BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Market Regulation, Complainant, vs. Respondent, Respondent.	REDACTED DECISION Complaint No. CMS030257 Dated: October 12, 2005

Held, Hearing Panel's findings affirmed and complaint dismissed.

Appearances

For the Complainant: Robert L. Furst, Esq., Jeffrey K. Stith, Esq., Michael R. Levy, Esq., Department of Market Regulation, NASD

For the Respondent: LI, Esq., RJ, Esq.

Decision

The Department of Market Regulation ("Market Regulation") appeals an August 6, 2004 Hearing Panel decision pursuant to Procedural Rule 9311. The Hearing Panel found that Respondent did not commit the violations charged in the complaint when he traded large blocks of Corporation stock between accounts that he controlled. After a thorough review of the record in this case, we affirm the Hearing Panel's findings. We therefore affirm the Hearing Panel's dismissal of the complaint in this matter.

I. Background

A. Respondent

Respondent first associated with “”Firm 1, in 1967. Since that time, he has been registered as both a general securities principal and a general securities representative of Firm 1. Respondent served as the head senior partner of Firm 1 until just shortly before Firm 2 purchased Firm 1 in November 2000.[1] After Firm 1’s purchase, Respondent held the title of senior managing director, but ceded all responsibilities for Firm 1’s operations.

B. Entities Owned or Controlled by Respondent

When the events at issue in this case unfolded, Respondent, in addition to his personal securities account at Firm 1, possessed the authority to make investment and trading decisions for the accounts of three separate legal entities: Company 1, Company 2, and Company 3.

1. Company 1

Respondent is the president of Company 1, an insurance company incorporated in Bermuda. Respondent’s two children own all of the common stock of Company 1, and Respondent owns all of the preferred stock of the company. In August 2001, Company 1 had no employees, and its insurance business was run by another entity on a contract basis. Company 1 maintained a margin account with Firm 1.

2. Company 2

Company 2 is a Delaware corporation wholly owned by Company 4, a non-regulated insurance entity with approximately 300 employees.[2] Company 2 also maintained a margin account with Firm 1.

3. Company 3

Company 3 is a Bermuda corporation wholly owned by Company 1. Like Company 1, it is an insurance company whose business was, at the time of the events at issue in this case, run by another entity on a contract basis. Company 3 also maintained a margin account at Firm 1.

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[1] Firm 1 has since been renamed Firm 3

[2] Company 1 owns a minority interest in Company 4.

C. Procedural History

In a single-cause complaint dated November 5, 2003, Market Regulation charged Respondent with violating Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), SEC Rule 10b-5, and NASD Conduct Rules 3310, 2120, and 2110. Market Regulation alleged that Respondent engaged in a series of four fraudulent "wash and matched trades" of Corporation shares between the accounts that he controlled at Firm 1. Respondent filed an answer in which he denied engaging in any fraudulent practice.

The Hearing Panel held a one-day hearing during which it heard testimony from four witnesses, including Respondent. On August 6, 2004, the Hearing Panel issued a written decision finding Respondent not liable and dismissing the complaint. Market Regulation timely appealed the Hearing Panel's decision.

II. Facts

A. The Favorable Tax Status of Company 1 and Company 2

The facts surrounding the trading with which Market Regulation takes issue in its complaint are largely undisputed. Respondent was a significant investor in the stock of Corporation. By July 2001, he was the beneficial owner of greater than 3.5 million shares -- 6.6 percent of the outstanding shares -- of Corporation. Prior to trading on August 1, 2001, Respondent's interests included holdings of 2,033,500 shares in the Firm 1 account of Company 1 and 700,000 shares in the Firm 1 account of Company 2. Respondent purchased these shares at prices substantially below the market price that Corporation stock reached as of August 1, 2001.

To understand the significance of these holdings and subsequent trading activity, it is first necessary to understand the tax-related footing upon which the entities whose trading Respondent controlled found themselves in August 2001.

First, Company 1 was a tax-exempt entity. As a result of satisfying a statutory provision governing insurance companies that generated minimal revenues from insurance premiums, Company 1's investment profits were sheltered from federal tax. Respondent, however, expected that Company 1 would lose its tax-exempt status in November 2001.

Second, Company 2, although a separate legal entity, maintained a favorable tax position because of its ownership by Company 4. Company 4 possessed roughly $100 million of expiring tax loss carry-forwards that, given Company 2's inclusion within the consolidated tax return of Company 4, could be used to offset any federal taxes on investment profits recognized by Company 2 upon its sale of Corporation stock.

It is against this backdrop that Respondent undertook a series of four trades of large blocks of Corporation stock among the several accounts that he controlled at Firm 1. Respondent desired to capture unrecognized gains from the Corporation holdings of Company 1 and Company 2 while the favorable tax conditions of those companies existed. He also desired, however, to maintain control of the shares of Corporation owned by Company 1 and Company 2.

B. Respondent's Corporation Trades

On August 1, 2001, Respondent placed an order to sell the 700,000 shares of Corporation stock that Company 2 owned and held in its account at Firm 1.[3] At the same time, Respondent placed an order to purchase 700,000 Corporation shares for the Firm 1 account of Company 1. Respondent expected that Firm 1 would cross these orders. This in fact occurred, resulting in Company 1 purchasing the 700,000 Corporation shares sold by Company 2. The 700,000 shares of Corporation traded between the Firm 1 accounts of Company 1 and Company 2 represented 54 percent of the total volume of Corporation shares traded on August 1, 2001. Each of the orders was executed at a price of $18 per share.

Respondent testified before the Hearing Panel that he could not recall the specific instructions he gave concerning each of the trades at issue in this case. When he placed each order, however, he expected that the trade would be priced inside the market. The August 1 trades, however, were executed at a time when the inside bid and ask were $17.07 and $17.14, respectively. The Hearing Panel found credible Respondent's testimony that he did not direct that the trades be effected at a price above the market. The Hearing Panel also found credible the testimony of the order taker from Firm 1's listed order desk that, due to a recent emotional trauma, he most likely failed to promptly relay Respondent's August 1 orders to Firm 1's agency trading department for execution. He thus attempted to rectify his error by having the orders executed at the opening price for the day, when the orders were originally received. We defer to the Hearing Panel's findings. *See*, *e.g.*, *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004) ("Credibility determinations of an initial fact-finder . . . are entitled to considerable weight and deference.")

Next, on August 7, 2001, Respondent placed an order for the sale of 1,000,000 Corporation shares from the Firm 1 account of Company 1. Respondent expected that Firm 1 would cross this order with an order that Respondent also placed to purchase 1,000,000 shares of Corporation for Company 2's Firm 1 account. On August 7, 2001, 1,000,000 shares represented approximately 70 percent of the total daily trading volume for Corporation shares. These trades were executed at a price of $17.50 per share, which was within the inside market, and resulted in Company 2 purchasing the shares from Company 1.

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[3] During his testimony before the Hearing Panel, Respondent could not recall the manner with which he placed the orders for each of the transactions that are the subject of this decision. Respondent testified that he generally would place an order for accounts that he controlled by directing his secretary to place an order on his behalf, calling Firm 1's order room directly, or personally walking the order to the order room. The orders usually were first sent to Firm 1's listed order desk. If the order were for a Nasdaq national market security such as Corporation, the listed order desk would then direct the order to Firm 1's agency trading department for execution.

Respondent placed an order to sell an additional 1,000,000 shares of Corporation from the Firm 1 account of Company 1 on August 9, 2001. This constituted approximately 84 percent of the total daily trading volume of Corporation shares on August 9, 2001. At the same time, he placed two orders, each for 500,000 shares, to purchase Corporation stock. The first buy order was for Respondent's personal account at Firm 1, and the second was placed on behalf of Company 3's Firm 1 account. Respondent again expected that these buy and sell orders would be crossed by Firm 1. In fact, Respondent and Company 3 purchased the shares sold by Company 1. Each of the orders Respondent placed on this date was executed at a price of $17.12 per share, which was within the inside market.

Finally, on August 13, 2001, Respondent placed orders mirroring the trades he had executed four days earlier. As a result of Firm 1 crossing Respondent's orders, Company 1 purchased 1,000,000 shares of Corporation for its Firm 1 account from Company 3 and Respondent, with sales of 500,000 shares apiece from their respective Firm 1 accounts. 1,000,000 shares represented approximately 70 percent of the trading volume for Corporation on this date. Each of the trades was executed at an inside market price of $17.20 per share.

Each of the trades was reported to Nasdaq through the Automated Confirmation Transaction Service ("ACT"). Therefore, information concerning each trade was disseminated to the public. At the end of trading on August 13, 2001, Company 1 and Company 2 held 1,733,500 and 1,000,000 shares of Corporation, respectively, in their Firm 1 accounts. Consequently, there was no change in the total number of Corporation shares that Respondent controlled in the combined accounts of Company 1 and Company 2 as a result of Respondent's trading between August 1 and August 13, 2001.[4] Respondent undertook all but one of the foregoing trades so that Company 1 and Company 2 could recognize tax-advantaged gains on the sale of Corporation stock.[5]

III. Discussion

Market Regulation's complaint alleges that Respondent's August 2001 trading in Corporation shares resulted in "wash and matched trades" that operated as a deceptive scheme in violation of the antifraud provisions of the Exchange Act, as well as SEC and NASD rules.[6]

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[4] Respondent did not again trade Corporation shares in any of these accounts during August 2001.

[5] The August 13 trades were executed so that Company 1 would hold the same number of Corporation shares that it held prior to August 9, as well as to avoid margin interest on the Corporation shares in Respondent's personal account and Company 3's corporate account at Firm 1.

[6] Section 10(b) of the Exchange Act makes unlawful the use or employment of "any manipulative or deceptive device or contrivance" in contravention of SEC rules. 15 U.S.C. § 78j(b). SEC Rule 10b-5 prohibits, in addition to nondisclosure and misrepresentation, "any

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Market Regulation proceeded on the theory that trading, which is allegedly similar in character to wash sales and matched orders, but not undertaken for any manipulative or fraudulent purpose, may be deemed unlawful given the impact that such trading has upon the market for the stock being traded. The Hearing Panel rejected this proposition and dismissed the complaint. We affirm the Hearing Panel's decision.

Section 9(a)(1) of the Exchange Act prohibits wash sales and matched orders when entered "[f]or the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security."[7] 15 U.S.C. § 78i(a)(1). Section 9(a)(2) of the Exchange Act similarly prohibits effecting "a series of transactions in any security registered on a national securities exchange . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others." 15 U.S.C. § 78i(a)(2). Although the prohibitions of Section 9(a) of the Exchange Act describe conduct involving listed securities, these provisions have been applied through Section 10(b) of the Exchange Act to similar manipulative practices effected in the over-the-counter markets. *See, e.g.*, *Smartwood, Hesse, Inc.*, 50 S.E.C. 1301, 1306-07 (1992) (finding respondent violated Section 10(b) of the Exchange Act and SEC Rule 10b-5 by manipulating the price of a stock that was not dictated by supply and demand); *Edward J. Mawod & Co.*, 46 S.E.C. 865, 869-71 (1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979) (finding registered broker-dealer and its general partner aided and abetted over-the-counter manipulation in violation of Exchange Act Section 10(b) and SEC Rule 10b-5); *Michael Batterman*, 46 S.E.C. 304, 308 (1976) (finding respondents violated anti-manipulation provisions of Exchange Act Sections 9(a) and 10(b)).

In this case, Market Regulation does not allege that Respondent's Corporation trading was undertaken for any manipulative purpose prohibited under Sections 9(a)(1) or 9(a)(2) of the Exchange Act.[8] Market Regulation also concedes that wash sales and matched orders are not per

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device, scheme, or artifice to defraud" or any practice "which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5. NASD Conduct Rule 2120 states that "[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

[7] "'Wash' sales are transactions involving no change in beneficial ownership." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 n.25 (1976). "'Matched' orders are orders for the purchase/sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale/purchase of such security." *Id*.

[8] "Manipulation" connotes conduct "designed to deceive or defraud investors by controlling or artificially affecting the price of securities," *Hochfelder*, 425 U.S. at 199, or "artificially affecting market activity in order to mislead investors." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977). Although not relevant to the issues before us on appeal, the

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se unlawful. Here, however, Market Regulation asserts that Respondent's August 2001 Corporation trades fraudulently injected false information into the market for Corporation stock. This allegation is premised upon the thesis that: 1) Respondent's Corporation trades were non-bona fide; 2) the reporting of these trades, allegedly in violation of NASD Conduct Rule 3310, created a false appearance of market activity for Corporation stock; and 3) Respondent therefore defrauded the market. We reject each of the elements upon which Market Regulation's thesis is predicated.

First, we agree with the Hearing Panel that Respondent's August 2001 Corporation trades were bona fide purchases and sales of securities. The fact that Respondent executed trades in Corporation between accounts that he controlled does not make such trades illegitimate or non-bona fide. *See Yoshikawa v. SEC*, 192 F.3d 1209, 1219-20 (9th Cir. 1999) (finding that trades undertaken between controlled accounts in an alleged "parking" scheme were not proven to be non-bona fide); *cf. United States v. Minuse*, 114 F.2d 36, 39 (2d Cir. 1940) (finding error in trial court's refusal to grant counsel permission to ask a witness whether brokerage firms actively trading in stock often buy their own stock, because crossing orders between controlled accounts without an intention to manipulate would not violate the law). Where, as is the case here, trades executed between controlled accounts occur at market prices, with actual market risk being transferred from seller to buyer, we are unable to find, absent additional evidence, that such trades are inherently illicit in character.[9] *Yoshikawa*, 192 F.3d at 1218-19; *Market Regulation Comm. v. Respondents*, Complaint No. CMS950041, 2000 NASD Discip. LEXIS 19, at *10 (NAC Feb. 7, 2000) (finding that trades at prevailing market prices in which actual market risk was transferred bore "the same indicia of bona fide transactions as do the transactions that the court [in *Yoshikawa*] dismissed").

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Hearing Panel concluded that there was insufficient evidence to conclude that Respondent's trades were effected for the purpose of manipulating the price of Corporation shares, inducing anyone to trade in those shares, or creating a false appearance with respect to the market for those shares. We concur. Because the terms "wash sales" and "matched orders" have, in practice, been used coextensively to describe manipulative activities, we decline to use those terms, as Market Regulation does, to define the character of Respondent's Corporation trading in this case.

[9] The 700,000 shares of Corporation stock that Company 1 bought from Company 2 on August 1, 2001, were not again sold by Company 1 during August 2001. Likewise, Company 2 did not again sell the 1,000,000 shares it purchased from Company 1 on August 7, 2001. Although Company 1 repurchased, on August 13, the shares it had sold to Company 3 and Respondent on August 9, 2001, we find nothing in the record to support the conclusion that these were non-bona fide transactions in which the economic consequences of ownership were not transferred in each trade. As stated above, the August 13 trades were undertaken to return ownership of these shares to Company 1 and to avoid the costs associated with such shares in Respondent's and Company 3's accounts. Such "strategic economic decisions" do not render these trades non-bona fide. *See Yoshikawa*, 192 F.3d at 1219.

Second, we also agree with the Hearing Panel that Respondent's trading did not inject false information into the marketplace.[10] In support of its arguments to the contrary, Market Regulation asserts that Respondent's sales of Corporation stock occurred at prices higher than Respondent could have obtained if he had sold the stock in the open market. On the record before us, this assertion is speculative.[11] Even taking at face value Respondent's concession that open market sales of large blocks of Corporation shares could have depressed the price of this inactively traded stock, a person that is conscious of the manner in which his trading decisions will affect the market price of a security does not thereby act unlawfully. *Ala. Farm Bureau Mut. Cas. Co. v. Am. Fid. Life Ins. Co.*, 606 F.2d 602, 616 n.12 (5th Cir. 1979); Loss & Seligman, 8 *Securities Regulation* 3986.35 (3d ed. 2004). Where, as we find here, trading is motivated by a valid economic rationale and executed in a lawful manner, any effect (or avoidance of effect) on the market price of the stock as a result of such trading is not improper. *See GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 207 (3d Cir. 2001) (finding no evidence of deceptive or manipulative conduct where lawful short sales may have contributed to the decline in a stock's price); *In re Olympia Brewing Co. Sec. Litig.*, 613 F. Supp. 1286, 1292 (N.D. Ill. Jan. 30, 1985) ("[F]luctuations in the market price of stock resulting from legitimate trading activities is a natural and lawful result of such activities.").

Finally, we find no evidence in the record that Respondent's trading was deceptive or fraudulent. While we recognize that Section 10(b) of the Exchange Act, as implemented through SEC Rule 10b-5, has aptly been described as a "catchall provision," what it catches must be fraud. *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980). Respondent's trading was prompted by a strategic economic decision, namely the avoidance of taxes.[12] This fact, standing

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[10] Conduct Rule 3310 provides, in pertinent part:

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

IM-3310 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." Because we find above that Respondent's Corporation trades were bona fide, we find that Respondent's reporting of these trades did not violate Conduct Rule 3310.

[11] SEC Rule 11Ac1-4(c)(4) states that block-sized orders for a stock need not be displayed to market makers outside the broker-dealer acting as market maker for such stock.

[12] Market Regulation asserts that Respondent's Corporation trades were not bona fide for tax purposes and thus implies that Respondent engaged in tax fraud. We are not willing to consider such an assertion for the first time on appeal given Market Regulation's failure to assert

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alone, is insufficient to establish that elements of fraud are present. *See Yoshikawa*, 192 F.3d at 1218-1219 (rejecting SEC theory that broker "'created a false and misleading picture'" of his firm's financial condition by executing trades akin to wash and matched sales, where there was no evidence that the trades were executed in bad faith for purpose of impermissibly avoiding a required haircut in the firm's net capital computation).

In an effort to prove otherwise, Market Regulation asserts in its briefs on appeal that Respondent was nonetheless "reckless," and thus liable for fraud, because the "natural consequence" of his trading was to "create a false appearance of market activity." In this respect, Market Regulation posits that large volume trades in an inactively traded stock between controlled accounts by a knowledgeable investor recklessly distort the market. But we are aware of no rule or precedent that would cause trading that serves a legitimate economic function, and is not, as we discuss below, otherwise undertaken as part of a greater manipulative or fraudulent scheme, to run afoul of the antifraud provisions of the federal securities laws because the market could have wrongly interpreted such trading.

Market Regulation further asserts that its "fraud upon the market" theory is supported by a series of related cases decided by the SEC, involving brokers that were found to have aided and abetted the misconduct of a common customer. In each of these cases (all decided on the same day), *Richard D. Chema*, 53 S.E.C. 1049 (1998), *Adrian C. Havill*, 53 S.E.C. 1060 (1998), and *Sharon M. Graham*, 53 S.E.C. 1072 (1998), *aff'd*, *Graham v. SEC*, 222 F.3d 994 (D.C. Cir. 2000), the SEC found that the respondent registered representatives aided and abetted customer John Broumas's trading, akin to wash sales and matched orders, between controlled accounts in violation of the anti-manipulative and antifraud provisions of Section 10(b) of the Exchange Act and SEC Rule 10b-5 there under.[13] We find these cases inapposite.[14]

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such a claim in its complaint or to address it through evidence placed into the record of the proceeding. *Cf. Dist. Bus. Conduct Comm. v. A.S. Goldman & Co.*, Complaint No. C10960208, 1999 NASD Discip. LEXIS 18, at *12 n.8 (NAC May 14, 1999) (declining to address the issue of a rule violation not alleged in the complaint). Furthermore, we do not, by virtue of our decision affirming the Hearing Panel's findings concerning alleged violations of the federal securities laws, pass judgment upon the validity of Respondent's trading for tax purposes.

[13] The SEC found that Broumas violated the Exchange Act by engaging in a fraudulent wash sale scheme and also by engaging in the practice of "marking-the-close." *See, e.g.*, *Richard D. Chema*, 53 S.E.C. at 1055. For purposes of our discussion, however, we focus solely upon the findings of fact and law concerning the wash sales and matched orders effected by Broumas.

[14] In support of its arguments, Market Regulation also relies upon the SEC's decision in *Edward J. Mawod & Co.*, 46 S.E.C. at 869-71. We also find this case inapposite. In *Edward J. Mawod*, the SEC found that respondents, in violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5, aided and abetted customers that engaged in over-the-counter wash sales and matched orders for the specific manipulative purposes prohibited by Section 9(a) of the

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It is true that in each of these cases the SEC rejected respondents' arguments that it was necessary for SEC staff to establish that Broumas acted with a specific manipulative intent, in order to find that Broumas effected a manipulative or deceptive scheme in violation of the general antifraud provisions of the Exchange Act. Rather, the SEC found it sufficient that Broumas either knowingly or recklessly "substantially distorted investors' perception of the market, creating a false appearance of enhanced activity." *Richard D. Chema*, 53 S.E.C. at 1054; *accord Adrian C. Havill*, 53 S.E.C. at 1066; *Sharon M. Graham*, 53 S.E.C. at 1081.

We cannot, however, agree with Market Regulation's broad interpretation of these cases that, as a matter of law, trading like Respondent's recklessly creates a false appearance of market activity and, therefore, is fraudulent. In the cases relied upon by Market Regulation, although there was no evidence that Broumas effected wash trades or matched orders for the specific purpose of creating a false or misleading appearance with respect to the market for such securities, his trading was nonetheless effected as part of an intentional, fraudulent scheme akin to check-kiting that was designed to raise money from the firms that paid him for sales of securities when in fact the ownership of the securities never changed.[15] It was because he used the markets to further his fraudulent purpose that the SEC concluded that "Broumas engaged in a course of conduct that operated as a fraud or deceit as to the nature of the market for [the stock]" for purposes of Section 10(b) of the Exchange Act and SEC Rule 10b-5. *See Richard D. Chema,* 53 S.E.C. at 1054; *Adrian C. Havill*, 53 S.E.C. at 1066 ("Broumas' creation of deceptive market activity was manipulative."); *Sharon M. Graham*, 53 S.E.C. at 1081 (same).

The SEC's findings in the foregoing cases stand for the simple proposition, which we find inapplicable to the facts of this case, that one who does not possess a specific manipulative intent, but who nevertheless possesses the requisite intent to perpetrate a scheme to defraud or deceive others, can be found to have violated the anti-manipulation and antifraud provisions of Section 10(b) of the Exchange Act and SEC Rule 10b-5 thereunder. *See United States v. Charnay*, 537 F.2d 341, 351 (9th Cir. 1976) (finding that an indictment alleging a knowing and intentional artificial depressing of the market price of a company's security, for the purpose of coercing the company's directors to reverse a vote rejecting an offer to acquire the company's assets at a price yielding shareholders a price per share above the depressed market price, was sufficient to allege a violation of Section 10(b) and SEC Rule 10b-5); *Michael B. Jawitz,* Exchange Act Rel. No. 44357, 2001 SEC LEXIS 1042, at *14-18 (May 29, 2001) (finding that broker who entered and then cancelled fictitious limit orders as part of an intentionally deceptive and fraudulent scheme to control his inventory, increase profitability of a proprietary account, and avoid execution mandated by his firm's policy concerning competing limit orders, also

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Exchange Act. *Id.* As we state above, Market Regulation does not allege that Respondent acted with any manipulative purpose.

[15] Because the stock was held in margin accounts, Broumas could obtain proceeds from his sales of stock one day after his trades were completed, but could delay paying for the corresponding purchases until the settlement date, which--at the time--was one week later.

defrauded the market generally by causing the dissemination of false and materially misleading trading information); *Thornton & Co.*, 28 S.E.C. 208, 224 n.21 (1948) (finding that registrant who engaged in a kiting operation to finance purchase of stocks, but claimed in defense that he did not effect over-the-counter wash sales and matched orders for any manipulative purpose, could not "be heard to say that the consequent misleading and false market . . . is none of his concern because his own private interest happened to be served"), *aff'd*, 171 F.2d 702 (2d Cir. 1948).

In sum, absent any identified and proven improper or illegal purpose associated with Respondent's trading, there is no basis upon which to hold that Respondent's activities violated Exchange Act Section 10(b), SEC Rule 10b-5, or NASD Conduct Rules 3310 and 2120.

Finally, we turn to the alleged violation of NASD Conduct Rule 2110.[16] As the SEC has stated, "[i]f no other rule has been violated, a violation of Rule 2110 requires evidence that the respondent acted in bad faith or unethically." *Chris Dinh Hartley*, Exchange Act Rel. No. 50031, 2004 SEC LEXIS 1507, at *10 n.13 (July 16, 2004). Given our findings above, we cannot find that Respondent violated NASD Conduct Rule 2110 alone.

IV. Conclusion

We affirm the Hearing Panel's findings and dismissal of the complaint in this case alleging that Respondent violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Conduct Rules 3310, 2120, and 2110.[17]

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

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[16] Conduct Rule 2110 provides that a member "shall observe high standards of commercial honor and just and equitable principles of trade." Pursuant to NASD Rule 115(a), this rule applies to all members and persons associated with a member.

[17] We also have considered and reject without discussion all other arguments advanced by the parties.