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account of a public customer in violation of NASD Conduct Rule 2110. Cause Two alleged that from on or about April 26, 1996, through on or about December 20, 1996, Respondent _____, acting through Respondent _____, failed and neglected to exercise reasonable and proper supervision over Respondent _____ in violation of NASD Conduct Rules 2110 and 3010.

The Hearing Panel found that Respondent _____ did not have an order from his client to purchase the stock at issue and, thus, violated NASD Conduct Rule 2110 as alleged in Count One of the Complaint. Further, the Hearing Panel found that Respondent _____ did not appreciate or understand the difference between a customer's "expression of interest" in an initial public offering and an order to buy. Accordingly, as to Respondent _____, the Hearing Panel determined that a fine of \$7,500 and requalification for Series 7 within thirty (30) days of the effective date of this decision were appropriate sanctions.

With respect to Respondents _____ and _____, the Hearing Panel concluded that there was no reason to suspect that Respondent _____ was a problem broker prior to the transaction which resulted in the Complaint. The Hearing Panel found that other customer complaints involving Respondent _____ were fully investigated and did not raise sufficient red flags to require that Respondent _____ be subject to heightened supervision. The Hearing Panel also found that immediately after the transaction giving rise to the Complaint, in conjunction with other customer complaints involving the same offering, Respondent _____ was subject to heightened supervision. Accordingly, the Hearing Panel found that Respondents _____ and _____ did not violate NASD Conduct Rules 2110 and 3010 as alleged in Count Two of the Complaint.

As to costs, the Hearing Panel found that at least half of the Hearing related to Count Two, the claims against Respondents _____ and _____. Further, the Hearing Panel found that

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Enforcement's evidence as to the violations alleged against Respondents _____ and _____ was deficient. Accordingly, the Hearing Panel determined it would be unfair to assess the entire costs of the Hearing against Respondent _____ and, thus, apportioned only some of the costs of the Hearing against Respondent _____.

APPEARANCES

Henry Sanchez, Jr., Esq., Regional Counsel, NASD Department of Enforcement, District No. 5, New Orleans, LA. Rory C. Flynn, Esq., Chief Litigation Counsel, NASD Regulation, Inc., Department of Enforcement, Washington, D.C., of counsel.

_____, Esq., _____, New Orleans, LA and _____, General Counsel, _____, Ft. Lauderdale, FL., for Respondents _____ and _____.

_____, Esq., _____, Miami, FL, for Respondent _____.

DECISION

I. Introduction

On October 10, 1997, Enforcement served a Complaint on Respondents. The Complaint includes two (2) causes of action alleging violations of NASD Conduct Rules 2110 and 3010.²

Cause One alleges that on or about September 10, 1996, Respondent _____³ bought 200 shares of an initial public offering ("IPO") of The Harmat Organization ("Harmat") in the account of

² Attached to the Complaint were two Exhibits: "Exhibit A" was the "Syndicate Order Ticket for the Alleged Unauthorized Trade in the Account of RM" and "Exhibit B" was the "List of Customer Complaints filed against James _____."

³ Respondent _____ entered the securities industry as a General Securities Representative with Respondent _____ in 1992. At all periods relevant to the Complaint, Respondent _____ was employed by Respondent _____. Respondent _____ currently is registered with the Association and associated with another member firm. Stipulation (March 10, 1996) ("Stipulation") at ¶7.

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public customer, RM, without the customer's knowledge or consent. This conduct is alleged to violate NASD Conduct Rule 2110.

Cause Two alleges that from on or about April 26, 1996, through on or about December 20, 1996, Respondent _____,⁴ acting through Respondent _____,⁵ failed and neglected to exercise reasonable and proper supervision over Respondent _____. More specifically, Cause Two alleges that Respondent _____ was the subject of various customer complaints and a customer-instituted arbitration, but that Respondent _____, in the capacity of _____ compliance officer, failed and neglected to exercise additional supervision over Respondent _____. Such acts, practices, and conduct are alleged to constitute separate and distinct violations of NASD Conduct Rules 2110 and 3010 by Respondent _____ and Respondent _____.

Respondents _____ and _____ filed an Answer on November 19, 1997, denying the allegations of the Complaint as they pertain to them. Respondent _____ filed an Answer on December 2, 1997, denying the allegations of the Complaint as they pertain to him. Respondent _____ also raised certain affirmative defenses.

On February 13, 1998, pursuant to Code of Procedure Rule 9264, Respondents _____ and _____ filed a Joint Motion for Summary Disposition as to the allegations set forth in the Complaint

⁴ Respondent _____ is a registered broker/dealer with the Securities and Exchange Commission and a current member of the Association. Stipulation at ¶1. Among other things, Respondent _____ is a market maker in speculative securities which involve a high degree of risk. CX-20 at 4. References to Enforcement's Exhibits admitted at the Hearing are designated as "CX-." References to Respondents _____ and _____ Exhibits admitted at the Hearing are designated as "RX-." Respondent _____ submitted only a few exhibits separate from those of the other Respondents. They are referred to as "_____' Ex."

⁵ At all relevant times, Respondent _____ was the Director of Compliance for Respondent _____. He is registered with the Association as a General Securities Principal, a Municipal Securities Principal, and a Financial and Operations Principal. Stipulation at ¶3.

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against them.⁶ Respondents _____ and _____ argued that summary disposition was appropriate since the facts did not support the charge of inadequate supervision or that _____ acted unreasonably by not subjecting _____ to heightened supervision prior to the RM transaction.⁷

In support of summary disposition, Respondents _____ and _____ discussed each of the five customer complaints which purportedly occurred prior to the RM complaint.⁸ Respondents _____ and _____ demonstrated that such complaints were investigated fully by _____ and either determined to be without merit or, in one instance, was not a complaint against Respondent _____.⁹ Respondents _____ and _____ also demonstrated that in September 1996, following complaints by RM and others who purchased Harmat through Respondent _____, heightened supervision was implemented.¹⁰

Respondents _____ and _____ also argued that they were entitled to summary disposition as a matter of law since reasonable supervision was exercised with respect to Respondent _____ and because neither the timing, nature, nor number of the pre-RM customer complaints triggered the need for heightened supervision.¹¹

⁶ Joint Motion by _____ and _____ for Summary Disposition of Complaint against Them and for Oral Argument, Memorandum in Support, and Statement of Undisputed Facts ("Motion").

⁷ Memorandum in Support ("Respondents' Mem.") at 15-16. In support of summary disposition, moving Respondents also filed a "Statement of Undisputed Facts" and an Affidavit of _____.

⁸ Id. at 8-13. Enforcement relied on these customer complaints to demonstrate that Respondents _____ and _____ acted unreasonably in not subjecting Mr. _____ to heightened supervision prior to the RM complaint.

⁹ Id.

¹⁰ Id. at 13-14. As discussed more fully in this decision, several of the other alleged customer complaints against Respondent _____ on which Enforcement relied occurred at or about the same time as the RM complaint.

¹¹ Id. at 16-28.

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Enforcement filed an opposition to the Motion.¹² In its Opposition, Enforcement argued that there were genuine issues of material fact which precluded summary disposition. Enforcement also argued that moving Respondents were not entitled to summary disposition as a matter of law.

Enforcement's Opposition was not persuasive. Enforcement did not submit a statement of controverted facts or an affidavit to refute the "Statement of Undisputed Facts" and the _____ Affidavit submitted in support of summary disposition. Moreover, Enforcement did not provide citations to any evidence of record to support its assertions that there were disputed facts. Rather, Enforcement improperly relied only on the allegations of the Complaint.¹³ In addition, the legal authorities relied upon by Enforcement presented situations that were distinguishable from the facts of the instant case.¹⁴ In summary, in opposing the Motion, Enforcement did not present sufficient evidence or legal authority to support its contention that Respondents _____ and _____ acted unreasonably or that supervisory procedures were inadequate with respect to Respondent _____.

Notwithstanding these deficiencies, after reviewing the filings and the arguments of the Parties, the Hearing Panel decided to give Enforcement an opportunity to present its case. Accordingly, the Hearing Panel deferred decision on the Motion pending the disciplinary hearing.¹⁵

The Parties presented evidence to a Hearing Panel in a two (2) day Hearing held in New Orleans, Louisiana on March 17-18, 1998. Enforcement called nine (9) witnesses in its direct case,

¹² Complainant's Response to Joint Motion by Respondents _____ and _____ for Summary Disposition and Oral Argument and Complainant's Motion to Strike ("Complainant's Opposition").

¹³ See Fed. R.Civ.P.56(e).

¹⁴ Cf. Enforcement's Opposition at 11-17 with Respondent's Mem. at 14-27.

¹⁵ The parties were informed of the Hearing Panel's decision to defer ruling on the Motion during the March 12, 1998 Final Pre-Hearing Conference and, again, at the commencement of the Hearing on March 17, 1998.

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most of whom appeared as "hostile witnesses" and, in fact, were listed as witnesses on behalf of Respondents in pre-hearing submissions.¹⁶ The principal witnesses testifying for Enforcement were _____ ("_____"), a Senior Compliance Examiner for District 5, RM, the customer who lodged the complaint giving rise to this disciplinary action, and RM's secretary.

Principal witnesses whose testimony supported Respondents' positions were _____, a branch manager for Respondent _____ and, formerly, Respondent _____' branch manager;¹⁷ _____, a sales assistant for Respondent _____ and, formerly, Respondent _____ sales assistant;¹⁸ and _____, the branch cashier in the New York office of Respondent _____ where Respondent _____ formerly worked.¹⁹ In addition, both Respondents _____ and _____ testified in support of their respective defenses.²⁰

II. Background of the Proceeding and Position of the Parties

The alleged violations which form the basis for this disciplinary proceeding arise as a result of a complaint made by RM, a public customer, concerning a purported unauthorized purchase transaction in his account by Respondent _____. Respondent _____ was employed as an account executive

¹⁶ These included Messrs. _____, _____, _____, Ms. _____, and Respondents _____ and _____. The purpose of calling such witnesses in Enforcement's direct case was not apparent to the Hearing Panel since their testimony tended to support Respondents' position and did not assist Enforcement in meeting its burden of proof. Since a majority of these witnesses were from out-of-town, Respondents were permitted to examine such witnesses immediately following Enforcement's examination, obviating the need for recalling such persons to testify in Respondents' direct case.

¹⁷ Mr. _____ was the branch manager in the New York office of Respondent _____ where Respondent _____ worked at the time of the RM complaint. Mr. _____ was responsible for supervising all brokers in _____ New York office. Stipulation at 9 and Tr. at 199-200. References to testimony in the hearing transcript are designated "Tr."

¹⁸ Tr. at 417-19.

¹⁹ Tr. at 426-27.

and sales manager in Respondent _____ New York office in September 1996, the time of the RM transaction.²¹

With respect to Cause I, Enforcement's position is that Respondent _____ purchased stock without RM's authorization.²² Respondent _____' position is that he had a *bona fide* "indication of interest" from RM to purchase the Harmat shares for his account.²³ Respondent _____ contends that, at worst, there was a misunderstanding between himself and RM concerning the purchase of Harmat shares, nothing more.²⁴

With respect to Cause Two, Enforcement's position is that Respondent _____ should have been subject to "heightened supervision" prior to the RM transaction because of a number of purported customer complaints that had been made against him.²⁵ Respondents _____'s and _____'s position is that the several customer complaints against Respondent _____ prior to the RM complaint were fully investigated and that such complaints did not raise any issues with respect to Mr. _____ integrity or sales practices sufficient to justify the imposition of heightened supervision.²⁶

²⁰ Mr. _____, another _____ broker who opened accounts for Respondent _____, who first contacted RM and sold him shares of American Express, also testified for Respondents. Tr. at 389-90 and 391-92.

²¹ Stipulation at ¶¶8 and 9; Respondents' Mem. at 5-7; CX-21 at 8.

²² See Tr. at 17-18, 54, and 307. See also CX-28 at ¶6. (Affidavit of RM).

²³ Tr. at 43-44, 448, and 453. As will be discussed in this decision, Mr. _____ testified that it is his understanding, that with respect to an IPO, a customer's "expression of interest" is an order. Tr. at 460-63.

²⁴ Tr. at 47 and 554.

²⁵ Tr. at 18-19, 54-55. Enforcement also alleged that Respondents _____ and _____ did not take appropriate steps to subject Respondent _____ to heightened supervision even after the RM complaint.

²⁶ See, e.g., Tr. at 29-35, 511-521. Respondents _____ and _____ position also is that heightened supervision was imposed in September 1996 after three complaints were made against Respondent _____ involving Harmat trades. Tr. at 29.

III. Findings of Fact and Conclusions of Law

A. Cause One

1. Evidence Presented at the Hearing

The investigation of Respondent _____ which resulted in the Complaint was based on a complaint letter sent to District 5 by RM.²⁷ Based on information received from RM, NASD Regulation staff conducted an investigation.²⁸ Enforcement presented evidence that on or about September 10, 1996, Respondent _____ purchased two hundred shares of Harmat for the account of RM.²⁹ During the course of the investigation, RM provided information to the NASD Regulation examiner who conducted the underlying investigation, Ms. _____, regarding his communications with _____ and told her that the Harmat trade was not authorized. He also signed an Affidavit she prepared on his behalf.³⁰

Cross-examination of Ms. _____ revealed that she did not attempt to verify or investigate the accuracy of several statements reflected in RM's Affidavit. Rather, she accepted what he told her.³¹

²⁷ Tr. at 51; CX-18. RM is the Chairman and CEO of a large real estate company in New Orleans who first opened an account with Respondent _____ on August 14, 1996. Tr. at 296; CX-21 at 13-16, and CX-28 at ¶2 (Affidavit of RM). On August 14, 1996, RM purchased 100 shares of American Express through another _____ broker, Mr. _____. Stipulation at ¶10 and Tr. at 392.

²⁸ Tr. at 50-51. Ms. _____ was responsible for conducting the investigation of the RM complaint and also for gathering information from Respondent _____ as to other customer complaints against Respondent _____. She also was responsible for preparing Exhibit B to the Complaint. Tr. at 54.

²⁹ CX-1 at 9 ("Exhibit A" to Complaint); Tr. at 53; Stipulation at ¶11. The Stipulation states the purchase was made on September 10, 1996. The trade date is confirmed by CX-21 at 23.

³⁰ Tr. at 54. When she was assigned the customer complaint, Ms. _____ contacted RM and asked him for documents which would support his allegations. She received and reviewed those documents and contacted RM to discuss the circumstances surrounding his complaint. She then asked him if he would sign an affidavit prepared by District 5 staff, which he did. Tr. at 63-64 and CX-28 ("RM Affidavit"). RM's complaint first was received by District 5 on September 13, 1996; however, his affidavit wasn't signed until May 20, 1997, eight (8) months later. Tr. at 171-72.

Ms. _____ also admitted that she did not review any phone records maintained by _____ to determine whether Mr. _____ attempted further communications with RM on September 9 and 10 prior to finalizing the Harmat trade for his account.³² She based the statements in the RM Affidavit solely on the information provided to her by RM, either orally or in documents.³³

Mr. _____ testimony corroborated that RM complained that the Harmat transaction was unauthorized.³⁴ Mr. _____ testified that he received a phone call from Respondent _____ on September 11, 1996 concerning RM's complaint and that there was a phone conversation later that day between himself, Respondent _____, and RM.³⁵ Mr. _____ testified that RM made clear that he did not want the Harmat shares in his account and instructed Mr. _____ to cancel the trade and close his account.³⁶ Mr. _____ also testified that after reviewing the matter, it was his opinion that there

³¹ Tr. at 185-86, 188. For example, RM complained about the Harmat transaction on or about September 11, 1996 in a phone call to Respondent _____ and the evidence establishes that there was a phone call later that day between RM and Messrs. _____ and _____ concerning the alleged unauthorized trade. See CX-18, RX-9, RX-10, and Tr. at 185, 202, and 204. Ms. _____ admitted that she knew of the September 11, 1996 communication at the time RM's affidavit was prepared and signed. Tr. at 185. Yet RM's Affidavit contains the inaccurate statement that there were no phone calls between Mr. _____ and RM between September 5-12, 1996. Tr. at 186. When questioned, Ms. _____ testified she never pointed out this inaccuracy to RM because she "didn't want to put words into his mouth." Id.

³² Tr. at 178.

³³ Tr. at 188-89.

³⁴ Mr. _____ had been Respondent _____ branch manager only for a short period of time prior to the RM complaint. CX-43 at 5. Respondent _____ previously had been located in _____ Bethesda, Maryland office, which was closed at the end of August 1996. Respondent _____ began working in the New York office on or about August 26, 1996. Tr. at 200, 226-27. Mr. _____ testified that _____ was Respondent _____ branch manager in Maryland. Tr. at 201, 227.

³⁵ Tr. at 202, 205-205 and RX-10. The statement Mr. _____ prepared in response to a request for information from Ms. _____ reflects that he reviewed the RM transaction with Respondent _____ before the telephone conversation and Respondent _____ indicated to him that he had a "bona fide indication of interest" from RM prior to the Harmat offering. CX-29 at ¶h. See also Stipulation at ¶12.

³⁶ Tr. at 204-09. During the phone conversation on September 11, 1996, RM also instructed Mr. _____ to transfer the American Express shares in his account to another firm. Id.

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was a misunderstanding between Respondent _____ and RM respecting the Harmat trade.³⁷ Both RM and Respondent _____ testified as to their communications concerning the Harmat transaction. There was conflicting and confusing testimony as to when Respondent _____ and RM first spoke,³⁸ whether RM indicated an interest in IPOs,³⁹ whether RM gave Respondent _____ a firm expression of interest to purchase Harmat shares worth between \$50,000-\$60,000,⁴⁰ whether Respondent

³⁷ Tr. at 251-52 and RX-11. In a September 11, 1996 letter to Mr. _____ after the phone conversation, RM stated that Respondent _____ "admitted he had no authority" to purchase the Harmat shares. See CX- 18. Mr. _____ testified, however, that he had no specific recollection of Respondent _____ making such statement. Tr. at 253 and 256.

³⁸ Respondent _____ testified that the first time he spoke with RM was on September 5, 1996. Tr. at 442. RM's Affidavit also states that he was contacted on September 5, 1996 by Respondent _____ who was soliciting his investment in Harmat and that he told Respondent _____ he was not interested in purchasing shares. CX-28 at ¶4 and Tr. at 300. At the Hearing, RM's testimony on this issue was confused and inconsistent. See, e.g., Tr. at 313-14 and 323-24. He testified that paragraph four of his Affidavit was in error and he was contacted by Respondent _____ on August 4, 1996. Tr. at 301. The testimony that follows, however, relates to a phone conversation RM had with another _____ broker, Mr. _____, not with Respondent _____. Also, RM's Affidavit recites that he received a phone call on August 14, 1996 from Mr. _____ when he opened an account with _____ by purchasing shares of American Express. CX-28 at ¶1. See also CX-21 at ¶¶13-16 (RM new account forms). The Affidavit says nothing about an earlier phone conversation with Respondent _____ and is worded to convey that the August 14 communication with Mr. _____ was the first with anyone from _____. Moreover, RM testified that he did receive a phone call from Respondent _____ on or about September 5, 1996 to discuss the Harmat IPO and the tenor of his testimony suggests that this was the first contact by Respondent _____. Tr. at 303-04. See also CX-28 at ¶4. The corroborating evidence of record also supports the conclusion that the first contact between Respondent _____ and RM was on September 5, 1996 and concerned the Harmat IPO. See, e.g., _____' Ex-1 (_____ Call Detail Report showing phone call to RM's office on September 5, 1996), _____' Ex-2 (_____ Call Detail Report showing fifteen (15) minute phone call to RM's home on September 5, 1996), and Tr. 375-76. See also Tr. at 392-93 (testimony of Mr. _____) and Tr. at 442 (testimony of Respondent _____).

³⁹ There was conflicting testimony as to whether RM expressed an interest in IPOs and needed to pursue such investments through a firm such as _____ since his daughter was a broker at another firm. Tr. at 303, 322-23, 335-36, 338, 395, 396-97, 399, 409, and 442. RM admitted that Mr. _____, "told [him] that _____ participated in initial public offerings * * *." CX-28 at ¶1 and Tr. at 339. Mr. _____ testified that RM expressed an interest in IPOs and he could not get them through his daughter, a broker. Tr. at 397. Respondent _____ testified that he contacted RM on September 5, 1996 to discuss the Harmat IPO based on conversations he had with Mr. _____ concerning RM's interest in IPOs. Tr. at 442 and 446-47. For purposes of the Hearing Panel's decision, such testimony largely was irrelevant except in evaluating the credibility of the witnesses.

⁴⁰ Cf. Tr. at 43-44, 47, 48, 448 and 453 (testimony of Respondent _____) and Tr. at 401-408 (testimony of Mr. _____) with Tr. at 305, 308, 312, 324, 333 (testimony of RM).

_____ attempted to contact RM prior to finalizing the transaction on his account,⁴¹ and how and when RM received confirmation that 200 shares of Harmat had been purchased for his account.⁴²

2. Findings

On balance, as between RM and Respondent _____, the Hearing Panel finds Respondent _____ the more credible witness. His recollection of most of the facts concerning his communications with RM was consistent both internally and with the testimony of other witnesses. It also was corroborated by the documentary evidence admitted at the Hearing.

By comparison, RM's testimony was unresponsive, vague, internally inconsistent, and, often, rambling.⁴³ It also was contrary to statements in his own Affidavit, other documentary evidence, and the testimony of other witnesses.⁴⁴ The Hearing Panel, however, found no dispute between the testimony of Respondent _____ and RM with respect to the critical fact. Respondent _____ never had an

⁴¹ See, e.g., Tr. at 451-52 (testimony of Respondent _____), Tr. at 377-381 (cross-examination of RM), and _____' Exs-3, 4, and 5 (_____ Call Detail Reports for September 9 and 10, 1996).

⁴² Although RM's Affidavit (at CX-28 at ¶5) states that he received confirmation of the Harmat trade on or about September 12, 1996, the record establishes that RM contacted _____ to complain about the trade on September 11, 1996. See, e.g., CX-18, RX-1 at 6, 9, 10, and 11. See also Tr. at 352-354.

⁴³ RM's secretary attempted to corroborate his testimony. Among other things, RM's secretary testified to conversations she allegedly overheard between Mr. _____ and RM, between Respondent _____ and RM, and between Respondent _____, Mr. _____ and RM. See, e.g., Tr. at 270, 273-75, 277-79, 283-85, 290-91. The Hearing Panel found most of her testimony to be irrelevant and, in part, not credible. For example, RM's secretary testified that she overheard a ten (10) to fifteen (15) minute phone call between Respondent _____ and RM. Tr. at 284-85. Other evidence, however, including RM's testimony, established that the only lengthy telephone call between Respondent _____ and RM took place at RM's home and that she could not possibly have overheard the conversation. Tr. at 374-76, and _____ Ex.2 (_____ Call Detail Report). RM's secretary's testimony did not assist Enforcement in meeting its burden of proof.

⁴⁴ Cf. Tr. at 301-02 with Tr. at 398. At the hearing, RM testified that paragraph 4 of his Affidavit was in error and that his memory was better three (3) weeks before the hearing than in May 1997 when he signed the Affidavit. Tr. at 329-30. The Hearing Panel found that the Affidavit probably reflected a better recollection of events than RM's testimony ten (10) months later. Further, RM's credibility was not assisted by his demeanor at the Hearing which was often flippant and evasive. Twice the Hearing Officer instructed RM not to confer with counsel for Enforcement during questioning by opposing counsel. Tr. at 377-78. The credibility of RM's version of the facts also was suspect since he appeared to make misleading statements. Cf. CX-28 at ¶2 (RM Affidavit) with Tr. at 335-37.

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order to purchase shares of Harmat for the account of RM.⁴⁵ At best, all Respondent _____ had from RM was an "indication of interest" to purchase shares of Harmat worth between \$50,000-\$60,000.⁴⁶ Respondent _____ own testimony reveals that he mistakenly believed an "indication of interest" gave him authority to purchase the Harmat shares for RM's account.⁴⁷

The Hearing Panel also found that Respondent _____ did not appreciate the difference between an expression of interest and an order to purchase shares. In response to questions from one Hearing Panelist, Respondent _____ gave the following responses:

Hearing Panelist: Let's go back then, for a minute to the -- as I understand it, your testimony is that you had a conversation with him on the 5th in which you got what you considered to be an indication of interest?

Respondent _____: Correct.

* * *

Hearing Panelist: Do you believe that there is a difference between the receipt from a client of an indication of interest and the receipt from a client of an order? Are those two things different?

⁴⁵ This was made clear by Respondent _____ own testimony as well as Mr. _____ written statement. Tr. at 43-44, 47, 448, 453, and 461-62; CX-29 at ¶h. In fact, in his opening statement, Respondent _____ counsel stated "Mr. _____ firmly believes that when RM told him he wanted to invest fifty thousand dollars (\$50,000) in Harmat that he had an order from that client, or more technically, **an indication of interest since it was an initial public offering.**" Tr. at 44 (emphasis added). See also Tr. at 554-55.

⁴⁶ Tr. at 447-48.

⁴⁷ Tr. at 453, 462-63. See also Tr. at 439. Respondent _____ testified that it was his general practice, prior to finalizing a trade in an IPO, to call the client back to discuss the exact amount of shares allocated to that client, but that this was the only purpose in going back to the client. Tr. at 451 and Tr. at 462-65. Respondent _____ testified that he attempted to reach RM before the Harmat offering became effective, but was unable to do so. Tr. at 451-52. Thus, Respondent _____ decided to purchase some shares of Harmat for RM, although far less than RM's indication of interest. Tr. at 453-54. In response to a question from his own counsel, Respondent _____ also admitted that "[t]he mistake was that I hadn't more carefully gone through my order tickets and, I guess, pulled out any ticket that a client -I did not go over the exact amount, and that that (sic) has definitely proven, due to the fact that we are here, to be a mistake." Tr. at 466-67.

Respondent _____: In an IPO, an indication of interest, in my opinion, is an order.⁴⁸

The Hearing Panel finds that an expression of interest in a particular offering is not an order to purchase shares.⁴⁹ Thus, the Hearing Panel concludes that Respondent _____ purchased Harmat shares without RM's consent in violation of NASD Conduct Rule 2110.

B. Cause Two

1. Evidence Presented at the Hearing

As part of her investigation, Ms. _____ requested and received from Respondent _____ information as to other customer complaints against Mr. _____. Based on that information, she prepared Exhibit B to the Complaint, the basis for the allegations in Count Two.⁵⁰ She also spoke with and received documents from several of the customers identified by Respondent _____ as having made complaints against Respondent _____.⁵¹ She also used that information in preparing Exhibit B to the Complaint.⁵²

⁴⁸ Tr. at 460-462.

⁴⁹ See, e.g., District Business Conduct Committee for District No. 4 v. Shelvy, Complaint No. KC-419, 1989 NASD Discip. LEXIS 16 (NBCC February 28, 1989). For this reason, Respondent _____ reliance on District Business Conduct Committee for District No. 8. v. Tompkins, No. C8A930064 (NBCC May 4, 1995) is misplaced. This is not a mere misunderstanding between a broker and a customer, but a failure by the broker to understand the difference between an “indication of interest” and an order to buy. Further, as the National Business Conduct Committee noted in Tompkins, and as recognized by Respondent _____ (Tr. at 448-49, 451, 462-65), it is general practice to confirm an “indication of interest” in an IPO prior to execution.

⁵⁰ Tr. at 54-55. Exhibit B to the Complaint identifies eight (8) customers in addition to RM who allegedly complained about Respondent _____: RS, LA and RK who jointly filed an NASD arbitration claim, DL, MB, PM, CB, and RB. The NASD arbitration claim filed by LA and RK is captioned _____ v. _____. (“_____”) (CX-17). In addition to Respondent _____, the _____ named several other employees and brokers as respondents.

⁵¹ Tr. at 63. Ms. _____ testified that she spoke with five (5) of the eight (8) individuals identified in Exhibit B.

⁵² Tr. at 84.

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Ms. _____ admitted that there were several mistakes reflected in Exhibit B, which had not been corrected as of the date of the hearing.⁵³ First, Exhibit B incorrectly lists the date of the PM complaint concerning Harmat.⁵⁴ Second, Exhibit B incorrectly characterizes the resolution of the _____ as an arbitration award when, in fact, the matter was settled.⁵⁵ Moreover, only one of the claimants in that proceeding -- LA -- had a claim against Respondent _____.⁵⁶ Further, with respect to the RB complaint, Ms. _____ testified that RB did not complain about Respondent _____ by name and also that the matter was investigated by District 5 and no action was taken because there wasn't sufficient evidence to support a violation of NASD rules.⁵⁷ The Parties also stipulated that RB did not complain about Respondent _____.⁵⁸

During Enforcement's presentation of its case, the Hearing Panel determined that two (2) of the other customer complaints allegedly made against Respondent _____ also involved the

⁵³ Tr. at 80-81 and 85. In addition to mistakes involving other customer complaints, Exhibit B also incorrectly records the date of the RM complaint to _____ as September 13, 1996, rather than September 11, 1996. See, e.g., Tr. at 119-20, 185-86 and CX-18.

⁵⁴ The date of the PM complaint concerning Harmat was September 17, 1996, not October 11, 1996 as reflected. Tr. at 28, 79-81 and CX-15 at 6.

⁵⁵ Tr. at 85 and 125.

⁵⁶ Tr. at 125-26, 129-130, and 195-96.

⁵⁷ Tr. at 55 and 88.

⁵⁸ See Stipulation at ¶17 and Tr. at 59-60.

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Harmat offering and occurred at or about the same time as the RM transaction.⁵⁹ Thus, the Hearing Panel ruled that those complaints, as well as two (2) other customer complaints, were irrelevant with respect to the issue of whether Respondent _____ should have been subject to heightened supervision before the RM complaint.⁶⁰ The Hearing Panel instructed Enforcement to focus its case on any pre-RM complaints which supported the allegations of Count Two that Respondents _____ and _____ should have imposed heightened supervision prior to the RM complaint.⁶¹ Other than introducing documents received from customers identified in Exhibit B, Enforcement offered no further evidence to support such allegations.

Ms. _____ cross-examination focused on the several pre-RM customer complaints allegedly made against Respondent _____. As to the _____ filed by LA and RK, she admitted that she never saw any document evidencing any claim by RK or someone else on his behalf alleging that Respondent _____ acted in an improper or unlawful manner in handling RK's account.⁶² After reviewing the _____, she also admitted that there was no allegation in the statement of claim

⁵⁹ The other two complaints relating to the Harmat IPO involved customers PM and MB. See CX-15, CX-40 at ¶8-9 and Tr. at 80-81 (relating to the PM complaint) and CX-16 and CX-33 at ¶5 (relating to the MB complaint). Exhibit B reflects another complaint by PM concerning an earlier transaction, that was not communicated to _____ until October 1996. Tr. at 80-82, CX-15 at 7 and CX-40 at ¶5. The Hearing Panel also was troubled by the fact that Exhibit B contained errors that Enforcement was aware of prior to the Hearing.

⁶⁰ Tr. at 105. The other two complaints that the Hearing Panel found irrelevant to the issue of whether heightened supervision should have been imposed prior to the RM complaint involved CB and RB. Id. CB's complaint, although recorded as September 25, 1996, referred to an earlier transaction. Tr. at 85-86, 246-47 and CX-27 at 22-23. And RB's complaint was not against Respondent _____. Stipulation at ¶17. The Parties stipulated that only four (4) of the complaints listed on Exhibit B -- RS, LA, RK, and DL -- occurred prior to the Harmat IPO. Stipulation at ¶13.

⁶¹ Tr. at 105-06.

⁶² Tr. at 126. Ms. _____ also admitted that she never saw any document suggesting that Respondent _____ opened an account for RK or made any trades on his behalf. Tr. at 126-27. Further, she never submitted any request to RK asking for any documents or an affidavit. Tr. at 127 and 131.

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that RK ever “dealt with _____ in any form or fashion.”⁶³ In response to a question from a Hearing Panelist, Ms. _____ testified that, based on the evidence, Exhibit B should not include RK.⁶⁴

Ms. _____ testified that in providing information to District 5 staff about LA's complaint, she had no information or knowledge that Respondent _____ ever defrauded or made any misrepresentations to LA.⁶⁵ Moreover, the amount of damages claimed by LA in his Affidavit was inconsistent with his statement of damages in the _____.⁶⁶

With respect to the complaint of RS, Ms. _____ testified that Respondent _____ conducted an investigation and responded to RS's complaint in a timely manner.⁶⁷ She also indicated that she was aware that RS, after receiving _____ response to his complaint, hired a lawyer and threatened to sue _____.⁶⁸ Moreover, Ms. _____ testified that despite threatening a lawsuit, RS continued to express an interest in doing business with _____.⁶⁹

Mr. _____ also testified concerning the pre-RM complaints. Mr. _____ testified that he participated in the investigation of the RS complaint and that he concluded that claim was without merit

⁶³ Tr. at 130.

⁶⁴ Tr. at 195-96.

⁶⁵ Tr. at 151-52. The only information Ms. _____ had was provided to her orally by LA, which she then reflected in his Affidavit. Tr. at 155 and 157.

⁶⁶ LA's Affidavit (CX-39 at ¶8) states his losses to be \$80,000. The _____ states LA's losses to be \$30,000. RX-21 at 6 and Tr. at 160-61.

⁶⁷ Tr. at 142-145. The Hearing Panel found that the other RS complaint (dated January 28, 1994) listed on Exhibit B merely was a request by RS that the description of the trade be changed from “unsolicited” to “solicited” and did not rise to the level of a “customer complaint.” Tr. at 196-98 and CX-27 at 6.

⁶⁸ Tr. at 143-46.

⁶⁹ Tr. at 146-148 and RX-18 and 19. Ms. _____ admitted that she was not in any position to evaluate whether a customer complaint has merit or totally lacks merit. More specifically, she testified that she was not in a position to evaluate whether the claims made by RS, LA, and DL had any merit. Tr. at 149-50, 168.

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and that RS was not credible.⁷⁰ Mr. _____ testified that he did not believe that RS's claim raised any questions about Respondent _____ integrity.⁷¹

Mr. _____ also was aware of the claim of DL and characterized it as a “case where we had a customer and an account executive playing telephone tag and trying to sell securities.”⁷² Mr. _____ asked _____, Respondent _____ former branch manager, to investigate the claim.⁷³ Then, in order, to rectify the situation, _____ put through a trade at the price the customer wanted which satisfied DL.⁷⁴ Mr. _____ testified that Mr. _____ never suggested that this incident raised any question about Respondent _____ integrity; nor did Mr. _____ believe such a question was raised.⁷⁵

The _____ which included the joint claims of LA and RK was handled by outside counsel for _____. Mr. _____ testified that after the arbitration was filed, up to and including the time of the RM complaint, he received information from _____ lawyers concerning the case. Counsel reviewed the documents and “felt this was a very, very defensible

⁷⁰ Tr. at 509-10. In support of his conclusions, Mr. _____ testified that RS threatened litigation and then backed off and later contacted Mr. _____, at least twice, for the purposes of continuing to do business with _____. Id. See also CX-27 at 6-20 and RX-12 through RX-19 (exchange of correspondence between RS and _____).

⁷¹ Tr. at 510.

⁷² Tr. at 512. The contemporaneous memoranda of this dispute reflect that DL instructed Respondent _____ sales assistant to sell certain stock and she told him she was not registered and could not do so. CX-14 at 5-7. Respondent _____ then attempted to call DL, but was unable to reach him so he left messages. Id. at 7. The stock was sold on June 27, 1996, the same day as DL's written complaint was received, at no loss to the customer. Id. at 9 and 10. See also CX- 37 (Affidavit of DL).

⁷³ Tr. at 512.

⁷⁴ Id.

⁷⁵ Tr. at 513.

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case and that we should proceed with defense of the arbitration.”⁷⁶ Mr. _____ testified that the arbitration had not been resolved by the date of the RM complaint.⁷⁷

As to RK's claim in the _____, Mr. _____ testified that Respondent _____ never was RK's broker and that he never made a trade for RK.⁷⁸ In fact, Mr. _____ testified that in a meeting with counsel for Enforcement in September 1997, before the complaint was filed, he made clear that Respondent _____ had no part at all in RK's claim even though it was joined with LA's claim in the _____.⁷⁹

Based on his knowledge and investigations of the pre-RM complaints, Mr. _____ testified as to his conclusions why Respondent _____ was not subject to heightened supervision.⁸⁰ Specifically, Mr. _____ noted that RS's complaint was received in the early part of 1994 and, in the next two year period, before the _____ was filed, there were no complaints whatsoever against Respondent _____.⁸¹ As to the _____, _____, based on the information received from counsel, had every reason to believe that its defenses would be successful.⁸²

Concerning DL's complaint, Mr. _____ testified that there was no pattern of any problems in the past about failures to sell, or any delays in selling, and that the problem appeared to arise because of

⁷⁶ Tr. at 514-15.

⁷⁷ Tr. at 515.

⁷⁸ Tr. at 516. This was consistent with Ms. _____ testimony that Exhibit B should not include RK.

⁷⁹ Tr. at 518-19.

⁸⁰ Tr. at 520-21.

⁸¹ Id.

⁸² Tr. at 521.

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a delayed communication between Respondent _____ and DL.⁸³ Mr. _____ further testified that, based on _____ investigation of these matters, he concluded that "[t]here is no discernible pattern. They're all unrelated, and there wasn't sufficient -- there's no merit here to warrant any heightened supervision of * * * [Respondent _____] * * *."⁸⁴

Respondents _____ and _____ also presented evidence that Respondent _____ was subject to heightened supervision after the RM complaint. Mr. _____ testified that at or about the time of the RM complaint, two other customers of Respondent _____ complained about the Harmat offering.⁸⁵ In response, Respondent _____ was subject to heightened supervision.⁸⁶

Mr. _____ testified as to the nature of the heightened supervision imposed on Respondent _____.⁸⁷ Mr. _____ instructed Respondent _____ sales assistant, Ms. _____,⁸⁸ who handled all his phone calls, that if Respondent _____ got more than two phone calls from a customer which were not returned to let Mr. _____ know.⁸⁹ Further, Mr.

⁸³ Id.

⁸⁴ Tr. at 521. Mr. _____ testified that when _____ Maryland office was closed, he spoke with Mr. _____ concerning the brokers (including Respondent _____) transferring to the New York office. Tr. at 228-29. See also CX-43 at 3 and 6. This was done pursuant to the instructions of Mr. _____. Tr. at 505-06. Mr. Kane did not indicate to Mr. _____ that there were any special supervisory requirements over Respondent _____. Tr. at 201-02, 229-30 See also CX-43 at 5. Mr. _____ also testified that Mr. Kane never told him that Respondent _____ was a problem broker. Tr. at 507.

⁸⁵ The two other customers who complained about Harmat were MB and PM. Tr. at 203, 237. MB, interestingly, complained that Respondent _____ did not allocate to him as many shares of Harmat as he thought he was getting. CX-16 (exchange of correspondence between MB and _____). See also Tr. at 454-55.

⁸⁶ Tr. at 237-38.

⁸⁷ Tr. at 238-39. See also CX-43 at 3-5.

⁸⁸ Mrs. _____ maiden named was Ms. _____ and she is referred to in the transcript both as _____ and _____.

⁸⁹ Tr. at 239.

_____ instructed Ms. _____ and Mr. _____, the branch cashier, that he wanted to see every order ticket put in by Respondent _____.⁹⁰ Mr. _____ also spent more time monitoring Respondent _____ phone calls.⁹¹

Mr. _____ testified that, although he did not believe an unauthorized trade took place in RM's account,⁹² _____ imposed heightened supervision after the RM complaint because of other complaints occurring at that time.⁹³ Mr. _____ confirmed Mr. _____ description of the heightened supervision imposed on Respondent _____.⁹⁴

Ms. _____ and Mr. _____ corroborated Mr. _____ testimony. Ms. _____ testified that, in September 1996, Mr. _____ instructed her to tell him if any customer had difficulty getting in touch with Respondent _____ after two attempts.⁹⁵ Mr. _____ also instructed her to tell him if any customer complained about Respondent _____ and to give Mr. _____ all order tickets for review before execution.⁹⁶ Mr. _____ testified that Mr. _____ instructed him that he (Mr. _____) wanted to review any order tickets submitted by Respondent _____ before they were entered into the system.⁹⁷

⁹⁰ Id.

⁹¹ Tr. at 239-40.

⁹² Tr. at 480-81.

⁹³ Tr. at 481 and 483.

⁹⁴ Tr. at 508-09.

⁹⁵ Tr. at 420-22; RX-28 (Statement of _____ to Enforcement); CX-43 at 9 (same).

⁹⁶ Id.

⁹⁷ Tr. at 428. See also RX-27 (Statement of Charles _____ to Enforcement); CX-43 at 8 (same).

2. Findings

The Hearing Panel finds that Enforcement failed to meet its burden to prove the allegations of Count Two of the Complaint.⁹⁸

Prior to the RM complaint, only three customers (RS, LA, and DL) complained about Respondent _____ during the four years he had been at _____. Of these three, two (RS and LA) alleged that Respondent _____ had been dishonest.⁹⁹ Of these two, only LA appears to have had a legitimate complaint against Respondent _____. The legitimacy of this complaint, however, still was pending at the time of the RM complaint. Based on the evidence, the Hearing Panel finds that there were no reasonable grounds for Enforcement to allege that Respondent _____ should have been subject to heightened supervision before the Harmat IPO.

Similarly, the Hearing Panel finds no basis for Enforcement's allegations that Respondent _____ was not subject to heightened supervision after the Harmat IPO. Enforcement provided no supporting documentation or other testimony to support this claim. Moreover, the evidence readily demonstrates that even some of the few details provided by Enforcement in Exhibit B with respect to the three (3) post-RM complaints are inaccurate.¹⁰⁰ The Hearing Panel finds that

⁹⁸ The testimony at the Hearing demonstrates that Enforcement's pre-Complaint investigation was incomplete and not fully developed. For example, affidavits prepared by District staff contained errors, Exhibit B to the Complaint was inaccurate, and testimony at the Hearing indicates that District staff apparently knew of such inaccuracies prior to filing the Complaint.

⁹⁹ DL complained that Respondent _____ ignored two of his phone calls. See RX-22 .

¹⁰⁰ For example, Exhibit B erroneously suggests that the PM complaint concerned a post-RM Harmat trade when, in fact, the trades occurred on the same day -- September 10, 1996. See CX-15 at 6. Moreover, although Exhibit B reflects that CB complained about a failure to sell and an unauthorized trade, it also records that CB retained the stock and retracted the claim. CX-27 at 4 and 23. The Hearing Panel fails to understand how this "complaint" evidences inadequate supervision. The same is true with respect to the RB complaint reflected on Exhibit B. Enforcement knew, prior to the Hearing, that RB did not complain about Respondent _____, but did not correct or amend its Complaint.

Enforcement had no basis for relying on these other complaints to support an allegation of inadequate supervision.

The Association's own instructions to members concerning heightened supervision¹⁰¹ make clear that isolated customer complaints, standing alone, whether valid or not, do not trigger a duty to impose heightened supervision. NTM 97-19 discusses the profile of registered representatives that should be considered for heightened supervision.¹⁰² More particularly, NTM 97-19 states that heightened supervision may be appropriate for registered representatives whose CRD record discloses sales practice problems, disciplinary actions, or arbitrations.¹⁰³

NTM 97-19 informs members that while a history of disciplinary actions, complaints, or arbitrations resolved in a manner adverse to the registered representative may indicate a situation appropriate for heightened supervision, pending isolated complaints simply may be indicative of a history that should be reviewed. Further, NTM 97-19 makes clear that the review of either final or pending matters need not result in a conclusion that heightened supervision is warranted. Rather, in each case, the conclusion reached is to be reasonable and supportable in view of all the evidence.¹⁰⁴

¹⁰¹ Notice to Members 97-19 ("NTM 97-19"), "The Joint Regulatory Sales Practice Sweep: Heightened Supervisory Procedures" (April 15, 1997).

¹⁰² NTM 97-19 at 159.

¹⁰³ Id.

¹⁰⁴ NTM 97-19 also suggests that red flags alone trigger no duty to impose heightened supervision. See Id. at 157. Rather, by way of example, NTM 97-19 states that a review procedure for a registered representative should be considered if the representative is named, during a one-year period, in three customer complaints alleging sales practice abuse. There is no such evidence here. Similarly, NTM 96-32, "Members Reminded To Use Best Practices When Dealing in Speculative Securities" (May 9, 1996), states that heightened supervisory is appropriate when a firm hires a representative who has a pattern of serious customer complaints, or a disciplinary history, or for an existing representative who becomes the subject of such problems. Prior to the RM complaint there is no evidence of any pattern of serious customer complaints against Respondent _____.

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Even though NTM 97-19 was issued after the customer complaints on which Enforcement bases its claims, the Hearing Panel finds that Respondents _____ and _____ did exactly what the Association expects its members to do. The pre-RM complaints were thoroughly investigated. Based on the results of those investigations, the Hearing Panel finds that _____ decision not to impose heightened supervision on Respondent _____ was rational and supportable.¹⁰⁵

Further, the Hearing Panel finds that after receiving three complaints about Respondent _____ in a relatively short period of time concerning the Harmat IPO, _____ also did exactly what it should have done. It imposed heightened supervision on Respondent _____ which remained in effect until he left the employ of _____ in April 1997.¹⁰⁶ The Hearing Panel finds that the evidence offered by Respondents _____ and _____ demonstrating that heightened supervision was imposed on Respondent _____ after the Harmat IPO is uncontroverted.

Based on the evidence, the Hearing Panel concludes that Respondents _____ and _____ did not violate NASD Conduct Rules 2110 and 3010 as alleged in Count II of the Complaint.

¹⁰⁵ When given the opportunity to offer legal support for its position that heightened supervision should have been imposed prior to the RM complaint, Enforcement failed to provide any relevant cases. The three cases primarily relied upon by Enforcement in its Opposition all are distinguishable from the facts here and stand only for the well known position that, in appropriate cases, line supervisors may be held responsible for inadequate supervision. Cf. Respondents' Mem. at 14-27 with Opposition at 11-17. See also Tr. at 34-37.

¹⁰⁶ Tr. at 26-27, 237 and 246. Even though Exhibit B reflects that _____ received CB's complaint after the complaints concerning the Harmat IPO, it relates to a transaction which predated that offering. CX-27 at 22-23. After heightened supervision was imposed, Respondent _____ did not engage in any conduct which gave rise to a customer complaint. Tr. at 246-47.

IV. Sanctions as to Respondent _____

The NASD 1998 Sanction Guidelines (“Sanction Guidelines”) recommend a fine of \$5,000 to \$75,000 for an unauthorized transaction.¹⁰⁷ The Sanction Guidelines also recommend that the Hearing Panel consider whether respondent misunderstood his authority and also consider the relevant factors listed at pages 8-9 of the Sanction Guidelines.

Here, the relevant considerations include (1) respondent’s disciplinary history; (2) whether respondent engaged in a pattern of misconduct; (3) whether respondent engaged in misconduct over an extended period of time; (4) whether respondent attempted to conceal his misconduct; (5) whether respondent’s misconduct resulted in the potential for monetary or other gain; (6) the number, size, and character of the transaction at issue; (7) the level of sophistication of the injured or affected customer; and (8) whether respondent's conduct resulted in injury either to the customer or the investing public.

There is no evidence of any prior disciplinary history of Respondent _____.¹⁰⁸ The Hearing Panel also finds no evidence that Respondent engaged in a pattern of misconduct. The pre-RM complaints, to the extent they are valid, do not reflect any pattern of unauthorized trading or other sales practice abuses. Similarly, the two (2) other complaints relating to the Harmat offering did not involve unauthorized transactions. Rather, PM complained that Respondent _____ discouraged him from immediately selling some of the Harmat shares he

¹⁰⁷ Sanction Guidelines at 86.

¹⁰⁸ Stipulation at ¶7.

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purchased in the IPO.¹⁰⁹ MB complained that he thought he was getting more Harmat shares than allocated to him by Respondent _____.¹¹⁰

The Hearing Panel also finds no evidence that Respondent _____ engaged in any misconduct over an extended period of time. The pre-RM customer complaints were spread over a two year period. The complaints relating to the Harmat IPO all occurred at the time of the offering. Further, Respondent _____ did nothing to conceal the alleged misconduct of which he is accused. The record demonstrates that all customers received timely confirmations of the transactions executed on their behalf. In fact, RM testified that he received the confirmation for the Harmat transaction on September 11, one day after the shares were purchased for his account. And Respondent _____ efforts to reach RM¹¹¹ are inconsistent with a conclusion that he attempted to conceal an unauthorized trade.

The record also is clear that the size of the RM transaction was small and there was no monetary or other gain to Respondent _____. Although RM gave Respondent _____ an indication of interest to purchase shares of Harmat worth between \$50,000-\$60,000, Respondent _____ only allocated 200 shares to RM at a cost of approximately \$1,150.00.¹¹² The record establishes that Respondent _____' commission for the RM transaction was approximately \$20.00

¹⁰⁹ CX-15 at 2 and 3. On September 10, 1996, PM purchased 1000 Harmat shares at 5 3/4 and 1500 shares at 7. On September 13, 1996, PM called Respondent _____ to sell the shares he purchased at 5 3/4 and Respondent _____ is alleged to have discouraged him from selling the shares at that time. CX-15 at 6. PM's complaint may reflect a different disciplinary problem than the one at issue in this proceeding. Nevertheless, the Hearing Panel considered this Harmat related complaint in determining appropriate sanctions.

¹¹⁰ CX-16 at 2.

¹¹¹ See _____ Call Detail Reports, _____' Exs.1-5.

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and that he incurred a \$15.00 Federal Express charge to send a "red herring" to RM prior to the offering.¹¹³ Respondent _____ also paid a ticket charge of \$15.00 to \$20.00 even though the trade was canceled.¹¹⁴ Thus, Respondent _____ actually lost money on this transaction.¹¹⁵

Further, there is no question that RM is a very sophisticated businessman.¹¹⁶ He freely gave information as to his substantial net worth¹¹⁷ and testified that he knew how to deal with brokers who were soliciting his business.¹¹⁸ In fact, RM testified, and his Affidavit reflects, that he told Mr. _____ that his daughter was a stockbroker in order to get rid of him.¹¹⁹ There also is no dispute that RM was not injured by the Harmat purchase for his account. At his request, the trade was promptly canceled at no cost to him.¹²⁰

¹¹² Tr. at 453-454. Respondent _____ explained that he only was allocated so many shares of Harmat and, accordingly, he had to look at several factors in allocating shares among his customers. Id. at 454. See also CX-24 at 3.

¹¹³ Tr. at 455. There is no question that RM received the "red herring" for the Harmat offering. Tr. at 271-73 and 304.

¹¹⁴ Tr. at 255, 455-56.

¹¹⁵ Mr. _____ confirmed Respondent _____ testimony that he was responsible for paying the Federal Express charge, that Respondent _____ account was debited \$20.00 when the RM trade was canceled, and that the most Respondent _____ could have made from the RM transaction was \$20.00. Tr. at 212, 253-55 and CX-22 at 19. Enforcement admitted that Respondent _____ made no profit on the RM trade. Tr. at 255.

¹¹⁶ RM testified that he does not own a lot of stock, but is "very heavy in real estate." Tr. at 300 and CX-28 at ¶2. See also Tr. at 207-08. Although RM testified he has not bought IPOs, he is familiar with IPOs since he sat on the board of a company that was preparing to go public. Tr. at 332. RM's secretary testified that he purchased shares in a private placement and also that he invested \$500,000 in an IPO. Tr. at 293-94.

¹¹⁷ Tr. at 334 and CX-28 at ¶2.

¹¹⁸ Id. at and 336-37.

¹¹⁹ Tr. at 336-37 and CX-28 at 2. RM testified that to get rid of brokers, he tells them that his daughter is a stockbroker and that he has a broker in New Orleans. Tr. at 337. He further testified that Mr. _____ phone call was a "hard sell" and that he knew how to terminate such calls. Tr. at 341-42. RM also testified he never bought stock from his daughter and he did not have an account with his daughter. Tr. at 335-36.

¹²⁰ Tr. at 311 and RX-11. In fact, RM testified that he would have been able to assume the entire loss of the transaction - \$1,150.00. Id. at 311-12.

Nevertheless unauthorized trading is a serious violation. The Hearing Panel is especially troubled by Respondent _____ lack of appreciation or understanding as to the difference between an "indication of interest" and an order to buy. Respondent _____ is not an inexperienced broker. He has worked in the securities industry since 1992 and he should understand the difference between the two.

In addition, by Respondent _____ own admission, his troubles could have been avoided if he had followed accepted practice and confirmed the trade with RM prior to execution or, in the absence of such communication, not put the order through. Although the Hearing Panel finds there was no intent to engage in an unauthorized trade, Respondent _____ may have been overanxious to show RM what he could do in order to capture his business for other trades.¹²¹

The Hearing Panel finds no other aggravating or mitigating factors. Accordingly, having considered all the evidence submitted by the Parties,¹²² the Hearing Panel determines that a fine of \$7,500 and requalification for Series 7 within thirty (30) days of the effective date of this decision is an appropriate sanction for the violation of NASD Conduct Rule 2110 alleged in Cause One of the Complaint against Respondent _____. A portion of the costs of the Hearing, \$1,562.00¹²³ also are assessed against Respondent _____.

¹²¹ There is some evidence of this from Mr. _____ contemporaneous memorandum to file regarding the conversation between himself, Respondent _____, and RM which reflects that Respondent _____ "stated he put RM in for 200 to show him how great our IPO's are and that he should like it because it was profitable already." RX-10. Also, the other complaints regarding Harmat -- those of MB and PM --- reflect that Respondent _____ may have been too aggressive on this IPO.

¹²² The Hearing Panel considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

¹²³ The total hearing costs attributable to the expense of the transcript and the administrative fee were \$3,124.00. The Hearing Panel determined that Respondent _____ only should pay a portion of those costs.

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These sanctions shall become effective on a date set by the Association, but not before the expiration of 45 days after the date of this decision.

Hearing Panel

By _____

Ellen A. Efros
Hearing Officer