BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. U.S. Rica Financial, Inc. San Jose, CA and Vinh Huu Nguyen San Jose, CA, Respondents.	DECISION Complaint No. C01000003 Dated: September 9, 2003

Respondent firm and its chief executive officer appeal Hearing Panel decision imposing sanctions for: (1) fraudulent representations to customers, on the Firm's Web site and on trade confirmations, that the firm executed agency trades and charged commissions in accordance with a published commission schedule or for "free," when, in fact, respondents effected customer trades on a riskless principal basis through the firm's proprietary account and charged customers undisclosed markups and markdowns, and thereby earned "secret profits," in violation of SEC and NASD Rules; and (2) respondents' failure to make appropriate memoranda of brokerage orders. Held, findings affirmed and sanctions modified.

Appearances

For the Department of Enforcement: David A. Watson, Regional Counsel, San Francisco, California, and Leo F. Orenstein, Litigation Counsel, NASD, Washington, DC.

For the respondents: Pro se.

DECISION

Respondents U.S. Rica Financial, Inc. ("U.S. Rica" or "the Firm") and Vinh Huu Nguyen ("Nguyen"), its chief executive officer and sole registered securities principal, appeal an NASD Hearing Panel decision pursuant to Procedural Rule 9311. In a decision dated July 9, 2002, the Hearing Panel imposed sanctions for the respondents' admitted violations of federal securities laws and NASD rules in connection with their misrepresentations to customers on confirmations and on the Firm's Web site that customers' trades had been, or would be, executed on an agency basis and charged commissions in accordance with the Firm's published commission schedule or charged no commissions at all, when in fact, respondents executed customer trades on a riskless principal basis through the Firm's proprietary account and charged their customers markups and markdowns without disclosing them. The Hearing Panel also found that respondents failed to maintain memoranda of brokerage orders. The Hearing Panel expelled U.S. Rica from NASD membership, barred Nguyen in all principal capacities, ordered Nguyen to requalify, fined respondents $133,579, and assessed costs. After a thorough review of the record, we affirm the Hearing Panel's findings and modify the sanctions. Thus, we expel U.S. Rica from NASD membership, bar Nguyen in all capacities, and fine Nguyen and the Firm $120,000, jointly and severally. We also affirm the Hearing Panel's imposition of costs.

I. Background

Nguyen established U.S. Rica, an on-line brokerage firm based in San Jose, California, in 1996. U.S. Rica has been an NASD member since 1996. Nguyen has served as U.S. Rica's chief executive officer and sole general securities principal throughout that time. Nguyen has been employed in the securities industry and registered as a general securities principal and a general securities representative since 1993.

The period relevant to this complaint is December 1998 through December 1999. During that period, U.S. Rica employed approximately 15 employees. It functioned as an introducing firm and cleared through U.S. Clearing Corp. The Firm drew the majority of its clientele from the Asian community. It serviced about 2,500 accounts and processed 200 to 300 orders per day. The Firm received approximately 80 to 90 percent of its orders on-line. Approximately 75 percent of the orders that the Firm received were limit orders.

II. Procedural History

This is the second time that this case has come before us. In January 2001, the first Hearing Panel appointed to serve on this matter issued a decision ("Initial Decision"), which the respondents appealed to us. On October 26, 2001, we remanded the matter to the Office of Hearing Officers for a new hearing limited to sanctions to be held before a newly appointed Hearing Panel.[1]

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[1] During our initial review of this matter, we focused our analysis on only one of the issues that respondents had raised: that the original Hearing Panel's decision had been rendered without the participation of three panel members and without the participation of a Hearing Officer in the decision. In light of our determination to remand the matter to the Office of Hearing Officers, we did not address other issues that respondents had raised in the first appeal. (Subsequent to the issuance of the initial Hearing Panel decision in this matter, NASD amended its Code of Procedure to provide that, in the event that a Hearing Officer withdraws or otherwise is unable to continue service after being appointed, the replacement Hearing Officer has discretion: (1) to allow the remaining Hearing Panel members to resolve the case and issue a decision without participation of the replacement Hearing Officer; or (2) to certify familiarity with the record and participate in the resolution of the case and the issuance of the decision.)

According to the 12-cause complaint,[2] respondents represented to customers, on the Firm's Web site and on trade confirmations, that the Firm charged commissions in accordance with its published commission schedule, or that it effected trades for "free," but respondents in fact executed 316 customer trades during the relevant period on a riskless principal basis through the Firm's proprietary account and charged its customers undisclosed markups and markdowns of $58,579.83, as well as commissions, on these trades. The complaint alleged that this conduct violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), SEC Rules 10b-5 and 10b-10(a)(2)(ii)(A), and Conduct Rules 2110, 2120, 2210(d)(1)(A) and (B), and 2230. The complaint also alleged that the respondents failed to make appropriate memoranda of brokerage orders, in violation of Section 17(a) of the Exchange Act, SEC Rule 17a-3, and Conduct Rules 3110 and 2110.

Respondents initially denied the allegations of the complaint, but they later admitted the allegations. On May 24, 2000, in response to an Enforcement motion for summary disposition, the respondents admitted the factual allegations of the complaint and "admit[ted] that these facts constituted violations of NASD and SEC Rules." In addition, at a pre-hearing conference held on June 8, 2000, respondents' counsel confirmed, "we are admitting the conduct, and, therefore, the violations." On July 6, 2000, the parties filed joint stipulations in which respondents again admitted to the violations alleged in the complaint. On the basis of these admissions, the first Hearing Panel granted Enforcement's motion for summary disposition on July 12, 2000 and noted that a hearing would be held solely on the issue of sanctions.

On August 10, 2000, the first Hearing Panel conducted a hearing on the issue of sanctions. After the hearing, the Hearing Officer who had presided at the first hearing left NASD, and the Office of Hearing Officers appointed a replacement Hearing Officer. On January 3, 2001, the first Hearing Panel issued the Initial Decision, which the replacement Hearing Officer wrote, but in which he did not participate.

The first Hearing Panel expelled U.S. Rica, barred Nguyen in all principal capacities, suspended Nguyen for two years in all capacities, ordered respondents to pay restitution, fined respondents $240,000, and imposed costs. Respondents appealed the Initial Decision to us, and we remanded the matter to the Office of Hearing Officers for a new hearing limited to sanctions to be held before a new Hearing Panel.

On March 20, 2002, the second Hearing Panel appointed to serve in this matter (hereinafter "the Hearing Panel") held a hearing on the issue of sanctions. The original exhibits, witness testimony from the hearing before the first Hearing Panel, and the original stipulations of the parties all were accepted as part of the record before the Hearing Panel. The Hearing Panel accepted additional exhibits and heard additional testimony as to the issue of sanctions. On July 9, 2002, the Hearing Panel issued a decision, which respondents have appealed to us.

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[2] Enforcement filed the complaint on January 31, 2000 and amended it on February 2, 2000. All references to "the complaint" in this decision refer to the amended complaint.

III. Factual Background

As noted above, respondents stipulated to the facts and violations alleged in the complaint. We describe the misconduct for purposes of assessing appropriately remedial sanctions.

These proceedings resulted from a routine examination of U.S. Rica in March 1999. NASD staff reviewed U.S. Rica's Web site and found that, between December 1998 and January 1999, U.S. Rica advertised that it would effect on-line trades for commissions as low as $4.95 per trade. The staff also found that U.S. Rica advertised that February 17, 1999 was a commission-free trading day. The Web site made no disclosure concerning principal trades.

NASD staff examined a sample of U.S. Rica's order tickets and customer confirmations for December 1998 through January 1999 and February 17, 1999, and discovered that the respondents had effected trades on a riskless principal basis, without disclosing to customers either the capacity in which the trades were executed or the markups and markdowns that the Firm charged in addition to commissions.

By letter dated April 14, 1999, NASD staff advised respondents that the Firm had engaged in riskless principal transactions and had failed to disclose markups and markdowns on its confirmations as required by SEC Rule 10b-10. NASD staff also noted that the Firm had advertised commission charges of $4.95 on the Internet without indicating that transactions might be executed on a riskless principal basis and without revealing that the Firm might charge a markup or markdown in addition to commission charges. Staff asked Nguyen to respond in writing.

Nguyen responded in a letter dated April 22, 1999. Nguyen identified himself as the person responsible for setting the Firm's commission policies. Nguyen acknowledged that the Firm's Web site improperly failed to disclose that customer trades might be effected on a "'riskless basis' with a markup or markdown," and stated "[w]e are adding this disclosure to our Web site. We are submitting the change to the NASD advertising department for review." Nguyen confirmed that on customer confirmations, he disclosed the Firm's capacity as "agent," and he asked whether he instead should be disclosing the Firm's status as "principal." He also indicated that he determined the Firm's markups and markdowns on trades based on "how much [the Firm] improve[d] the execution over the best market."

On July 28, 1999, NASD staff deposed Nguyen in an on-the-record interview. During the interview, Nguyen admitted that certain of the trades at issue were riskless principal trades and that the Firm had not disclosed them as such on customer confirmations. Nguyen stated that the Firm rarely took risk positions and admitted that, as of that date, he had not revised the Firm's Web site to disclose that the Firm might execute customer trades on a riskless principal basis. He indicated that he intended to add the disclosure to the Web site.

In December 1999, NASD staff reviewed the Firm's Web site and discovered that the respondents still had not made the promised corrections. Moreover, on December 22, 1999, respondents published an advertisement that promised free commissions. Like the prior advertisements, this advertisement failed to disclose that customer transactions might be effected on a riskless principal basis and that customers could be charged undisclosed markups or markdowns. Respondents nonetheless effected riskless principal trades on December 22, 1999 and issued confirmations for these trades that stated that the trades had been effected "free" of commissions, falsely represented that the Firm was acting in the capacity of an agent, and failed to disclose the Firm's markups or markdowns.

Thereafter, respondents' violations continued. On January 5, 2000, respondents falsely represented in customer confirmations for six transactions that the Firm had charged commissions in accordance with its published commission schedule when, in fact, it effected the transactions on a riskless principal basis and charged customers undisclosed markups or markdowns.

In February 2000, after the complaint had been filed, respondents began disclosing on the Firm's Web site that the Firm might effect transactions on a riskless basis and began issuing confirmations to the Firm's customers that correctly noted the capacity in which the Firm had effected trades and any markups or markdowns that the Firm had charged. Two days before the August 10, 2000 hearing, respondents, acting on the advice of counsel, disclosed to the customers identified in the complaint that the Firm had acted in a principal capacity on prior trades and that it had charged markups and markdowns in addition to commissions on their trades. None of the customers responded to Nguyen or requested commission refunds.

IV. Findings of Violation

Respondents stipulated to the violations alleged. In addition, we have conducted our own independent review of the evidence, and we affirm the Hearing Panel's award of summary disposition with respect to its findings of violation. When reviewing a Hearing Panel ruling on a motion for summary disposition, we follow Rule 9264, which states that summary disposition may be granted if there is no genuine issue with regard to any material fact and the moving party is entitled to summary disposition as a matter of law. In cases involving motions for summary disposition, federal law also provides significant guidance.[3] In this case, the Hearing Panel concluded that there were no issues with respect to the facts related to all of the violations alleged in the complaint and that Enforcement was entitled to summary disposition as to all violations alleged as a matter of law. Based on respondents' stipulations and for the reasons set forth below, we agree.

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[3] See Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (the moving party bears the initial burden of showing that no genuine issue of material fact exists); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (if the moving party meets its burden of establishing the absence of a genuine issue of material fact, the opposing party must come forward with specific facts to establish a genuine factual issue); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (the substantive law governing a case will identify those facts that are material and "only disputes over facts that might affect the outcome of a suit under the governing law will properly preclude the entry of summary judgment.").

A. Causes One through Three (December 1998 and January 1999)

From December 29, 1998 through January 21, 1999, the Firm, acting through Nguyen, advertised on the Firm's Web site that the Firm would effect customer trades of 500 or more shares for the following specific commissions: (a) $4.95 for Internet trades; (b) $10 for touch-tone telephone trades; and (c) $35 for broker-assisted trades. With respect to trades of less than 500 shares, the Firm represented that it would charge its customers: (a) $10 for Internet trades; (b) $15 for touch-tone telephone trades; and (c) $35 for broker-assisted trades. The Firm's Web site did not indicate that the Firm might effect customer trades on a riskless principal basis. During this period, respondents in fact effected 263 transactions for customers on a riskless principal basis through the Firm's own proprietary account and charged undisclosed markups and markdowns on those trades in addition to the advertised commissions. Respondents thereby violated NASD Rules 2110 and 2210(d)(1)(A) and (B), as alleged in cause one of the complaint.[4]

During the same period, respondents misrepresented to customers in connection with the same 263 customer purchases and sales of securities that the Firm had charged commissions in accordance with the Firm's published commission schedule, when in fact respondents effected the transactions as riskless principal transactions through the Firm's proprietary account, and charged both commissions and undisclosed markups and markdowns, resulting in the Firm's generating secret profits of $37,132.95 on the 263 transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110, as alleged in cause two of the complaint.[5]

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[4] Conduct Rule 2110 states that a member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade. Rule 2210(d)(1)(A) states that all member communications with the public shall be based on principles of fair dealing and good faith, should provide a sound basis for evaluating the facts, and may not omit any material that could cause the communication to be misleading. Rule 2210(d)(1)(B) states that exaggerated, unwarranted or misleading statements or claims are prohibited in all member communications with the public. Rule 115 states that NASD's Rules shall apply to all members and persons associated with a member and that persons associated with a member shall have the same duties and obligations as a member under the rules.

[5] Section 10(b) provides that it is unlawful for any person, directly or indirectly, "to use or employ, in connection with the purchase or sale of any security . . ., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." SEC Rule 10b-5 implements Section 10(b) and states that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange: (1) To employ any device, scheme, or artifice to defraud, ... [or] (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. Rule 2120, NASD's anti-fraud rule, parallels SEC Rule 10b-5 and states that no 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.

During the same period, and in connection with the same 263 transactions, respondents effected purchases and sales of securities for and with the accounts of customers as a principal for the Firm's own account, and not as a market maker. In the confirmations to the customers, however, respondents falsely indicated that the Firm had acted as an agent and had charged a commission in accordance with its published commission schedule. Respondents also failed to disclose on the confirmations that the transactions had been effected on a riskless principal basis through the Firm's proprietary account and that the Firm charged both commissions and undisclosed markups and markdowns on the transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2)(ii)(A), and NASD Rules 2230 and 2110, as alleged in cause three of the complaint.[6]

B. Causes Four through Six (February 17, 1999)

On February 17, 1999, respondents advertised on the Firm's Web site that February 17 was a "commission free day." In fact, on that day, respondents effected 26 customer transactions on a riskless principal basis through the Firm's proprietary account and charged customers undisclosed markups and markdowns. Respondents thereby violated NASD Rules 2110 and 2210(d)(1)(A) and (B), as alleged in cause four of the complaint.

On the same date, respondents misrepresented to customers in connection with the same 26 purchases and sales of securities that the Firm effected their transactions as commission-free trades when, in fact, the Firm effected the transactions as riskless principal transactions through the Firm's proprietary account and charged the customers undisclosed markups and markdowns, through which the Firm received secret profits of $2,156.25. Respondents thereby violated

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6 SEC Rule 10b-10(a)(2)(ii)(A) provides that it shall be unlawful for any broker or dealer to effect for or with an account of a customer any transaction unless the broker or dealer, at or before the completion of the transaction, sends the customer a confirmation that discloses whether the broker or dealer is acting as an agent or as a principal for its own account and, if the broker or dealer is acting as a principal, whether it is a market maker in the security. Additionally, the rule requires that, if a broker or dealer is acting as principal for its own account and is not a market maker, and if, after having received an order to buy from a customer, the broker or dealer purchased the security from another person to offset a contemporaneous sale to the customer or, after having received an order to sell from a customer, the broker or dealer sold the security to another person to offset a contemporaneous purchase from the customer, the broker or dealer must disclose in the confirmation the difference between the price to the customer and the dealer's contemporaneous purchase or sale price. NASD Rule 2230 states that members, before or at the completion of each customer transaction, must send the customer written notification (a confirmation) disclosing whether the firm is acting as a broker for the customer, for another person, or for both, or as a dealer for his own account. The rule requires, in cases in which the member is acting as a broker for the customer or for the customer and another person, that the member disclose the identity of the person to whom or from whom the security was sold or bought, the date and time that the transaction took place, and the source and amount of any commission or other remuneration that the member received in the transaction.

Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110, as alleged in cause five of the complaint.

Also on the same date, and in connection with the same 26 transactions, respondents effected purchases and sales of securities for and with the accounts of customers as a principal for the Firm's own account, and not as a market maker. In the confirmations to the customers, however, respondents falsely indicated that the Firm had acted as an agent for free, when in fact the Firm had charged undisclosed markups and markdowns on the transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2)(ii)(A), and NASD Rules 2230 and 2110, as alleged in cause six of the complaint.

C. Causes Seven through Nine (December 1999)

On December 22, 1999, respondents advertised on the Firm's Web site: "To celebrate the new Millennium and to show our appreciation, U.S. RICA has GREAT news for YOU. Until the End of 1999 All Internet Orders are COMMISSION FREE." In fact, on that day, respondents effected customer Internet trades on a riskless principal basis through the Firm's proprietary account and charged undisclosed markups and markdowns. Respondents thereby violated NASD Rules 2110 and 2210(d)(1)(A) and (B), as alleged in cause seven of the complaint.

On the following day, December 23, 1999, in connection with 21 customer purchases and sales of securities, respondents misrepresented to customers that the Firm had effected their Internet transactions for free when, in fact, the Firm effected transactions as riskless principal transactions through the Firm's proprietary account and charged undisclosed markups and markdowns of $18,815.63 on the 21 transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110, as alleged in cause eight of the complaint.

Also on December 23, and in connection with the same 21 transactions, respondents effected purchases and sales of securities for and with the accounts of customers as a principal for the Firm's own account, and not as a market maker. In the confirmations to the customers, however, the respondents falsely indicated that the Firm had acted as an agent for free. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2)(ii)(A), and NASD Rules 2230 and 2110, as alleged in cause nine of the complaint.

D. Causes 10 and 11 (January 2000)

On January 5, 2000, respondents misrepresented to customers in connection with six customer purchases and sales of securities that the Firm had charged commissions on the transactions in accordance with the Firm's published commission schedule when, in fact, the Firm effected the transactions as riskless principal transactions through the Firm's proprietary account and charged both commissions and undisclosed markups and markdowns of $475. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110, as alleged in cause 10 of the complaint.

On the same date, and in connection with the same six transactions, respondents effected purchases and sales of securities for and with the accounts of customers as a principal for the

Firm's own account, and not as a market maker. In the confirmations to the customers, however, respondents falsely indicated that the Firm had acted as an agent and would charge commissions in accordance with its published commission schedule. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2)(ii)(A), and NASD Rules 2230 and 2110, as alleged in cause 11 of the complaint.

E. Cause 12

During the periods: (a) from December 29, 1998 through January 21, 1999; (b) on February 17, 1999; (c) on December 23, 1999; and (d) on January 5, 2000, in connection with the transactions described above, the Firm, through Nguyen, failed to make a memorandum of each brokerage order reflecting the time of entry and the time of execution of purchases of securities from other broker-dealers into the Firm's inventory account and sales of securities to other broker-dealers from the Firm's inventory account. Respondents thereby violated Section 17(a) of the Exchange Act, SEC Rule 17a-3, and NASD Rules 3110 and 2110, as alleged in cause 12 of the complaint.[7]

F. Scienter

Respondents executed a joint stipulation agreement in which they admitted to the violations alleged in causes two, five, eight, and 10 of the complaint, including violations of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rule 2120, all of which require a finding of scienter to establish a violation. In the stipulation agreement, respondents specifically admitted that they "intentionally or recklessly employed devices to defraud." Based on respondents' admissions in the stipulation agreement, we find that respondents acted with scienter. In addition, we conclude that the evidence independently supports a finding that respondents acted intentionally or, at a minimum, recklessly and that the record therefore supports a finding of scienter.[8]

The Supreme Court has defined scienter as an "intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Scienter also may be shown through reckless conduct. See Nathenson v. Zonagen, Inc., 267 F.3d 400 (5th Cir. 2001); Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991); Dirks v. SEC, 220 U.S. App. D.C. 309, 681 F.2d 824 (D.C. Cir. 1982), rev'd on other grounds, 463 U.S. 646, 77 L.Ed.2d 911, 103 S. Ct. 3255 (1983); Coastline Financial, Inc., Exchange Act Rel. No. 41989

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7 Section 17(a) of the Exchange Act and SEC Rule 17a-3 address records and reports that brokers-dealers are required to make and maintain. NASD Rule 3110 requires NASD members to make and preserve books, accounts, records, memoranda, and correspondence in conformity with Rule 3110, all other NASD Rules, and SEC Rules 17a-3 and 17a-4.

8 See e.g., Trost & Co., 12 S.E.C. 531, 536 (1941) (respondent defrauded customers when it represented that it was acting as an agent, but instead purchased securities in its own account and resold them to the customers as a principal at substantial "secret" profits).

(Oct. 7, 1999). Scienter is established because Nguyen: (1) was aware of and responsible for the Firm's execution of riskless principal trades and charging of undisclosed markups and markdowns; and (2) knowingly misrepresented to customers that the Firm was charging commissions in accordance with its established commission schedule, that it was not charging a markup or markdown, and that it was acting in an agency capacity.

First, Nguyen knew that the Firm's trading strategy involved riskless principal trading and markups or markdowns. He unequivocally testified that he commenced riskless principal trading on behalf of the Firm after reading about it in an NASD publication. He stated that the publication explained the type of trading that is considered to be riskless principal trading and indicated how to report riskless principal trades. Indeed, Nguyen testified as early as July 28, 1999, in an NASD deposition, that the Firm engaged in riskless principal trading. Nguyen testified before both Hearing Panels in this matter that he adopted riskless principal trading as a method of trading to allow U.S. Rica to become more competitive and to generate more profits for the Firm. Nguyen testified that when he started the Firm, most of its business involved agency trades for which he charged $80 per trade. Over time, Nguyen stated, new competitors introduced lower commissions, which forced Nguyen to lower his commissions to $35 per trade. At that level, he contended, the Firm was barely profitable. Faced with a loss of customers, Nguyen concluded that he could not compete unless he found a way to increase revenue and reduce commission rates. He saw riskless principal trading as a strategy that would allow him to do just that. Nguyen determined that, if the Firm engaged in principal trading, it could undercut competitors. Nguyen concluded that, by executing trades on a riskless principal basis, the Firm could charge both a commission and a markup or markdown and thereby remain profitable while charging very low commission rates.

Second, Nguyen knowingly solicited customers via the Firm's Internet Web site without disclosing that the Firm might effect customer transactions on a principal basis and without indicating that the Firm might charge markups and markdowns in addition to the Firm's advertised commissions. Nguyen knew that, in reality, the Firm effected principal trades and charged customers undisclosed markups and markdowns. Nguyen also knew that the likely success of his "riskless principal" strategy would be enhanced if he did not disclose to customers that the Firm, in addition to charging a commission, would receive a markup or markdown on the trades. Even after NASD staff alerted Nguyen to the violative nature of this conduct in an April 14, 1999 letter, Nguyen continued to mislead the Firm's customers by misrepresenting that the Firm executed only agency trades and charged customers only the disclosed commissions. In doing so, he acted with scienter or, at a minimum, recklessly. <u>See</u> <u>SEC v. Falstaff Brewing Corp.</u>, 629 F.2d 62 (D.C. Cir. 1980) (knowledge of one's actions and the consequences of those actions (or a reckless disregard of the consequences), not the labels that the law attaches to those actions, is sufficient to support a finding of scienter).

As further support for our finding of scienter, we note that Nguyen also misled NASD staff during its investigation. After being advised by NASD staff in an April 14, 1999 letter that the Firm needed to revise the disclosures on its Web site, Nguyen responded with a letter dated April 22, 1999, in which he stated that he was in the process of revising the Firm's Web site. Nguyen failed to revise the Firm's Web site, however, until February 2000, 10 months later. Yet he knowingly continued during that period to maintain the Firm's Web site and keep it available to existing and potential Firm customers.

In sum, we find that the record fully supports a finding that Nguyen acted with scienter.

V. Procedural Arguments

On appeal, respondents raise myriad procedural objections. First, respondents argue that they are the victims of selective prosecution based on the Firm's size and the fact that Nguyen and most of the Firm's clients are Asian.[9] In order to substantiate a claim of selective prosecution a respondent must establish, not merely assert, that he was singled out for enforcement action while others who were similarly situated were not and that his prosecution was motivated by an arbitrary or unjust consideration such as race. See Nicholas T. Avello, Exchange Act Rel. No. 46780 (Nov. 7, 2002); Sheen Financial Resources, Inc., 52 S.E.C. 185 (1995). Respondents have made no such showing and, in fact, offer no evidence to support this charge. We have reviewed the record in this proceeding and see no basis for this argument.

Second, respondents argue that the Hearing Panel erred in denying their request to offer expert testimony. On remand, respondents moved to adduce expert testimony. Respondents contended that "[e]ssentially, the expert [would] explain how the prices charged by respondents were proper and fair to customers, thus not the cause of financial loss or other customer harm." (Respondents asserted that the Firm always provided the NBBO (national best bid or offer) to its customers.) The Hearing Panel denied the request and found that respondents failed to establish the need for expert testimony. The Hearing Panel noted that respondents had not identified their proposed expert, had not explained the witness's area of expertise, and had not demonstrated how the expert would assist the Hearing Panel in that the NBBO can be established through documentary evidence. Furthermore, the Hearing Panel granted respondents leave to renew their motion if the motion identified the proposed witness, listed the witness's qualifications, identified the witness's area of expertise, and provided a detailed narrative summary of the witness's proposed testimony. Respondents did not renew the motion.

We find that the Hearing Panel properly denied respondents' motion to adduce expert testimony and that respondents were not prejudiced in this regard. Under NASD Procedural Rule 9263, the Hearing Officer may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. (At the outset, we note that the issue of customer harm is irrelevant as to the issue of liability.) With respect to sanctions, respondents did not indicate, in any way, why the issue of customer harm was so unique or complex that expert testimony was necessary. Furthermore, in matters that are before a tribunal that includes two or more individuals with experience in the securities industry, expert testimony is often unnecessary and rarely accepted. See Meyer Blinder, 50 S.E.C. 1215 (1992) (NASD is an expert body whose "businessman's judgment" may be brought to bear in reaching its decision); Pagel, Inc., 48 S.E.C.

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[9] At the outset, we note that respondents failed to raise this argument before the Hearing Panel and therefore have waived it. See Ashvin R. Shah, 52 S.E.C. 1100 (1996) (objection not raised before the District Committee Hearing Panel deemed waived); Mayer A. Amsel, 52 S.E.C. 761 (1996) (matter not raised before District Committee Hearing Panel deemed waived). We nonetheless address the merits of respondents' argument in the body of this decision.

223 (1985), aff'd, Pagel, Inc. v. SEC, 803 F.2d 942 (8th Cir. 1986) (affirming SEC Administrative Law Judge's exclusion of expert testimony). We conclude that respondents were not prejudiced by the Hearing Panel's denial of their request to adduce expert testimony.

Third, respondents argue that the Hearing Panel erred in not granting respondents' motion for relief from the stipulation agreement that they previously had signed. We reject this argument. On remand, respondents moved to strike the stipulation agreement from the record for purposes of sanctions only. (Respondents specifically indicated that they did not seek to withdraw the stipulations as to liability.) Respondents contended that they agreed to the stipulation agreement only to remove the issue of liability, and they had not intended to foreclose their ability to present evidence regarding Nguyen's state of mind and customer harm with respect to sanctions. The Hearing Panel denied respondents' request to strike the stipulation agreement, but granted respondents leave to present evidence on remand of Nguyen's state of mind and customer harm. The Hearing Panel acted appropriately. "Stipulations entered into freely and fairly shall not be set aside except to avoid manifest injustice." Henry v. Commissioner of Internal Revenue, 362 F.2d 640, 643 (5th Cir. 1966). Furthermore, the Hearing Panel eliminated even the possibility of prejudice as to respondents by granting respondents the opportunity to present the types of evidence that they sought to present – evidence of Nguyen's state of mind and evidence of customer harm. We find that the Hearing Panel did not deny respondents procedural fairness.

Fourth, respondents contend that they were unfairly denied the right to negotiate a settlement of this matter. We find no evidence to support respondents' claim in this regard. Procedural Rule 9270 provides that a respondent may propose in writing an offer of settlement at any time, but that an offer of settlement shall not stay a disciplinary proceeding unless otherwise decided by the Hearing Officer or Hearing Panel. Rule 9270 also provides that, when an Offer of Settlement is contested by the Department of Enforcement, the Hearing Officer or Hearing Panel may order the parties to attend a settlement conference.

At the commencement of the initial hearing before the first Hearing Panel, respondents submitted an Offer of Settlement to Enforcement, and Enforcement orally rejected it. Rather than adjourning the hearing to require Enforcement to prepare a written opposition or to require the parties to attend a settlement conference, the first Hearing Panel told the respondents that they could request that the first Hearing Panel impose sanctions consistent with the terms of their contested Offer of Settlement. At the conclusion of the initial hearing, the first Hearing Panel afforded the parties the opportunity to submit post-hearing briefs. In respondents' post-hearing brief, they again presented a contested Offer of Settlement to the first Hearing Panel. The first Hearing Panel rejected respondents' Offer of Settlement in the Initial Decision. On remand, respondents abandoned the sanctions that they had proposed in their Offer of Settlement and asserted in their post-hearing brief that, in consideration of the costs that they had endured in the two hearings and on appeal, "additional sanctions will not do further justice to the situation." In our view, the first Hearing Panel acted appropriately and in accordance with NASD's Code of Procedure. Under the Code, the Hearing Panel was not required to stay the disciplinary proceeding or require the parties to attend a settlement conference. Furthermore, NASD is not required to accept an Offer of Settlement. See Clyde J. Bruff, 53 S.E.C. 880 (1998) (NASD is not required to accept a respondent's Offer of Settlement that is made during the course of a disciplinary proceeding). We find no procedural irregularities with respect to respondents' settlement offer.

Finally, respondents assert that they were prejudiced by the fact that certain Hearing Panel members (whom respondents did not identify) were associated with member firms that directly competed with U.S. Rica. Respondents also argue that NASD erred in failing to allow respondents to choose the members of the Hearing Panel. We reject both arguments. At the outset, we note that NASD's Code of Procedure does not provide respondents in disciplinary proceedings with the opportunity to choose the members of the Hearing Panel that will preside over their proceedings. Rule 9213 provides that the Chief Hearing Officer, not the parties, shall appoint the members of a Hearing Panel.

With respect to respondents' argument that they were prejudiced by the make-up of the Hearing Panel, we conclude that respondents have waived the right to assert this argument. We note that respondents failed to raise this argument before the Hearing Panel, at a time when a problem with the make-up of the Hearing Panel, if one existed, could have been addressed. "As one court has stated, it is inappropriate for a party to 'suppress his misgivings while waiting anxiously to see whether the decision goes in his favor.'" Mayer A. Amsel, 52 S.E.C. 761, 767 (1996) citing Marcus v. Director, 548 F.2d 1044, 1051 (D.C. Cir. 1976). Furthermore, respondents offer no evidence that one of the Hearing Panel members was biased or prejudiced. Article 4, Section 4.14 of the NASD Regulation By-Laws states, in part, that a committee member shall not directly or indirectly participate in any adjudication of the interests of any party if that committee member has a conflict of interest or bias, or if circumstances otherwise exist in which his or her fairness might reasonably be questioned. Respondents here have made no such showing. Furthermore, the SEC consistently has ruled in cases involving motions to disqualify NASD panel members that the fact that a respondent's competitor sits on a hearing panel does not render the proceeding invalid. See Conrad C. Lysiak, 51 S.E.C. 841 (1993).[10] We reject respondents' arguments in this regard.

In sum, respondents have not demonstrated that NASD failed to comply with its own Code of Procedure or that respondents were not afforded procedural fairness. We thus reject respondents' procedural arguments.

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[10] In Lysiak, the SEC rejected the argument that a panel member's potential pecuniary interest in excluding competitors is sufficient to render suspect the impartiality of the panel member. Similarly, in Paul F. Kendrick, 47 S.E.C. 195 (1980), the SEC rejected a respondent's contention that, since one panel member was associated with the firm through which respondent's firm cleared, the panel member was biased, since he had an interest in excluding the respondent from the industry and acquiring respondent's clients.

VI. Sanctions

We expel U.S. Rica from NASD membership, bar Nguyen in all capacities, and fine Nguyen and the Firm $120,000, jointly and severally. We also affirm the Hearing Panel's imposition of costs from the proceeding below.

On appeal, respondents argue that NASD has exaggerated the egregiousness of their misconduct and imposed excessive sanctions. Respondents argue in mitigation of sanctions that respondents' errors were not intentional or deceitful, that respondents' misconduct did not result in harm to the Firm's customers, that respondents have no disciplinary history, and that NASD erred in relying on the NASD Sanction Guidelines. For the reasons discussed below, we reject each of respondents' arguments.

A. Respondents' Misconduct Was Egregious

We find that respondents' misconduct was egregious. Rule 10b-10 "works to protect investors and combat broker-dealer fraud by ensuring full and fair disclosure to investors of the substance of the transactions effected by their brokers." Hattier, Sanford & Reynoir, 53 S.E.C. 426, 433 (1998). Respondents wholly disregarded the requirements of Rule 10b-10 with respect to the transactions at issue. NASD Rule 2210(d) also seeks to protect investors. Rule 2210 provides that all member communications with the public shall be based on principles of fair dealing and good faith. Rule 2210, like Rule 10b-10, provides "important safeguards for the protection of public investors." Robert L. Wallace, 53 S.E.C. 989, 996 (1998). Respondents' mischaracterization, both on the Firm's Web site and in customer confirmations, of hundreds of customer trades over the course of more than one year was a deliberate course of conduct that contravened both NASD and SEC Rules. We view this misconduct as egregious.

Furthermore, the seriousness of respondents' misconduct is aggravated by the fact that the misconduct continued even after NASD staff brought to respondents' attention the nature of their wrongdoing. Moreover, although Nguyen assured NASD staff that the respondents would take prompt action to correct the Firm's false and misleading disclosures on the Firm's Web site, they failed to do so. See Thomas P. Reynolds, 50 S.E.C. 721 (1991) (fact that respondent lied to regulators and flouted regulatory authority aggravated misconduct and warranted substantial sanction). In fact, respondents failed to implement any remedial measures until after Enforcement filed the complaint in this proceeding.

Respondents in this matter have demonstrated "a marked insensitivity to their obligation to deal fairly with customers." Frank L. Palumbo, 52 S.E.C. 467, 480 (1995). We find that their misconduct is egregious and deserving of significant sanctions.

B. Respondents' Misconduct Was Intentional

Respondents contend that their misconduct resulted from their confusion as to the nature of the transactions at issue, their mistaken understanding of NASD and SEC Rules, and a general lack of clarity in the law with respect to riskless principal transactions. Respondents also argue that they did not intentionally neglect to address the inaccuracies in the Firm's Web site and confirmation disclosures, but that, once they understood them, these issues simply "[fell] through the cracks." We do not agree with respondents' characterization of their actions or of the state of the law with respect to riskless principal transactions.

Nguyen argues that he misunderstood the nature of the Firm's transactions. Nguyen's own testimony demonstrates, however, that he clearly understood the nature of the transactions at issue. Nguyen testified that, in an effort to solicit business and remain competitive in the on-line trading business, he chose to effect some of the Firm's transactions on a riskless principal basis. Nguyen explained that he did this in order to charge customers a markup or markdown in addition to a commission, thereby increasing the Firm's profit potential on those trades. During this time, Nguyen also knew (as evidenced by his own April 1999 letter to NASD staff) that the Firm's Web site led potential and actual customers to believe that the Firm would effect their trades either for "free" or in accordance with the Firm's published commission schedule. Nguyen's own representations belie his argument that he misunderstood the nature of the transactions and that he mistakenly misled customers. To the contrary, the evidence suggests that he knew exactly what he was doing and hoped that his actions would generate additional profits for the Firm.

Nguyen also contends that his confusion regarding what types of transactions are considered to be riskless principal trades resulted from a lack of clarity in the state of the law surrounding riskless principal trades. We do not agree. In an SEC no-action letter (Buys-MacGregor, MacNaughton-Greenawalt & Co., SEC No-Action Letter, 1980 SEC No-Act LEXIS 2851 (Jan. 2, 1980)), a copy of which NASD staff sent to respondents with staff's April 14, 1999 letter, the SEC addressed the question of how to determine whether a transaction is a riskless principal trade within the meaning of SEC Rule 10b-10. In the letter, the SEC concluded that trades covered on the same trading day, regardless of sequence, are considered riskless principal trades for which disclosure of remuneration is required under SEC Rule 10b-10 "where the transactions are in fact designed to be offsetting." In Buys-MacGregor, the SEC advised that Rule 10b-10 applies in cases (like U.S. Rica's) in which the facts and circumstances demonstrate that the firm "designed" the transactions to be offsetting. See Buys-MacGregor, 1980 SEC No-Act LEXIS 2851, at *3-4. Like the Hearing Panel, we find that Nguyen knew exactly what riskless principal trading was and how he could use it to his and the Firm's benefit. Nguyen intended to engage in riskless principal trading; therefore, he designed the transactions to be offsetting. Thus, they were riskless principal trades for the purposes of SEC Rule 10b-10, and the respondents were obligated to disclose the Firm's markups and markdowns.[11]

Nguyen also argues that the SEC's decision in Kevin B. Waide, 50 S.E.C. 932 (1992), demonstrates the confusing state of the law with respect to riskless principal trades and that this confusion added to respondents' failure to understand the disclosures that they should have made. We do not agree. The SEC's decision in Waide addressed "questions concerning the appropriate method of calculating markups when a dealer engages in transactions on a riskless principal

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[11] Furthermore, as a registered person and principal in the securities industry, Nguyen is assumed as a matter of law to have read and had knowledge of NASD's Rules and the standards in the securities industry. See Carter v. SEC, 726 F.2d 472 (9th Cir. 1983); B.R. Stickle & Co., 51 S.E.C. 1022 (1994).

basis," not the issue of the requirement to disclose markups under SEC Rule 10b-10. See Waide, 50 S.E.C. at 933. Furthermore, contrary to respondents' assertions regarding Waide, the decision actually provides significant guidance as to what is a riskless principal trade. Waide identifies riskless principal sales as occurring "where a dealer, after receiving a customer order for a security, purchases the security from another firm for its own account, and then contemporaneously sells that security to the customer." 50 S.E.C. at 933. The Waide decision goes on to state that a riskless principal trade is the economic equivalent of an agency trade and cites to Securities Exchange Act Rel. No. 15219 (October 6, 1978), which, in fact, is the release announcing that the SEC had adopted the requirement that a dealer effecting riskless principal trades must disclose markups in its customer confirmations. Id. at 936. Undoubtedly, Waide could have provided respondents with significant guidance if they had chosen to review it carefully. We reject respondents' claim that the Waide decision led them to conclude that they did not have to disclose markups and markdowns on riskless principal trades.

We also reject as mitigating Nguyen's contention that his failure to revise the Firm's disclosures after receiving notice from NASD staff of the Firm's deficiencies occurred because of a simple mistake and that the issue simply "slipped through the cracks." Nguyen contended that he retained counsel in November 1999 to correct the Firm's Web site advertisements and to determine what confirmation disclosures were required. This was his first action in response to staff's April 1999 letter. He stated that in January 2000, the Firm began testing software that would enable it to issue redesigned trade confirmations, and that the Firm had corrected its disclosure problems by February 2000. Nguyen argued that these were reasonable corrective steps under the circumstances. Like the Hearing Panel, we conclude that Nguyen intentionally delayed taking corrective action. Even assuming Nguyen retained counsel when he said he did, he waited more than six months after he had represented to NASD staff in April 1999 that the Firm would correct the misleading advertisements. Moreover, like the Hearing Panel, we do not believe that Nguyen was genuinely concerned about correcting the advertisements before NASD filed the complaint in this matter.[12] Even after Nguyen retained counsel, he published the December 22, 1999 advertisement announcing that all trades until the end of the millennium would be "free," yet the Firm continued to effect riskless principal trades and charge customers undisclosed markups and markdowns. In our view, this evidence casts significant doubts on Nguyen's purported motives.

We conclude that respondents acted intentionally.

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12 Credibility determinations of the initial fact-finder are entitled to considerable weight and deference and can be overcome only by substantial evidence. Daniel D. Manoff, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684 (Oct. 23, 2002); Joseph S. Barbera, Exchange Act Rel. No. 43528, 2000 SEC LEXIS 2396 (Nov. 7, 2000). As discussed above, we find that the record supports the Hearing Panel's conclusions regarding Nguyen's intent to revise the Firm's Web site.

C. Respondents' Misconduct Resulted in Harm to Customers

Respondents argue that none of the affected customers suffered economic harm and that this fact should be considered as mitigative. According to the respondents, each customer received either his or her limit order price or the NBBO. Thus, in the respondents' view, their violations were de minimis. We disagree.

Even accepting respondents' assertion that their customers always received the NBBO or limit order price, we find that the Firm's customers nevertheless were harmed because they were deprived of material information about their trades. See Marc N. Geman, Exchange Act Rel. No. 43963, 2001 SEC LEXIS 282 (Feb. 14, 2001) (firm that fraudulently misled customers regarding its use of principal trading strategy by failing to disclose strategy, deprived customers of the chance to obtain for themselves similar trading opportunities and profits). As the SEC indicated when it amended Rule 10b-10 in 1985, disclosure of transaction costs in principal transactions permits individual investors to compare their broker-dealers' costs with the comparable costs of other broker-dealers and enhances their ability to police the handling of their accounts. Absent this knowledge, an investor's ability to negotiate or obtain competitive transaction charges is limited. See Confirmation Disclosure for Reported Securities, Exchange Act Release No. 22397 (Sept. 11, 1985), 1985 SEC LEXIS 712, at *13-15. Ultimately, the disclosure of this information discourages fraud and enables the market to operate more fairly and efficiently. Id. at *14. Respondents' failure to make these disclosures therefore harmed the Firm's customers. In addition, in many instances, U.S. Rica's customers paid both a commission and a markup or markdown, so they also suffered a pecuniary loss. Furthermore, respondents' use of the Internet to communicate with the investing public ensured that the Firm's misrepresentations were widely available to many members of the public.

We find that respondents' misconduct resulted in significant harm to the investing public in that it deprived the Firm's customers and other public investors of valuable information that could affect their choices as to investment strategy.

D. Respondents' Lack of Disciplinary History Is Not Mitigating

Respondents contend that their "clean" disciplinary history should mitigate the severity of the sanctions imposed.[13] We do not agree. While we concur that the existence of disciplinary

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13 At the remand hearing, Enforcement offered into evidence, over the objection of respondents, a February 2002 letter from the SEC to Nguyen regarding a recent SEC examination of U.S. Rica. The letter stated that during the examination, the Commission discovered the need for certain revisions in the Firm's practices and procedures related to newspaper advertisements. Enforcement also offered into evidence a February 2002 document signed by Nguyen and titled "Undertaking of U.S. Rica." The document identified the steps that U.S. Rica intended to take to avoid the future use of advertisements or communications with the public that are misleading or inaccurate. The Hearing Panel accepted these documents into the record of this proceeding. We do not agree that these documents were relevant to this proceeding and have determined, in our review of this matter, to disregard these documents.

[Footnote continued on next page]

history is an aggravating factor, we do not concur that the lack thereof is necessarily mitigating. Registered individuals are required as part of the terms of their admission to the securities industry to comply with NASD's Rules and to observe high standards of conduct. We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry as a registered person. We therefore do not find that the absence of a disciplinary history should mitigate the seriousness of the misconduct at issue or the significance of the sanctions imposed. See Tammy S. Kwikkel-Elliott, Complaint No. C04960004, 1998 NASD Discip. LEXIS 4 (NAC Jan. 16, 1998) (respondent's lack of disciplinary history is not mitigating, particularly when respondent has not been registered very long); Henry E. Vail, 52 S.E.C. 339 (1995), aff'd 101 F.3d 37 (5th Cir. 1996) (rejecting repayment of funds and lack of disciplinary record as factors mitigating sanction).

Thus, in our view, respondents' lack of disciplinary history is not mitigating.

E. NASD May Rely on the NASD Sanction Guidelines to Determine Appropriately Remedial Sanctions

Respondents contend on appeal that the Hearing Panel erred in relying on the NASD Sanction Guidelines in imposing sanctions.[14] Respondents are mistaken on this issue. The SEC has long accepted and endorsed NASD's reliance as an advisory tool on the NASD Sanction Guidelines in crafting appropriately remedial sanctions. See Michael F. Flannigan, 2003 SEC LEXIS 40 (Jan. 8, 2003) (fine imposed by NASD is neither excessive nor oppressive and is

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[con't]
Rule 9263 states that a Hearing Officer shall receive relevant evidence and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. The SEC's letter and U.S. Rica's response are both dated February 2002, well after the misconduct at issue in this proceeding. Although subsequent acts of misconduct may be evidence of a pattern of behavior and may be considered as aggravating factors with respect to assessing sanctions, the SEC's letter does not prove that respondents in fact engaged in subsequent misconduct. Rather, it demonstrates that the SEC had identified potential deficiencies at the Firm. Similarly, U.S. Rica's letter demonstrates the internal procedures that the Firm intended to employ. Neither document references a regulatory proceeding in which a final decision was issued. Thus, we have determined on appeal to disregard these two exhibits. See NASD Sanction Guidelines (2001 ed.) at 4 (pending regulatory investigations or the existence of ongoing regulatory proceedings prior to a final decision are not relevant to sanctions).

[14] Respondents also argue that, by imposing a joint and several fine on respondents, the Hearing Panel failed to acknowledge that respondents were two separate legal entities. Respondents' argument in this regard fails. Article VIII, Section 1 of the NASD By-Laws (Powers of the Board to Impose Sanctions) indicates that NASD may impose "any other fitting sanction." NASD and the SEC have interpreted this phrase to include the imposition of joint and several fines. See Bison Securities, Inc., 51 S.E.C. 327 (1993) (NASD possesses authority to impose joint and several fines).

within range recommended in NASD Sanction Guidelines); Hattier, Sanford & Reynoir, 53 S.E.C. 426 (1998) (NASD Sanction Guidelines provide a starting point in the determination of remedial sanctions); Joel Eugene Shaw, 51 S.E.C. 1224 (1994) (NASD Sanction Guidelines are advisory as to sanctions); Edward C. Farni, II, 51 S.E.C. 1118 (1994) (NASD Sanction Guidelines are an acceptable tool to provide a starting point and a range in the determination of remedial sanctions). The Hearing Panel appropriately relied on the NASD Sanction Guidelines.

We too have considered the NASD Sanction Guidelines in determining appropriately remedial sanctions. We first considered the General Principles and Principal Considerations applicable to all violations. See NASD Sanction Guidelines (2001 ed.) at 3-11. We have discussed above many of the factors recommended for consideration in the Sanction Guidelines. Additionally, we have considered other factors listed in the Sanction Guidelines.

Respondents contend that they should be credited with the fact that they have corresponded with every customer involved in the trades at issue in this case and have alerted them to the fact that the Firm acted as principal in the trades and may have charged a markup or markdown. Respondents' efforts, however, are not mitigating. The Guidelines recommend consideration of whether a respondent employed subsequent corrective measures and acknowledged his responsibility for misconduct prior to detection and intervention by a regulator. Respondents here communicated with their customers on advice of counsel only after NASD commenced this disciplinary proceeding. Respondents' attempts to rectify their misconduct after discovery by regulators do not lessen the significance of their original misconduct. Cf. Daniel D. Manoff, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684 (Oct. 23, 2002) (subsequent repayment of funds in case involving unauthorized use of co-worker's credit card is not mitigating). We also considered that respondents engaged in a pattern of misconduct that continued even after NASD staff notified respondents of their violations and after respondents assured NASD staff that they would rectify the problems that staff identified. Indeed, we considered it aggravating that respondents lulled NASD into inactivity by misleading staff in respondents' April 1999 letter as to their intention to rectify their misconduct. Additionally, we considered that respondents' misconduct occurred over a period of more than one year, that their misconduct resulted in the potential for their monetary gain, and that it involved more than 300 customer transactions.

We also considered the specific Sanction Guidelines applicable to each type of violation. We aggregated the misconduct alleged in causes one, four and seven (false and misleading advertising). The applicable NASD Sanction Guideline recommends considering whether the violative communications were circulated widely. See Guidelines at 87 (Communications with the Public – Late Filing; Failing to File; Failing to Comply with Rule Standards or Use of Misleading Communications). In this case, the Firm's communications were widely circulated because respondents used the Internet. Thus, the Firm's Web site was available to many potential and existing customers across the county. The applicable Guideline also advises that, in cases like this involving numerous acts of intentional or reckless misconduct over an extended period of time, adjudicators should consider expelling the firm and barring the responsible individual. Id. For disseminating false and misleading advertisements via the Internet, we expel U.S. Rica, bar Nguyen in all capacities, and fine respondents $25,000, jointly and severally.[15]

We also aggregated the misconduct alleged in causes two, five, eight and 10 (fraudulent misrepresentations and omissions) for sanctions purposes. The applicable NASD Sanction Guideline recommends that, for intentional or reckless misrepresentations or omissions, adjudicators consider imposing a suspension in all capacities for 10 business days to two years and that, in egregious cases such as this, adjudicators consider barring the individual and expelling the firm. See Guidelines at 96 (Misrepresentations or Material Omissions of Fact). The applicable Guideline also suggests the imposition of a fine ranging from $10,000 to $100,000 and indicates that adjudicators may increase the fine amount by adding the amount of a respondent's financial benefit.[16] Id. Accordingly, for this misconduct, we expel the Firm, bar Nguyen in all capacities, and fine respondents, jointly and severally, $80,000[17] -- $25,000 plus

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15 These sanctions are within the range recommended in the applicable Sanction Guideline. See Guidelines at 87 (Communications with the Public – Late Filing; Failing to File; Failing to Comply with Rule Standards or Use of Misleading Communications).

16 On appeal, respondents contend that NASD improperly calculated their financial gains. Respondents, however, offer no legal or factual support for this argument and provide no meaningful analysis of their argument in this regard. In determining the amount of respondents' financial gain, we relied on NASD staff's Schedules A through D, copies of which were attached to and incorporated in the joint stipulation of facts that respondents signed and to which respondents agreed. Copies of Schedules A through D also are attached to this decision.

17 The Hearing Panel did not order respondents to pay restitution to their customers based on our holding in Department of Enforcement v. Hanson, Complaint No. C8A000059, 2002 NASD Discip. LEXIS 5, at *4-5 (Mar. 28, 2002). The Hearing Panel's interpretation of our holding in Hanson, however, is incorrect. Hanson involved a registered representative who violated Conduct Rule 3040 by participating in private securities transactions for compensation without prior written notice to and approval by his firm. In Hanson, we noted that the record did not establish that the customers' losses were caused by anything other than the poor performance of the investments and that there was no adjudication of whether Hanson had made unsuitable recommendations or misrepresentations. As such, we determined that in a case such as Hanson, in which a respondent has engaged in private securities transactions and no other violations, adjudicators should follow the approach recommended in the Guidelines and impose a fine that includes a respondent's commissions or other financial benefits. Our narrow holding in Hanson, however, should not be construed to suggest that ill-gotten gains should never be paid to victims as restitution to compensate them for a respondent's wrongful conduct. We have determined not to order restitution in this case because the record does not contain evidence that adequately quantifies the amount of the customers' losses.

$55,000 (the approximate amount, based on Schedules A through D, of respondents' undisclosed markups and markdowns).[18]

For purposes of imposing sanctions, we aggregated the misconduct alleged under causes three, six, nine, and 11 (inaccurate and misleading confirmations). The Sanction Guidelines do not include a guideline that specifically addresses violations of Rule 10b-10. We have, however, considered the guideline for misrepresentations and omissions of material facts, which we consider to be a guideline for an analogous violation. For issuing false confirmations to customers, we find that it would be appropriate to suspend Nguyen from acting as a principal for 30 days and to require him to requalify as a principal. In light, however, of our imposition of a bar for violations under other causes, we consider the principal suspension and principal requalification requirement redundant and do not impose them. For inaccurate confirmations, we fine the Firm and Nguyen $15,000, jointly and severally.

For recordkeeping violations under cause 12 of the complaint, we find that there is no evidence that respondents deliberately failed to prepare memoranda of brokerage orders reflecting the time of entry and execution of inter-dealer transactions. Accordingly, we do not find that respondents' misconduct with respect to this violation was egregious, but we do find that their recordkeeping violations were pervasive and occurred over an extended period of time. In light, however, of our imposition of a bar for violations under other causes, we consider the imposition of additional sanctions for recordkeeping violations redundant and do not impose them.

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In sum, we find that the egregiousness of respondents' misconduct, the length of time during which the misconduct occurred, the intentional nature of their misconduct, respondents' willingness to continue the misconduct even after receiving notification from NASD staff, respondents' continuation of their violative acts after assuring NASD staff that the Firm's Web site would be corrected, and respondents' insensitivity to their obligations to their customers suggest that respondents would engage in similar misconduct in the future if we do not impose appropriate remedial sanctions. We impose the following sanctions: U.S. Rica is expelled from membership, Nguyen is barred from acting in all capacities, and respondents are fined a total of $120,000, jointly and severally. In addition, we affirm the Hearing Panel's imposition of costs in the amount of $1,853.94.

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[18] These sanctions are within the range recommended in the applicable Sanction Guideline. See Guidelines at 96 (Misrepresentations or Material Omissions of Fact).

VII. Conclusion

Accordingly, U.S. Rica is expelled from NASD membership. The expulsion is effective upon service of this decision. Nguyen is barred from acting in all capacities. The bar is effective upon service of this decision. In addition, respondents are fined a total of $120,000, jointly and severally. We also impose Hearing Panel costs of $1,853.94.[19]

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

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[19] We also have considered and reject without discussion all other arguments advanced by respondents.

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