BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of Market Surveillance Committee (n/k/a Market Regulation Committee) Complainant, vs. Michael J. Markowski Miami Beach,FL and Joseph F. Riccio Palm Harbor, Florida Respondents.	:	DECISION Complaint No. CMS920091 Market Surveillance Committee (n/k/a Market Regulation Committee) Dated: July 13, 1998

Pursuant to NASD Procedural Rule 9310, Michael J. Markowski ("Markowski") and Joseph F. Riccio ("Riccio") have appealed a July 9, 1996 decision of the Market Surveillance Committee (now known as and hereinafter referred to as the Market Regulation Committee or "MRC").[1] We find that: 1) Markowski and Riccio violated Conduct Rules 2110 and 2120,[2]

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[1] Markowski and Riccio appealed this matter to the National Business Conduct Committee ("NBCC") of NASD Regulation, Inc. and oral argument was held before a Subcommittee of the NBCC. This matter was decided by the National Adjudicatory Council, which, as approved by the Securities and Exchange Commission ("SEC" or "Commission"), became the successor to the NBCC on January 16, 1998.

[2] The complaint alleged violations of various NASD Rules of Fair Practice which are now known as Conduct or Procedural Rules, e.g., alleging violations of Article III, Sections 1 and 18 of the Rules of Fair Practice (now Conduct Rules 2110 and 2120), Article III, Section 5 of the Rules of Fair Practice (now Conduct Rule 3310), and Article IV, Section 5 of the Rules of Fair Practice (now Procedural Rule 8210).

Section 10(b) of the Securities Exchange Act of 1934 ("the Exchange Act"), and Rule 10b-5 thereunder by engaging in manipulative, deceptive, and fraudulent conduct in Mountaintop Corp. ("Mountaintop"), a security underwritten by Global America, Inc. ("Global" or "the Firm"); 2) Markowski and Riccio violated Conduct Rules 2110, 2120 and 3310 by publishing non-bona fide quotations for Mountaintop securities; 3) Markowski violated Conduct Rule 2110 by violating the terms of the Firm's Restriction Agreement; and 4) Markowski violated Conduct Rule 2110 and Procedural Rule 8210 by his refusal to submit to an investigative interview requested in writing by Market Regulation staff.[3]

Accordingly, we order that Markowski be censured, barred in all capacities from association with any member of the National Association of Securities Dealers, Inc. ("NASD" or "the Association"), fined $300,000, and assessed costs of $3,961.88; and that Riccio be censured, barred in all capacities from association with any member of the NASD, fined $250,000, and assessed costs of $3,961.88.

Respondents' Background

At all times relevant to this action Markowski was registered as a general securities principal with Global, a former NASD member firm which closed in January of 1991. Markowski was also the Firm's Chairman, Chief Executive Officer ("CEO"), and majority shareholder. Markowski first entered the securities business in November 1977. Before forming Global, Markowski was associated with D.H. Blair & Co., Inc. ("D.H. Blair") and two other firms. After Global closed, Markowski was associated with another firm until January 1992. He has not been associated with any member firm since that time.

At all times relevant to this action Riccio was the Firm's trader and was registered as a general securities representative with Global. Riccio first entered the securities business in 1979. Before joining Global, Riccio had worked with Markowski at D.H. Blair and another firm, and on his own at a third firm. After the demise of Global, Riccio went to work with Markowski at another firm until they both left that firm in January 1992. Riccio then worked as a registered representative at another firm from January 1992 until April 1994. He has not been associated with any member firm since that time.

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[3] We also reverse the findings of the MRC as to the remaining allegations in: cause one of manipulative conduct with respect to three other securities underwritten by the Firm, HQ Office Supplies, Inc. ("HQ"), Auto Depot, Inc. ("Auto Depot"), and Capucino's, Inc. ("Capucino"); cause two of the complaint (alleging manipulative conduct by Markowski and Riccio in one security not underwritten by Global); cause three of the complaint (alleging that Markowski and Riccio failed to execute customer market orders); in cause four, the allegations as to HQ, Auto Depot, Capucino and Choices, Entertainment Corp. ("Choices") (alleging publication of non-bona fide quotations); and cause six (alleging inadequate supervision by Markowski).

Procedural History

The seven-cause complaint in this action was issued on August 7, 1992, alleging that violative conduct by Markowski and Riccio had occurred between February 28, 1990 and January 16, 1991 (the "Review Period").[4] An initial hearing was held before a hearing panel of the MRC (the "Initial Hearing") on February 23 through 25, 1993. Riccio appeared at the Initial Hearing with counsel. Markowski did not attend the Initial Hearing, and the MRC hearing panel denied his request to participate in that hearing by telephone.[5]

At the Initial Hearing, MRC staff called six witnesses and introduced 21 exhibits. Riccio did not offer any witnesses, but he did cross-examine staff witnesses and testify on his own behalf. Markowski was permitted to submit a written statement of his defense because he did not participate in the Initial Hearing. The MRC hearing panel also admitted Markowski's exhibits (totaling more than 6,000 pages) into the record on the first day of the Initial Hearing, even though Markowski had not submitted those exhibits prior to the hearing.

The MRC issued a decision on September 15, 1993, in which it made findings of violation as to all seven causes of the complaint and imposed sanctions ("the Initial Decision"). Markowski and Riccio timely appealed the MRC's Initial Decision to the NBCC. On February 10, 1994, the NBCC ordered Markowski, Riccio, and MRC staff to file written submissions that addressed: (1) Markowski's non-participation in the Initial Hearing; (2) Markowski's submission of some 6,000 pages of documentary evidence on the first day of the Initial Hearing and Riccio's opportunity to review and comment upon such evidence; and (3) Riccio's submission of documentary evidence during the Initial Hearing and Markowski's opportunity to review and comment upon such evidence.

Following briefing by all parties, the NBCC issued an order on July 21, 1994, remanding the matter to the MRC (the "Remand Order"). The Remand Order stated that:

1. The MRC should conduct a separate proceeding ("the Remand Hearing"), in person or by telephone, to permit Markowski to cross-examine witnesses who had testified at the Initial Hearing, to comment upon the documents adduced at the Initial Hearing by Riccio, to adduce testimony and documentary evidence, and to present argument on his behalf;

2. Riccio should be permitted to participate in the Remand Hearing, either in person or by telephone; and

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[4] The causes of action are described and discussed in detail in the Factual Background and Discussion sections herein.

[5] The MRC upheld the hearing panel's decision to deny Markowski the opportunity to participate in the Initial Hearing by telephone.

3. An attorney-advisor should be appointed to assist the MRC hearing panel at the Remand Hearing and to ensure that an accurate record be created and that the procedural issues which led to the entry of the NBCC's February 10, 1994 Order be addressed.

The Remand Hearing was held on June 12 through 14, 1995. Markowski attended the Remand Hearing in person and was accompanied by counsel. Riccio participated in the Remand Hearing by telephone. The parties also submitted extensive post-hearing briefs. The MRC issued a Decision on Remand on July 9, 1996, making findings of violation as alleged in the complaint under all seven causes, and imposing the following sanctions: Markowski -- censure; $3,000,000 fine; bar in all capacities; and $3,961.88 in costs; Riccio -- censure; $1,000,000 fine; bar in all capacities; and $3,961.88 in costs.[6] This appeal followed.

Factual Background

Global began conducting a securities business in May 1989. Markowski brought to Global with him 15 to 20 people with whom he had worked at D.H. Blair, including Riccio, who was recruited to be Global's trader.[7] In July 1989, Global became a wholly-owned subsidiary of Global Financial Group, Inc. ("GFG"), a holding company. Markowski became Chairman, CEO, and a Director of both GFG and Global, and he acquired, from his brother David Markowski, approximately 77 percent of the equity and 94 percent of the voting power of GFG, in exchange for a promissory note in the amount of $66,000.

According to the Firm's promotional brochure, Global was founded to be a "full service investment banker" with a philosophy of supporting emerging growth companies "that [would go] well beyond the traditional underwriting process." (Emphasis added). The brochure stated that Global placed its new issues only with individuals of high net worth and key institutional investors, in the United States and Europe, who shared Markowski's "buy and hold" approach to securities transactions.

The brochure also made repeated references to Markowski's prominent role in the Firm, stating:

- "Global America Chairman Michael Markowski places the opportunity for realizing higher-than-average returns into the hands of investors, while minimizing the risk inherent in small-cap [Initial Public Offerings or IPOs]."

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6 The MRC's Initial Decision had imposed the same censures, bars, and costs, but Markowski was fined $300,000 and Riccio was fined $250,000.

7 As noted earlier, Markowski and Riccio had worked together at several firms beginning in 1979.

- "Global America Incorporated, founded by innovative investment banker Michael Markowski, follows a unique philosophy in its role as financial intermediary, advisor and broker."

- "Global founder Markowski made his mark as a standout in the challenging world of initial public offerings."

Cause One. Cause one alleged that from February 28, 1990 through January 16, 1991, Markowski and Riccio engaged in conduct designed to create actual and apparent trading in four securities for which Global had served as the lead underwriter -- Mountaintop, HQ, Auto Depot, and Capucino (collectively, the "Underwritten Securities"). Cause one alleged that Markowski and Riccio effected numerous transactions in the Underwritten Securities and induced others to purchase and sell such Underwritten Securities at artificial prices by means of manipulative, deceptive, and other fraudulent devices and contrivances in violation of Conduct Rules 2110 and 2120, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Each of the Underwritten Securities was a firm-commitment public offering of units, and each unit was comprised of common stock and warrants,[8] except for HQ, which had units consisting of 1,000 shares of common stock. Virtually all of the Underwritten Securities were placed with Global's own customers,[9] and upon the completion of each distribution, the units and components were traded in The Nasdaq Stock Market with Global acting as the primary market maker.

The Mountaintop Offering. Mountaintop was defined in the prospectus as a "development stage company" formed to market Alaskan vodka. As of March 31, 1990, Mountaintop's unaudited financial statements showed a working capital deficiency of $(360,364). The offering consisted of 1,200,000 units, with each unit consisting of two shares of common stock and two Class A Warrants. The Class A Warrants were immediately exercisable and entitled the holder to purchase one share of common stock and one Class B Warrant for $1.875. The Class B Warrant entitled the holder to purchase one share of common stock at $2.75. The public offering price of a unit was $3.50. Thus, without accounting for the value of the warrants, the $3.50 unit offering price rendered each share of common stock worth $1.75.

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[8] A warrant is a type of security that entitles the holder to buy a proportionate amount of common stock at a specified price ("the exercise price") for a set period of time.

[9] There is no dispute that the vast majority of the Underwritten Securities were placed with the Firm's customers. See Brief of Markowski and Riccio on Appeal to NAC, p. 34. The Firm's Compliance Officer, Gary Boccio ("Boccio"), agreed that "very close to 100 percent" of these issues were placed with Global's customers; Riccio agreed that the Firm had up to 99 percent of the issues placed with its customers.

The Mountaintop secondary market began on June 29, 1990. Global sold the first 1,500 units to another firm at $6.75 per unit, thereby rendering Mountaintop a "hot issue."[10] From June 29, 1990 through January 16, 1991 (the "Mountaintop Review Period"), approximately 1,700 trades occurred, mainly between Global's inventory and its customers, or as cross-trades between Global customers. Eight hundred of those trades were executed on July 2, 1990, when the first common stock trades occurred at $2.50 per share. Global's first purchase of common stock on June 29, 1990 was at a price of $2.12 per share, in excess of the $1.87 exercise price of the Class A Warrants, thereby making the Class A Warrants "in the money" on the first day of trading.[11] On July 2, 1990, Global experienced a gross loss of $2,419,575 on Mountaintop units, a gross loss of $26,793.50 on Mountaintop warrants, and a gross profit of $4,966,743.80 on Mountaintop common stock, for an overall gross profit on that one day of $2,520,375.30.[12] At the end of the Mountaintop Review Period, the Firm showed a gross trading profit of $1,161,005, with an ending position inventory of 604,270 shares.

Global was in net capital deficiency and ceased doing business on January 15, 1991. The record shows that during the last two weeks of its existence, Global purchased 425,600 shares of Mountaintop from "the Street."[13] At an average cost of $4.50 per unit and $2 per common share, this means that Global spent approximately $850,000 to buy Mountaintop stock during the final weeks of Global's business, even though the Firm's inventory account was long 178,670 shares at the end of December 1990. The record also shows that Global was a substantial net wholesale purchaser of Mountaintop units, common stock, and warrants, selling very little to the Street throughout the Mountaintop Review Period. Global also acted as a net retail purchaser of Mountaintop units, buying them from customers with whom the Firm had originally placed the units, and then selling the components of those units (common stock and warrants) to other customers of the Firm. In Mountaintop units, 95.16 percent of Global's sales were to retail customers, and only 4.84 percent of its sales were to the Street. In Mountaintop common stock, almost 100 percent of the Firm's sales were to retail customers, with just a fraction of 1 percent to the Street. In Mountaintop warrants, Global sold 96 percent to its retail customers and only four percent to wholesale customers. Global was the leading purchaser and seller of Mountaintop units, common stock, and warrants throughout the Mountaintop Review Period.

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[10] A "hot issue" is newly issued stock that is in great demand. Hot issue stocks usually increase dramatically in price in the trading that follows their initial offering since there is more demand than there are shares available.

[11] The phrase "in the money" is used to describe a warrant to purchase a stock when the stock has a current market price that exceeds the exercise price of the warrant.

[12] Markowski argued that these figures do not accurately portray the Firm's profits because they do not include the cost to the Firm of exercising the Class A Warrants or consider the Firm's inventory positions. Staff explained, however, that the intent of the calculations was to show gross trading revenues, not net profits or losses, for the transactions at issue.

[13] "The Street," a shorthand reference to "Wall Street," refers to the financial community in New York City and elsewhere.

Global first reached 100 percent on a combined basis of exclusive and shared high bid prices for Mountaintop warrants and common stock between August 24 and September 7, 1990.[14] Global offered the exclusive high bid for Mountaintop warrants 100 percent of the time, and offered the exclusive or shared high bid for Mountaintop common stock 100 percent of the time, through the end of the Mountaintop Review Period. In comparing Global's inventory of Mountaintop common shares to the Firm's maintenance of the high bid for common stock, the record shows that Global maintained its high bid, notwithstanding the existence of a substantial long inventory (ranging from 47,090 shares to 722,860 shares) throughout the Mountaintop Review Period.

Global withdrew as a market maker in Mountaintop at 9:22:02 a.m. on January 16, 1991. Within the next seven minutes, the inside bid price for Mountaintop common stock dropped 64 percent from the previous day's close of $1 3/8 per share to 50 cents per share and it remained at that low level until the close of the market that day. Also on January 16, 1991, the inside bid price for Mountaintop warrants dropped 78 percent from the previous day's close, and the inside bid price for Mountaintop units dropped 75 percent.

The HQ, Capucino, and Auto Depot Offerings. Market Regulation staff described the situations with respect to the other three Underwritten Securities as having been "similar" to that of the Mountaintop offering. Yet Market Regulation staff also testified that they had "focus[ed] primarily" on Mountaintop because "it would [have been] very cumbersome to investigate them [the other three Underwritten Securities] all," and because Market Regulation staff was aware that the SEC was investigating the Auto Depot offering. Market Regulation staff testified that "Mountaintop's trading history would be fairly representative of the trading history of all of the underwritings that Global did."

As a result of this limited investigation, the evidence on HQ, Capucino, and Auto Depot is much more scanty than the evidence adduced with regard to Mountaintop. No "blue sheeting"[15] of market makers was performed, and thus there were no chronological transaction analyses for HQ, Capucino, or Auto Depot. Market Regulation staff also did not compile certain other helpful statistical information for these three Underwritten Securities, as they did for Mountaintop, such as a summary of wholesale trading profits, a retail analysis, a purchase and sale analysis, or a comparison of the Firm's inventory in a particular security to the maintenance of a high bid price for that security by the Firm. Accordingly, the only information we have on these three Underwritten Securities is as follows:

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[14] The exclusive high bid price, or highest price offered by Global as a prospective buyer during the Mountaintop Review Period, means that Global was the only market maker that showed the high bid for Mountaintop. The shared high bid price means that Global was one of two or more market makers that reflected the same high bid.

[15] "Blue sheets" are regulatory requests for information to market makers about the transactions that they have effected in a particular security.

The prospectus states that HQ was a company that operated a chain of warehouse-type retail office supply stores.[16] HQ commenced operations on February 9, 1989, and by April 1, 1990, it had incurred an aggregate net loss of $15,535,184 and had inadequate earnings to cover fixed charges by approximately ($1,196,000). Global maintained the exclusive or shared high bid price 100 percent of the time for HQ common stock from August 24, 1990 through December 18, 1990, and Global was the leading market maker in the stock throughout the HQ Review Period. When Global withdrew as a market maker in HQ on January 16, 1991, the inside bid price of HQ common stock declined from $ 1/4 to $ 3/16 per share on the first day, approximately a 25 percent drop, and then to $ 5/32 per share by January 31, 1991.

Capucino's prospectus stated that the company was formed to develop, establish, and operate a chain of Italian restaurants. The offering price was $5 per unit, and Capucino common stock began trading with an inside bid price of $2 1/8 per share on February 28, 1990. Global maintained the exclusive or shared high bid for Capucino common stock 80 to 100 percent of the time during the Capucino Review Period of February 28, 1990 until January 16, 1991. When Global withdrew from the market on January 16, 1991, the bid price of Capucino common stock fell from $2 per share to $1 1/8 per share on January 16, 1991, approximately a 64 percent decline, and to $1 3/16 per share by January 31, 1991.

The Auto Depot prospectus, dated September 7, 1990, stated that the company was organized in January 1989 to establish warehouse-type retail auto parts centers that would sell automotive products at discount prices. The prospectus also stated that Auto Depot had not yet commenced operations or generated operating revenue and that it required the net proceeds of the offering to start its business. The offering price was $5 per unit, and the units began secondary trading at 9:31 a.m. on September 10, 1990 with an inside bid of $5 1/2 per unit. By the time Global entered the market at 10:14 a.m., the inside bid price had risen to $10 5/8 per unit. Global consistently maintained the exclusive or shared high bid price for Auto Depot units and common stock from September 10, 1990 through January 15, 1991. When Global withdrew from the market on January 16, 1991, the inside bid price for Auto Depot units declined from $4 5/8 to $2 1/8 by the close of the market on January 16, 1991, approximately a 62 percent decline, and the inside bid price for Auto Depot common stock declined from $1 5/16 per share to $ 1/2 per share, approximately a 94 percent decline.

Discussion

Cause One. Cause one alleged that from February 28, 1990 through January 16, 1991, Markowski and Riccio engaged in conduct designed to create actual and apparent trading in four securities for which Global had served as the lead underwriter -- Mountaintop, HQ, Auto Depot, and Capucino. Cause one alleged that Markowski and Riccio effected numerous transactions in

[16] The HQ Offering consisted of 11,500 units at $1,000 per unit. Each unit consisted of 1,000 shares of common stock.

the Underwritten Securities and induced others to purchase and sell such Underwritten Securities at artificial prices by means of manipulative, deceptive, and other fraudulent devices and contrivances in violation of Conduct Rules 2110 and 2120, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Manipulation has been defined as "intentional interference with the free forces of supply and demand." In re Pagel, Inc., 48 S.E.C. 223, 226 (1985), aff'd sub nom. Pagel, Inc. v. SEC, 803 F.2d 942 (5th Cir. 1986). In making a determination as to whether a manipulation has occurred, "inferences [have been] drawn from a mass of factual detail" including "patterns of behavior," "apparent irregularities, and from trading data." Pagel, 48 S.E.C. at 226. Case law has identified certain "earmarks" of a manipulation, including: 1) domination and control of the market in the subject securities; 2) sales of virtually all of the securities to the firm's retail customers; 3) absorption of customer sales into the firm's inventory; 4) price leadership by the firm, or a price surge;[17] 5) scant investor interest;[18] 6) abundant supply;[19] 7) reduction in the floating supply of stock; 8) absence of any known prospects for the issuer, or absence of favorable developments affecting it;[20] and 9) collapse of the market when the firm ceases activity in the security. See, e.g., In re Patten Securities Corporation, 51 S.E.C. 568, 573 (1993); In re Gary E. Bryant, 51 S.E.C. 463, 468 (1993). A finding of manipulation "does not hinge on the presence or absence of any particular device usually associated with a manipulative scheme. Rather, each case must be judged on its own facts." Patten, 51 S.E.C. 568, 574 (citations omitted). Manipulation also may be "inferred from the facts and circumstances of a given case because 'manipulators seldom publicize their intentions.'" In re Jay Michael Fertman, 51 S.E.C. 943, 949 (1994) (citations omitted).

The SEC has recognized that a firm that controls a market, such as Global did in the Underwritten Securities, "can charge prices unrelated to supply and demand over an extended period without using any elaborate manipulative techniques." Patten, 51 S.E.C. 568, 574.

> The fact that . . . an underwriter is in a position to dominate and control the trading market does not necessarily produce a manipulation, but it does enable the underwriter to control

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17 See SEC v. Resch-Cassin, 362 F. Supp. 964, 976-977 (S.D.N.Y. 1973); Norris & Hirshberg, Inc., 21 S.E.C. 865, 879-881 (1946), aff'd sub nom. Norris & Hirshberg, Inc. v. SEC, 177 F.2d 228 (D.C. Cir. 1949).

18 See generally Dlugash v. SEC, 373 F.2d 107, 109 (2d Cir. 1967); Todd and Company, Inc., 46 S.E.C. 315, 319 (1976), vacated and remanded on other grounds sub nom. Todd and Company, Inc. v. SEC, 557 F.2d 1008 (3d Cir. 1977).

19 See Pagel, 48 S.E.C. at 225-226.

20 See Edward J. Mawod & Co. v. SEC, 591 F.2d 588, 591 (10th Cir. 1979) (aff'g In re Edward J. Mawod & Co., 46 S.E.C. 865 (1977)).

> wholesale pricing to such an extent as to preclude an independent, competitive market from arising . . . . The price leadership resulting from [an] almost exclusive control of the source of supply empowers the underwriter to set prices arbitrarily. If that power is abused, the result is a manipulation. Pagel, 48 S.E.C. at 226.

We find that the evidence shows that, as to Mountaintop, Markowski and Riccio deliberately abused their power over market prices which resulted from their almost exclusive control of the supply of the securities. They used that power to maintain unrealistically high prices in the market for Mountaintop while preventing excess securities from depressing the market by: (1) absorbing excess securities into Global's swollen inventories; and (2) consciously and consistently failing to address clear and systemic problems with executing customers' sell orders. Based on the paucity of relevant evidence, however, we do not find that the record supports the MRC's finding of manipulative activity with respect to the markets in HQ, Capucino, and Auto Depot, and we therefore reverse those findings of violation.

A dealer's pricing must reflect genuine market conditions. In order to manage risk, dealers normally attempt to keep their inventory positions flat. If a market maker buys more shares of a certain security than it sells, it may be obligated to lower its ask quotation for that security in order to dispose of excess inventory, and lower its bid quotation to reduce the likelihood that it will accumulate additional inventory. Patten, 51 S.E.C. 568, 574 (citations omitted). The pattern of trading at Global in the Underwritten Securities did not follow these basic economic principles. The record shows that Global's bid prices for Mountaintop securities were maintained consistently, while its inventory in Mountaintop remained at exceedingly high levels from August through December 1990.[21]

Gary Boccio ("Boccio"), the Firm's Compliance Officer, testified that Markowski did not "want to show [that Global] had any weakness in the stocks." James Shanley ("Shanley"), the Firm's Chief Operations Officer,[22] testified that Markowski and Riccio worked closely together and that the Firm's trading department could not liquidate its long positions to the Street unless Markowski approved such an action. Shanley also testified that he and Riccio had discussed the need for the Firm to stop supporting the prices of the Underwritten Securities, but that Riccio had feared that if they took action on one stock, there would be adverse repercussions with respect to all of the stocks. On October 22, 1990, the Firm's Chief Financial Officer ("CFO"), Stuart Polansky ("Polansky"), sent a memorandum to Riccio, with a copy to Markowski, that stated: "It is imperative that we reduce our inventory by $3 million by Wednesday October 24, 1990." On November 21, 1990, Polansky directed another memorandum to Markowski, with a copy to

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21 For example, from October 22, 1990 through November 2, 1990, Global had the exclusive or shared high bid price for Mountaintop common stock 100 percent of the time, even though it had an inventory of 714,260 shares.

22 Shanley testified that he was designated as the Firm's Chief Operations Officer, but that at times he functioned more like the Chief Operating Officer ("COO").

Riccio, that warned that the Firm was facing undercapitalization in November 1990 if the inventory was not reduced to $3 million or less in stocks that affected marketplace blockage (including Auto Depot, Capucino, and Mountaintop). Polansky urged that it was "imperative that [they] take whatever action [was] needed . . ." On December 11, 1990, Polansky and Boccio co-authored a memorandum to Markowski, entitled "Immediate regulatory and financial concerns," which stated that the NASD was questioning the Firm's capital and monitoring the Firm's positions.

In October 1990, Global also had begun running a debit balance in its inventory account with its clearing firm, Prudential Securities, Inc. ("Prudential"). The debit balance exceeded $1.4 million by December 5, 1990, and Prudential informed Global that the Firm had to eliminate the debit immediately with an additional deposit of $2 million into the Firm's trading account. Global managed to raise more capital within a few days by selling Auto Depot securities and briefly showed a credit balance of $1.7 million in the trading account. Yet in order to maintain the price of Mountaintop, Global continued to buy stock, and by December 19, the Firm again had a debit balance of $600,000, which rose to almost $1 million by January 9, 1991.

At the same time that Global's stock inventories were swelling and its debit balance with Prudential was increasing, the Firm was experiencing serious problems with customer sell orders that were not being executed. The record indicates that as early as May 1990, Boccio noticed this problem and brought it to the attention of Markowski.[23] Boccio testified that the Firm's problem with unexecuted customer sell orders was persistent and grew increasingly worse throughout 1990. Boccio documented the problem in a memorandum to Markowski dated August 23, 1990 ("the First Survey"), which stated that "as of August 22, 1990 there were approximately 136 sell orders pending for a total market value of $2,670,772." By October 11, 1990, a second memorandum on this subject ("the Second Survey") prepared for Markowski stated that "there were approximately 147 sell orders pending for a total market value of $2,852,939." On December 11, 1990, a memorandum to Markowski that was co-authored by Polansky and Boccio stated that:

> [T]he NASD is questioning our failure to sell stock promptly . . . . The NASD notified Gary [Boccio] and said if you [the Firm] cannot execute sells we [the Firm] should come off the box and that there is no excuse for not processing sell orders, if a customer has a letter instructing us to sell and we don't, they will win an arbitration . . . . Customers are starting to go directly to the NASD for our failure to sell . . . . The SEC has our full customer complaint file for August. It shows over 50 complaints for failure

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[23] A May 1, 1990 memorandum from Boccio indicated that 23 out of 54 complaints by customers were related to unexecuted sell orders. Shanley also testified at the Remand Hearing that both Markowski and Riccio were fully aware of the problem of unexecuted customer sell orders as early as the Spring of 1990.

> to sell. This does not include the number of people going directly to the SEC that we don't know about. The SEC based on the complaint file alone can take severe action against us . . . . Currently compliance has around 50 open customer complaints. The majority of these complaints will result in a loss to the firm once they are executed. Gary is currently receiving about 10 complaints a day. Besides trading has numerous customers [sic] trades that are still not executed.[24]

Boccio's testimony was corroborated by Shanley and a consultant to the Firm, Charles Amerkanian ("Amerkanian").[25] The MRC found the testimony of Boccio, Shanley, and Amerkanian to be consistent and credible.[26]

The record shows that despite Mountaintop's "start-up status," its lack of a proven product, and the absence of favorable developments that might have affected its value, Mountaintop securities opened at a high price in the secondary market and remained at a high level throughout the Review Period. The Firm's failure promptly to process customer sell orders, its maintenance of high bid prices, and its increasingly high inventory positions for Mountaintop throughout the Review Period indicate that Markowski and Riccio sustained artificial and inflated prices in Mountaintop. The SEC consistently has stated that investors are:

> [e]ntitled to assume the prices they pay and receive are determined by the unimpeded interaction of real supply and real demand so that those prices are the collective marketplace judgments that they purport to be. Manipulations frustrate those expectations. They substitute fiction for fact . . . The vice is that the market has been distorted and made into a 'stage-managed performance.' Patten, 51 S.E.C. at 572, citing Mawod, 46 S.E.C. 865, 871-872.

The record shows that Markowski and Riccio were the "managers" of Global's "performance." Riccio admitted in his testimony at the Initial Hearing that he deliberately maintained prices in the Underwritten Securities, including Mountaintop. He testified that at

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24 The record also includes draft resignation letters, addressed to Markowski, prepared by Boccio and Polansky on December 12, 1990. Both letters referred to the Firm's failure to sell stock for customers in a timely manner as one of the major reasons that Boccio and Polansky wanted to resign.

25 Amerkanian testified that he had considered joining Global as its COO, but did not do so because he had significant concerns about the operations of the Firm, including its problems with unexecuted sell orders and oversized inventories.

26 The MRC also found not credible Riccio's denial that he had ever seen the First and Second Surveys.

certain times throughout the Review Period, there was "no market outside of Global's own customers," and that if he had lowered Global's bid prices, "the other market-makers would [have] drop[ped] behind [him]." Riccio testified:

> "Global's basic philosophy was - - we finance these companies. We brought initial public offerings, we did secondary, private placements. We continually financed these companies."

Riccio testified that this philosophy justified the policy of not selling the Firm's excessive inventory to the Street.

Riccio also argued that the Underwritten Securities were "investment stage companies" and "high-risk securities," and he asserted that his trading efforts in these securities were geared to maintaining an "orderly market." As officers of a market maker operating in a dealer market, however, Markowski and Riccio were not obligated to support prices through manipulative means. Instead, they were obligated to allow the free forces of supply and demand to determine prices and to make every effort to execute all customer sell orders promptly, regardless of the impact that such sales might have had on market prices. See In re Bateman, Eichler, Hill, Richards, Inc., et al., 47 S.E.C. 692 (1982).

We are not persuaded by respondents' arguments that there were independent forces at work to cause the Firm's backlog of unexecuted customer sell orders and the ultimate demise of Global. A fire in the Wall Street Telephone Exchange caused a communications "blackout" on Wall Street in August 1990 ("the Blackout"), thereby closing the doors of Global and many other firms for approximately one week. The record, however, does not support respondents' assertions that this freak event resulted in the Firm's failure to process the customer sell orders reflected in the First Survey on August 23, 1990. Boccio, who conducted the First Survey, testified that the Blackout did not cause the Firm's problem with unexecuted orders, which had begun in the Spring of 1990. Further, Shanley testified that the Blackout might actually have helped the Firm because customers' inability to reach the Firm during that time resulted in fewer sell orders.[27]

We also do not credit respondents' argument that Prudential was responsible for the Firm's backlog in execution of customer orders. The record shows that in December 1990, Prudential prohibited Global from entering its trades directly into Prudential's system through a terminal on Global's premises. In order to monitor Global's proprietary accounts more closely to see whether the Firm was carrying a debit balance, Prudential instructed Global to send its order

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[27] We also find that the record does not support respondents' assertion that the Iraqi invasion of Kuwait during August 1990 somehow affected the markets for the Underwritten Securities and contributed to the demise of Global. In addition, the Commission's inquiry to customers regarding trading in Auto Depot shares, which occurred in November 1990, could not have been a major factor in Global's problems, which existed well before that time.

tickets to Prudential's correspondent division. Testimony from Prudential officials, however, indicated that Prudential processed every order that was given to it by Global. Further, this change in Global's order processing system did not occur until December 1990, and the record shows that Global's problems with unexecuted customer sell orders had existed at least from May 1990, when Boccio first communicated with Markowski about this issue.

Neither Markowski nor Riccio has produced a plausible explanation for the Firm's maintenance of huge inventories and continuing high bid prices in Mountaintop. The record shows that the Firm was suffering major financial difficulties.[28] Yet rather than instructing Riccio to liquidate the excessive inventories and keep the Firm's positions flat in Mountaintop, Markowski continually attempted to raise capital for the Firm by traveling to Europe to solicit infusions from his foreign institutional accounts. Moreover, Prudential officials testified that they met with Global representatives, including Markowski and Riccio, several times during the Fall of 1990, to discuss Prudential's concern with Global's debit balances in its trading accounts and to instruct Global to reduce those debits by infusing capital or selling stock. Yet, on one occasion during December 1990 when Global did sell Auto Depot stock to raise $2 million, the Firm soon purchased more securities for its inventory, and once again increased the deficit in its proprietary account.

Moreover, even if Markowski and Riccio did believe that Prudential was ignoring or delaying the Firm's transactions, there is no reason why Global's trades could not have been executed on an agency basis, thereby avoiding the necessity of dealing with Prudential and its involvement with the Firm's proprietary account. The record shows, however, that Markowski and Riccio did not seek to solve Global's problems with excessive inventory and need for capital by selling Mountaintop to the Street because they realized that such action would cause the carefully maintained price for Mountaintop to tumble as, in fact, it did when Global withdrew as

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[28] Markowski and Riccio have taken issue with net capital calculations performed by Market Regulation staff. These calculations purported to show that if Global had not sustained the prices on the securities in question, the "true" value of those securities would have put the Firm into net capital deficiency in October 1990. The Market Regulation staff used, as the "true value," the price of the securities in January 1991 after Global had withdrawn as the primary market maker. Respondents argue that this "retrospective analysis" fails to take into account many factors that would have affected the value of a particular security at a particular time, such as market conditions and developments within the companies themselves. We need not, however, decide what the exact value of the securities might have been because we do not find it necessary to conclude that respondents were manipulating the market for Mountaintop in order to prevent the Firm from developing a net capital deficiency. The record is replete with evidence that the Firm was experiencing financial difficulties, and Riccio admitted that he kept bid prices up to prevent a drop in the market prices of the Underwritten Securities. As set forth above, we find sufficient evidence of manipulative intent on the part of the respondents without determining whether, in fact, the Firm would have been forced out of business due to net capital deficiency as of October 1990 if the price action in Mountaintop had not occurred.

a market maker on January 16, 1991. Rather, Markowski and Riccio attempted to maintain the "atmosphere" which they had sought to create for Global -- the "buy and hold" philosophy of securities transactions. This atmosphere was such that the Firm's brokers were reluctant to pass their sell orders on to Riccio, for fear that he would retaliate by withholding their allocation of shares in the next IPO.[29] In addition, although Riccio denied ever having refused to execute a market order that was submitted to him, the record contains complaints from customers that their sell orders were not being filled and complaints by brokers that some of the market orders they submitted to the trading department were refused or ignored by Riccio.[30] All of these factors contributed to the creation of a stage-managed performance in Mountaintop and interfered with the free forces of the marketplace.

Contrary to respondents' contention, there is ample evidence that they acted with the required manipulative intent, or scienter. "Intent, like other elements of a manipulation charge, may be inferred from the facts and circumstances of a given case because 'manipulators seldom publicize their intentions.'" In re Jay Michael Fertman, 51 S.E.C. 943 (1994) (citing In re Edward J. Mawod & Co., 46 S.E.C. 865 (1977), aff'd, 591 F.2d 588 (9th Cir. 1979)). See also In re R.B. Webster Investments, Inc., supra (proof of manipulation almost always depends on inferences drawn from a mass of factual detail). With knowledge of Global's deficit with Prudential, the Firm's excessive inventories, and its backlog of customer sell orders, Markowski and Riccio did not reduce the Firm's bid prices for Mountaintop, did not sell stock to the Street, and did not otherwise attempt to liquidate the Firm's inventories. Instead, they purposely maintained the bid price and continued to purchase securities for the Firm's inventory, thereby resulting in an artificial stabilization of the market for Mountaintop.

We also do not credit respondents' arguments that they lacked sufficient intent to manipulate because they did not receive any "benefit" from the actions at issue here. Riccio testified that the Firm's "philosophy" was to "continually [finance] these companies." By doing so, Markowski and Riccio attempted to keep their issuers satisfied in order to ensure that new IPOs would continue to be directed to Global. This "reputational benefit" to Markowski and Riccio was a sufficient motivating factor behind their manipulative actions. See In re R.B. Webster Investments, Inc., 51 S.E.C. at 1274 (a failure to profit monetarily, or even a loss of money, is not inconsistent with a finding of intent to manipulate).

Accordingly, we find that the record contains sufficient evidence of willful conduct on the part of Markowski and Riccio to support the finding that they acted knowingly, or at the very least, acted recklessly with regard to Global's role in the market for Mountaintop. See, e.g., Rolf

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[29] Markowski acknowledged that as CEO of Global, he should have made it clear to his brokers that they should feel free to give sell orders to Riccio.

[30] Regardless of whether the transactions were being delayed by the brokers or the traders, the record is clear that the Firm was experiencing selling pressure and the customers' sell orders were not being executed promptly. We find that Markowski and Riccio were aware of this and did not take sufficient action to address the problem.

v. Blythe Eastman Dillon & Co., 570 F.2d 38 (2d Cir. 1978).[31] The record demonstrates a sufficient number of "red flags" that should have indicated a market manipulation to Markowski and Riccio. We find that their failure to recognize and act on these red flags represented an extreme departure from the standards of ordinary care for a market maker. We therefore affirm the MRC's findings of violation as to Conduct Rules 2110 and 2120, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder as alleged in cause one with respect to Mountaintop. Based on the paucity of relevant evidence, however, we do not find that the record supports the MRC's finding of manipulative activity with respect to the markets in HQ, Capucino, and Auto Depot, and we therefore reverse those findings of violation.

Cause Two. Cause two alleged that from September 4 through December 4, 1990, Markowski and Riccio engaged in conduct designed to create apparent active trading in the common stock of Choices Entertainment Corp. ("Choices"), another "development stage" company that proposed to retail pre-recorded video cassettes through a network of computerized vending machines. Cause two further alleged that Markowski and Riccio effected numerous transactions in Choices common stock, and induced others to purchase and sell those securities at artificial prices, by means of manipulative, deceptive, and other fraudulent devices and contrivances in violation of Conduct Rules 2110 and 2120, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Choices was underwritten in June 1988 by D.H. Blair, the firm that employed Markowski and Riccio prior to their formation of Global. In March 1990, D.H. Blair completed a secondary offering of Choices common stock and warrants. Global was, from its inception in May 1989, a registered Nasdaq market maker in Choices common stock, and on May 11, 1990 Markowski and Riccio each purchased, for their own accounts, 200,000 Choices Class B warrants ("the Choices Warrants") at a price of a mill[32] per warrant. Global maintained the exclusive or shared high bid price for Choices common stock 90 percent of the time from September 4, 1990 until

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[31] To date, the Supreme Court has not addressed the question, reserved in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), of whether scienter may also include recklessness for purposes of finding violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. See Aaron v. SEC, 446 U.S. 680 (1980). "But the overwhelming rule in the [United States Circuit] Courts of Appeals . . . . is that recklessness satisfies the Rule 10b-5 scienter requirement." Dirks v. SEC, 681 F. 2d 824, 844 (D.C. Cir. 1982) (citations omitted), rev'd on other grounds, 463 U.S. 646, (1983); see also SEC v. Steadman, 967 F.2d 636 (D.C. Cir. 1992) (extreme recklessness may also satisfy intent requirement with respect to Rule 10b-5); Fine v. American Solar, 919 F.2d 290 (5th Cir. 1990) (one may prove scienter by showing severe recklessness), cert. denied, 502 U.S. 976; Hollinger v. Titan Capital Corp., 914 F. 2d 1564 (9th Cir. 1990) (recklessness may satisfy the element of scienter under Section 10(b) of the Exchange Act and Rule 10b-5), cert. denied, 499 U.S. 976; Sirota v. Solitron Devices, Inc., 673 F. 2d 566 (2d Cir. 1982) (same), cert. denied, 459 U.S. 838; ITT v. Cornfeld, 619 F. 2d 909 (2d Cir. 1980) (same).

[32] A mill is one-tenth of one cent, or $.001.

January 15, 1991, and the Firm maintained the sole high bid 100 percent of the time from September 17 through November 30, 1990.

The MRC concluded that Markowski and Riccio had manipulated the market in Choices common stock from September 4 through December 4, 1990 in order to maintain prices at artificial levels until they could profitably dispose of their Choices Warrants. We find, however, that the record does not support this conclusion. The evidence regarding the alleged Choices manipulation, like that regarding the alleged manipulation of the securities of Capucino, HQ, and Auto Depot, did not include blue sheet analyses or other statistical information helpful in reaching a determination as to whether manipulation may have occurred.

There is little else in the record that addresses the allegations relating to the manipulation of the Choices market, and accordingly, we are not persuaded that the evidence on the Choices Warrants shows the requisite manipulative intent by Markowski and Riccio. Utilizing the same analysis for manipulation allegations that we employed in our earlier discussion regarding Mountaintop, we note that Global did not underwrite the Choices offering and that the record does not show that Global had Choices shares placed almost exclusively with its own customers. Thus, the Firm did not exercise the same kind of control over the Choices market that it did with respect to Mountaintop. Riccio liquidated most of his Choices Warrants in September and October 1990, but Global did not reduce its bid price for Choices common stock below that of other market makers until December 1990.[33]

If Riccio had maintained the Choices bid price to reap personal profit from the sale of his Choices Warrants, as found by the MRC, we question whether there was a reason for him to maintain the Choices bid price beyond the time when he had disposed of the majority of his Choices Warrants. Further, if Riccio and Markowski were working in concert, we question why Markowski did not sell some or all of his Choices Warrants, which had been "in the money" for some time, during the same period.

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[33] The record showed that Riccio sold 15,000 Choices Warrants for $1 per warrant in September 1990, 140,000 Choices Warrants for $1.25 per warrant in October 1990, and 38,000 Choices Warrants for $1.25 per warrant in December 1990. MRC staff calculations show that Riccio received a profit of $289,530 from these sales. Riccio testified that he sold the bulk of his Choices Warrants in October 1990 because he wanted to purchase a home and did not have any available funds because he had received no salary from Global, having chosen instead to be compensated in warrants. Markowski's Choices Warrants were sold on December 3, 1990 (57,600 warrants) for $1.25 per warrant and December 13, 1990 (20,000 warrants) for $1 per warrant. Markowski testified that he was traveling in Europe at that time and did not have any personal involvement in these sales because the Choices Warrants were liquidated in order to meet a margin call in his account. The remaining 122,000 Choices Warrants in Markowski's account were not sold.

Respondents have argued that Global reduced its bid price for Choices common stock in December 1990 for legitimate market reasons. During the first two weeks of December 1990, they argued, average daily trading volume in Choices increased on the two days on which the common stock price fell. They asserted that this increase in daily volume might have produced more sellers than buyers, and that Riccio might have been reacting to these market conditions when he reduced Global's bid price for Choices common stock. Further, respondents argued that Global had a long position in Choices common stock at the end of November 1990, which also might have led to the Firm's reducing the bid price in December 1990.

These assertions by respondents suggest that Markowski and Riccio might have been responding to market conditions that existed in the Choices market. The fact that they profited in their sales of Choices Warrants is not enough to prove that those profits were achieved by manipulating the Choices market. Accordingly, we have determined that the record is insufficient to sustain the MRC's findings of violation as to Markowski and Riccio under cause two and we hereby reverse those findings.

Cause Three. Cause three alleged that from February 28, 1990 through January 16, 1991, Global accepted market orders from its customers, and that Riccio, with Markowski's full knowledge and approval, failed timely to execute hundreds of customer market orders in securities, including the Underwritten Securities and Choices common stock,[34] in violation of Conduct Rules 2110 and 2120, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

We find that the record does not support the specific allegations of cause three and therefore we reverse the MRC's findings of violation. In reaching this conclusion, we have considered that Global's corporate culture discouraged the Firm's employees from promptly accepting and processing customers' orders to sell securities. Further, the systemic problems that Global experienced in failing to process its customers' sell orders in a timely manner played a role in our finding that a manipulation had occurred in Mountaintop as alleged in cause one.

Accordingly, we have recognized that there was a systemic problem at Global with timely processing of customers' instructions to sell their securities. Given the record before us, however, we cannot conclude that Riccio, with Markowski's knowledge and approval, failed to execute hundreds of customer market orders as was specifically alleged in cause three. Accordingly, we reverse the MRC's findings of violation as to cause three.

Cause Four. Cause four alleged that from February 28, 1990 through January 16, 1991, Markowski and Riccio published and circulated quoted prices for the Underwritten Securities which they knew or should have known were non-bona fide, and which were published and circulated for manipulative, deceptive and fraudulent purposes, in violation of Conduct Rules 2110, 2120 and 3310. Cause four further alleged that Markowski had engaged in similar

[34] Cause three stated that at times, the combined market value of these unexecuted market orders exceeded $2.6 million.

activities with respect to non-bona fide quotations for Choices common stock, and that Riccio's refusal to execute market orders for the Underwritten Securities and Choices common stock, while the Firm was quoting the sole high bid for those securities, was indicative of the violative practices of Markowski and Riccio.

For the reasons set forth above in our discussion of causes one through three, we reverse the MRC's findings of violation under cause four with respect to Capucino, HQ, Auto Depot, and Choices securities, and the allegations concerning Riccio's refusal to execute customer market orders. For the reasons set forth below, we affirm the MRC's finding of violation as to the allegations of cause four that concern non-bona fide quotations in Mountaintop.

Conduct Rule 3310 provides that members shall not publish or circulate, or cause to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to quote the bid price or asked price for any security, unless such member believes that such quotation represents a bona fide bid for, or offer of, such security. IM-3310 (formerly Interpretation of the Board of Governors under Article III, Section 5 of the Rules of Fair Practice) provides that it would be inconsistent with the provisions of Conduct Rules 2110, 2120, and 3310 for a member to publish or circulate a quotation for a security without having reasonable cause to believe that such "quotation is a bona fide quotation, is not fictitious and is not published or circulated or caused to be published or circulated for any fraudulent, deceptive or manipulative purpose."

For the reasons set forth above in our discussion of cause one, we have determined that Markowski and Riccio engaged in manipulative conduct with respect to Mountaintop. One element that helped to frame our finding in cause one was our conclusion that the record did not support the continually high bid prices quoted by Global for Mountaintop. The prospectus for Mountaintop indicated that it was a development-stage enterprise with no proven history of product or service success. There was also no evidence that any favorable events had occurred with respect to Mountaintop that would have had a positive effect on the prices for its securities. Yet the stock for Mountaintop opened "hot" and stayed at a high price level, with Global entering the shared or exclusive high bid price for a major proportion of the Review Period.

Moreover, Global maintained the high bid prices despite its long positions in Mountaintop. For example, Global had the exclusive high bid prices for Mountaintop common stock and warrants from September 10, 1990 through January 15, 1991, even though the Firm was long 722,860 shares of Mountaintop common stock on September 21, with a market value of approximately $1.4 million. We have found that the maintenance of these high bid prices was one of the devices used by Markowski and Riccio to keep prices for Mountaintop at an artificially high level.

Accordingly, we find that these same facts support our conclusion that Markowski and Riccio published quoted prices for Mountaintop which they knew or should have known were not bona fide, for manipulative, deceptive, and fraudulent purposes, in violation of Conduct Rules 2110, 3110, and 2120, as alleged in cause four.

Cause Five. Cause five alleged that from September 1, 1990 through January 15, 1991, Global violated certain terms of an agreement that it had entered into with the NASD's District No. 10 office ("District No. 10"), and that Markowski was responsible for not taking appropriate action to address the violations. The record showed that when Global was admitted to membership in the Association, it was subject to certain operating restrictions placed on it by District No. 10. These restrictions were agreed to in a restriction agreement that was signed by David Markowski, on behalf of Global, on May 19, 1989 ("Restriction Agreement"). Following the change of ownership of Global in July 1989, Michael Markowski negotiated with District No. 10 for certain amendments to the Restriction Agreement, and he signed the resulting amendments on behalf of Global.[35] According to the Restriction Agreement, Global was not permitted to exceed $50,000 in any single inventory position, and the Firm's total inventory position was not permitted to exceed 200 percent of the Firm's excess net capital. The Restriction Agreement further stated that its terms could not be changed without the prior written approval of District No. 10.

We concur with the MRC's determination that Markowski was responsible for not addressing Global's violation of its Restriction Agreement. He negotiated with District No. 10 and signed the amendments to the Restriction Agreement that were agreed upon, and he also negotiated about other proposed amendments as to which no agreement was reached. In doing so, Markowski assumed responsibility, as Global's CEO, for the Firm's adherence to the provisions contained in the Restriction Agreement.

The record demonstrates, however, that Global did not adhere to the conditions of the Restriction Agreement. The Firm's FOCUS Report, Schedule A for July through December 1990 shows that Global was in violation of certain terms of its Restriction Agreement for the months of September through December. For example, in October, the Firm had a total inventory position of 5,482,000 shares, representing approximately 575 percent of its excess net capital, instead of the 200 percent permitted by the Restriction Agreement. Further, the record shows that Global often exceeded the $50,000 limit on its inventory position in a single security, e.g., from September 10 to 21, 1990, Global had a long position of 722,860 shares of Mountaintop common stock with a value of approximately $1.4 million.

These violations were brought to the attention of Markowski on numerous occasions, but he did not take any action to correct them. On December 11, 1990, a memorandum to Markowski co-written by Polansky and Boccio stated that the NASD was monitoring the Firm's position on a daily basis and that "[Markowski was] aware that [the Firm was] violating [its] restriction letter for the fourth straight month." In a previous letter dated November 30, 1990 from Polansky to Shanley, with a copy to Markowski, Polansky indicated his desire to resign from Global, in part because of the "daily violation of [Global's] NASD restriction letter." In his

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[35] The amendments do not concern the provisions of the Restriction Agreement that are at issue in cause five.

final resignation letter dated December 12, 1990, Polansky informed Markowski that many problems that Polansky had raised with Markowski had not been addressed satisfactorily, including "[t]he daily violation [sic] [Global's] restriction letter regarding position limitations."

For these reasons, we find that Markowski violated Conduct Rule 2110 as alleged in cause five.

Cause Six. Cause six alleged that from February 28, 1990 through January 16, 1991, Markowski failed to establish, implement and enforce reasonable supervisory measures necessary to prevent the misconduct alleged in the complaint, in violation of Conduct Rules 2110 and 3010.[36]

Markowski was Global's Chairman and CEO. The Firm's brochure indicates Markowski's prominent role at Global, and testimony from Shanley, Boccio, Polansky and others demonstrates that Markowski was involved in decision-making for the Firm on a regular basis. Thus, Markowski was not the "remote CEO" that he has tried to depict in this proceeding.

We note that a senior officer of a brokerage firm is responsible for compliance with all of the requirements imposed on the firm "unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient." In re Kochcapital, Inc., 51 S.E.C. 241, 248 n. 18 (1992) (citing In re Universal Heritage Invs. Corp., 47 S.E.C. 839, 845 (1982)). Here, the record shows that Global had supervisory procedures and that Markowski had delegated responsibilities to seemingly competent and professional operations, compliance, and financial personnel -- Shanley, Boccio, and Polansky. The record also shows, however, that when each of these delegatees raised serious problems with Markowski, he did not take sufficient action to address those problems.

Yet Markowski's failure to act appropriately in response to the situations at Global during the Review Period is a part of the equation that we have used in determining that Markowski was a primary actor in the findings of violation that we have made in causes one, four, and five of the complaint. Since we have found Markowski substantively responsible for the misconduct found in causes one, four, and five, we cannot also find that he is responsible for inadequate supervision with respect to these violations. See In re R.A. Johnson & Company, Inc., et al., 48 S.E.C. 943, 947 at n.14 (1988) (Commission found that since the respondent had been found to be substantively responsible for certain misconduct, additional findings of deficient supervision as to the same violations were "inappropriate and inconsistent") (citing In re

36 Conduct Rule 3010 provides that members are required to establish, maintain, and enforce written procedures which are reasonably designed to achieve compliance with all applicable rules and regulations, to supervise the types of business in which they engaged and the activities of their registered representatives and associated persons.

Fox Securities Company, Inc., 45 S.E.C. 377, 383 (1973); and In re Adolph D. Silverman, 45 S.E.C. 328, 331 (1973)); see also In re Anthony J. Amato, et al., 45 S.E.C. 282, 286 (1973).

Accordingly, we reverse the MRC's findings that Markowski violated Conduct Rules 2110 and 3010 as alleged in cause six.

Cause Seven. Cause seven alleged that Markowski failed to submit to Market Regulation staff's requests for an on-the-record interview until almost four months after Market Regulation staff had first delivered a written request for such interview, in violation of Conduct Rule 2110 and Procedural Rule 8210.[37]

The record shows that on February 25, 1992, Market Regulation staff made a written request for an investigative interview pursuant to Procedural Rule 8210. Three days before the scheduled interview, Markowski notified Market Regulation staff that he could not appear because he had to attend a "seminar in California." The interview was rescheduled by Market Regulation staff based on assurances that Markowski and his counsel would be available the week of March 23, 1992. Attempts by Market Regulation staff to reschedule the interview for that week, however, were futile because Markowski and his counsel again indicated that they were unavailable. An agreement was later reached to reschedule the interview for April 16, 1992, but on April 13, 1992, Markowski's attorney notified Market Regulation staff that Markowski would not submit to an interview.

Markowski's counsel contacted Market Regulation staff on June 5, 1992 and indicated that Markowski was then willing to be interviewed. The interview was finally conducted on June 29, 1992, almost four months after Market Regulation staff had initially attempted to schedule it.

We find that Markowski's conduct violated Conduct Rule 2110 and Procedural Rule 8210 as alleged in cause seven. The Commission has long recognized that, in the absence of subpoena power, the ability of the NASD "to obtain from its members information necessary to conduct investigations . . . is a key element in [its] effort to police its members." In re Richard J. Rouse, 51 S.E.C. 581, 584 (1993). In In re Michael David Borth, 51 S.E.C. 178, 180 (1992), the Commission emphasized the importance of Procedural Rule 8210 to the NASD's ability to fulfill its regulatory responsibilities:

> In order for the NASD to carry out its regulatory functions, it must have the full and prompt cooperation of persons associated with members when requests for information are made. Failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate.

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[37] Procedural Rule 8210 permits the Association to require members to report, either informally or on the record, orally or in writing in regard to any matter under investigation by the Association.

The record shows that Markowski refused to provide on-the-record investigative testimony as requested by Market Regulation staff. Markowski has argued that he and his attorney had "cogent reasons" for "deferring the request" until other collateral proceedings against Markowski had run their course. The law is clear, however, that it is impermissible for a member or an associated person to delay his or her response to the Association's inquiries or place conditions upon the Association in return for his or her compliance with the requirements of Procedural Rule 8210. In re Darrell Jay Williams, 50 S.E.C. 1070, 1072 (1992) (Commission rejected argument that respondent acted on advice of counsel not to submit written disclosure until other legal action had been resolved); In re Michael Markowski, 51 S.E.C. 553 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994) (Commission held that Markowski knew or should have known that he could not delegate to his counsel the ultimate responsibility for complying with the NASD's request). See also In re Boren & Co., 40 S.E.C. 217, 225 (1960) (Commission upheld NASD's finding that a member could not refuse to supply copies of additional information requested by the NASD and, instead, offer that the information would be available for examination by or on behalf of the NASD Board of Governors).

Accordingly, we affirm the MRC's determination that Markowski violated Conduct Rule 2110 and Procedural Rule 8210 as alleged in cause seven by failing to submit to an interview as requested by Market Regulation staff.

Sanctions. We concur with the MRC's determination that Markowski and Riccio's misconduct was egregious and that they should be barred in all capacities from the securities industry. The integrity of the securities markets is paramount, and those who engage in activities that manipulate markets cause great harm not only to investors who are involved in the manipulated markets,[38] but to the overall public perception that the markets are driven by the free forces of supply and demand. Moreover, both Markowski and Riccio have shown a decided lack of remorse throughout these proceedings, and have attempted to place responsibility for their actions and inaction on many others, including Shanley, Boccio, and officials of Prudential. See In re Patrick G. Keel, 51 S.E.C. 282 (1993) (Commission affirmed an NASD bar against a respondent who failed to accept responsibility for his own actions and continued to place the blame on others for the circumstances which occurred). Based on their serious misconduct and their insistence as to their lack of responsibility in this action, Markowski and Riccio pose a threat to the public interest if allowed to continue in the securities industry. We therefore find that a bar in all capacities is appropriate as to Markowski and Riccio for their misconduct in

[38] The record does not provide sufficient evidence of monetary harm that occurred to customers in the manipulated markets. The only evidence on this point was testimony from an examiner at the Initial Hearing about Market Regulation staff calculations of loss based on amounts estimated by the customers and reported to staff. Based on the scarcity of evidence on this issue, the age of the transactions, and the fact that Global has been out of business since January 1991, we find that it is not practical to consider restitution to customers as a sanction in this matter.

connection with the manipulation of Mountaintop (cause one), and that a bar is also, separately, necessary for Markowski's failure to submit to the interview requested by Market Regulation staff (cause seven).[39] See Steadman v. SEC, 603 F.2d 1126 (5th Cir. 1979).

We also concur with the censures and costs for the MRC proceedings imposed on both Markowski and Riccio. As to the fines imposed by the MRC, however, we find no support in the record, and no rationale expressed by the MRC, to justify the fine of $3,000,000 for Markowski and $1,000,000 for Riccio. Accordingly, we reduce the fines to $300,000 for Markowski and $250,000 for Riccio.[40] Further, we allocate those fines by cause as follows: Markowski -- $150,000 for cause one, $100,000 for cause four, $30,000 for cause five, and $20,000 for cause seven; Riccio -- $150,000 for cause one, and $100,000 for cause four.

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[39] In imposing these sanctions, we also note that both Markowski and Riccio have prior disciplinary histories. Markowski was censured, fined $50,000, suspended in all capacities for two years, and barred in a principal capacity and from maintaining a debt or equity interest in any member firm, for refusing to allow an on site inspection of his firm's books and records pursuant to a written request by NASD staff. See In re Michael Markowski, 51 S.E.C. 553 (1993) aff'd, 34 F. 3d 99 (2d Cir. 1994).

Riccio entered into an Offer of Settlement on March 20, 1997 with the SEC. The Offer barred him from association with any broker, dealer, investment adviser, investment company or municipal securities dealer. 1997 WL 126708 (SEC). The Offer was in connection with a February 9, 1996 final consent judgment, entered by the United States District Court for the Southern District of New York, which permanently enjoined Markowski and Riccio from future violations of Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Exchange Act and Rules 10b-5 and 10b-6 thereunder. SEC v. Michael J. Markowski and Joseph Riccio, 95 Civ. 6931 (KTD). The SEC's complaint had alleged that Markowski and Riccio manipulated the markets in Capucino, Mountaintop, and Auto Depot. The public administrative proceeding pursuant to Section 15(b) of the Exchange Act remains pending against Markowski.

[40] The applicable NASD Sanction Guidelines ("Guidelines") in this matter are contained in the 1993 edition because the complaint was issued on August 7, 1992. There are no specific guidelines to address the violations found against Markowski and Riccio in causes one and four. The guidelines for the other violations found against Markowski in causes five and seven, respectively, may be found at Guidelines (1993 ed.) at 35 (Restrictive Agreement Violations), and 20 (Failure to Respond or Respond in a Timely Manner to the NASD).

Accordingly, Markowski is censured, barred from associating with any member in any capacity, fined $300,000, and assessed costs of $3,961.88. Riccio is censured, barred from associating with any member in any capacity, fined $250,000, and assessed costs of $3,961.88. The bars imposed herein shall become effective immediately upon issuance of this decision.[41]

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

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

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