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NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION Complainant, v. Respondent Respondent.	Disciplinary Proceeding No. CMS030257 Hearing Officer – AWH **Hearing Panel Decision** August 6, 2004

Registered principal found not liable for engaging in fraudulent wash and matched trades, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and 3310. Complaint dismissed.

Appearances:

Robert Furst, Esq., Jeffrey Stith, Esq., and Michael R. Levy, Esq.,
For the Department of Market Regulation

LI, Esq., and RJ, Esq., for Respondent

DECISION

Background

On November 5, 2003, the Department of Market Regulation ("Market Regulation") issued the single-cause Complaint in this proceeding, alleging that Respondent engaged in fraudulent wash and matched trades designed to recognize tax-exempt gains in accounts he controlled, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and 3310. On December 2, 2003, Respondent filed an Answer to the Complaint,

admitting that he placed orders for the trades at issue, denying that the trades violated any securities laws or rules, and averring that he had legitimate business and tax related reasons for the trades. A hearing was held on March 17, 2004, before a Hearing Panel composed of the Hearing Officer, the Chairman of the Market Regulation Committee, and a current member of the District 10 Committee. The parties each filed a post-hearing brief, and, on June 7, 2004, Market Regulation filed its reply brief.

Findings of Fact[1]

Respondent entered the securities industry in the mid-1960's. In 1967, he was registered as a principal through member firm SLK. C-1. Eventually, he became the head of the firm, which had grown from 45 employees and $5 million in capital in 1968, to one with 2,600 employees and $1.5 billion in capital in 2000, when the firm was acquired by GSC. Respondent had stepped down as senior partner at SLK approximately a year before the firm was acquired. Tr. 102-03. He currently has a titular position with SLK, but has ceded all operational functions. Tr. 30. He remains registered with NASD through SLK. C-1.

He has no disciplinary history. *Id.*

Entities Owned or Controlled by Respondent

During the period of time that the trades at issue were executed, in addition to his personal securities account at SLK, Respondent owned, controlled, and/or had trading authority over the accounts of three other entities:

Respondent founded and was president of IAT, an insurance company that was originally incorporated in New York, and, in 1991, reincorporated in Bermuda. Tr. 31;

[1] References to Market Regulation's exhibits are designated C_; Respondent's exhibits, as K_; and the transcript of the hearing, as Tr._.

C-4. Respondent's two children own all of the outstanding stock of IAT; he owns all of the preferred voting stock. Tr. 31. In 2001, IAT had no employees, and its insurance business was operated on a contract basis by Marsh McLennan. Tr. 35. In 2001, Respondent was responsible for investing hundreds of millions of dollars for IAT through a margin account at SLK. Tr. 35-36; C-4. IAT was tax-exempt as a result of a statutory provision that gave tax-exempt status to insurance companies which generated little premium revenue. Consequently, IAT's investment profits were not subject to federal tax. Tr. 37; C-34; Answer at 5. Respondent expected that IAT would lose its tax-exempt status in November 2001. Tr. 66-67; Answer at 3. IAT bought a controlling interest in MCM, a Delaware insurance company that operated worldwide, had 300 employees, and had $100 million in operating loss carry-forwards.[2] Tr. 39, 50-51.

EH is a Delaware corporation with its principal place of business in Raleigh, North Carolina. As the name implies, its function is to hold investments. Tr. 39. MCM owns 100% of EH. IAT was engaged to provide investment advice to EH through an account with SLK controlled by Respondent. Tr. 40-42; C-3.

MMK is a Bermuda corporation that is a wholly owned subsidiary of IAT. IAT acquired the stock of MMK from MassMutual Holding Company. C-6. MMK has no employees. Its insurance business is run on a contract basis, and it is a regular tax payer. Tr. 51-52.

Respondent's Trading in Thoratec Corporation, Inc. ("THOR")

Respondent was a significant investor in the stock of Thoratec Corporation, Inc., controlling over 6.6% of its shares outstanding as of July 24, 2001. Tr. 73; C-33. As of August 1, 2001, IAT held 2,033,500 shares of THOR. Tr. 59. Those shares had been

[2] IAT's use of those loss carry-overs is detailed below.

purchased at prices lower than the approximate $17 price that THOR was trading at in early August 2001. Tr. 58-59; C-13, C-54. On August 1, 2001, EH held 700,000 shares of THOR that Respondent purchased for it in February 2001 at $8.6875 per share. Tr. 55; C-8.

Respondent's general practice in placing trading orders for execution was either (1) to call the night before and leave a message on his secretary's voicemail; (2) to give the order in person to his secretary, if he was in the office; (3) to call the order room directly; or (4) to walk the order to the order room. Tr. 110. GH, who had worked for 27 years at SLK, would frequently take orders from Respondent or Respondent's secretary. GH worked on the listed order desk. If he received an order for Nasdaq securities, he would give it to HR, the manager of the agency trading department, for execution. When GH gave an order to HR for execution, he would generally fill out an order ticket, but he would not do so every time. Tr. 180-81, 183, 186.

As described more fully below, between August 1 and August 13, 2001, Respondent engaged in a series of four transactions in THOR between the various accounts he controlled. C-46. Those trades were ordered for the purpose of realizing capital gains while, at the same time, offsetting those gains by tax loss carry-forwards, or taking advantage of available tax exemptions on those gains. At the same time, he sought to retain control over the shares of THOR that the various accounts held. He was not aware of any significant news that may have affected the price of THOR. There is no evidence that he had any motive for the trades, other than tax reasons[3] and a desire not to

[3] As noted below, avoidance of margin interest motivated one trade, in part.

reduce the size of IAT's holdings of THOR. He had no motive artificially to affect the price of THOR or to induce others to trade the stock. Tr. 121-22.

The Trades of August 1 and 7

By August 2001, EH had an unrealized gain on the 700,000 shares of THOR that it had purchased in February at just under $8.70. As a wholly owned subsidiary of MCM, EH could offset any realized taxable capital gains on THOR by using MCM's loss carry-forwards before they expired. However, Respondent was a long-term investor in THOR, and he did not want to lose control of the 700,000 shares held by EH. Tr. 50-51, 70-71. As a result, on August 1, 2001, Respondent put in a sell order on behalf of EH for its 700,000 shares of THOR. Tr. 69-70; C-22, p. 3. At the same time he placed an identical buy order on behalf of IAT, expecting that the two orders would be crossed. Tr. 69, 75; C-22, p. 1. The trades were executed at $18 per share, and constituted 54% of the day's volume in THOR. C-22, pp. 1, 3; C-52, p. 16.

On August 7, 2001, Respondent placed a sell order, on behalf of IAT, for 1,000,000 shares of THOR. Tr. 76-77; C-23, p. 2. On that same day, he placed an identical buy order on behalf of EH. C-23, p. 1. The trades were executed at $17.50, within the bid and ask price at the opening of the market. The trade constituted approximately 70% of the volume in THOR for that day. C-52, p. 16. As a result of the sale of THOR, IAT was able to realize gains on its investments in THOR before its tax exemption expired in November 2001.[4] Tr. 66-67, 116.

The Execution Price of the Trades on August 1

[4] IAT's sale of 1,000,000 shares did not include the 700,000 shares it had bought from EH on August 1. If it had, IAT would have lost money because it purchased the 700,000 shares at $18, and sold the 1,000, 000 shares at $17.50.

As noted above, the execution price of the trades on August 1 was $18, the opening price on that date.[5] However, the trades were entered at 12:53 pm, when the inside bid and ask were $17.07 and $17.14. C-22; K-11, pp. 1, 10. Respondent did not order the trades to be effected above the inside market; he assumed that the price would be set between the bid and ask at the opening of the market. Tr. 137. The Hearing Panel finds that the most likely cause for the outside market price was that GH neglected to relay the order to HR prior to the opening of the market, as Respondent intended. Rather, when he realized his oversight, he attempted to rectify his error by having HR execute the order at the opening price and note on the ticket the symbol ".o," indicating that there was a price override. Tr. 150, 221-22.

GH was emotionally upset on August 1, 2001, as a result of the death, on July 24, of his mother, to whom he was very close, and her funeral on July 28. GH did not plan to be in the office on August 1 because he thought he would be given a longer bereavement leave. Because his bereavement leave did not extend that long, he came into the office, but was not able to function as he usually did. He would find customer orders that had lain on his desk for some time without his taking any action on them. When that happened, he attempted to have the order executed at the price the customer would have obtained had the order been executed promptly. Tr. 202-06. Although he candidly stated that he could not remember specific orders that he treated in this manner, the Hearing Panel credits his testimony and finds it more likely than not that Respondent's orders were executed above the inside market only because GH neglected to act on them at the

[5] From and after the twelfth minute of trading, the inside ask ranged from a high of 17.99 to a low of 16.80, closing at 17.52. K-11.

opening of the market, and not because Respondent directed them to be executed at a price above the inside market.

The Trades of August 9 and August 13

On August 9, 2001, Respondent placed an order, on behalf of IAT, to sell 1,000,000 shares of THOR. The purpose, again, was to take advantage of IAT's tax exemption before it expired in November. Tr. 78, 117; C-24, p. 3. At the same time, he placed two buy orders for THOR, each for 500,000 shares. The first buy order was for his personal account at SLK; the second, was on behalf of MMK. He expected the buy and sell orders to be crossed. Tr. 97. The trades were executed at $17.12, within the inside bid and ask, and constituted 84% of the volume in THOR for the day. Tr. 79; C-52, p. 16.

On August 13, 2001, Respondent reversed the trades of August 9, placing a buy order for 1,000,000 shares of THOR on behalf of IAT, and a sell order for 500,000 shares each for MMK and his personal account. He expected the orders to be crossed. Tr. 82, 97; C-25, pp. 1-3. The orders were executed at $17.20, within the inside bid and ask, and they comprised approximately 70% of the volume in THOR for the day. C-25, C-52, p. 16. The trades had no tax purposes. They were executed to enable IAT to hold the same number of THOR shares it had held prior to the August 9 transactions because Respondent wanted IAT to remain a long-term investor in the stock. In part, the trades were executed to avoid margin interest on the 500,000 THOR shares in his own and MMK's accounts. Tr. 85-88, 118-20.

Market Response to the Trades

On August 1, 2001, the day of the first trades (at $18), THOR closed at $17.51, down $.37 from it previous day's close of $17.88.[6] C-52, p. 16. On August 2, the stock recovered $.44, to close at $17.95. *Id*. The stock closed down $.35 two trading days later, but closed at $18 on August 7, the second day of Respondent's trades (at $17.50). On August 8, it closed down almost $.30, and on August 9, the third day of Respondent's trades (at $17.12), it closed down an additional $.34 to $17.34. By August 13, the last day of Respondent's trades (at $17.12), THOR closed at $17.46. Over the next two days, it dropped to $15.85 per share, before rising to $17.64 on August 17, and reaching a high of $20.02 on August 31, 2001.

Respondent's Cessation of Trading in THOR

After the August 13, trades, Respondent did not trade in THOR stock for the balance of that month, either for himself or any other entity. C-10, C-15, C-18, C-21. Moreover, SLK account records in evidence demonstrate that there were no trades in THOR stock in Respondent's personal account and the accounts of EH or MMK between August 2001 and March 2003, or in IAT's account through October 2002. Tr. 232-34; C-37, C-38, C-39, C-53.

Discussion and Conclusion

In its pre-hearing and post-hearing submissions, Market Regulation posits three theories for finding Respondent liable for violations of § 10(b) of Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 promulgated thereunder: (1) matched orders are *per se* illegal, regardless of whether they are part of a broader wash sale scheme, and

[6] All of IAT's trades in THOR were reported between 10 a.m. and 1 p.m. on the day of the trade. C-46.

therefore do not require independent proof of scienter;[7] (2) even in the absence of manipulative intent, wash sales and matched orders are deceptive and operate as a fraud on the market;[8] and (3) Respondent, if he did not intend to defraud, acted with recklessness sufficient to establish the scienter required to prove fraud.[9] The Hearing Panel finds that the first two theories are not consistent with the provisions of the Exchange Act or the case law arising thereunder, and it does not find that Respondent acted recklessly in initiating the trades at issue.

Scienter – intent to deceive, manipulate, or defraud – is a necessary element of proof in an action under § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. *Ernst and Ernst v. Hochfelder*, 425 U.S. 185 (1976). As the Court noted, § 9(a)(1) of the Exchange Act "proscribes wash sales and matched orders when effectuated for the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or . . .with respect to the market for any such security."[10] *Id*. at 206. The proscription in § 9(a)(1) contains the element of scienter, and, as defined in that section, wash sales and matched orders violate § 10(b) and Rule 10b-5. The Court rejected negligence as a basis for §10(b) liability, finding that "[t]here is no indication that Congress intended anyone to be made liable for such practices unless he acted other than in good faith." *Id*. The Court also rejected an

[7] Market Regulation Pre-Hearing Brief, p. 7; Market Regulation Post-Hearing Reply Brief, p. 5.

[8] Market Regulation Pre-Hearing Brief, p. 7; Market Regulation Post-Hearing Brief, pp. 12, 14.

[9] Market Regulation Pre-Hearing Brief, pp. 7-8; Market Regulation Post Hearing Brief, p. 15; Market Regulation Post-Hearing Reply Brief, p. 11.

[10] Wash sales are transactions involving no change in beneficial ownership; matched orders are orders for the purchase or sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same price, have been or will be entered by the same or different persons for the sale or purchase of such security. *Id*. at 205.

interpretation of § 10(b) that would impose an "effect upon investors" standard and eliminate proof of intentional or willful conduct designed to deceive or defraud investors. The Court stated: "The logic of this effect-oriented approach would impose liability for wholly faultless conduct where such conduct results in harm to investors, a result the [Securities and Exchange] Commission would be unlikely to support." *Id*. at 198.

A year after *Ernst & Ernst*, the Court, in *Santa Fe Industries, Inc. v. Green*, 423 U.S. 462 (1977) quoted the same legislative history in concluding that the only reference in the Senate Report on § 10 of the Exchange Act "merely states that the section was 'aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful function.'" *Id*. at 474. In discussing the term "manipulation," the Court reiterated that the "term refers generally to practices, such as wash sales, matched orders, or rigged prices, *that are intended to mislead* investors by artificially affecting market activity." (emphasis added). *Id.* at 476.

The SEC has also concluded that wash sales and matched orders are expressly proscribed by the Exchange Act "whenever the actor's purpose is to create 'a false or misleading appearance of active trading' or to induce others to buy or sell." *Edward J. Mawod & Co.*, Exch. Act Rel. No. 13,512, 1977 SEC LEXIS 1811 (May 6, 1977). In that case, the SEC held that such proscriptions are applicable under § 9(a) of the Exchange Act to securities "registered on a national securities exchange," and that they violate § 10(b) of the Exchange Act when they are applied to securities in the over-the-counter market.[11] *Id*. at *11.[12]

[11] NASD Systems and Programs Rule 6440 also proscribes transactions which involve no change in beneficial ownership of the security, or matched trades, only when they are "for the purpose of creating or inducing a false or misleading appearance of activity in an eligible security or creating or inducing a false or misleading appearance with respect to the market in such security[.]"

In affirming the SEC's decision in *Mawod*, the 10th Circuit stated:

> We recognize that under the doctrine of Ernst & Ernst, scienter is an essential element. However, it must be noted in this connection that the wash sale and matched order are per se manipulative and are so regarded *in the Ernst & Ernst scheme of things.* (emphasis added) (citing *Ernst & Ernst* and *Santa Fe Industries, Inc.*).

Mawod & Company v. Securities and Exchange Commission, 1979 U. S. App. LEXIS 17367, at *20 (10th Cir. 1979).

The quoted language does not suggest that matched orders that do not fall within the definition in § 9(a)(1) are per se manipulative, eliminating the need for proof of scienter to establish a violation of Section 10(b), Rule 10b-5 and NASD Conduct Rule 2120. The 10th Circuit's reference to "the Ernst & Ernst scheme of things" can only be interpreted to mean that, where there is evidence that a wash sale or matched order, as those terms are defined in § 9(a)(1), is effectuated *for the purpose of* creating a false or misleading appearance of active trading or some other market activity, no further proof of scienter is necessary to make out a violation of § 10(b) or Rule 10b-5. Before its reference to "the Ernst & Ernst scheme of things," the Circuit Court found that "[t]there is no challenge to the conclusion that manipulations were taking place at least by the [customers] and also the Mawod firm and Mawod." *Id*., at *19. Here, Respondent's trades were effected in good faith and did not come within the proscription of § 9(a). There were only four transactions in shares of an established company, and no evidence of any attempt or reason to manipulate the price of those shares, to induce anyone to trade

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[12] The respondents in that case were a registered broker-dealer and its general partner who were charged with aiding and abetting violations of § 10(b) by two of their customers. The SEC found that the two customers manipulated the price of an obscure over-the-counter shell company by trading large blocks of the stock on an in-and-out basis. In two months, Mawod's firm executed at least 30 trades in the stock for those customers, despite the fact that the trades were economically irrational.

in those shares, or to create the false or misleading appearance of market activity. To read the language to eliminate completely the requirement of scienter as an element of proof is to read intent out of § 9(a) and to find violations of § 10(b) where the actor has acted completely in good faith, contrary to Supreme Court's pronouncements in *Ernst & Ernst*.[13]

To bolster its argument that, even in the absence of manipulative intent, wash sales operate as a fraud on the market, Market Regulation cites a series of cases, all decided on the same day, involving brokers who were alleged to have violated § 10(b) and Rule 10b-5 by aiding and abetting misconduct by their customer, John G. Broumas. However, those cases are clearly distinguishable on their facts. Broumas directed hundreds of trades among 25 different brokerage accounts that he controlled at 14 different broker-dealers, in a scheme similar to check-kiting that also included the practice of "marking the close."[14] Those cases are: *Richard D. Chema*, Exchange Act Rel. No. 40719, 1998 SEC LEXIS 2592 (Nov. 30, 1998); *Adrian C. Havill*, Exchange Act Rel. No. 40726, 1998 SEC LEXIS 2599 (Nov. 30, 1998); and *Sharon M. Graham and Steven C. Voss*, Exchange Act Rel. No. 40727; 1998 SEC LEXIS 2598 (Nov. 30, 1998).

In two cases, *Havill* and *Graham and Voss*, the SEC specifically found Broumas' conduct to be manipulative, citing *Ernst & Ernst*. In *Havill*, the SEC found that Broumas "intentionally distorted" the market price of the stock (1998 SEC LEXIS 2599, at **12-

[13] Even assuming that *Mawod* could be read as Market Regulation urges, under the facts of this case, the Hearing Panel declines to adopt such a reading because it would conflict with *Ernst & Ernst*'s holding that scienter is an essential element of a § 10(b) violation.

[14] Marking the close is the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market. *Graham and Voss*, *Id*. at *5, n.4.

13), and in *Graham and Voss*, the SEC found that his hundreds of wash trades created a "deceptive appearance of market activity" that was manipulative (1998 SEC LEXIS 28, at *20). In *Chema*, the SEC found that Chema handled seven separate accounts for Broumas, and that Chema effected 73 wash trades for Broumas in an eight month period, only 14 of which he reported. He effected 15 orders during the last seven minutes of the trading day. The SEC concluded that Broumas' wash trades substantially distorted investors' perception of the market, and that he defrauded the clearing firm into advancing him substantial sums of money by inducing the clearing firm to believe that he was making legitimate sales of stock (1998 SEC LEXIS 2592, at **12-13).

In all three, the brokers were found to have acted with scienter because they were aware of Broumas' "bizarre," "economically irrational trading" that was not profitable. None of those three cases suggests that the SEC sought to abrogate *Ernst & Ernst's* holding that § 10(b) does not apply to wholly faultless or merely negligent conduct. Broumas' conduct stands in stark contrast to Respondent's four transactions that were effected in good faith, and only to take advantage of favorable tax consequences. The Hearing Panel finds that, given the size[15], limited number, and character of Respondent's trades, investors would not likely have been misled, and there is no evidence to the contrary.

Market Regulation's citation to *Michael B. Jawitz*, Exch. Act Rel. No. 44357, 2001 SEC LEXIS 1042 (May 29, 2001), does not support its argument that Respondent's conduct evidenced a reckless disregard for the consequences of his actions. Jawitz entered 184 fictitious (not bona fide) limit orders in an attempt to manipulate his firm's

[15] As noted below in the discussion of Rule 3310, a single large block trade, standing alone, would not indicate a groundswell of trading.

internal automated order routing and execution system that provided limit order protection for customers of the firm. *Michael B. Jawitz*, No. CMS960238, 1999 NASD Discip. LEXIS 24, at *4 (July 9, 1999). He allowed 309 fictitious orders to be reported to the NASD's Automated Confirmation Transaction Service, and then tried to cancel the orders within the same day. *Id*. Despite attempts to cancel the orders, 236 of the fictitious trades were reported to the Nasdaq tape. *Id.* The National Adjudicatory Council found that Jawitz violated NASD Conduct Rule 2120 because his conduct was intentional and deceptive. In affirming that decision, the SEC also found that Jawitz "recklessly compromised the integrity of the markets," by executing the fictitious trades:

> As Jawitz admitted, he was aware that the trades resulting from the execution of his fictitious limit orders, although not bona fide, would be reported to the public by [the firm] through ACT. Thus Jawitz's actions further demonstrate a reckless disregard for whether market participants were misled regarding the "trades" that resulted from his fictitious limit orders.

Jawitz, 2001 SEC LEXIS at *18.

Here, there was no evidence that Respondent engaged in conduct that was intentionally deceptive, engaged in fictitious trading, believed that his conduct violated the securities laws, or caused SLK to violate its obligation to provide its other customers with limit order protection. The Hearing Panel finds credible his testimony that the trades were executed for legitimate business and tax related reasons. There is no evidence that his four transactions had any significant effect on the market price of THOR. Moreover, there is no evidence that he had any motive to engage in fraud or deception. Indeed, Respondent did not purchase or sell any shares of THOR after the trades at issue were executed. He engaged in trades that he believed were bona fide,

knew that they would be reported to the public, and made no attempt to conceal any aspect of his actions. Accordingly, because the Hearing Panel finds that Market Regulation has not proved by a preponderance of the evidence that Respondent engaged in fraudulent wash sales and matched trades, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and NASD Conduct Rules 2120, the Complaint against him on those allegations will be dismissed.

Alleged Violation of Conduct Rules 3310 and 2110

Conduct Rule 3310 provides, in pertinent part:

> No member shall . . . cause to be published or circulated . . . any communication of any kind which purports to report any transaction as a purchase or sale of any security unless such member believes that such transaction was a bona fide purchase or sale of such security.

The trades at issue were reported through the Automated Confirmation Transaction Service ("ACT"). C-46.[16] Respondent's block size orders for those trades were not required to be displayed to market-makers outside of SLK. *See* Exchange Act Rule 11Ac-1-4.(c)(4).

The Rule does not define the term "bona fide," but it literally means "good faith." Considering all the evidence, the Hearing Panel concludes that Respondent believed that his transactions were bona fide purchases and sales. He placed the orders in good faith, for a legitimate purpose. He reasonably assumed that they would be executed within the relevant day's price range, and that they would be subject to normal handling and reporting, in accordance with relevant trading practice rules.

NASD Rule 6440 proscribes matched orders and transactions which involve no change in beneficial ownership, only when they are executed or ordered "for the purpose

[16] Exhibit C-46 was prepared by NASD staff, based on information reported by members to ACT. Tr. 218.

of creating or inducing a false or misleading appearance of activity . . . or creating or inducing a false or misleading appearance with respect to the market in such security[.]" Respondent's transactions were not done for such purposes, nor were they fictitious; as noted above, they were accomplished in good faith for what Respondent believed were legitimate tax and business reasons.

There is no evidence to suggest that he had reasonable grounds to believe that those transactions were "false or misleading or would improperly influence the market price" of THOR. *See* Rule 6440(e). The Hearing Panel finds that a single large block trade might raise a red flag, but standing alone, would not indicate or prompt a groundswell of trading. The evidence of trading activity after Respondent's trades supports that finding. Accordingly, the Hearing Panel concludes that Market Regulation has not proved by a preponderance of the evidence that Respondent violated Conduct Rule 3310, as alleged in the Complaint, and the Complaint will be dismissed as to those allegations.

Finally, the Complaint alleges violations of Conduct Rule 2110. As the SEC has recently noted, "if no other rule has been violated, a violation of Rule 2110 requires evidence that the respondent acted in bad faith or unethically." *Chris Dinh Hartley*, Exch. Act Rel. No. 50031, 2004 SEC LEXIS 1507 (July 16, 2004) (citing *Calvin David Fox*, Exch. Act Rel. No. 48731 (October 31, 2003), 81 SEC Docket 2017, 2020-2021). Having found no violation of any other securities law or Conduct Rule, the Hearing Panel concludes that Respondent has not been shown to have violated Rule 2110 as a result of violating any other law or Rule. Moreover, the Hearing Panel does not find any evidence

they he engaged in any bad faith, or unethical conduct. Accordingly, the Complaint will be dismissed as to those allegations.

Conclusion

Respondent is found not liable for engaging in fraudulent wash and matched trades, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and 3310. The Complaint against him is *dismissed*.

SO ORDERED.

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Alan W. Heifetz
Hearing Officer
For the Hearing Panel