NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MONROE PARKER SECURITIES, INC. (BD No. 31204) Purchase, NY, ALAN SCOTT LIPSKY (CRD No. 1907150) Kings Point, NY, BRYAN JAY HERMAN (CRD No. 1967760) Kings Point, NY, RALPH JOSEPH ANGELINE (CRD No. 6094) Katonah, NY, RICHARD STEVEN LEVITOV (CRD No. 602479) Bayonne, NJ, Respondents.	:	Disciplinary Proceeding No. CAF970011 Hearing Officer - AHP **Hearing Panel Decision** June 18, 1999

Digest

The Hearing Panel found that Monroe Parker, its vice-president, and its head trader, charged retail customers fraudulently excessive markups and manipulated the

market for warrants issued by Steven Madden, Ltd. in violation of Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, and NASD Conduct Rules 2120, 2440, and 2110. The Hearing Panel also found that Monroe Parker, its president, and its vice-president violated Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, and NASD Conduct Rules 2110 and 2120, by failing to disclose an adverse interest in the sale of United Leisure stock to 92 retail customers. The Hearing Panel further found that Monroe Parker's president and its director of compliance failed to supervise the trading and sales activity at the firm in violation of NASD Conduct Rules 2110 and 3010.

Monroe Parker is expelled from membership in the NASD and fined $5,592,692. The firm's president is barred from associating with any member of the NASD in any capacity and fined $5,242,692. The firm's vice-president is barred from associating with any member of the NASD in any capacity and fined $5,592,692. The firm's head trader is barred from associating with any member of the NASD in any capacity and fined $3,756,930. And the firm's director of compliance is barred from associating with any member of the NASD in any principal capacity, suspended in all capacities for one year commencing December 31, 1997, fined $5,000, and ordered to requalify by passing the Series 7 examination before re-associating with any member firm. With the exception of Monroe Parker's director of compliance, the Hearing Panel also ordered the Respondents to pay the costs of this proceeding in the amount of $3,285.80.

Appearances

Rory C. Flynn, Esq., Chief Litigation Counsel, Washington, DC, and Frank SanClemente, Esq., Regional Counsel, Boston, Massachusetts, counsel for the Department of Enforcement.

Martin P. Russo, Esq. and Matthew H. Maschler, Esq., counsel for Monroe Parker Securities, Inc.

Richard Levitt, Esq., counsel for Alan Scott Lipsky.

Martin H. Kaplan, Esq. and Scott Silver, Esq., Gusrae, Kaplan & Bruno, counsel for Bryan Jay Herman.

David Gordon, Esq., counsel for Ralph Joseph Angeline.

Diarmuid White, Esq. and Brendan White, Esq., counsel for Richard Steven Levitov.

DECISION

Introduction

On January 28, 1998, the Department of Enforcement (Enforcement) filed its First Amended Complaint in this disciplinary proceeding against Monroe Parker Securities, Inc. (Monroe Parker or the "Firm"), Alan Scott Lipsky (Lipsky), Bryan Jay Herman (Herman), Ralph Joseph Angeline (Angeline), and Richard Steven Levitov (Levitov). The gravamen of the first and second causes of action is that Monroe Parker, Herman, and Angeline manipulated the market and charged excessive markups for Steven Madden, Ltd. Class A Warrants ("Madden Warrants" or the "Warrants") between August 1994 and January 1995 in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act"); Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5; and NASD Conduct Rules 2110, 2120, and 2440. In essence, Enforcement alleges that Monroe Parker and its controlling officers acquired nearly all of the Madden Warrants available for trading by the public, manipulated the price upwards, and then sold them at artificially inflated prices. In the third cause of action, Enforcement alleges that Monroe Parker,

Herman, and Lipsky failed to disclose to those customers who purchased United Leisure common stock from Monroe Parker that it had acquired the stock from its officers, Herman and Lipsky. Enforcement alleges that, by such conduct, Monroe Parker, Herman, and Lipsky violated Section 10(b) of the Exchange Act, Rule 10b-5, and NASD Conduct Rules 2110 and 2120. In the fourth cause of action, Enforcement alleges that Lipsky, Herman, and Levitov failed to adequately supervise the trading and sales activity at Monroe Parker, thereby permitting the violations alleged in the other causes of the First Amended Complaint to occur, in violation of NASD Conduct Rules 2110 and 3010.

Enforcement moved for summary disposition on May 4, 1998. Under Rule 9264(d), the Extended Hearing Panel (Hearing Panel)[1] deferred ruling on the motion until the close of the hearing. After hearing the evidence and reviewing the papers presented by the Parties, the Hearing Panel denied Enforcement's motion for summary disposition, finding that there were material issues of fact in dispute.

The Hearing Panel held a hearing on November 16-18, 1998, during which Enforcement offered the testimony of two staff members of NASD Regulation, Inc. ("NASDR"), four customers who purchased United Leisure stock from Monroe Parker, and the former manager of the over-the-counter trading department at Baird, Patrick &

[1] Under NASD Procedural Rule 9231(c), the Chief Hearing Officer designated this matter an Extended Hearing. Accordingly, an Extended Hearing Panel was appointed.

Co., Incorporated. Enforcement also introduced 93 exhibits into evidence,[2] including transcripts of the Respondents' testimony taken during the investigation that led to the filing of the Complaint in this proceeding.[3] The Respondents offered no evidence.

At the commencement of the hearing, the Respondents renewed their applications for a stay of the hearing pending disposition of pending state and federal criminal proceedings against them. The Hearing Panel denied their applications for the same reasons set out in the Order Denying Motions To Stay The Proceeding And To Seal Discovery dated June 25, 1998.

At the conclusion of the hearing, the Hearing Officer granted the Parties' requests for leave to file post-hearing submissions in lieu of closing arguments. On December 28, 1998, Enforcement filed a Memorandum of Points and Authorities in Support of a Final Decision Against the Respondents and Proposed Findings of Fact. Angeline, Levitov, and Herman filed post-hearing memoranda on December 28 and 30, 1998, and January 11, 1999, respectively. Neither Monroe Parker nor Lipsky filed post-hearing submissions.

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[2] Two of Enforcement's exhibits are summaries of the trading in Madden Warrants during the period January 4 to January 17, 1995. (Tr. 120.) Exhibit C070 is a Chronological Transaction Analysis on a settlement basis, and Exhibit C071 is a Chronological Transaction Analysis on a trade date basis. These summaries are derived from Enforcement's analysis of several other source documents, including the NASD Integrated Equity Journal (or "Equity Trade Journal"), Ex. C068, and the NASD Market Maker Price Movement Report for Madden Warrants (Ex. C069). Although Enforcement did not move the Equity Trade Journal and the Market Maker Movement Report into evidence at the hearing, the Hearing Panel admitted them after the conclusion of the hearing because they are essential to understanding the trading in Madden Warrants. Both reports had been filed with Enforcement's pre-hearing submissions, and none of the Respondents objected to their admissibility as required by the Initial Pre-Hearing Order dated March 12, 1998. In addition, the Hearing Panel notes that at least some of the Respondents believed the reports to be in evidence. For example, Angeline cited to the Equity Trade Journal in his post-hearing submission, arguing that Enforcement had assigned the wrong execution times to some trades.

[3] References to the evidence are as follows: References to the hearing transcript are cited as "Tr.[number]." Enforcement's exhibit references are "Ex. C[number]." Testimony of the Respondents taken by NASDR is cited as "Ex. C[number], [Last name of Respondent] Tr.[number]." All transcript cites are to the transcript page numbers, not the exhibit page numbers.

Findings of Fact

A. Respondents' Backgrounds in the Securities Industry

1. Monroe Parker

Now defunct, Monroe Parker at all times relevant to this proceeding was a broker-dealer and a member of the National Association of Securities Dealers, Inc. ("NASD"). Its sole office, which it acquired from Biltmore Securities, Inc. (Biltmore), was in Purchase, New York. (Tr. 39.) Although Monroe Parker first registered with the NASD in May 1994, it did not begin operating until August 1994. It was an integrated broker-dealer, making a market in 17–25 securities. (Tr. 40.) Its trading revenues for the years 1994-1996 were $14,700,305, $31, 800,821, and $52,805,030, respectively. (Monroe Parker Ans. ¶ 4; Tr. 207; Ex. C114; Ex. C115.) In December 1997, Monroe Parker ceased operating and filed with the NASD a Uniform Request For Withdrawal From Broker-Dealer Registration (Form BDW). (Ex. C033.)

Monroe Parker was run by Lipsky and Herman, its founders. Lipsky owned 51% of the Firm's voting stock and was its President. (Ex. C127, Lipsky Tr. 10-11.) Herman owned 49% of Monroe Parker's voting stock and was its Vice President in charge of sales and trading. (Ex. C127, Lipsky Tr. 10-11; Ex. C032, at 32.) They comprised Monroe Parker's entire Board of Directors. Consequently, they had absolute control of the Firm.

Together, Lipsky and Herman made all of the management decisions regarding Monroe Parker's business. They set the Firm's policies, determined the securities in which it made a market, supervised its sales and trading operations, and set all of the salaries and

bonuses[4] for Monroe Parker's employees, including their own. (Ex. C123, Herman Tr. 10-14; Ex. C127, Lipsky Tr. 8-9.) Working as partners, they controlled every element of Monroe Parker's business.

Monroe Parker has no disciplinary history.

2. *Alan Scott Lipsky*

Lipsky first worked in the securities industry as a General Securities Representative with Stratton Oakmont, Inc. (Stratton) from July 1989 to September 1992. At Stratton he met Herman, and they both joined Biltmore in January 1993 to run its branch office in Purchase, New York. (Ex. C127, Lipsky Tr. 10.) Lipsky worked at Biltmore as a General Securities Representative and a General Securities Principal until he and Herman started Monroe Parker.

At Monroe Parker, Lipsky and Herman ran the Firm as "partners." (Ex. C127, Lipsky Tr. 9; Ex. C123, Herman Tr. 5, 14.) Lipsky, however, was responsible primarily for the administrative and financial management of the Firm. (Ex. C127, Lipsky Tr. 7-8.) He supervised the sales force, managed the day-to-day operations, and oversaw Monroe Parker's finances. (Ex. C127, Lipsky Tr. 8; Ex. C117, Angeline Tr. 75, 84.) Along with Herman, Lipsky also determined the securities in which Monroe Parker made a market and in which initial public offerings Monroe Parker would participate. (Ex. C127, Lipsky Tr. 27-28.)

Lipsky's salary and bonuses for the years 1994-1996 were $4,748,353.99, $4,221, 574.81, and $11,505,331.60, respectively. (Ex. C116, at 1.)

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[4] Usually, they set the salaries and bonuses based upon the profitability of the Firm. (Tr. 204.)

Except for failing to respond to a request for information in May 1998 that was issued in connection with another investigation of Monroe Parker, Lipsky has no disciplinary history.[5]

3. Bryan Jay Herman

Herman entered the securities industry as a General Securities Representative with Stratton in July 1989. (Ex. C009, at 4.) Although Herman and Lipsky generally had overlapping duties at Monroe Parker, Herman was responsible primarily for supervising Monroe Parker's trading department and managing its trading account. (Ex. C123, Herman Tr. 10.) He directly supervised Angeline, Monroe Parker's head trader, and Angeline's assistants in the trading department. (Ex. C123, Herman Tr. 10.)

Herman's salary and bonuses for the years 1994-1996 were $4,748,353.99, $1,230,874.81, and $2,178,566.71, respectively. (Ex. C116, at 2.)

As is the case with Lipsky, except for failing to respond to a request for information in May 1998 that was issued in connection with another investigation of Monroe Parker, Herman has no disciplinary history.[6]

4. Ralph Joseph Angeline

Angeline first entered the securities industry in 1968, and he thereafter worked at a series of broker-dealers until he joined Monroe Parker in August 1993 as its Director of

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[5] The NASD entered a Default Decision against Lipsky on September 22, 1998, finding that he had failed to appear for an on-the-record interview. He was censured, fined $50,000, and barred from associating with any NASD member in any capacity. A copy of the decision was introduced into evidence as Ex. C142.

[6] The NASD entered a Default Decision against Herman on September 22, 1998, finding that he had failed to appear for an on-the-record interview. He was censured, fined $50,000, and barred from associating with any NASD member in any capacity. A copy of the decision was introduced into evidence as Ex. C143.

Trading. (Ex. C117, Angeline Tr. 5-6.) Angeline was not an officer of Monroe Parker, nor did he sit on the Board of Directors. (Ex. C117, Angeline Tr. 5.) His duties were to oversee the trading operations and supervise the other traders at the Firm. (Ex. C117, Angeline Tr. 7.) Angeline and Herman worked together closely. Angeline executed the trading strategies Herman developed each day before the market opened. (Ex. C117, Angeline Tr. 12, 18-19, 74-75, 84.) Together, they determined the price for each trade, (Ex. C117, Angeline Tr. 10, 13.) after which Herman set the sales credit each registered representative received as compensation. (Tr. 565-67, 571; Ex. C117, Angeline Tr. 10, 13.) Angeline also reviewed each day's order tickets to assure their accuracy. (Ex. C117, at 8-11.)

Angeline's salary and bonuses for the years 1994-1996 were $198,000, $203,000, and $459,740, respectively. (Ex. C116, at 2.)

Angeline has no disciplinary history.

5. Richard Steven Levitov

Levitov began his career in the securities industry with Drexel Burnham & Co., Incorporated in 1973 where he held the position of Vice President of Legal and Compliance. (Ex. C126, Levitov Tr. 7.) He left Drexel in 1990 and thereafter worked at two other broker-dealers before joining Monroe Parker in August 1993 as its Director of Compliance. (Ex. C126, Levitov Tr. 6-7; Ex. C011.) Levitov worked at Monroe Parker until it closed in December 1997. (Ex. C011.)

Levitov did not have an ownership interest in Monroe Parker, and he was not an officer of the Firm. (Tr. 494-95.) He did, however, have important regulatory compliance responsibilities. According to Monroe Parker's Registered Representative & Compliance

Manual (Compliance Manual), he was responsible for all of Monroe Parker's compliance issues. The Compliance Manual stated that his responsibilities included "[m]atters falling within, but not limited to compliance responsibilities addressed in this Manual and necessary enhancements based upon actual experience." (Ex. C032, at 32.) His duties as Director of Compliance were to review and answer customer complaints, review the Firm's daily trading activity, and oversee the registration of securities. (Tr. 496, 498.) Levitov also was responsible for ensuring that Monroe Parker's customers were not charged excessive markups. (Tr. 512-13.) Additionally, he had responsibility for training Monroe Parker's sales personnel on compliance issues, but he had no authority to hire and fire registered representatives, which Lipsky retained. (Tr. 495, 498.)

Levitov's salary and bonuses for the years 1994-1996 were $65,643.55, $149,188.29, and $208,812.20, respectively. (Ex. C116, at 2.)

Levitov has no disciplinary history.

B. Manipulation of Madden Class A Warrants

The market manipulation allegations in the First Amended Complaint relate to the sales practices of Monroe Parker, Herman, and Angeline involving Madden Warrants during the period August 1994 to January 1995. During this period, Monroe Parker accumulated nearly 94% of the Madden Warrants available for trading by the public (the "floating supply" or the "float").[7] It then manipulated the price of the Madden Warrants upward before selling its inventory to its customers at excessive prices.

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[7] The floating supply or float of a security is that part of an issue which is outstanding and which is held with a view to resale for a trading profit. In re F.N. Wolf & Co., Admin. Proc. File No. 8533, 1996 SEC LEXIS 8, at *47 (Jan. 3, 1996). Securities held for investment are not included. E.g., In re Gob Shops of America, Inc., 39 S.E.C. 92, 102 (1959).

1. Steven Madden, Ltd.

Steven Madden, Ltd., a New York corporation, designs and manufactures women's shoes. It began operations in August 1990 and, in December 1993, it listed on the Nasdaq SmallCap Market and issued an initial public offering of 1,500,000 Units, each Unit consisting of one share of Common stock, one Class A Warrant, and one Class B Warrant.[8] The Class A and Class B warrants were exercisable for a four-year period beginning on December 10, 1994, and had respective exercise prices of $4.75 and $5.50 per warrant.[9] When exercised, both classes of warrants yielded one share of common stock.[10] At all times relevant to this proceeding, the float of Madden Warrants was 1,875,000. (Tr. 66.) Stratton underwrote the initial public offering.

The prospectus disclosed that investment in Steven Madden securities was speculative and involved a high degree of risk. In fact, Steven Madden did not make a profit between August 1990 and March 1995. (Tr. 64, 538; Ex. C036, at 4.)

2. Monroe Parker's Accumulation of Madden Class A Warrants

Immediately upon opening for business in August 1994, Monroe Parker began to accumulate Madden Warrants. (Tr. 68.) Between August 11, 1994, and the morning of January 4, 1995 (the "Accumulation Period"), Monroe Parker purchased 1,610,700 Warrants from Stratton, in 11 separate transactions, at prices ranging from $0.75 to $2.8125 per Warrant. (Tr. 83; Ex. C052.) These purchases equaled approximately 85% of the float of Madden Warrants. (Tr. 74.) Monroe Parker also purchased, in seven

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[8] Tr. 64, 68; Ex. C034. The trading symbols were SHOO for the common stock, SHOO W for the Class A Warrants, and SHOO Z for the Class B Warrants.

[9] Tr. 65; Ex. C034, at 34-35.

transactions, approximately 150,000 Warrants from other broker-dealers during the last five trading days before January 4, 1995. (Tr. 99.) During the Accumulation Period, the price for Madden Warrants steadily increased. (Tr. 90.) At the end of the Accumulation Period, Monroe Parker owned or controlled 93.9% of the float of Madden Warrants.[11]

Although Monroe Parker was a market maker in Steven Madden securities, it did not sell any of the Warrants to public customers during the Accumulation Period. (Tr. 85-86, 98, 121.) Other than selling 400,000 Warrants to Lipsky and Herman at cost ($0.75 each) on August 11, 1994, the only other times Monroe Parker reduced its inventory during the Accumulation Period were: (i) when it gave John Clancy (Clancy), its top producing registered representative, 25,000 Warrants on September 15, 1994, as a bonus; and (ii) when it sold Clancy 15,000 Warrants on November 2, 1994, at $2.00 per Warrant.[12] Apart from Monroe Parker's purchases during the Accumulation Period, there were few other trades of Madden Warrants, and those involved small quantities.[13]

3. *Monroe Parker Raised the Bid Price for Madden Class A Warrants on January 4, 1995*

In anticipation of retail selling, on January 4, 1995, Monroe Parker raised the inside bid for Madden Warrants by 24.4% over the course of 78 minutes. In six instances

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[10] Tr. 65-66.

[11] At one point during the hearing, a Special Investigator with NASDR testified that Monroe Parker acquired a total of 1,796,000 Warrants during the Accumulation Period. (Tr. 83.) However, the balance of the evidence establishes that Monroe Parker acquired 1,760,700 Warrants, of which 1,320,700 were in its inventory account by 11:46 a.m. on January 4, 1995, and the remaining 440,000 Warrants were held by Herman, Lipsky, and Clancy. The Parties did not address this discrepancy in their Post-Hearing Submissions.

[12] Tr. 85-90, 554; Ex. C044; Ex. C046; Ex. C048; Ex. C126, at 101; Ex. C127, at 88. Clancy first registered with the NASD at Stratton on January 4, 1991, as a General Securities Representative. (Ex. C012.) Clancy left Stratton to work with Lipsky and Herman at Biltmore in January 1993, and he left Biltmore to join them at Monroe Parker in 1994. (Tr. 63-64; Ex. C012.)

starting at 12:27 p.m., Monroe Parker upticked its bid although it was at the exclusive bid 84.24% of the time and at the shared bid 15.76% of the time. (Tr. 273-74, 278-79; Ex. C072.) In all, Monroe Parker moved the inside bid from $2.8125 to $3.50 in the absence of any market demand, news, or event.[14] (Tr. 143-44.)

Most of the activity in Madden Warrants on January 4, 1995, was generated by Monroe Parker. That morning, only two other broker-dealers, Stratton and A. T. Brod & Company (Brod), traded Madden Warrants.[15] At 10:55 a.m., Monroe Parker purchased 3,000 Warrants from Brod, at $2.8125 per Warrant. Then, in five transactions between 11:25 a.m. and 11:27 a.m., Stratton purchased 355,500 Warrants from its customer accounts, at $2.8125 per Warrant, of which 348,000 Warrants came from Stratton's officers, Belfort, Porush, and Stitsky. (Tr. 133, 135-36.) Ten minutes later, at 11:37, Stratton sold 375,150 Madden Warrants to Monroe Parker, at $2.8125 per Warrant. (Tr. 138; Ex. C070.) At 11:46 a.m., Stratton bought another 2,000 Warrants from a customer at $2.8125 and immediately sold them to Monroe Parker at the same price. (Tr. 139.) After this sale, Stratton had no Madden Warrants left in inventory, and Monroe Parker had 1,320,700 Warrants in its account. (Tr. 139-40.)

Despite the "activity" created by Monroe Parker and Stratton there was, in fact, little interest in Madden Warrants by either the public or by other broker-dealers before 2:02 p.m. on January 4, 1995, when Monroe Parker started selling to its customers. Apart from Monroe Parker transactions, the Chronological Transaction Analysis (Settlement

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[13] Tr. 90.

[14] Herman and Angeline were responsible for deciding the Firm's bid and ask price. (Ex. C123, at 78-79.)

[15] Ex. C070.

Basis) ("CTA-S")[16] prepared by a Special Investigator with NASDR shows only one public sale of 2,000 Warrants and the following interdealer transactions before Monroe Parker began selling to its customers:

WARRANTS	BUYER	SELLER	TIME
500	Wien Securities Corp.	Brown & Company	12:38 p.m.
2,000	Josephthal & Co.	Duke And Company	12:41 p.m.
500	Wien Securities Corp.	Brown & Company	1:41 p.m.
500	Wien Securities Corp.	Brown & Company	1:46 p.m.
1,500	Charles Schwab & Co.	Wm. V. Frankel & Co.	1:59 p.m.

The only other transactions on January 4, 1995, involved the sale of 261,000 Madden Warrants by Monroe Parker to L.L., which trades Monroe Parker used to justify its bid increases in the absence of any genuine demand for the Warrants.

4. Monroe Parker Used Customer L.L.'s Order as Part of its Manipulative Scheme

In the early afternoon of January 4, Clancy[17] solicited L.L. to purchase Madden Warrants. (Tr. 151-53, 227-28, 246.) In reliance on Clancy's recommendation that the Warrants would soon increase in price, L.L. authorized Clancy to sell his shares of Steven Madden common stock and purchase Madden Warrants. Although L.L. did not recall the specifics of his conversation, he testified that the only instructions he gave with his authorization to purchase the Warrants was that he did not want to put any more money

[16] Ex. C070.

[17] L.L. testified that Clancy was his representative at the time he purchased the Madden Warrants, and he assumed Clancy is whom he spoke to about purchasing the Madden Warrants. (Tr. 246.) Although Rick Virgilio's identification number appears on L.L.'s order tickets for January 4, 1995, L.L. had not dealt with him. (Tr. 247; Exs C136, C139, at 1.)

into his account at Monroe Parker. (Tr. 229-30.) No one at Monroe Parker had discretionary authority to trade for his account. (Tr. 153.)

Monroe Parker treated L.L.'s order as a market order. (Tr. 470-71, 524; Ex. C053; Ex. C136.) Monroe Parker filled the order by selling 195,000 shares of Steven Madden common stock at $5 per share and purchasing, in eight transactions, 261,000 Madden Warrants at a total of $942,672.50.[18] (Ex. C070; Ex. C138, at 2, 3.) Although there were only 115,000 Warrants available from sources other than Monroe Parker and its officers, Monroe Parker did not fill L.L.'s order from inventory. Instead, Monroe Parker first purchased Warrants for L.L.'s account on an agency basis.[19] The first six purchases, totaling 11,000 Warrants, were made between 12:41 and 2:07 p.m. on January 4, 1995, at prices ranging from $2.9375 to $3.50 per Warrant. (Ex. C070.) At the time of these trades, Monroe Parker had never paid more than $2.8125 per Warrant. Then, at 3:32 p.m., Monroe Parker filled the balance of the order, 250,000 Warrants, from its inventory at $3.625 per Warrant, the highest price at which they had traded up to that time. (Ex. C070.)

The Hearing Panel believes it is clear that Monroe Parker used L.L.'s order to condition the market for Madden Warrants before it commenced retail selling from its own account later in the day. To maximize its profits, Monroe Parker wanted to manipulate the price of the Warrants upward. The inference from the evidence is compelling that Monroe Parker used L.L.'s market order to accomplish this goal.

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[18] At the same time, L.L. purchased 13,750 Madden Class B Warrants. (Ex. C138, at 2.)

[19] L.L. testified that he did not know the difference between an agency and a principal trade. (Tr. 151, 230.)

Monroe Parker solicited L.L.'s order at the same time that it purchased Stratton's remaining inventory. The timing is significant in light of the fact that Monroe Parker had not sold any Madden Warrants since it started accumulating them five months earlier. Furthermore, the order tickets for the first four agency purchases were originally designated for Monroe Parker's trading account, but Monroe Parker's account number was crossed out and replaced with L.L.'s account number. (Tr. 149-50, 270, 465; Ex. C136.)[20] This change, and the fact that three of the trades were confirmed at 12:44 p.m., support the conclusion that Monroe Parker executed these purchases in the manner it did to justify raising its bid price.

Although Enforcement advanced the theory that Monroe Parker upticked its bid several times before it executed any of the purchases for L.L., the Hearing Panel concludes that this is not the case. Rather, the evidence shows that the purchases from Fahnestock & Co., Inc. (Fahnestock), Herzog, Heine, Geduld, Inc. (Herzog), and Nash, Weiss & Co. (Nash Weiss) of 1,000 Warrants each were executed earlier.

In reconstructing the trading activity in Madden Warrants, Enforcement used the actual order tickets for Monroe Parker trades and the Integrated Equity Journal for trades away from Monroe Parker. (Tr. 265-66.) When an order ticket reflected two times, NASDR's Special Investigator testified that she assumed that the first time reflected the time the order was received and the second time reflected the time the order was executed. (Tr. 465.) She conceded, however, that her assumption may be wrong. (Tr. 461-66.) While the later time on an order ticket normally reflects the order execution time,

[20] Herman and Angeline each authorized these trades by initialing the order tickets. (Tr. 467.)

the Hearing Panel finds this was not the case with respect to the three agency trades for L.L.'s account on the morning of January 4, 1995, from Fahnestock, Herzog, and Nash Weiss. The Integrated Equity Journal shows clearly that the execution time for these trades was not 12:44 p.m., as shown on the CTAs. These trades actually were executed at the following times: Fahnestock at 12:27:19, Herzog at 12:31:36, and Nash Weiss at 12:36:00. (Ex. C068, at 1, 2.)

Using the foregoing execution times, the Hearing Panel finds that Monroe Parker upticked its bid after each of the first four purchases for L.L.'s account as follows:

Time	Seller	Volume	Price	Monroe's Bid	Uptick
12:27:19	Fahnestock	1000	$2.9375	$2.8125	
12:27:50					$2.8750
12:31:36	Herzog	1000	$3.0000	$2.8750	
12:32:55					$3.0000
12:36:00	Nash Weiss	1000	$3.1250	$3.0000	
12:41:11					$3.1250
12:41:42	Josephthal	2000	$3.1250	$3.1250	
13:37:30					$3.250

Monroe Parker then raised its bid twice more, once at 1:40:44 p.m. from $3.25 to $3.375 and again at 1:45:49 p.m. from $3.375 to $3.50, before it started its sales campaign of Madden Warrants. (Ex. C071.)

5. Monroe Parker Sales to Customers

Seventeen minutes after Monroe Parker upticked the price of the Warrants for the last time on January 4, 1995, the Firm began an aggressive sales campaign of Madden Warrants. In the first two hours, Monroe Parker sold 801,500 Warrants—approximately

43% of the float—to 30 customers at $3.625 per Warrant.[21] Indeed, once Monroe Parker commenced selling Madden Warrants, its sales force sold little else. Excluding the Belfort and Porush transactions with Stratton, Monroe Parker accounted for approximately 84% of all purchase volume and 67% of all sales volume on January 4, 1995, for Madden Warrants, or approximately 70% of the total volume reported to Nasdaq that day. (Tr. 166-67; Ex. C055.) As a result, Monroe Parker's inventory dropped from 1,320,700 Warrants to 519,200 Warrants in a single afternoon.[22] (Tr. 163; Ex. C071.) Thereafter, Monroe Parker continued its aggressive sales campaign of Madden Warrants through January 9, 1995, by which point the Firm sold 1,807,180 Warrants—approximately 96.4% of the float—to 92 customers at either $3.50 or $3.625 per Warrant.[23]

To encourage Monroe Parker's registered representatives to concentrate their efforts on Madden Warrants, Herman authorized that they be paid sales credits as great as $0.625 per Warrant.[24] On average, Monroe Parker paid a gross credit of approximately 7.45% of the amount of the trade on the first 32 sales on January 4, 1995. (Tr. 164-65; Ex. C062.) By comparison, the average gross credit it paid for all other transactions that day was only 3.59%. (Tr. 165; Ex. C062.) In other words, Monroe Parker's registered

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[21] The order tickets for all but one of these transactions were marked "solicited." The remaining order ticket was neither marked "solicited" nor "unsolicited." (Tr. 160; Ex. C053.)

[22] The CTA-S (Ex. C070) inaccurately shows that Monroe Parker had 517,500 Warrants in inventory at the close of trading on January 4, 1995. This discrepancy is caused by the inclusion of a canceled sale of 1,700 Warrants to customer R.G. (record number 23) in the total sales volume. Properly, the subject trade was excluded on Ex. C071.

[23] The order tickets for 91 of these transactions were marked solicited, one was marked unsolicited, and two were not introduced. (Tr. 179-81; Ex. C053.)

[24] Angeline testified at his deposition on February 25, 1997, that Herman approved 99.9% of the sales credits. (Ex. C117, at 10.)

representatives made more than twice as much selling Madden Warrants as they did selling other securities. (Tr. 164-65; Ex. C062.)

The aggressiveness of Monroe Parker's campaign to unload Madden Warrants also can be gauged by the targeted customers. Three-quarters of the 92 customers who purchased Warrants between January 4 and January 9, 1995, sold Steven Madden common stock. (Tr. 184-86; Ex. C058.) This was not a coincidence. Herman and Lipsky had devised a plan to recommend that holders of Steven Madden common stock sell their shares and purchase the Warrants. (Ex. C121, at 179-80.) Although the price of the common stock would have had to rise by at least 51% for the exercise price of the Warrants to be favorable to the stock price (or "in the money"), these customers were told it was a wise investment.[25] (Tr. 189.)

In less than four days, Monroe Parker sold 1,807,180 Madden Warrants, leaving it short 458,980 Warrants at the close on January 9, 1995.[26] (Ex. C071.) Monroe Parker 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 1995. It also bought the 40,000 Warrants Clancy held. (Tr. 200-01.)

Once it got rid of its inventory and covered most of its short position, Monroe Parker's trading activity in Madden Warrants dramatically changed. Over the next three

[25] At the beginning of trading on January 4, 1995, the inside bid was respectively $5.00 and $2.8125 for the common stock and the Madden Warrants, and the exercise price for the Warrants was $4.75. That meant the price of the common stock would have had to increase to approximately $7.56 per share for the Warrants to be in the money. Once the price of the Warrants had increased to $3.625, the common stock had to rise by approximately 67.5% for the Warrants to be in the money.

[26] The Special Investigator with NASDR testified that Monroe Parker sold 1,797,750 Warrants. (Tr. 377.) However, the balance of the evidence shows clearly that the actual number of Warrants sold is 1,807,180.

days Monroe Parker only made one sale of 200 Warrants. (Ex. C071.) It also did not cover its remaining short position. Although Monroe Parker did make a few small purchases between January 11 and January 17, 1995, on a trade reporting basis it still was short 47,680 Warrants at the close on January 17, 1995, despite the fact that the price for the Warrants fell to a low of $1.25. (Ex. C071.) Monroe Parker also stopped supporting the price of Madden Warrants after January 10, 1995. In fact, Monroe Parker reduced its bid 11 times between 1:26 p.m. on January 10 and 10:45 a.m. on January 17, leading the inside bid down from $3.25 to $1.25. (Ex. C073.) A year later, Steven Madden called the Warrants for five cents each. (Tr. 212-13.)

As a result of the decline in the price of Madden Warrants, 77 of the 92 customers who purchased Warrants from Monroe Parker lost a total of $3,081,849.13.[27] (Tr. 281-86; Ex. C063.) On the other hand, Monroe Parker made $2,056,930. (Ex. C067.)

C. Excessive Markups

The threshold factual issue regarding the markups charged to Monroe Parker customers on January 4, 1995, is determination of the "prevailing market price" for the Madden Warrants.[28] Once determined, the markup is calculated by subtracting the prevailing market price for the Warrants from the price charged to the customers.[29] In turn, the determination of prevailing market price is dependent upon the nature of the

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[27] Enforcement could not obtain documents to calculate the losses, if any, suffered by the remaining 15 customers. (Tr. 283, 418-19.)

[28] SEC v. First Jersey Securities, Inc., 890 F. Supp. 1185, 1197 (S.D.N.Y. 1995), aff'd 101 F.3d 1450 (2d Cir. 1996).

[29] NASD Notice To Members 92-16 (Apr. 1992).

market for the Warrants and whether Monroe Parker was a market maker in the Warrants.[30]

Here, Monroe Parker was an integrated dealer in Madden Warrants, both making a market and simultaneously selling to retail customers. It also dominated and controlled the trading of Madden Warrants on January 4, 1995. Monroe Parker's trading volume for the Warrants, excluding Stratton's purchases from its officers,[31] was approximately 70% of the total volume reported to Nasdaq that day. (Ex. C055.) Monroe Parker accounted for approximately 84% of all purchase volume and 67% of all sales volume on January 4, 1995. (Tr. 166-67; Ex. C055.) Monroe Parker's total market activity represented over 90% of the total number of shares traded and over 80% of the total number of trades. (Ex. C056.) Without question, Monroe Parker dominated and controlled the market for Madden Warrants on January 4, 1995.[32] Consequently, the prevailing market price for the Warrants on January 4, 1995, was Monroe Parker's contemporaneous cost, or the price it paid to other dealers at the time.[33] In their respective answers to the First Amended

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[30] Id.

[31] The Hearing Panel considers it appropriate to disregard the repurchase of Warrants by Stratton from its controlling officers, Porush, Belfort, and Stitsky because those Warrants were immediately sold by Stratton to Monroe Parker. If they are included in the totals, Monroe Parker still had 61% of the total reported volume and 51.73% of the purchase volume.

[32] Monroe Parker actually dominated and controlled the market for Madden Warrants from January 4 to January 9, 1995. During this period, Monroe Parker's total market activity represented over 94% of the total number of shares traded and over 83% of the total number of trades. (Ex. C061.)

[33] See, e.g., In re Alstead, Dempsey & Co., Exchange Act Release No. 20825, 30 S.E.C. Docket 208, 209 (Apr. 5, 1984). Accord NASD Notice To Members 92-16 (Apr. 1992).

Complaint, each Respondent admits Monroe Parker's contemporaneous cost is the price to use in calculating markups here.[34]

Monroe Parker's contemporaneous cost in acquiring the Warrants on January 4, 1995, was $2.8125 for each Warrant. (Tr. 169.) It paid this price three times that day when buying Warrants from other broker-dealers. It is also the price it paid in seven different transactions during the five-trading days that preceded January 4. On the other hand, Monroe Parker charged $3.625 per Warrant in each sale that day—a markup of 28.89%. As a result, on January 4, 1995, Monroe Parker's customers were overcharged approximately $538,507. (Tr. 168-69; Ex. C059.) These markups were undisclosed, excessive, and fraudulent.

Herman and Angeline were primarily responsible for these markups. As already noted, together they ran Monroe Parker's trading department and, according to Monroe Parker's compliance manual, were responsible for overseeing pricing to ensure that excessive markups were never charged. As Angeline admitted in his deposition on February 25, 1997:

> Q. Who is responsible for determining the markups on orders?
>
> A. The markup is the first responsibility, is Mr. Herman, and I have power of veto if it is too much.
>
> Q. Who had this responsibility in January of 1995.
>
> A. Mr. Herman.

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[34] Each of the Respondents admits that Herman and Angeline were required to determine markups on the basis of the Firm's contemporaneous cost. (Angeline Answer ¶ 31; Herman Answer ¶ 31; Levitov Answer ¶ 31; Lipsky Answer ¶ 31; Monroe Parker Answer ¶ 31.) Herman further admitted that Monroe Parker's contemporaneous cost on January 4, 1995, was $2.8125 per Warrant. (Ex. C123, at 95.)

(Ex. C117, at 12-13.) Herman and Angeline provided pricing guidance to the Firm's sales force, and they knew that Monroe Parker dominated and controlled the market for Madden Warrants because Levitov told them, a fact they did not contest. (Tr. 107-08; Ex. C126, at 26-30; Ex. C049.) Furthermore, Herman and Angeline admitted that they knew of the NASD's "5% Policy,"[35] which serves as a guideline and states that markups should generally not exceed 5% of the prevailing market price for equity securities. (Ex. C117, at 14-17; Ex. C123, at 72.) The NASD's policy also was incorporated in the Firm's Compliance Manual. (Ex. C32, at 27.)

D. Failure to Disclose Adverse Interest in United Leisure Stock

In January 1996, Monroe Parker sold 300,000 shares of United Leisure Corporation (United Leisure) common stock to customers without disclosing that the stock came from Herman's and Lipsky's personal accounts. Herman and Lipsky had obtained the stock as a bonus two months earlier, cycled it through their newly opened accounts at Citicorp Investment Services (Citicorp) and Baird Patrick & Company (Baird Patrick), and then sold the stock back to Monroe Parker. This circular trading was instituted by Herman and Lipsky so they could liquidate their United Leisure stock without disclosing that they were the actual sellers.

1. United Leisure

United Leisure (formerly known as Lion Country Safari, Inc.) was organized in May 1969. (Tr. 594.) Its securities were listed on the Nasdaq SmallCap Market. (Tr. 597; Ex. C080.) In November 1994, United Leisure issued securities to the public through a

[35] See NASD Notice To Members 92-16 (Apr. 1992).

syndicate led by Stratton. (Ex. C077.) At all times relevant to this proceeding, there were 12,368,849 shares of United Leisure common stock available for trading by the public.

For several years, United Leisure suffered cash flow problems. (Tr. 594; Ex. C077.) After years of losses, its financial statements for June 30, 1994, reflected a negative net worth of more than $12 million. (Tr. 594-95; Ex. C078.) In fact, United Leisure's auditors had issued a qualified opinion, which indicated substantial doubt about its ability to continue as a going concern. (Tr. 594-95; Ex. C077.)

2. Herman and Lipsky's Trading of United Leisure Common Stock

In November 1995, Herman and Lipsky, Monroe Parker's entire Board of Directors, granted each of themselves a bonus of 150,000 shares of United Leisure common stock from Monroe Parker's trading account. (Tr. 598-99.)[36] Upon receiving the stock, they transferred it from their personal trading accounts at Monroe Parker to their accounts at Citicorp and then from there to their new accounts at Baird Patrick. (Tr. 603, 607.)[37] Within a day of opening the Baird Patrick accounts, through a pre-arranged trade, they sold the stock back to Monroe Parker. (Tr. 607, 611-12; Ex. C105; Ex. C106.)[38]

Angeline prearranged the re-sale to Monroe Parker with John D'Angelo (D'Angelo), the manager of over-the-counter trading at Baird Patrick. On January 23, 1996, Angeline called D'Angelo and asked him to open two trading accounts on behalf of Lipsky and Herman "to effect a transaction." (Tr. 711-13, 723-24.) Although Angeline

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[36] See also Ex. C085; Ex. C086; Ex. C087.

[37] See also Herman Answer ¶36; Lipsky Answer ¶ 36, 51; Monroe Parker Answer ¶ 36.

[38] See also Herman Answer ¶36; Lipsky Answer ¶ 36; Monroe Parker Answer ¶ 36; Ex. C093; Ex. C095; Ex. C096; Ex. C097; Ex. C098; Ex. C099; Ex. C102; Ex. C103; Ex. C104; Ex. C105; Ex. C106.

did not have a power of attorney to act on behalf of Herman and Lipsky (Tr. 721) and D'Angelo did not speak directly with them, D'Angelo agreed to open the accounts and to sell all of their United Leisure shares even though the stock had not yet been received. (Tr. 691-92, 713-16.)[39] D'Angelo testified that he was willing to accommodate Angeline due to their long-standing friendship. (Tr. 718, 724.)

At the time Angeline opened the accounts, he instructed D'Angelo to offer the United Leisure stock back to Monroe Parker as soon as it was received. (Tr. 714.) D'Angelo testified:

> Q. Well, let me stop you. You say you were instructed to offer the stock to Monroe Parker?
>
> A. Yes.
>
> Q. Who instructed you to offer the stock to Monroe Parker?
>
> A. Well, I believe it was Mr. Angeline that suggested that I offer the stock, suggested that I offer the stock to Monroe Parker to see whether they would be interested. Obviously, they were the major market makers in the security and probably the only one that would be in a position to absorb that kind of size.
>
> Q. So there were other market makers—
>
> A. There were other market makers, yes. Yes. But at that particular time I was very active in the security and they were the prime market makers who were more active than anybody else.
>
> Q. Well, was this an arranged transaction, then?
>
> A. Well, I don't know where else I could have gone with the stock, to be absolutely honest.

[39] The 300,000 shares were later delivered from Lipsky's and Herman's personal trading accounts at Citicorp to their personal accounts at Baird Patrick on January 26, 1996, the settlement date for the transactions. (Ex. C123, p. 128.)

> Q. So then if I hear you correctly, then, the fact that you did the transaction was because you knew where you were going to sell the stock?
>
> A. Exactly. Exactly.

(Tr. 714-15.)

In accordance with Angeline's instruction, D'Angelo sold the United Leisure stock to Monroe Parker on January 23, 1996. (Ex. C111.) D'Angelo personally executed the trade. (Ex. C117, pp. 65-66.)

3. Monroe Parker's Sales to Customers

On January 23, 1996, under Herman's and Lipsky's instructions, Monroe Parker's sales force started a sales campaign recommending United Leisure common stock to the Firm's customers. (Tr. 618; Ex. C123, at 141-42.) Monroe Parker opened the day with 476,867 shares of United Leisure stock in inventory. (Tr. 618; Ex. C102; Ex. C111.) Between the opening of trading and 1:17 p.m., Monroe Parker sold 625,770 shares to its customers in largely solicited transactions, resulting in a short position of 99,003 shares. (Tr. 618; Ex. C102; Ex. C111.)[40] Monroe Parker then repurchased Herman's and Lipsky's United Leisure stock, covering its short position. Because Herman and Lipsky did not purchase these shares, their gross proceeds over cost were approximately $1,309,496. (Ex. C110.)

Over the following two days, Monroe Parker sold the remaining United Leisure shares in its inventory. (Ex. C111.) The Firm's gross proceeds over cost for those shares were approximately $26,266.(Tr. 633; Ex. C112.) The total amount paid by Monroe

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[40] All but three of the transactions were solicited. (Ex. C107.)

Parker's customers for the 300,000 United Leisure shares Herman and Lipsky resold to Monroe Parker was $1,340,116.26. (Ex. C111.)

Monroe Parker did not disclose that Lipsky and Herman had sold their own shares of United Leisure stock back to the Firm at the same time the Firm was recommending the stock to the public. (Tr. 729-30, 749, 764; Ex. C113; Ex. C123, at 140-41.) Herman admitted in his deposition that the sales force was not privy to his personal holdings. (Ex. C123, at 140-41.) Accordingly, the salesmen could not have disclosed the origin of the stock. In addition, Enforcement called three customer witnesses who testified that they were not given this information, and they would have considered it important in making their decision to buy United Leisure stock. (Tr. 733-35, 749-50, 764.)

Conclusions of Law

A. Jurisdiction

The NASD has jurisdiction over the Respondents and the matters alleged as violations in the First Amended Complaint. Each of the individual Respondents was registered with the NASD when the First Amended Complaint was filed, and the Complaint was filed within two years of the date Monroe Parker filed Form BDW seeking to withdraw from membership with the NASD.[41]

B. Market Manipulation—Cause One

In the First Cause of Action, Monroe Parker, Herman, and Angeline are alleged to have manipulated the market for Madden Warrants on January 4, 1995, in violation of Section 10(b), Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120.

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[41] See Article V, Section 4 of the NASD's By-Laws.

1.   Legal Standard

Sales of securities by broker-dealers to their customers carry the implied representation that the prices charged in those transactions are reasonably related to prices prevailing in a free, open, and competitive market.[42] The Exchange Act was intended to insure such fair and honest markets.[43] The central purpose of the Exchange Act is to prevent persons from rigging the market for a security by ensuring that the price of the security is determined through the free forces of supply and demand.[44]

The manipulation of securities prices runs directly contrary to those objectives. Market manipulation "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."[45] Accordingly, such conduct is prohibited by several provisions of the federal securities laws, including Section 10(b) and SEC Rule 10b-5 thereunder.[46]

Section 10(b) and Rule 10b-5 prohibit, in connection with the purchase or sale of any security, the use of "any manipulative or deceptive device or contrivance."[47] Rule 10b-5 flatly prohibits deceitful practices and market manipulations. It prohibits activities

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[42] SEC v. Resch-Cassin & Co., 362 F. Supp. 964, 978 (S.D.N.Y. 1973).

[43] 15 U.S.C. § 78b.

[44] See United States v. Stein, 456 F.2d 844, 850 (2d Cir.), cert. denied, 408 U.S. 922 (1972).

[45] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

[46] See, e.g., United States v. Russo, 74 F.3d 1383, 1390-91 (2d Cir.), cert. denied, 519 U.S. 927 (1996).

[47] United States v. Charnay, 537 F.2d 341, 349 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

that falsely persuade the public that activity in an over-the-counter security is the reflection of genuine demand rather than a mirage.[48]

To establish a violation of Section 10(b) and Rule 10b-5, it must be shown that the person acted with scienter, which the Supreme Court has defined as "a mental state embracing intent to deceive, manipulate or defraud . . . ."[49] It is not necessary, however, as it is under Section 9(a)(2) of the Exchange Act, to show manipulative intent. Instead, it is sufficient that the person engaged in a course of business which operated as a fraud or deceit as to the nature of the market for the security.[50]

Proof of a manipulation is generally not based on a single activity, but rather on a course of conduct showing an intentional interference with the normal functioning of the market for a security. "Proof of a manipulation almost always depends on inferences drawn from a mass of factual data. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data."[51]

In Resch-Cassin, the court identified the following factors that have come to be regarded by the courts and the SEC as classic elements of market manipulation: (i) restriction of the floating supply of the securities; (ii) price leadership by the manipulator;

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[48] SEC v. Kimmes, 799 F. Supp. 852, 859 (N.D. Ill. 1992), aff'd, 997 F.2d 287 (7th Cir. 1993) (quoting SEC v. Resch-Cassin & Co., 362 F. Supp. 964, 975 (S.D.N.Y. 1973). Sections 9(a)(1) and 9(a)(2) of the Exchange Act, 15 U.S.C. §§ 78i(a)(1) and (2), expressly prohibit manipulation of securities listed for trading on a national exchange. Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970). On the other hand, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder apply to manipulative conduct as to any security, including over-the-counter securities such as that at issue here. Unites States v. Gilbert, 668 F.2d 94 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982).

[49] Ernst & Ernst, 425 U.S. at 193, n.12.

[50] In re Graham, Initial Decision Release No. 82, 60 S.E.C. Docket 2707, 2714 (Dec. 28, 1995); In re Batterman, 46 S.E.C. 304, 305 (1976).

[51] In re Pagel, Inc., Exchange Act Release No. 22280, 33 S.E.C. Docket 1003, 1005 (Aug. 1, 1985), aff'd, 803 F.2d 942 (8th Cir. 1986).

(iii) domination and control of the market for the security; and (iv) a collapse of the market for the security following the manipulation.[52] The SEC also has inferred manipulation where there is "a rapid surge in a security's price that is driven by control of the security's supply and that occurs despite scant investor interest and in the absence of any known prospects for or favorable developments affecting the issuer."[53] Each of these elements is present here although a finding of manipulation is not dependent upon the presence of any one of them.[54]

2. *Monroe Parker's Manipulation of the Market for Madden Class A Warrants*

a. *Restriction of Floating Supply*

Reduction of the floating supply of a security characterizes attempts by manipulators to raise the price of an over-the-counter security,[55] and it is particularly persuasive evidence of manipulation where the quantity withdrawn from the market is substantial.[56] Here, as discussed in the Findings of Fact above, Monroe Parker took over Stratton's dominant position in Madden Warrants through a series of large block transactions. Between August 1994 and January 1995, Monroe Parker acquired 85% of the float of Madden Warrants from Stratton and sold none to the public. Monroe Parker's lack of sales over the five-month Accumulation Period further evidences its intent to

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[52] SEC v. Resch-Cassin & Co., 362 F. Supp. at 976.

[53] In re Jay Michael Fertman, Exchange Act Release No. 33479, 55 S.E.C. Docket 2367, 2371 (Jan. 14, 1994); Dlugash v. SEC, 373 F.2d 107, 109 (2d Cir. 1967).

[54] In re Swartwood, Hesse, Inc., 50 S.E.C. 1301, 1307 (1992).

[55] Resch-Cassin, 362 F. Supp. at 977.

[56] See, e.g., Gob Shops at 100 (broker-dealer purchased 39% of the float).

manipulate the market.[57] By the end of the Accumulation Period, on January 4, 1995, Monroe Parker, Lipsky, Herman, and Clancy together owned almost 94% of the float. Only 114,300 Madden Warrants were not owned or controlled by Monroe Parker.

b. Price Leadership

Monroe Parker also exercised price leadership during the Accumulation Period. In 11 large block transactions, Monroe Parker purchased 85% of the float of Madden Warrants from Stratton and increased the bid price by 375%. Monroe Parker's impact on the bid price was particularly significant since it had reduced drastically the floating supply with its initial purchases from Stratton on August 11, 1994.[58] Moreover, in seven transactions immediately before January 4, 1995, Monroe Parker purchased approximately 150,000 Warrants although it had more than 1,600,000 Warrants in inventory and there was no evident market demand. These purchases had the effect of maintaining the higher price for the Warrants by further constricting the supply of tradable Warrants.[59]

At no time was Monroe Parker's price leadership more evident than on January 4, 1995, when it used customer L.L.'s order to drive the bid price from $2.8125 to $3.50 in preparation of its intense sales campaign. Although Monroe Parker could have filled L.L.'s order entirely from inventory, it instead split the order into several agency purchases at increasingly higher prices. Given the severely restricted supply available on

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[57] See In re Randolph K. Pace, Exchange Act Release No. 32153, 53 S.E.C. Docket 2330, 2332 (Apr. 15, 1993) (respondent's firm constantly increased the percentage of the security held by the firm and its customers).

[58] See In re Harold T. White, 3 S.E.C. 466, 477 (1938) (where the floating supply has been reduced, block purchases have a particularly significant impact on the price of a security).

[59] It is also significant that at no point is there evidence that Monroe Parker attempted to negotiate a reduction in price for the size of the blocks it purchased.

the market, Herman, Lipsky, and Angeline knew that they could manipulate the bid price in this manner. Moreover, there is no rational explanation for this trading pattern other than that Monroe Parker intended to manipulate the market for the Warrants and thereby increase its profits once it began retail selling from its inventory.

c. Rapid Price Increase Absent Demand or News

Manipulative activity also may be inferred where there is a rapid surge in a security's price that is driven by control of the security's supply rather than investor demand.[60] This is precisely the situation presented here. On January 4, 1995, despite the lack of any significant activity away from Monroe Parker, it was able to raise the bid price for Madden Warrants by 24.4% in less than two hours because it controlled the supply of the Warrants. Furthermore, the NASDR Special Investigator assigned to this case testified that she searched for press releases issued by Steven Madden that might explain the price surge and found none. (Tr. 143, 325-26.)

d. Domination and Control

The evidence shows clearly that Monroe Parker dominated and controlled the market for Madden Warrants. Monroe Parker's total market activity between January 4 and January 9, 1995, represented over 90% of the total number of shares traded and over 80% of the total number of trades. (Ex. C056; Ex. C061.)[61] Monroe Parker's volume in Madden Warrants on January 4, 1995, was approximately 70%, and over the next three trading days—January 5, 6, and 9—Monroe Parker's volume in the Warrants ranged

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[60] E.g., In re Jay Michael Fertman, Exchange Act Release No. 33479, 55 S.E.C. Docket 2367, 2371 (Jan. 14, 1994).

[61] Pace, 53 S.E.C. Docket at 2332 (where firm's trading activity accounted for 67% of the purchases and 55% of the sales made by broker-dealers during the trading period).

between approximately 42% and 99.5% of the total volume reported to Nasdaq. Other broker-dealers were relatively inactive. There were 13 other broker-dealers that purchased Warrants and 16 other broker-dealers that sold Warrants between January 4 and 9, 1995. Other than Stratton, each had less than 3% of the total purchase volume and less than 1% of the total sales volume.

e. Collapse of the Market Price Following the Manipulation

A final hallmark of manipulation is the collapse of the market for the security once the manipulative activity ends.[62] This also is present in the instant case. Once Monroe Parker sold its inventory and covered most of its short position, it stopped supporting the price of the Warrants. Starting on January 10, 1995, after it repurchased the Warrants held by Lipsky, Herman, and Clancy, Monroe Parker consistently reduced its bid for the security. The Firm continued to decrease its bid through January 17, 1995. As it did, other market makers followed suit. By January 17, the price of the Warrants had dropped as low as $1.25 per Warrant, and the price closed at $1.50 per Warrant, a drop of more than 241%.[63]

In summary, many of the classic elements of market manipulation are present in this case. Monroe Parker, acting through Herman and Angeline, utilized a series of large block purchases to artificially inflate the price of the Warrants for their own benefit. The effect was to create artificial activity and raise the price of the Warrants in anticipation of Monroe Parker's sales campaign. The price rise further was effected by Monroe Parker's

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[62] Resch-Cassin, 362 F. Supp. at 977.

[63] Resch-Cassin, 362 F. Supp. at 976 (telltale sign of manipulation when price of security collapses when not artificially supported).

domination and control of the market for the Warrants, and its price leadership in its quotes and actual purchases. The collapse of the market for the Warrants once Monroe Parker sold out its inventory further evidences their manipulative scheme and its consequences. Their scheme suspended the normal interplay of market forces and caused a misleading appearance that there was sufficient market interest in the Madden Warrants to sustain a price that was, in fact, not an accurate reflection of their worth. As such, Monroe Parker, Herman, and Angeline misled the public regarding material information the public is entitled to know.[64]

f. Scienter

The Supreme Court has defined scienter as a "mental state embracing intent to deceive, manipulate or defraud."[65] Scienter encompasses knowing or intentional misconduct, or recklessness.[66] And proof of scienter where securities manipulation is involved need not be established through direct evidence. Scienter is satisfactorily proven when it has been shown through circumstantial evidence that the respondents pursued a course of conduct that constituted market manipulation.[67]

Here, there is plentiful evidence to infer that Herman and Angeline acted with such intent. As found above, they were acutely aware of the Firm's trading strategy on a

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[64] See In re Halsey, Stuart & Co., 30 S.E.C. 106, 112 (1949) ("It is of utmost materiality to a buyer . . . to know that he may not assume that the prices he pays were reached in a free market; and the manipulator cannot make sales not accompanied by disclosure of his activities without committing fraud.").

[65] Ernst & Ernst, 425 U.S. at 193 n.12.

[66] Lanza v. Drexel & Co., 479 F.2d 1277, 1306 (2d Cir. 1973) (en banc).

[67] See Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983). See also Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir. 1986) (inference from the evidence of price movement, trading activity, and other factors that manipulation was undertaken for the purpose of securing financial and tax benefits and thus was intentional).

minute-by-minute basis. They devised and directed the trades in Madden Warrants, which made no economic sense. Circumstantial evidence of this sort supports a finding that Herman and Angeline participated in a manipulation scheme with scienter.[68] Further, their activity is directly attributable to Monroe Parker, as a firm necessarily acts through its officers and agents.[69]

Accordingly, the Hearing Panel finds that Monroe Parker, Herman, and Angeline manipulated the price of Madden Warrants in violation of Section 10(b), Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120.[70]

C. Excessive Markups—Cause Two

In the Second Cause of Action, Monroe Parker, Herman, and Angeline are alleged to have charged excessive and undisclosed markups in the sale of Madden Warrants on January 4, 1995, in violation of Section 10(b), Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120.

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[68] See SEC v. Sayegh, 906 F. Supp. 939, 946-47 (S.D.N.Y. 1995), aff'd sub nom., SEC v. Militano, 101 F.3d 685 (2d Cir. 1996) (Table).

[69] In re Stuart K. Patrick, Exchange Act Release No. 32314, 54 S.E.C. Docket 230, 232 (May 17, 1993), aff'd, 19 F.3d 66 (2d Cir.), cert. denied, 513 U.S. 807 (1994).

[70] Conduct Rule 2120, the NASD's antifraud rule, 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." Conduct Rule 2120 is the equivalent of SEC Rule 10b-5, and conduct which violates SEC Rule 10b-5 also violates Conduct Rule 2120 and Conduct Rule 2110, which requires members and associated persons to observe high standards of commercial honor and just and equitable principles of trade. See, e.g., District Business Conduct Committee For District No. 9 v. Michael R. Euripides, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45, at *17 (NBCC July 28, 1997).

Under the NASD's Conduct Rules, members are required to charge fair prices in transactions with their retail customers. Rule 2440 states in relevant part that in selling securities in the over-the-counter market, "if a member . . . sells for his own account to his customer, he shall . . . sell at a price which is fair, taking into account all relevant circumstances . . . ." Interpreting this section, as well as Rule 2110—which requires adherence to just and equitable principles of trade—the NASD has stated: "It shall be a violation of Rule 2110 and Rule 2440 for a member to enter into any transaction with a customer in any security at any price not reasonably related to the current market price of the security or to charge a commission which is not reasonable."[71] Likewise, charging undisclosed excessive markups violates Section 10(b) and Rule 10b-5.[72]

The NASD has long used what is known as the "5% Policy" in evaluating the reasonableness of markups. Under this policy, a markup of more than 5% is considered excessive.[73] The policy is not a *per se* rule, and the appropriateness of a markup must be judged by the circumstances of each case. The circumstances may indicate that a higher or lower markup is proper.[74] The SEC, however, has held that an undisclosed markup of more than 10% above the prevailing market price is fraud *per se*.[75]

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[71] NASD Conduct Rule IM-2440.

[72] SEC v. First Jersey Secs., Inc., 101 F.3d 1450, 1471 (2d Cir. 1996).

[73] NASD Conduct Rule IM-2440. Accord First Jersey Secs., 101 F.3d at 1469; In re Thill Secs. Corp., Exchange Act Release No. 7342, 42 S.E.C. 89, 92 n.4 (1964).

[74] See In re Staten Secs. Corp., Exchange Act Release No. 18628, 25 S.E.C. Docket 21, 22 (Apr. 9, 1982); In re J.A. Winston & Co., Exchange Act Release No. 7337, 42 S.E.C. 62, 69-70 (1964).

[75] See, e.g., First Jersey Secs., 101 F.3d at 1469; Orkin v. SEC, 31 F.3d 1056, 1063 (11th Cir. 1994); In re Powell & Assoc., Exchange Act Release No. 18577, 24 S.E.C. Docket 1577, 1578 (Mar. 22, 1982).

Determining the fairness of prices charged by dealers to their retail customers requires two steps. First, the prevailing inter-dealer wholesale market price for the security must be determined. Second, it must be determined whether the markup over that price charged to the retail customer was, under the circumstances, excessive.

As determined above, Monroe Parker, under the direction of Herman and Angeline, charged its customers undisclosed markups of 28% on January 4, 1995. These markups were fraudulent, and they resulted in the customers being overcharged by approximately $538,507. Accordingly, the Hearing Panel finds that Monroe Parker, Herman, and Angeline violated Section 10(b), Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120.

D. Failure to Disclose Adverse Interest—Cause Three

When recommending a security to a customer, broker-dealers and their salespeople must not only avoid affirmative misstatements, they must disclose material adverse facts of which they are or should be aware, including self interest that could influence their recommendations.[76] An intentional failure to do so constitutes fraud and a violation of Section 10(b), Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120.[77]

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[76] In re Gilbert A. Zwetsch, Exchange Act Release No. 30092, 50 S.E.C. Docket 635, 636-37 (Dec. 18, 1991); Chasins v. Smith, Barney & Co., 438 F.2d 1167, 1172 (2d Cir. 1970).

[77] See, e.g., District Business Conduct Committee No. 9 v. Euripides, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45, at *16-20 (July 28, 1997); cf., SEC v. Hasho, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992) (citing Chasins v. Smith, Barney & Co., Inc., 438 F.2d 1167, 1172 (2d Cir. 1970) (failure to disclose broker's financial or economic incentive in connection with stock recommendation violates Section 10(b) and Rule 10b-5.

Here, Herman and Lipsky directed Monroe Parker's sales force to recommend United Leisure stock at the same time that they had Angeline arrange for Baird Patrick to sell their shares back to Monroe Parker. They also were intimately involved in Monroe Parker's trading. They knew on an on-going basis the extent of Monroe Parker's inventory of United Leisure stock. Thus, Herman and Lipsky knew that their shares of United Leisure would be used to cover Monroe Parker's short position on January 23, 1996, and that continued sales from inventory would necessarily involve sales of their stock to customers. Further, they controlled and approved all of Monroe Parker's trading. Under these circumstances, the failure to disclose to those customers who purchased United Leisure common stock that it came from Herman and Lipsky and that they had not paid for it was fraudulent. The fact that Herman and Lipsky did not personally engage in direct selling to the Firm's customers is no defense.[78] The existence of such an adverse economic interest is information that an investor would want to know before making an investment.

In a case involving a similar disclosure issue, the SEC held that the president of a broker-dealer violated the NASD rules by his failure to disclose that at least some of the securities used to fill customer orders would come from his personal account and that he had purchased the stock at substantially less than the price charged to the customers. The SEC analyzed the resulting conflict of interest as follows:

> In promoting World Wide stock to Atlanta Securities' registered representatives and in sales directly to its retail customers, Blalock [Atlanta Securities' President] failed to disclose

[78] Cf. Zwetsch, 50 S.E.C. Docket at 636 (SEC rejected respondent's argument that he should not be held liable because the shares he sold came from his relatives' accounts).

> the fact that Atlanta Securities would fill at least some of its retail orders by purchasing the stock from Blalock's account. We believe that, in determining whether to purchase stock, a reasonable investor would want to know that the president of the broker-dealer that had recommended the purchase of a thinly-traded security was selling that stock from his personal account. Blalock engaged, at a minimum, in conduct that constituted a conflict of interest, selling his stake in what the Firm represented as a promising investment at prices that were substantially higher than those that he had paid just one month earlier. . . . Blalock was, at a minimum, reckless in failing to make this disclosure, thereby violating Article III, Sections 1 and 18 [now NASD Conduct Rules 2110 and 2120].[79]

In this case, the evidence overwhelmingly supports the Hearing Panel's conclusion that Herman and Lipsky moved 300,000 shares of United Leisure common stock from Monroe Parker's trading account through two personal accounts at other firms in an effort to disguise their activities. Their intent was to personally benefit by selling their United Leisure stock to their Firm's customers without disclosing the origin of the stock and their conflict of interest. In other words, Herman and Lipsky intended to withhold important investment information from the purchasers in violation of Section 10(b), Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120.

E. Failure to Supervise—Cause Four

1. Legal Standard

NASD Conduct Rule 3010 requires member firms to establish a supervisory system reasonably designed to achieve compliance with applicable laws, rules and regulations. The Rule further requires that, as a component of the supervisory system, a

[79] In re William Jackson Blalock, Exchange Act Release No. 35002, 58 S.E.C. Docket 147, 149-50 (Nov. 23, 1994). Accord In re Michael A. Niebuhr, Exchange Act Release No. 34-36620, 60 S.E.C. Docket 2502, 2505-06 (Dec. 21, 1995); Zwetsch, 50 S.E.C. at 636-37.

member establish and maintain written supervisory procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives and associated persons that are reasonably designed to achieve compliance with applicable laws, rules and regulations.

A senior officer at a brokerage firm is responsible for compliance with all the requirements imposed on the firm "unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient."[80] It is not sufficient, however, to just delegate responsibility to a subordinate without adequate follow-up. The officer must ensure that the delegated authority is exercised properly.[81]

Further, supervisors are required to follow up and vigorously review when they are presented with "red flags" or "suggestions" of irregularities.[82] A supervisor must conduct an independent investigation of the irregularities detected by the firm's procedures.[83] And, a supervisor's responsibility is not lessened by the fact that others may

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[80] In re Kochcapital, Inc., Exchange Act Release No. 31652, 53 S.E.C. Docket 205, 210 n.18 (Dec. 23, 1992), quoting In re Universal Heritage Investments Corp., 47 S.E.C. 839, 845 (1982).

[81] See, e.g., In re Rita H. Malm, Exchange Act Release No. 3500, 58 S.E.C. Docket 131, 134-35 (Nov. 23, 1994).

[82] See, e.g., In re John H. Gutfreund, Exchange Act Release No. 31554, 1992 SEC LEXIS 2939, at *35 (Dec. 3, 1992).

[83] See, e.g., District Business Conduct Committee for District No. 8 v. Freedom Investors Corp., Complaint No. C8A950011, 1997 NASD Discip. LEXIS 21, at *43-44 (Jan. 27, 1997).

also have supervisory responsibility or by the fact that the supervisor has little influence or authority at the firm.[84]

2. Alan Lipsky

Lipsky was Monroe Parker's President and Chief Executive Officer. He owned a majority interest in the Firm, sat on its Board of Directors, and oversaw its finances. Lipsky also supervised the sales force and managed Monroe Parker's day-to-day operations. He had extensive supervisory authority, responsibility, and control that he did not delegate. His role was that of a direct line manager of all aspects of Monroe Parker's operations, including regulatory compliance.

There is overwhelming evidence that Lipsky failed to adequately supervise the registered representatives at Monroe Parker with respect to the markups of Madden Warrants. Lipsky knew Monroe Parker dominated and controlled the market for Madden Warrants because Levitov told him so, but he failed to take any action to halt the excessive markups. Lipsky also had access to quotation media which showed Monroe Parker dominated both price and volume in the market for the Warrants. There is also substantial circumstantial evidence from which the Hearing Panel concluded that Lipsky knew about the manipulation of Madden Warrants, and was a willing participant in the scheme. Monroe Parker was a one-office firm, and between August 11, 1994, and January

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[84] District Business Conduct Committee for District No. 8 v. John A. Chepak, Complaint No. C8B960042, (NAC July 22, 1998) (citing In re George Lockwood Freeland, 51 S.E.C. 389 (1993)). Cf., In re Patricia Ann Bellows, Initial Decision Release No. 128, 67 S.E.C. Docket 1426, aff'd Exchange Act Release No. 40411, 67 S.E.C. Docket 2091 (Sept. 8, 1998) and In re Arthur James Huff, Exchange Act Release No. 29017, 48 S.E.C. Docket 767 (March 28, 1991) (Lochner and Schapiro, Commissioners, concurring) (suggesting that supervisory responsibility requires that the supervisor have sufficient control to effect remediation of irregularities).

10, 1995, it made a market in only a handful of securities.[85] Lipsky knew on a daily basis how many Madden Warrants Monroe Parker held in its trading account. Indeed, for Lipsky it was a personal matter because he looked upon the money in the Firm's trading account as his own. As Lipsky phrased it, "I know from one day to the next what happened. It is my money." (Ex. C127, Lipsky Tr. 16.) From these facts it is reasonable to conclude that Lipsky knew of the manipulation and chose to allow it because it was in his best financial interest to do so. Not only did he stand to gain as an officer and majority owner of the Firm, but he was able to sell his personal holdings of Madden Warrants for a $550,000 profit.

Accordingly, the Hearing Panel finds that Lipsky violated NASD Rules 2110 and 3010 by failing to adequately supervise Monroe Parker's registered representatives, as alleged in the Fourth Cause of Action in the First Amended Complaint.

3. Richard Levitov

The First Amended Complaint alleges that "Lipsky, Herman, and Levitov were responsible for the supervision of trading and sales activity at Monroe Parker [and that they] failed to establish, maintain, and enforce procedures reasonably designed to achieve compliance with the securities laws and applicable NASD rules." (First Am. Compl. ¶ 43.) Specifically, Enforcement contends that Levitov failed in his supervisory responsibilities by not halting the manipulation of Madden Warrants and by not acting to prevent Monroe Parker's customers from being charged excessive markups.[86] Levitov, on the other hand,

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[85] See In re Pace, 53 S.E.C. Docket at 2335 (where manipulated stock was but one in a handful in which an office other than the headquarters made a market, greater attention should have been focused upon it).

[86] Enforcement's Post-Hearing Memorandum of Points and Authorities in Support of a Final Decision Against the Respondents at 21-22.

contends that he had only secondary responsibility for the supervision of trading and sales, that he did establish and maintain appropriate compliance procedures, and that his ability to enforce those procedures was subverted by the corrupt management structure at Monroe Parker.[87]

As Monroe Parker's Director of Compliance, Levitov had general supervisory responsibilities. Under Monroe Parker's Compliance Manual, he was responsible for all of Monroe Parker's compliance issues. The Compliance Manual stated that his responsibility included "[m]atters falling within, but not limited to compliance responsibilities addressed in this Manual and necessary enhancements based upon actual experience." (Ex. C032, at 32.) More specifically, the evidence shows that Levitov was responsible for compliance issues involving advertising and outside speaking engagements, subpoenas and regulatory requests, outgoing correspondence, registration of securities, customer complaints, suitability determinations, and activity reports. (Tr. 498; Ex. C032.) He also held annual and periodic compliance meetings and issued Compliance Bulletins. (Tr. 496; Ex. C032, at 4.) The purpose of the compliance meetings was to instruct Monroe Parker's staff regarding securities laws, regulations, and rules. (Ex. C032, at 5.) "The purpose of the Compliance Bulletin [was] to provide supervisory principals with the understanding that they will review policies and procedures and adapt or modify them immediately so that they are consistent with the firm policies established and clarified through the Compliance Bulletins." (Ex. C032, at 4.) Although Lipsky and Herman did not delegate overarching supervisory responsibility to Levitov, he clearly was responsible for devising and enforcing

[87] Levitov's Post-Hearing Submission at 2.

Monroe Parker's compliance policies. This included review of trading records for compliance with NASD's markup policy.

Enforcement, however, presented no evidence in support of its generalized claim that Levitov failed to "establish" procedures reasonably designed to achieve compliance with the securities laws and NASD rules. Indeed, Levitov did detect that Monroe Parker dominated and controlled the market for Madden Warrants, and he brought this to the attention of Lipsky, Herman, and Angeline. Instead, Enforcement focused on Levitov's actions; particularly his failure to halt Lipsky's, Herman's, and Angeline's violations. In other words, Enforcement's theory and proof are limited to Levitov's alleged failure to "enforce" Monroe Parker's procedures, including the detection and investigation of excessive markups and manipulation of Madden Warrants.

The Hearing Panel believes that the evidence supports the finding that Levitov failed to adequately carry out his supervisory responsibilities as the Director of Compliance at Monroe Parker. First, on or about December 28, 1994, Levitov determined from his oversight of the order tickets that Monroe Parker may be in a position of domination and control of the market for Madden Warrants. Although he brought this to the attention of Lipsky, Herman, and Angeline, he did nothing more to investigate or follow up on whether Monroe Parker continued to markup the Warrants. (Tr. 505; Ex. C049.) Presented with this situation, and in light of Monroe Parker's significant accumulation of Madden Warrants over a period of many months, it is not sufficient for Levitov to disclaim responsibility because the amount of the markups was not readily apparent from the face of the order tickets. (Tr. 514-15.) He had an affirmative duty to investigate, which he failed to do.

In addition, Levitov failed to take any action to detect or prevent the market manipulation of the price for Madden Warrants. As part of his duties as the Director of Compliance, Levitov reviewed the Firm's order tickets daily. From this review, he knew or should have known that Monroe Parker had accumulated a significant position in Madden Warrants and that on January 4, 1995, Monroe Parker increased the price dramatically and commenced a concerted effort to sell off its inventory. These were red flags of an irregular trading pattern that should have alerted Levitov to investigate. With his vast experience as a compliance officer, these events should have alerted him to the possibility of improper sales activity. But Levitov failed to make any inquiry whatsoever, thereby defaulting in his supervisory responsibilities.

Accordingly, the Hearing Panel finds that Levitov failed to adequately carry out his supervisory responsibilities in violation of NASD Conduct Rules 2110 and 3010.

4. Bryan Herman

Because Herman has been found to be substantively responsible for the manipulation and excessive markups of Madden Warrants, the Hearing Panel cannot also find that he was responsible for inadequate supervision with respect to these violations.[88] Additional findings of deficient supervision as to the same violations would be "inappropriate and inconsistent."[89] Accordingly, the charges against Herman in the Fourth Cause of Action are dismissed.

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[88] See Market Surveillance Committee v. Michael J. Markowski, Complaint No. CMS920091, 1998 NASD Discip. LEXIS 35, *52 (NAC July 13, 1998). See also In re R.A. Johnson & Co., 48 S.E.C. 943, 947 n.14 (1988).

[89] In re Fox Securities Co., 45 S.E.C. 377, 383 (1973).

Sanctions

Monroe Parker's, Lipsky's, Herman's, and Angeline's misconduct was egregious and deserving of serious sanctions. They substantially injured a large number of investors and harmed the industry as a whole by manipulating the market for Madden Warrants. In addition, their misconduct manifested a total disregard of their obligation to deal fairly with customers. On the other hand, the Hearing Panel considers Levitov's conduct to deserve far less serious sanctions. Levitov did not directly participate in, or profit from, the fraudulent activity of the others.

In assessing sanctions, the Hearing Panel is guided by the NASD Sanction Guidelines, which are designed to provide a starting point in the determination of remedial sanctions. In addition to specific guidelines for excessive markups and failure to supervise, the Guidelines specify 19 principal considerations in determining sanctions.[90] These factors have been considered by the Hearing Panel in arriving at the sanctions in this matter, and the significant, applicable factors are discussed below along with those case specific factors the Hearing Panel considered important to its determinations.

A. Market Manipulation (Monroe Parker, Herman, and Angeline)

Monroe Parker, Herman, and Angeline are primarily responsible for the manipulation of Madden Warrants. Herman devised the manipulative scheme, and Angeline's participation was necessary to implement it. Over a period of five months they acquired Madden Warrants with the intent to manipulate their market price and then unload the inventory in a sales blitz to customers. Herman also set himself up to profit

[90] NASD Sanction Guidelines 8-9 (2d ed. 1998).

personally from the manipulative scheme. In addition to his regular compensation and bonuses, Herman made $550,000 on the re-sale of his Warrants to Monroe Parker on January 10, 1995. None of these Respondents acknowledged his wrongdoing or made any attempt to compensate the victims.

Although there is no specific guideline for market manipulation, it is clear that it is a serious offense that warrants significant sanctions to deter future offenses. The SEC has indicated the gravity of the offense as follows:

> Respondents' misconduct could hardly be more serious. Manipulation strikes at the heart of the pricing process on which all investors rely. It attacks the very foundation and integrity of the free market system. . . .
>
> We accordingly view respondents' violations in the most serious light. And the gravity of that misconduct is compounded since it was perpetrated by experienced professionals who, invested with public confidence, abused that trust for their own personal benefit. We are not persuaded that the public interest would be served by permitting proven manipulators to continue making markets in local securities or, for that matter, to engage in any other aspect of the securities business. . . .
>
> In view of the foregoing, we see no basis for leniency. In an industry that presents so many opportunities for abuse and overreaching, and depends so heavily on the integrity of its participants, respondents' behavior cannot be countenanced.[91]

The Guideline for misrepresentation of material facts is relevant in determining the appropriate sanction for market manipulation. For intentional misrepresentation, the Guideline recommends a fine of $10,000 to $100,000 and a bar where the misconduct is

[91] In re Pagel, Inc., Exchange Act Release No. 22280, 33 S.E.C. Docket 1003, 1008-09 (Aug. 1, 1985).

found to be egregious.[92] The Guideline also states that the adjudicator may impose a fine per investor rather than in the aggregate.

Considering the seriousness of the harm to investors and the market, the lack of any mitigating factors, and the scope of the manipulative scheme, the Hearing Panel determines that Monroe Parker should be expelled from membership in the NASD and that Herman and Angeline each should be permanently barred from associating with any NASD member in any capacity. In addition, the Hearing Panel determines that Monroe Parker, Herman, and Angeline each should be fined $3,656,930, which includes a base fine of $500,000 and disgorgement of $3,156,930.[93]

B. Excessive Markups (Monroe Parker, Herman, and Angeline)

The NASD Sanction Guidelines for excessive markups and excessive commissions recommend that in egregious cases an individual respondent be suspended for up to two years or barred and that a firm be suspended with respect to any or all activities for up to two years or expelled.[94] The Guideline also suggests the imposition of a fine ranging between $5,000 and $100,000 plus the gross amount of the excessive markup if restitution is not ordered.

Here Monroe Parker's, Herman's, and Angeline's conduct was egregious. They intentionally marked up the Madden Warrants as part of their manipulative scheme.

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[92] NASD Sanction Guidelines 80 (2d ed. 1998).

[93] This amount includes $2,056,930 in illicit gains from the manipulation and the excessive markups of the Madden Warrants and $1,100,000 Herman and Lipsky received from the sale of their Warrants to Monroe Parker. The amount assessed in disgorgement for the violations in the first three causes of the Complaint is discussed in Section E below.

[94] NASD Sanction Guidelines 82 (2d ed. 1998).

Accordingly, the Hearing Panel concludes that Monroe Parker should be expelled from membership in the NASD and that Herman and Angeline each should be permanently barred from associating with any NASD member in any capacity. In addition, the Hearing Panel determines that Monroe Parker, Herman, and Angeline each should be fined $638,507, which includes a base fine of $100,000 and disgorgement of $538,507.[95]

C. Failure to Disclose Adverse Interest (Monroe Parker, Lipsky, and Herman)

The failure to disclose an adverse interest is a form of fraud on the customer. Accordingly, the Hearing Panel looked to the Guideline for misrepresentation or omission of material facts in determining the appropriate remedial sanction against Monroe Parker, Lipsky, and Herman under the Third Cause of Action.

As stated above, the NASD Sanction Guidelines for misrepresentations or material omissions of fact recommend that in egregious cases an individual respondent be barred and that a firm be expelled.[96] The Guideline also suggests the imposition of a fine ranging between $10,000 and $100,000. The Guideline further states that the adjudicator may impose a set fine per investor rather than in the aggregate.

Here, the Hearing Panel concludes that Lipsky's and Herman's conduct was egregious. They transferred their United Leisure stock through two accounts to disguise its origin and then sold it back to Monroe Parker. From this activity, the Hearing Panel finds that they intended to mislead the purchasers of the stock. Monroe Parker participated in and profited from their deception.

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[95] The amount Monroe Parker charged in excessive markups ($538,507) is included in the total amount Monroe Parker received in excess of its costs from the sale of Madden Warrants ($2,056,930).

[96] NASD Sanction Guidelines 80 (2d ed. 1998).

Accordingly, the Hearing Panel concludes that Monroe Parker, Lipsky, and Herman each should be fined $1,835,762, which includes a base fine of $500,000 and disgorgement of $1,335,762. In addition, Lipsky and Herman each should be barred from associating with any NASD member in any capacity, and Monroe Parker should be expelled from membership in the NASD.

D. Failure to Supervise (Lipsky and Levitov)

The NASD Sanction Guidelines provide that the appropriate sanction for failure to supervise in violation of NASD Conduct Rules 2110 and 3010 is a fine of $5,000 to $50,000 and, in egregious cases, a bar.[97] The Guideline also provides that the fine may be increased by the amount of the respondent's financial benefit. The Guideline further instructs the adjudicator to consider the following: whether the supervisor ignored "red flag" warnings that should have resulted in additional supervisory scrutiny; the nature, extent, size, and character of the underlying misconduct; and the quality and degree of the supervisor's implementation of the firm's supervisory procedures and controls.

Lipsky's conduct is an extremely egregious case of failure to supervise, and severe sanctions are warranted as a deterrent to others. Lipsky purposely set up a compliance program that was little more than a sham. Although the Firm's compliance manual appeared to set out proper controls, in fact, Lipsky retained ultimate authority and control. Lipsky maintained virtual control of all aspects of the Firm's operations and ran the Firm in a manner that facilitated the fraud described in this Decision. Lipsky not only ignored numerous red flags, but he had actual knowledge of the scheme to manipulate the market

[97] NASD Sanction Guidelines 89 (2d ed. 1998).

for Madden Warrants and willingly participated in it. Lipsky also directly benefited from the scheme. Accordingly, the Hearing Panel determines that Lipsky should be barred from associating with any member of the NASD in any capacity and fined $250,000 for his violations of NASD Conduct Rules 2110 and 3010.

As to Levitov, the Hearing Panel agrees with Enforcement's assessment that his conduct was not egregious. As Enforcement points out, Levitov did not participate in the fraud or profit from it directly. However, his failure to take any action to detect and prevent the manipulation of Madden Warrants over a substantial period of time requires more than minimal sanctions despite his otherwise clear disciplinary record. Accordingly, the Hearing Panel determines that Levitov should be barred as a principal, 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 passing the Series 7 examination before re-associating with any member firm.[98]

E. Disgorgement and Restitution (Monroe Parker, Lipsky, Herman, and Angeline)

In addition to any other sanctions, Enforcement requests that Monroe Parker, Lipsky, Herman, and Angeline be ordered to disgorge their ill-gotten gains. Disgorgement is a remedy designed to deprive violators of their illegal profits, thereby effectuating the

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[98] In determining the appropriate level of sanctions for Levitov, the Hearing Panel took into consideration his limited financial resources and that he has been out of the securities industry since he left Monroe Parker. Although a more substantial fine would otherwise have been warranted, the Hearing Panel concluded that in this case a substantial fine would be punitive.

deterrence objectives of the securities laws.[99] It is appropriate to order disgorgement in cases involving market manipulation[100] and excessive markups.[101]

Here, the Hearing Panel finds that Monroe Parker, Herman, and Angeline directly participated in, and jointly profited from, the manipulation and excessive markups of Madden Warrants. Therefore, they should disgorge the amount of their ill-gotten gains. Further, although Lipsky was not charged with manipulating the market for Madden Warrants, the Hearing Panel finds that he knowingly profited from Herman's and Angeline's illicit conduct. Lipsky was intimately involved in all of the trading and pricing strategies employed by Monroe Parker. Accordingly, Monroe Parker, Lipsky, Herman, and Angeline should jointly and severally disgorge $3,156,930, the amount of the illicit profits earned as a result of the excessive markups and manipulation of the price for Madden Warrants.[102]

With respect to Enforcement's request for restitution to the purchasers of United Leisure stock, the Hearing Panel notes that restitution is a traditional equitable remedy designed to "restore the status quo where otherwise a . . . victim would unjustly suffer loss."[103] Unlike disgorgement, which focuses on the unjust enrichment of violators, restitution remedies the unjust injury to victims. The NASD Sanction Guidelines

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[99] See, e.g., SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991).

[100] See SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996) (per curiam).

[101] E.g., First Jersey Secs., 101 F.3d at 1474-76.

[102] See, e.g., Hately v, SEC, 8 F.3d 653, 656 (9th Cir. 1993) (affirming disgorgement order imposed jointly and severally against broker-dealer and its officers for violations of NASD rules where defendants "acted collectively in violating the association's rules and because of the close relationship among the three of them").

[103] In re David Joseph Dambro, 51 S.E.C. 513, 518 (1993).

generally recognize that, in cases where an identified individual has suffered a quantifiable loss as a result of a respondent's misconduct, it is fitting to order the respondent to pay restitution.[104] Here, however, Enforcement has failed to establish the losses, if any, suffered by the purchasers of United Leisure stock.[105] Accordingly, the Hearing Panel concludes that restitution cannot be ordered.

On the other hand, it is clear from the evidence that Herman and Lipsky improperly profited on the sale of their United Leisure stock back to Monroe Parker. Consequently, although Enforcement has not shown with sufficient specificity the amount owed to each purchaser, there is sufficient evidence to order Monroe Parker, Herman and Lipsky to disgorge the amount of their illicit profits. Accordingly, the Hearing Panel concludes that Monroe Parker, Herman, and Lipsky should jointly and severally disgorge $1,335,762, the amount of their combined profit on the sale of United Leisure stock to Monroe Parker's customers.[106]

Order

Therefore, having considered all of the evidence, the Hearing Panel imposes the following sanctions:

1) Monroe Parker Securities, Inc. is expelled from membership in the NASD and fined $5,592,692 (including disgorgement in the total sum of $4,492,692, of which $3,156,930 is imposed jointly and severally against

[104] NASD Sanction Guidelines 6 (2d ed. 1998).

[105] In its supplemental post-hearing submission, Enforcement concedes that it does not have sufficient information to calculate the investors' actual out-of-pocket losses.

[106] This amount includes $1,309,496 Herman and Lipsky received for their United Leisure stock and $26,266 Monroe Parker earned when it sold the stock to its customers.

Herman, Lipsky, and Angeline, and $1,335,762 is imposed jointly and severally against Herman and Lipsky).[107]

2) Alan Scott Lipsky is barred from associating with any member of the NASD in any capacity and fined $5,242,692 (including disgorgement in the total sum of $4,492,692, of which $3,156,930 is imposed jointly and severally against Monroe Parker, Herman, and Angeline, and $1,335,762 is imposed jointly and severally against Monroe Parker and Herman).[108]

3) Bryan Jay Herman is barred from associating with any member of the NASD in any capacity and fined $5,592,692 (including disgorgement in the total sum of $4,492,692, of which $3,156,930 is imposed jointly and severally against Monroe Parker, Lipsky, and Angeline, and $1,335,762 is imposed jointly and severally against Monroe Parker and Lipsky).[109]

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[107] The fine, totaling $5,592,692, consists of $500,000 for market manipulation (First Cause of Action), $100,000 for excessive markups (Second Cause of Action), $500,000 for failing to disclose adverse interest (Third Cause of Action), and disgorgement of $4,492,692 ($2,056,930 in illicit gains from the manipulation and the excessive markups of the Madden Warrants, $1,100,000 Herman and Lipsky received from the sale of their Madden Warrants to Monroe Parker, and $1,335,762 in profits from the sale of United Leisure stock). Monroe Parker is expelled for the violations found under each of the First, Second, and Third Causes of the Complaint.

[108] The fine, totaling $5,242,692, consists of $500,000 for failing to disclose adverse interest (Third Cause of Action), $250,000 for failure to supervise (Fourth Cause), and disgorgement of $4,492,692 ($2,056,930 in illicit gains from the manipulation and the excessive markups of the Madden Warrants, $1,100,000 Herman and Lipsky received from the sale of their Madden Warrants to Monroe Parker, and $1,335,762 in profits from the sale of United Leisure stock). Lipsky is barred for the violations found under both the Third and Fourth Causes of the Complaint.

[109] The fine, totaling $5,592,692, consists of $500,000 for market manipulation (First Cause of Action), $100,000 for excessive markups (Second Cause of Action), $500,000 for failing to disclose adverse interest (Third Cause of Action), and disgorgement of $4,492,692 ($2,056,930 in illicit gains from the manipulation and the excessive markups of the Madden Warrants, $1,100,000 Herman and Lipsky received from the sale of their Madden Warrants to Monroe Parker, and $1,335,762 in profits from the sale of United Leisure stock). Herman is barred for the violations found under each of the First, Second, and Third Causes of the Complaint.

4) Ralph Joseph Angeline is barred from associating with any member of the NASD in any capacity and fined $3,756,930 (including disgorgement in the sum of $3,156,930 which is imposed jointly and severally against Monroe Parker, Lipsky, and Herman).[110]

5) Richard Steven Levitov is 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 passing the Series 7 examination before re-associating with any member firm.

In addition, Monroe Parker, Herman, Lipsky and Angeline are ordered to pay interest on the amounts ordered to be disgorged at the rate set forth in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), from January 4, 1995, until paid.

Monroe Parker, Herman, Lipsky, and Angeline are also jointly and severally ordered to pay costs in the amount of $3,285.80, which includes an administrative fee of $750 and hearing transcript costs of $2,535.80.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after the date of service of the decision constituting final disciplinary action

[110] The fine, totaling $3,756,930, consists of $500,000 for market manipulation (First Cause of Action), $100,000 for excessive markups (Second Cause of Action), and disgorgement of $3,156,930 ($2,056,930 in illicit gains from the manipulation and the excessive markups of the Madden Warrants and $1,100,000 Herman and Lipsky received from the sale of their Madden Warrants to Monroe Parker). Angeline is barred for the violations found under each of the First and Second Causes of the Complaint.

of the NASD; provided, however, that all bars, suspensions, and expulsions shall become effective upon service of the decision constituting final disciplinary action of the NASD.[111]

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Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

Monroe Parker Securities, Inc. (via FedEx overnight delivery and first class mail)
Alan Scott Lipsky (via FedEx overnight delivery and first class mail)
Bryan Jay Herman (via FedEx overnight delivery and first class mail)
Ralph Joseph Angeline (via FedEx overnight delivery and first class mail)
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Frank SanClemente, Esq. (via first class mail and e-mail)

[111] 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.