of Directors. He was responsible for overseeing the Firm's trading operations and for supervising other traders. He was registered as a general securities representative and a general securities principal. Angeline has not been employed in the securities industry since he left Monroe Parker in December 1997.

Levitov began his career in the securities industry in 1973. Levitov joined Monroe Parker in August 1994 as Director of Compliance. Like Angeline, Levitov was neither an officer of Monroe Parker, nor a member of the Firm's Board of Directors. According to Monroe Parker's compliance manual, Levitov was responsible for all of Monroe Parker's compliance issues and for supervising the compliance department. He was registered as a general securities representative, a general securities principal, and an options principal. Levitov has not been in the securities industry since he left Monroe Parker in December 1997.

Alan Lipsky ("Lipsky") and Bryan Herman ("Herman"), who were also charged in this matter, founded Monroe Parker in August 1994.[2] Lipsky and Herman had worked together

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[1] In December 1997, Monroe Parker ceased operating and filed a Uniform Request for Withdrawal From Broker-Dealer Registration.

[2] Monroe Parker and Herman were also charged with violations of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120 and 2440 for market manipulation and for charging excessive mark-ups. The Hearing Panel found that both Herman and Monroe Parker violated Section 10(b), Rule 10b-5, and Conduct Rules 2110,

previously at Stratton Oakmont, Inc. ("Stratton"). Lipsky was responsible for administrative and financial matters and for overseeing Monroe Parker's day-to-day operations. Herman was primarily responsible for supervising Monroe Parker's trading department and managing its trading account. He directly supervised Angeline and Angeline's assistants.

Manipulation of Steve Madden Class A Warrants

Immediately after opening for business in August 1994, Monroe Parker began accumulating Steve Madden, Ltd. ("Steve Madden") Class A warrants ("Madden Warrants").[3] At all times relevant to this proceeding, the float of the Madden Warrants was 1,875,000.

Between August 11, 1994 and January 4, 1995 (the "Accumulation Period"), Monroe Parker purchased 1,610,700 Madden Warrants from Stratton in 11 separate transactions at prices ranging from $0.75 to $2.8125 per warrant. After these purchases from Stratton, Monroe Parker owned or controlled approximately 85 percent of the float of Madden

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2120 and 2440. As discussed in detail below, Herman and Monroe Parker were fined, Herman was barred from association with any member of the NASD in any capacity and Monroe Parker was expelled from the Association. Neither Herman nor Monroe Parker appealed.

Monroe Parker, Herman and Lipsky were also charged with failing to disclose an adverse interest in violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and NASD Conduct Rules 2110 and 2120. The Hearing Panel found that Monroe Parker, Herman and Lipsky violated these rules when they sold 300,000 shares of United Leisure, Ltd. ("United Leisure") common stock to the public without informing the purchasers that Herman and Lipsky owned these shares. The Hearing Panel imposed on Monroe Parker, Herman, and Lipsky a joint and several fine of $1,335,762, which included the disgorgement of profits from the sale of their United Leisure stock. Lipsky and Herman were also charged with violations of NASD Conduct Rules 2110 and 3010 for failure to supervise properly the trading activity at Monroe Parker. The Hearing Panel found Lipsky liable, but determined that because Herman had been substantively involved in the manipulation scheme, he could not also be liable for failure to supervise. These matters are not before us on appeal.

[3] Steve Madden is a designer and manufacturer of women's shoes. In December 1993, Stratton underwrote Steve Madden's initial public offering. Each unit in the public offering comprised one share of common stock, one Class A warrant and one Class B warrant. The trading symbols were SHOO, SHOO W and SHOO Z, respectively. The Class A warrants were exercisable for a four-year period beginning December 10, 1994, and had an exercise price of $4.75 per warrant. One warrant yielded one share of common stock. The prospectus stated that Steve Madden securities were a speculative, high risk investment. Steve Madden did not earn any profits between August 1990 and March 1995.

Warrants. During the last five trading days preceding January 4, 1995, Monroe Parker purchased approximately 150,000 additional Madden Warrants in seven separate transactions from other broker-dealers. At the end of the Accumulation Period, Monroe Parker owned or controlled approximately 94 percent of the float.

Monroe Parker did not sell any Madden Warrants to retail customers during the Accumulation Period. Monroe Parker did, however, sell 400,000 Madden Warrants to Herman and Lipsky at cost ($0.75 per warrant) in August 1994, and on September 15, 1994, the Firm gave John Clancy ("Clancy"), its top producer, 25,000 Madden Warrants as a bonus. The Firm also allowed Clancy to purchase 15,000 Madden Warrants on November 2, 1994 for $2 per warrant.

During the morning of January 4, 1995, before Monroe Parker launched an aggressive retail sales campaign of Madden Warrants, Clancy solicited customer LL to sell shares of Steve Madden common stock that he owned at $5 per share and use the proceeds to buy Madden Warrants. At the same time that Clancy was soliciting LL's order, Monroe Parker began purchasing for its own inventory a total of 380,150 Madden Warrants in six separate transactions from two broker-dealers, Stratton and A.T. Brod & Co. ("Brod"), at $2.8125 per warrant. Stratton purchased 348,000 warrants from its officers' accounts in order to make these sales to Monroe Parker. By noon on January 4, 1995, Stratton had sold its entire remaining inventory of Madden Warrants to Monroe Parker.

At 12:27 p.m. on January 4, 1995, Monroe Parker began using LL's solicited order to uptick its bid for Madden Warrants. Monroe Parker purchased 247,250 Madden Warrants for LL's account in eight transactions.[4] Over the course of one hour and 18 minutes, Monroe Parker raised the inside bid for Madden Warrants by 24.4 percent -- even though Monroe Parker had the exclusive or shared bid 100 percent of the time. Furthermore, even though Monroe Parker could have filled LL's order from its inventory, and only 115,000 Madden Warrants were available from other broker-dealers, Monroe Parker treated LL's order as a market order. Over the course of 78 minutes, Monroe Parker purchased 11,000 Madden Warrants in eight transactions on an agency basis at prices ranging from $2.9375 to $3.50.[5] At

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[4] Monroe Parker purchased 247,250 Class A Madden warrants and 13,750 Class B Madden warrants for LL's account for a total of $942,673.

[5] The transactions were as follows:

12:27:19	The Firm bid $2.8125 and paid $2.9375 for 1000 from Fahnestock & Co., Inc. ("Fahnestock")
12:27:50	The Firm upticked to $2.8750
12:31:36	The Firm bid $2.8750 and paid $3.000 for 1000 from Herzog, Heine, Geduld, Inc. ("Herzog")
12:32:55	The Firm upticked to $3.000

3:32 p.m. on January 4, 1995, Monroe Parker filled the balance of LL's order (250,000 Madden Warrants) from its inventory at $3.625 per warrant. As previously noted, however, Monroe Parker had purchased Madden Warrants for its own inventory at $2.8125 per warrant immediately before it began purchasing them for LL's account at increasingly high prices.

At 2:02 p.m., just 17 minutes after its last uptick, Monroe Parker representatives began a sales campaign, during which they sold 801,500 Madden Warrants (43 percent of the float) in two hours to 30 customers at $3.625 per warrant.[6] Excluding its transactions with Stratton, Monroe Parker accounted for approximately 84 percent of all purchase volume, approximately 64 percent of all sales volume, and approximately 70 percent of all volume reported on January 4, 1995 in the Madden Warrants.

Monroe Parker's sales campaign continued through January 9, 1995, by which time Monroe Parker had sold 1,807,180 Madden Warrants (approximately 96.4 percent of the float) to 92 customers for $3.625 per warrant.[7] At the close of business on January 9, 1995, Monroe Parker was short 458,980 Madden Warrants. The Firm covered most of its short position on January 10, 1995 by repurchasing the 400,000 warrants it had sold to Lipsky and Herman in August 1994 and by purchasing the 40,000 warrants that Clancy held.

Over the next several days, Monroe Parker made just one sale of 200 Madden Warrants. Monroe Parker reduced its bid 11 times between January 10, 1995 and January 17, 1995, leading the inside bid down from $3.25 to $1.25 per warrant. A year later, Steve Madden called the Madden Warrants for $0.05 each. As a result of the decline in price, 77 of

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12:36:00	The Firm bid $3.000 and paid $3.1250 for 1000 from Nash, Weiss & Co. ("Nash, Weiss")
12:41:11	The Firm upticked to $3.1250
12:41:42	The Firm bid $3.1250 and paid $3.1250 for 2000 from Josephthal & Co., Inc. ("Josephthal")
12:37:30	The Firm upticked to $3.250
1:40:44	The Firm upticked from $3.250 to $3.375 and paid $3.375 for 1000 from Herzog
1:45:49	The Firm upticked from $3.375 to $3.500 and over the course of next 22 minutes paid $3.500 for 5000 from three other broker-dealers

[6] All order tickets for these transactions were marked "solicited" except for one, which was unmarked.

[7] With the exception of one order ticket that was marked "unsolicited" and two order tickets that were not introduced, all of the order tickets for these transactions were marked "solicited."

the 92 customers who had purchased Madden Warrants from Monroe Parker lost a total of $3,081,849, while Monroe Parker made $2,056,930.[8]

Excessive Mark-Ups

Each respondent admitted in his answer to the First Amended Complaint that Monroe Parker dominated and controlled the market for Madden Warrants and that any mark-ups therefore should have been based on Monroe Parker's "contemporaneous cost" for the Madden Warrants.[9] Monroe Parker's contemporaneous cost for the Madden Warrants on January 4, 1995 was $2.8125, which was the price Monroe Parker paid three times that day when it purchased for its own inventory from other broker-dealers. Monroe Parker also paid $2.8125 in seven different transactions during the five trading days that preceded January 4, 1995.

Monroe Parker nonetheless charged its customers $3.625 per warrant in each sale on January 4, 1995.[10] Therefore, the sales price for Madden Warrants included a mark-up of 28.9 percent.

Angeline's Role In Manipulative Scheme

As Director of Trading, Angeline ran Monroe Parker's trading department with Herman. Herman determined the trading strategy each day before the market opened, and then discussed his plan with Angeline. Angeline explained that Herman "makes the trading decision [sic] as far as the strategy goes. I act them out on a tactical basis. He's the strategist and I am the technician."[11] In addition to executing the trading strategy, Angeline was also involved in

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8 The Department of Enforcement ("Enforcement") was unable to obtain information about the other 15 customers.

9 A mark-up is the difference between the retail price and the "prevailing market price" of a security. In re Alstead, Dempsey & Co., Inc., 47 S.E.C. 1034, 1035 (1984). When a firm dominates and controls the market for a security, the "contemporaneous cost" of the security, which is the price the dominating dealer actually paid for the security, is the best indicator of the prevailing market price. Id.

10 Only one price – the execution price – appeared on the face of the order tickets. The boxes designated "mark-up" were left blank. The mark-ups were added to the contemporaneous cost, and together they appeared as the "execution price." Thus, it was not apparent from the face of the order tickets that mark-ups were charged.

11 Angeline and Levitov chose not to testify during the Hearing Panel proceedings or during at National Adjudicatory Council ("NAC") proceedings because they were the subjects of a grand jury investigation related to this matter. Enforcement attorneys deposed respondents during Enforcement's investigation, however.

setting the bid and ask price of securities. Although Herman had the initial responsibility to set mark-ups, Angeline had "the power of veto if it [was] too much." Angeline also admitted that he was aware of the so-called NASD five percent policy, which was in Monroe Parker's compliance manual.[12] He reviewed the daily order tickets to ensure that customers had not been charged excessive mark-ups.

Herman testified that he reviewed the Firm's records for evidence of domination and control. He explained that he would determine the number of shares of a particular stock owned or controlled by the Firm, and he would then make certain that the number of shares that the Firm owned or controlled did not rise above a certain percentage of the float. He testified that if the Firm dominated and controlled the market for a particular security, no mark-ups would be charged for that security. He testified that he would obtain information about a company's outstanding float from the company's prospectus. He also stated that Angeline had access to the same prospectuses and that he would have expected Angeline to have known whether the Firm dominated and controlled a security.

Angeline testified that domination and control were two of the factors that he considered when he evaluated mark-ups. When asked whether he knew what percentage of the outstanding float of Madden Warrants had been controlled by Monroe Parker, he responded that he might have known at the time of the trading but that "[w]ithout records" he was unable to say. Angeline also stated that in reviewing for domination and control, he monitored only the daily trading volumes of stocks. He testified that although he knew the Firm's inventory positions in stocks, he never looked at the number of shares that were held in the Firm's customers' accounts: "Outside of my trading position and outside of trading activity day in and day out, I wouldn't know [the percentage of the float held by the Firm]. I don't know what is in my customer accounts. I don't know what they hold."

Levitov's Responsibility for Supervision

According to the Firm's compliance manual, Levitov's responsibilities as Director of Compliance included "[m]atters falling within, but not limited to compliance responsibilities addressed in this Manual and necessary enhancements based on actual experience." Levitov

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[12] The NASD Board of Governors' policy statement regarding mark-ups, which appears in the NASD Manual following Conduct Rule 2440, provides that a reasonable mark-up is generally not more than five percent over the prevailing market price. IM-2440. See also NASD Notice to Members 92-16, at 91 (April 1, 1992) (same). The SEC has also held that a mark-up of more than five percent of the prevailing market price is presumed to be unfair. See In re Steven P. Sanders, Exchange Act Rel. No. 40600, at 7 (Oct. 26, 1998). Furthermore, the SEC has found that "[a]n undisclosed mark-up of more than 10% above the prevailing market price" is fraud per se. See, e.g., In re Powell & Associates, 47 S.E.C. 746, 748 (1982).

was responsible for reviewing and responding to customer complaints, reviewing daily trading activity, overseeing the registration of securities, ensuring that customers were not charged excessive mark-ups, and supervising the compliance department. Levitov did not, however, supervise sales representatives or the trading department, which was supervised by Herman. Levitov testified that he reviewed order tickets, which he received from the trading department, at the end of every day. He also testified that he reviewed volume reports and inventory reports on a daily basis and customer account records on a weekly basis to check for evidence of domination and control.

Levitov testified that in December 1994, after he had determined that Monroe Parker might be dominating and controlling the market for Madden Warrants, he told Angeline, Herman and Lipsky that no mark-ups should be charged for those warrants. The record evidence also includes a handwritten document on which Levitov noted his having warned Angeline not to charge mark-ups on Madden Warrants. When asked whether this warning had been given to the sales force, Levitov replied: "I know information like that would be disseminated." Levitov could not state, however, that he had confirmed that the warning had been issued. Herman acknowledged that Levitov had told him not to charge mark-ups on Madden Warrants because of the possibility that the Firm dominated and controlled the market. Angeline, on the other hand, claimed that he did not remember being told.

Procedural History

In the proceedings below, Monroe Parker, Herman and Angeline were charged with violations of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120 and 2440[13] for market manipulation (cause one) and for charging fraudulently excessive mark-ups (cause two). Lipsky, Levitov and Herman were charged with violations of NASD Conduct Rules 2110 and 3010 for failure to supervise properly the trading activity at Monroe Parker (cause four).

As stated earlier, the Hearing Panel made findings of violation consistent with the allegations in the complaint against Monroe Parker, Herman and Angeline. It also found that Lipsky and Levitov violated NASD Conduct Rules 2110 and 3010 for failure to supervise properly Monroe Parker's representatives, as alleged in the complaint.

Angeline appealed the June 18, 1999 decision of the Hearing Panel. We called the Levitov matter for review to determine whether the sanctions imposed by the Hearing Panel were appropriate in light of the violation.

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[13] Conduct Rule 2440 prohibits a member from entering into any retail transaction in a security at a price not reasonably related to the current market price of that security.

Discussion

Angeline stipulated to the Hearing Panel's findings and conclusions that the market for Madden Warrants was manipulated in violation of Exchange Act Section 10(b), Rule 10b-5 and Rules 2110 and 2120 and that Monroe Parker's customers were charged fraudulently excessive mark-ups in violation of Exchange Act Section 10(b), Rule 10b-5 and Rules 2110, 2120 and 2440. Angeline's sole argument on appeal was that his conduct was not violative because he did not act with scienter. After reviewing the record and considering the parties' arguments, we find that Angeline participated with scienter in both the market manipulation and the charging of fraudulently excessive mark-ups and we therefore affirm the Hearing Panel's finding that Angeline violated the federal antifraud provisions and Rules 2110, 2120 and 2440.[14]

Although we called the Levitov decision for review to determine whether his sanctions were appropriate in light of the violations, Levitov argued that we should also reconsider the Hearing Panel's finding that he violated Conduct Rules 2110 and 3010 by failing to supervise properly the trading and sales activity at Monroe Parker. We have reviewed the evidence and the parties' arguments, and we affirm the Hearing Panel's finding that Levitov violated NASD Conduct Rules 2110 and 3010 when he failed to investigate after he had discovered evidence of possible market manipulation.

Angeline Acted With Scienter. Market manipulation "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976). Manipulation has also been defined as the deceptive movement of a security's price accomplished by an intentional interference with the forces of supply and demand. In re Patten Securities Corp., 51 S.E.C. 568, 572 (1993). Such conduct is prohibited by Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Ernst & Ernst v. Hochfelder, 425 U.S. at 195-96.[15]

Proof of scienter is required to establish a violation of Section 10(b) and Rule 10b-5. Ernst & Ernst v. Hochfelder, 425 U.S. at 193, n.12. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." Id. Scienter is often established by circumstantial evidence; direct evidence is not necessary. In re Meyer Blinder, 50 S.E.C. 1215, 1229-30 (1992); see also In re Blech Securities Litigation, 961 F. Supp. 569, 582 (S.D.N.Y. 1997) (scienter can be inferred from circumstantial evidence); In re Sandra Simpson, 1999 SEC LEXIS 1908 (Sept. 21, 1999) (same). Evidence that the respondent acted with recklessness is

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[14] We note that Rules 2110 and 2440 do not require a finding of scienter.

[15] Similarly, NASD Conduct Rule 2120 provides that "[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

sufficient to establish scienter. In re Meyer Blinder, supra.[16] Recklessness has been defined as "an extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it."[17] Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990). Thus, scienter is established if the evidence shows that the market manipulation and excessive mark-ups were so obvious to Angeline that he must have been aware of them.[18]

In the present case, we find compelling evidence that Angeline knowingly or recklessly participated in the manipulation and excessive mark-ups of the Madden Warrants. Indeed, to find otherwise would strain credulity. Angeline was Monroe Parker's Director of Trading, and he worked inextricably with Herman, the mastermind of the manipulation scheme. Angeline executed the trading strategies that Herman developed each day. Furthermore, both Angeline and Herman were responsible for the pricing of securities to ensure that the sales force never charged excessive mark-ups. To this end, Angeline reviewed the order tickets each day to make certain that any mark-ups conformed to the NASD's five percent mark-up policy. Angeline and Herman failed miserably in these responsibilities. Moreover, given Angeline's nearly 30 years of experience in the securities business, we find that the manipulative activity that was occurring with his assistance should have been obvious to him.

We find that Angeline had knowledge of the following blatant evidence of manipulative activity: (1) Levitov's warning in December 1994 that Monroe Parker should not charge mark-

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[16] The Supreme Court has expressly reserved the issue of whether "recklessness" is sufficient to prove scienter under Rule 10b-5. See Ernst & Ernst v. Hochfelder, 425 U.S. at 193 n.12; see also Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980). Most Circuit Courts of Appeals, however, have held that "recklessness" satisfies the Rule 10b-5 scienter requirements. See, e.g., Dirks v. SEC, 681 F.2d 824, 844 (D.C. Cir. 1982); Broad v. Rockwell International Corp., 642 F.2d 929, 961 (5th Cir.)(en banc), cert. denied, 454 U.S. 965 (1981); Nelson v. Serwald, 596 F.2d 1332, 1337 (9th Cir. 1979), cert. denied, 439 U.S. 970 (1978); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44 (2d Cir.), cert. denied, 439 U.S. 1039 (1978); and Hackbart v. Holmes, 675 F.2d 1114, 1118 (10th Cir. 1982); see also Louis Loss & Joel Seligman, Securities Regulation, Vol. VIII, ch.9, §B(6), at 3665-67 n.521 (3d ed. 1991) (11 circuits have held that showing of recklessness is sufficient to prove scienter).

[17] Scienter is also required under Rule 2120, and it may be satisfied by a showing of intentional or reckless conduct. In re Kevin Eric Shaughnessy, Exchange Act Rel. No. 40244 (July 22, 1998).

[18] As explained above, undisclosed mark-ups of more than 10 percent above the prevailing market price constitute fraud per se. See p. 7, n.14, supra.

ups for Madden Warrants;[19] (2) Monroe Parker's acquisition of more than 1.6 million Madden Warrants (90 percent of the float) during a six-month period, without making a single retail sale; and (3) the fact that the Firm, after acquiring more than 90 percent of the float, engaged in an aggressive sales campaign, during which it sold its entire inventory of Madden Warrants over just four days at a price more than 28 percent higher than the highest price Monroe Parker had ever paid for them, in the absence of any unsolicited investor interest or other favorable information about Steve Madden.

Given this pervasive evidence of fraud, Angeline's approximately 30 years of experience, his central roles in executing Monroe Parker's trading strategy, pricing Monroe Parker's securities and reviewing order tickets for excessive mark-ups, and Levitov's warning about the Firm's domination of Madden Warrants, we find that Angeline either knew or was reckless in failing to discover Monroe Parker's domination and control of the market for Madden Warrants and the fraudulent mark-up activity.[20] Although Angeline professed to have reviewed for domination and control, he testified that he ignored information that was essential to a proper analysis of the Firm's trading position. He cannot escape liability by professing his ignorance of the percentage of the float in Monroe Parker's inventory or the number of warrants held by customers. See In re G.K. Scott & Co., Inc., 51 S.E.C. 961, 968 (1994) (firm trader is charged with "knowing fundamental standards for charging fair prices to the public," including the standards applicable in dominated and controlled market, and trader's reckless disregard for these standards satisfies scienter requirement); see also In re George Salloum, 1992 SEC LEXIS 3303 (Dec. 10, 1992) (where firm dominated almost entire market in security, it was "not sufficient for [the trader] to have closed his eyes nor [sic] to have obeyed blindly the direction of the man signing his paycheck").

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19 Although Angeline testified that he could not remember being told not to charge mark-ups on Madden Warrants, we find that Levitov did warn Angeline. We credit Levitov's testimony that he had told Angeline and Levitov's handwritten note indicating that he had warned Angeline.

20 See In re George Salloum, 52 S.E.C. 208, 214 (1995) (where head trader knew of high level of trading volume and knew that firm's significant supply of securities made transactions away from the firm infrequent, head trader's pricing of securities based on quotations rather than on contemporaneous cost was at least reckless and demonstrated scienter); In re Meyer Blinder, supra (scienter was established in excessive mark-up case, where applicants were involved in pricing of issues in both initial offering and secondary trading and were involved in supervising activity in trading department, and applicants therefore either knew or were reckless in not knowing that high mark-ups would be charged).

In sum, we find that Angeline must have known of -- or recklessly chosen to ignore -- Monroe Parker's fraudulent activity.[21] We therefore affirm the Hearing Panel's finding that Angeline participated in the manipulation and the fraudulent, excessive mark-ups with scienter in violation of Section 10(b), Rule 10b-5, and Conduct Rules 2110, 2120 and 2440.

Levitov Failed to Supervise Properly. Conduct Rule 3010(b)(1) requires member firms to establish, maintain and enforce written supervisory procedures that are reasonably designed to achieve compliance with applicable laws, rules and regulations. In In re John H. Gutfreund, 51 S.E.C. 93, 113 (1992), the Commission stated that compliance officers who are not designated as "supervisors" can nonetheless be deemed "supervisors" for purposes of Section 15(b)(4)(E) of the Exchange Act[22] under certain circumstances.[23] The Commission reasoned that once a legal or compliance officer who is informed of misconduct becomes "involved in formulating management's response to the problem, he or she is obligated to take affirmative steps to ensure that appropriate action is taken to address the misconduct." John H. Gutfreund, supra.

In this case, we recognize that Levitov was responsible for supervising the compliance staff rather than the sales representatives. We also note that he did not have the power to hire and fire registered representatives. As Director of Compliance, however, Levitov was responsible for reviewing order tickets and trading records daily to ensure that the Firm did not charge excessive mark-ups. Once Levitov had discovered that Monroe Parker had accumulated a dominant position in Madden Warrants and had warned Lipsky, Herman and Angeline in December 1994 that Monroe Parker should not charge mark-ups on Madden Warrants, Levitov had a heightened responsibility to ensure that the Firm did not charge

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21 It is irrelevant that Angeline appears not to have noticeably profited from the manipulation. See In re R.B. Webster Investments, Inc., 51 S.E.C. 1269, 1274 (1994) (failure to profit, or even a loss of money, is not inconsistent with a finding of scienter); see also SEC v. U.S. Environmental, Inc., 155 F.3d 107, 112 (2d Cir. 1998) (personal motivation for manipulating market is irrelevant in determining violation of Section 10(b)).

22 Section 15(b)(4)(E) states that the Commission may impose sanctions on registered persons who fail reasonably to supervise, "with a view to preventing violations of the provisions of [the Securities Act of 1933, the Exchange Act or any rules promulgated thereunder], by another person who commits such a violation, if such other person is subject to his supervision."

23 In John H. Gutfreund, the Commission determined that three officers of Salomon Brothers, Inc. ("Salomon") had failed to supervise properly when they had been informed of wrongdoing by an employee but failed to follow up and investigate. In this decision, the Commission articulated its views about the application of the Commission's supervisory provisions to employees who have legal or compliance responsibilities but are not necessarily designated "supervisors."

excessive mark-ups on those securities. See John H. Gutfreund, supra; see also In re Michael E. Tennenbaum, 47 S.E.C. 703, 707 (1982) (Commission found that head of firm's arbitrage department, who was responsible for establishing compliance procedures for options transactions, failed to supervise properly for compliance with rules governing options even though he had no official supervisory responsibility over representative who violated firm's options rules).

Even though the order tickets did not indicate that mark-ups had been charged, Monroe Parker's massive sell-off of Madden Warrants at much higher prices than it had ever paid for them was a "red flag" that should have prompted Levitov to investigate. Instead, he made no inquiry and Monroe Parker was successful in perpetrating its fraudulent scheme. We find that his inaction in the face of these red flags constituted a failure to supervise properly, and we therefore affirm the Hearing Panel's finding that Levitov violated Conduct Rules 2110 and 3010.

Sanctions

The Hearing Panel barred Angeline from associating with any member of the NASD in any capacity and imposed a $3,756,930 fine. This fine included $500,000 for market manipulation, $100,000 for excessive mark-ups, and disgorgement to the NASD of $3,156,930 (imposed jointly and severally against Angeline, Herman, Lipsky and Monroe Parker), of which $2,056,930 represented illicit gains from the manipulation and excessive mark-ups and $1,100,000 represented the amount Herman and Lipsky received from their sale of 400,000 Madden Warrants.[24]

Because market manipulation can cover such a wide range of situations, there is no specific NASD Sanction Guideline ("Guideline") for manipulation. The SEC has made clear, however, that manipulation is a serious offense that warrants significant sanctions. See In re Pagel, Inc., 48 S.E.C. 223, 232 (1985) (manipulation "attacks the very foundation and integrity of the free market system" and in crafting sanctions for such conduct there is "no basis for

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[24] Monroe Parker was expelled from membership in the NASD and fined $5,592,692 (including the disgorgement sum of $4,492,692, of which $3,156,930 was imposed jointly and severally against Monroe Parker, Herman, Lipsky and Angeline (see above), and $1,335,762 was imposed jointly and severally against Monroe Parker, Herman and Lipsky for gains from the sale of United Leisure stock). Monroe Parker's fine also included a $500,000 fine for market manipulation, a $100,000 fine for excessive mark-ups, and a $500,000 fine for failure to disclose adverse interest. Herman and Lipsky were barred from associating with any member of the NASD in any capacity and fined $5,592,692 and $5,242,692, respectively. These fines included the disgorgement sum of $4,492,692, which is detailed above. The fines also included separate fines for Herman ($500,000 for market manipulation, $100,000 for excessive mark-ups and $500,000 for failure to disclose adverse interest) and Lipsky ($500,000 for failure to disclose adverse interest and $250,000 for failure to supervise).

leniency"). The Guideline for excessive mark-ups recommends a fine of $5,000 to $100,000 plus the gross amount of the excessive mark-ups, if restitution is ordered.[25] In egregious cases, the Guideline also recommends suspending the respondent in any or all capacities for up to two years or barring the respondent.

We find, as to Angeline, that the Hearing Panel's imposition of a bar is warranted for both cause one and cause two in this case. The carefully planned manipulation scheme was perpetrated over a series of months with Angeline's help, resulting in customer losses of more than $2,000,000. We find that his conduct was egregious, and we find that because of the threat he represents to the investing public, the public interest would best be served by barring Angeline from the industry. We also affirm the imposition of the $500,000 fine for manipulation and the $100,000 fine for excessive mark-ups.[26] Because this case involved more than 90 investors, we do not find the $500,000 fine for manipulation to be unreasonable.

We find, however, that Angeline should not have been made jointly and severally liable for the disgorgement sum of $3,156,930, which represented the Firm's illicit gains ($2,056,930) and the profits of Herman and Lipsky from the sale of their Madden Warrants ($1,100,000). "The purpose of disgorgement is to deprive a person of 'ill-gotten gains' and prevent unjust enrichment." Hateley v. SEC, 8 F.3d 653, 655 (9th Cir. 1993), (quoting SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991)). It is a sanction that "may be ordered only against those who received such unjust enrichment." In re Kenneth L. Lucas, 51 S.E.C. 1041, 1046 (1994). The amount of the disgorgement "must be reasonable, i.e. , approximately equal to the unjust enrichment." Id. at 656.

In this case, there is no evidence that Angeline received any portion of the $1,100,000 profit that Herman and Lipsky made from the sale of their Madden Warrants. Nor does Angeline's combined salary and bonus of $203,000 in 1995 evidence that Angeline received a sum anywhere close to the $3,156,930 of "ill-gotten gains" that the Firm earned from the manipulation.[27] In contrast, Herman's combined salary and bonus that year was $1,230,875, and Lipsky's was $4,221,575. We find no evidence that Angeline was unjustly enriched in the

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25 See Guidelines (1998 ed.) at 82 (Excessive Mark-ups).

26 The Hearing Panel looked to the Guideline for Misrepresentations or Material Omissions of Fact, which recommends a fine of $100,000 for intentional or reckless misconduct. The Guideline permits setting a fine amount per investor in cases involving multiple investors. Although we do not use this Guideline to determine the sanctions in manipulation cases, we do not find the Hearing Panel's $500,000 fine to be unreasonable.

27 Angeline's salary and bonuses for 1994 and 1995 were $198,000 and $203,000, respectively. By contrast, Lipsky's salary and bonuses for 1994 and 1995 were $4,748,354 and $4,221,575, respectively. Herman's salary and bonuses for 1994 and 1995 were $4,748,354 and $1,230,875, respectively.

manner of Herman and Lipsky. We therefore find the disgorgement order against Angeline to be unjustified under the circumstances. The record makes clear, however, that Angeline received $203,000 from the Firm in 1995, the year in which he participated in the fraudulent scheme. Because Angeline was involved in the perpetration of the fraud, "any salary he received constitutes ill-gotten gains and is subject to disgorgement." In re Sky Scientific, Inc., Initial Decisions Rel. No. 137 (Mar. 5, 1999). We find it appropriate and in the public interest for Angeline to disgorge the $203,000 salary and bonus he received in 1995, the year in which the Firm made its profit from the manipulation scheme.[28] Therefore, Angeline is ordered to disgorge $203,000 for causes one and two, fined $600,000 ($500,000 for the manipulation and $100,000 for the excessive mark-ups), and barred from association with any member of the NASD in any capacity.[29]

We called this matter for review to determine whether the sanctions that the Hearing Panel imposed on Levitov were appropriate in light of the violations. The Hearing Panel found that although Angeline's conduct was egregious and deserved serious sanctions, Levitov's conduct warranted far less serious sanctions, as he did not directly participate in the fraud. Consequently, Levitov was barred from associating with any member of the NASD in any principal capacity, suspended in all capacities for one year commencing December 31, 1997 (the date he left Monroe Parker), fined $5,000, and ordered to requalify by examination as a general securities representative before re-associating with any member firm.

The Guideline for failure to supervise recommends a $5,000 to $50,000 fine and a suspension of up to 30 days. In egregious cases, the Guideline recommends a suspension of up to two years or a bar.[30]

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[28] Angeline has the burden of showing why the disgorgement figure is unreasonable. See In re Sky Scientific, Inc., supra. At a hearing on January 20, 2000 before a subcommittee of the NAC, counsel for Angeline argued that Angeline made only $5,000 more in 1995, the year of the fraud, than he did in 1994 and that it was therefore inappropriate to make Angeline jointly and severally liable for the disgorgement on the Firm's profits. In response to Enforcement's argument that at the very least, Angeline's salary should be disgorged, Angeline's counsel made no showing of why disgorgement of Angeline's salary for 1995 would be inappropriate.

[29] Angeline's sanctions are consistent with Notice to Members 99-86, which states that NASD Regulation generally will require payment of disgorgement and will pursue the collection of any fine in a sales practice case, even where the individual is barred, if there has been "widespread, significant, and identifiable customer harm."

[30] See Guidelines (1998 ed.) at 89 (Supervision).

We find that barring Levitov from associating with any NASD member in any principal capacity and suspending him for one year in all capacities are warranted. Although he did not participate in or profit from the fraud, he showed a lack of understanding of his responsibilities at the Firm. Once he discovered Monroe Parker's potentially dominant position in Madden Warrants, he had a duty to monitor the situation. Monroe Parker's massive sell-off of Madden Warrants just weeks after Levitov spoke with Angeline should have prompted Levitov to investigate, which he failed to do. We affirm the Hearing Panel's imposition of a one-year suspension as to Levitov.

We find, however, that the suspension should run from the date of this decision and not from December 31, 1997. We also affirm the $5,000 fine, but not for the reasons stated in the Hearing Panel's decision. The Hearing Panel imposed the lowest recommended fine because of Levitov's allegedly "limited financial resources." We require all respondents who wish to make a claim of inability to pay to verify the accuracy of their financial condition through the submission of signed and notarized documents evidencing financial hardship. The record in this case does not contain the required evidence. We therefore do not impose the lowest recommended fine because of an inability to pay. We impose the minimum fine because we believe that the bar in any principal capacity, the suspension and the requirement to requalify will more effectively serve the public interest than would the imposition of a larger fine.

Accordingly, Angeline is fined $803,000, including disgorgement of $203,000 to the NASD, and barred from associating with any member of NASD in any capacity. Levitov is fined $5,000, barred from associating with any member of the NASD in any principal capacity, suspended in all capacities for one year commencing on the date of this decision, and ordered to requalify by examination as a general securities representative before re-associating with any member firm.[31] The bars are effective upon service of this decision.[32]

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Senior Vice President
and Corporate Secretary

[31] The recommended sanctions are consistent with applicable NASD Sanction Guidelines ("Guidelines"). See Guidelines (1998 ed.) at 82 (Excessive Mark-ups) and 89 (Supervision).

[32] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.