

NASD REGULATION, INC.  
OFFICE OF HEARING OFFICERS

---

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CMS980108
v.	:	
	:	<b>Hearing Panel Decision</b>
	:	
	:	Hearing Officer - Ellen B. Cohn
	:	
	:	July 29, 1999
Respondent.	:	

---

*Digest*

The Department of Enforcement's Complaint charges that Respondent \_\_\_\_\_, a registered broker-dealer, violated SEC Rule 11Ac1-1(c), NASD Conduct Rules 3320 and 2110, and Marketplace Rule 4613(b) by failing to honor its published quotations when presented with 12 preferred SelectNet liability orders to purchase or sell securities. The Complaint also alleges that Respondent, in violation of NASD Conduct Rules 3010 and 2110, failed to establish, maintain, and enforce written supervisory procedures to ensure compliance with the SEC and NASD firm quote rules. Respondent filed an Answer denying the substantive allegations in the Complaint and, thereafter, requested a hearing. The Hearing Panel found that Respondent committed the violations charged in the Complaint. As for sanctions, the Hearing Panel censured Respondent and fined it \$9,000.

*Appearances*

Tamara L. Sesok-Schmidt, Senior Attorney, Rockville, Maryland, Michael D. Wolk, Chief Counsel, Rockville, Maryland (Rory C. Flynn, Chief Litigation Counsel, Washington, DC, Of Counsel), for the Department of Enforcement.

\_\_\_\_\_, New York, New York for Respondent

\_\_\_\_\_.

**DECISION**

**I. Introduction**

On January 14, 1999, the Department of Enforcement (Enforcement) filed a two cause Complaint against Respondent \_\_\_\_\_ (“\_\_\_\_\_” or “Respondent”). Cause One charges that the firm, on 12 separate occasions, failed to honor its published quotations when presented with preferenced SelectNet liability orders to purchase or sell securities.<sup>1</sup> According to the Complaint, \_\_\_\_\_ failed to execute an order to sell 10,000 shares of LASX presented on October 1, 1997, an order to buy 2,500 ZNRGW presented on October 7, 1997, and 10 orders to sell VLNT presented on December 12, 1997, notwithstanding that each of these orders was priced at \_\_\_\_\_’s published quotations and within its published size, as displayed in the Nasdaq system at the time of presentment. Based on the foregoing, Enforcement charges \_\_\_\_\_ with violating SEC Rule 11Ac1-1(c) (the “SEC firm quote rule”), NASD Conduct Rule 3320 and Marketplace Rule

<sup>1</sup> SelectNet is a screen-based order negotiation and execution service. It allows NASD members to direct or broadcast orders in Nasdaq securities to market makers or Electronic Communications Network (ECN) market participants, and to negotiate the terms of orders by entering counter-offers. When a SelectNet order is directed to a particular market maker or ECN market participant, it is known as a “preferenced” order. A preferenced SelectNet liability order is an order presented to a particular market maker at a price at least as favorable as its current bid or offer and within its displayed quote size at the time of order entry.

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

4613(b) (the “NASD firm quote rules”), and NASD Conduct Rule 2110. Cause Two charges that, from September 2, 1997 to December 31, 1997, \_\_\_\_\_, in violation of NASD Conduct Rules 3010 and 2110, failed to establish, maintain, and enforce written supervisory procedures to ensure compliance with the SEC and NASD firm quote rules. Respondent filed an Answer in which it denied the charges and, at the Initial Pre-Hearing Conference, requested a hearing.<sup>2</sup>

A hearing in this proceeding was held on May 27, 1999,<sup>3</sup> before a Hearing Panel composed of an NASD Hearing Officer, a current member of the Market Regulation Committee, and a current member of the District Committee for District 10.<sup>4</sup> During the hearing, Enforcement offered the testimony of one witness, Terry L. Kirby, Jr., who is a team leader in the Firm Quote Compliance section of the Market Regulation Department of NASD Regulation, Inc. (NASDR) (Tr. 36-37), and 16 exhibits, all of which were admitted in evidence.<sup>5</sup> \_\_\_\_\_ offered the testimony of two witnesses, its President, \_\_\_\_\_, and \_\_\_\_\_, an order clerk and over-the-counter trader at \_\_\_\_\_ during the relevant period (Tr. 152-53), and two exhibits, which were admitted in

---

<sup>2</sup> See Transcript of Initial Pre-Hearing Conference, p. 5.

<sup>3</sup> References to the transcript of the hearing are cited as “Tr. \_\_\_\_.”

<sup>4</sup> Because the Complaint contained a cause of action involving alleged violations of a statute or rule described in Code of Procedure Rule 9120(s), *i.e.*, the execution of transactions and trading practices, Enforcement requested that one of the panelists be a current or former member of the Market Regulation Committee. Although Respondent requested and was granted the opportunity to respond to Enforcement’s request, it never did so. (See Order Regarding Enforcement’s Request for the Appointment of a Market Regulation Committee Member as a Hearing Panelist, dated March 23, 1999.) Accordingly, the Deputy Chief Hearing Officer, pursuant to Rule 9231(b)(2), appointed a current member of the Market Regulation Committee to serve as a Hearing Panelist in this proceeding.

<sup>5</sup> Thirteen of the exhibits offered by Enforcement had been pre-marked by the Parties as joint exhibits, *i.e.*, JX 1-12, 14, and were admitted without objection. Two of the three additional exhibits offered by Enforcement, CX 1 and CX 3, were admitted in evidence over Respondent’s objections, and CX 2 was admitted without objection. (Tr. 65-68, 83-84.)

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

evidence.<sup>6</sup> In addition, prior to the hearing, the Parties filed stipulations concerning many of the relevant underlying facts.<sup>7</sup>

## **II. Findings of Fact and Conclusions of Law**

### **A. Background**

At all times relevant, \_\_\_\_\_ was registered as a broker-dealer pursuant to the Securities Exchange Act of 1934 and was a member of the National Association of Securities Dealers, Inc. (NASD). Its registration and membership are currently in effect. (Stip. ¶ 1.) Further, during all times relevant, \_\_\_\_\_ was registered with the Association as a market maker in Lasertechnics, Inc. (“LASX”), Zydeco Energy Incorporated Warrants (“ZNRGW”), and Videolan Technology, Inc. (“VLNT”), all of which were listed to trade on the Nasdaq National Market. (Stip. ¶ 2.)

\_\_\_\_\_ has been censured and fined previously by the Association for, among other things, technical trade reporting and other market-related violations, and supervisory deficiencies. On or about \_\_\_\_\_, the Association accepted a Letter of Acceptance, Waiver, and Consent (AWC), in which the firm agreed to findings, without admitting or denying, that it: (1) violated the late trade reporting requirements in Marketplace Rule 6620(a); (2) failed to report various ACT transactions as required by Marketplace Rule 6130(b); (3) failed to display a customer limit order and failed to promptly update its quotations after receiving limit orders as required by SEC Rule 11Ac1-

---

<sup>6</sup> One of the exhibits offered by Respondent had been pre-marked by the Parties as a joint exhibit (JX 13) and the other exhibit offered by Respondent, RX 1, was admitted in evidence over Enforcement’s objection. (Tr. 212-15.) Prior to the hearing, at the Final Pre-Hearing Conference, the Hearing Officer sustained Enforcement’s objections to six of Respondent’s proposed exhibits, *i.e.*, RX 3-4, 6-8, 11, and sustained, in part, Enforcement’s objections to two of Respondent’s other proposed exhibits, *i.e.*, RX 9 and RX 10. (Respondent did not seek to introduce at the hearing any portion of RX 9 or RX 10.) Prior to the hearing, the Hearing Officer also granted Enforcement’s motion to preclude testimony from an NASDR examiner about a routine examination conducted by NASDR’s District 8 Office. (See Order Following Final Pre-Hearing Conference, dated May 21, 1999.)

<sup>7</sup> References to the Parties’ Stipulations, filed on May 3, 1999, are cited as “Stip. ¶ \_\_\_\_.”

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

1c(5) and 11Ac1-4; and (4) failed to establish and maintain adequate written supervisory procedures with respect to trade reporting and ACT compliance, and various trading and market making rules.

Pursuant to the AWC, the firm consented to the imposition of a censure, a \$4,000 fine, and agreed to take corrective steps to prevent further misconduct. (JX 14.)<sup>8</sup>

**B. \_\_\_\_\_'s Failure to Honor the Firm Quote Rules: (Cause One)**

Enforcement instituted this proceeding as a result of a Firm Quote Compliance System<sup>9</sup> quarterly review, for the period September through December 1997, conducted by NASDR's Market Regulation Department. (Tr. 42.)

*(1) The SelectNet Orders Presented to \_\_\_\_\_*

The timing, price, size, and circumstances surrounding the presentment of the SelectNet orders, which are the basis of the alleged violations of the SEC and NASD firm quote rules, are, in most respects, undisputed.

- On October 1, 1997, at 14:15:48, Network 1 Financial Securities, Inc. ("NETW") sent \_\_\_\_\_ a preferenced SelectNet order to sell 10,000 shares of LASX at \$.625 per share.

(Stip. ¶ 3; JX 1; Tr. 68.)

---

<sup>8</sup> In 1991 and 1986, \_\_\_\_\_ was censured and fined by the NASD for other technical violations, and in 1986 was censured and fined by state authorities for offering and selling securities when it was not registered to do so. (JX 14.)

<sup>9</sup> The Firm Quote Compliance System is an automated surveillance system developed by NASDR to permit the resolution of backing away complaints on a real-time basis. In the absence of complaints, the Firm Quote Compliance System also aids in identifying firms that demonstrate a pattern of failing to respond to SelectNet liability orders. Special NASD Notice to Members 97-67, 1997 NASD LEXIS 95, at \*1 (Oct. 1997).

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

- On October 7, 1997, at 12:13:49, Van Kasper & Company (“VKCO”) sent \_\_\_\_\_ a preferred SelectNet order to buy 2,500 ZNRGW at \$1.625 per warrant. (Stip. ¶¶ 4; JX 4; Tr. 76-77.)

- On December 12, 1997, during approximately a nine minute period, from 15:24:02 to 15:33:23, ten preferred SelectNet orders were sent to \_\_\_\_\_ to sell shares of VLNT, as follows: (1) at 15:24:02 Troster Singer Stevens Rothchild Corp. (“TSCO”) sent an order to sell 25,000 shares of VLNT at \$.031; (2) at 15:26:00, Herzog, Heine, Geduld, Inc. (“HRZG”) sent an order to sell 50,000 shares of VLNT at \$.031; (3) at 15:26:33, Wien Securities Corp. (“WIEN”) sent an order to sell 250,000 shares of VLNT at \$.031; (4) at 15:26:49, Wm. V. Frankel & Co., Inc. (“FRAN”) sent an order to sell 2,500 shares of VLNT at \$.031; (5) at 15:27:47 FRAN sent an order to sell 2,500 shares of VLNT at \$.031; (6) at 15:28:13, Kaufman Bros., L.P. (“KBRO”) sent an order to sell 100,000 shares of VLNT at \$.031; (7) at 15:29:13, Sherwood Securities Corp. (“SHWD”) sent an order to sell 10,000 shares of VLNT at \$.031; (8) at 15:30:43, TSCO sent an order to sell 50,000 shares of VLNT at \$.031; (9) at 15:32:44, KBRO sent an order to sell 100,000 shares of VLNT at \$.031; and (10) at 15:33:23, H. J. Meyers & Co., Inc. (“HJMC”) sent an order to sell 50,000 shares of VLNT at \$.031. (Stip. ¶¶ 5-14; JX 7.)

Each of the 12 orders was for a minimum acceptable quantity of “ANY” (Stip. ¶¶ 3-14), meaning that the order entry party was willing to accept a partial execution. During all times relevant, \_\_\_\_\_’s displayed quotation size for LASX, ZNRGW, and VLNT was 500 shares. (JX 2, 5, 8; CX 1-3; Tr. 69.) Further, each of the orders to sell was presented at \_\_\_\_\_’s then current published bid, as displayed on the Nasdaq system (Stip. ¶¶ 3, 5-14; see also JX 1-2, 7-8; CX 1, 3), and the one order to purchase was presented at the firm’s then current published offer, as displayed on

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

the Nasdaq system. (Stip. ¶ 4; see also JX 4-5; CX 2.) Each order “timed out” approximately three minutes after presentment.<sup>10</sup> (Stip. ¶¶ 3-14; see also JX 1, 4, 7; CX 1-3; Tr. 70, 77-79.)

The Market Maker Price Movement Reports for LASX, ZNRGW, and VLNT confirm that \_\_\_\_\_ did not revise its quoted price or size for these securities before it was presented with any of the subject SelectNet orders. (JX 2, 5 8; see also CX 1-3; Tr. 70, 77, 85-87.) The Equity Audit Trails for LASX, ZNRGW, and VLNT confirm that \_\_\_\_\_ was not in the process of effecting a transaction in any of these securities at the time it was presented with the SelectNet orders to sell or purchase these securities. (JX 3, 6, 9; see also CX 1-3; Tr. 69, 77, 85- 87.)

On October 1, 1997, at 14:19:35 – approximately four minutes after NETW sent \_\_\_\_\_ its original order to sell LASX and after that order timed out – NETW sent \_\_\_\_\_ a subsequent preferred SelectNet order to sell 10,000 shares of LASX. \_\_\_\_\_ executed that order and thereafter updated its quotations for LASX. (JX 1; see also CX 1, Tr. 71.) On October 7, 1997, at 12:26:56 – approximately 13 minutes after VKCO sent \_\_\_\_\_ its order to buy 2,500 ZNRGW at \$1.625 and after that order timed out – \_\_\_\_\_ sent VKCO a preferred SelectNet order to sell 2,500 shares of ZNRGW at \$1.625. (JX 4; see also CX 2, Tr. 78.) VKCO executed that order and \_\_\_\_\_ thereafter updated its quotations for ZNRGW. (JX 4-5; see also CX 2.)

Despite Respondent’s claims to the contrary, the subsequent orders for LASX and ZNRGW were not the same orders that were originally presented to Respondent:<sup>11</sup> each of the

---

<sup>10</sup> Preferred orders remain “live” in SelectNet for a period of three minutes, after which they will expire if unaddressed.

<sup>11</sup> Tr. 65-68; see also JX 11 (\_\_\_\_\_’s response to the Market Regulation Department’s “Wells letter”).

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

four orders was identified by a unique SelectNet reference number. (Tr. \_\_\_\_\_ 68-69, 71, 79, 85.)

Further, \_\_\_\_\_ did not receive a subsequent order from VKCO to buy ZNRGW, but instead sent VKCO an order to sell ZNRGW. (JX 4; Tr. 78.)

(2) \_\_\_\_\_'s *Explanation for its Failure to Execute the Subject SelectNet Orders*

\_\_\_\_\_ claims that its failure to execute the 12 SelectNet orders at issue was not intentional. As to the firm's failure to execute the order to sell LASX, Mr. \_\_\_\_\_ speculated that, because his Nasdaq workstation terminal screen had only three lines devoted to SelectNet orders, the order probably "scrolled off" the screen before he saw it. (Tr. 154-56; see also JX 13.) Similarly, as to the failure to execute VKCO's order to buy ZNRGW, Mr. \_\_\_\_\_ "guessed" that the order "scrolled off and [he] never noticed it." (Tr. 157, 190; see also JX 13.)

As to the ten orders to sell VLNT, \_\_\_\_\_ claims that its failure to execute stemmed from a single event involving an unfortunate confluence of circumstances. According to \_\_\_\_\_, during Mr. \_\_\_\_\_'s brief absence from the trading desk, other market makers in VLNT withdrew their quotations, and \_\_\_\_\_ was "bombarded" with a "bunch" of preferenced orders to sell VLNT. (Tr. 158-59.) In Mr. \_\_\_\_\_'s absence, \_\_\_\_\_'s other order clerks responded by attempting to lower the firm's then current bid of 1/32, apparently unaware that the Nasdaq system would not accept any quotation lower than 1/32. (Tr. 159-60, 178-79.) Nine minutes elapsed, during which \_\_\_\_\_ attempted four times, without success, to change its quotations for VLNT. (JX 8; CX 3; see also Tr. 178.) According to \_\_\_\_\_, during the confusion resulting from its inability to lower its bid, it failed to execute any of the incoming orders to sell VLNT. (Tr. 231-32; JX 11.)



**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

Ultimately, \_\_\_\_\_ withdrew from the market without executing any of the ten orders presented.

(JX 8, 11; CX 3; Tr. 160-61.)

Although Mr. \_\_\_\_\_'s testimony about the reasons for missing the LASX and ZNRGW orders was based on speculation and Respondent did not adduce any non-hearsay testimony about the circumstances surrounding the presentation of the VLNT orders, the Hearing Panel finds Respondent's explanations plausible. No evidence was introduced to suggest that Respondent's failure to execute the subject SelectNet orders was motivated by an improper purpose. In fact, \_\_\_\_\_ remediated its failures to execute the LASX and ZNRGW – albeit only after the missed orders were brought to the firm's attention by the respective order entry firms. And, as to VLNT, the Hearing Panel notes that, as Respondent suggested at the hearing, its failure to comply with the firm quote rules was not likely motivated by economic considerations: \_\_\_\_\_ could have complied with the rules by executing the first of the ten orders presented, for a mere \$16, and thereafter withdrawn from the market.<sup>12</sup>

(3) *The Firm Quote Rules*

SEC Rule 11Ac1-1 requires a market maker “to execute any order to buy or sell a subject security, other than an odd-lot order, presented to it by another broker or dealer . . . at a price at least as favorable” as the market maker's published quotation up to its published quotation size. Exceptions to the Rule exist only if: (a) the market maker revises its quoted price or size and communicates its revision to The Nasdaq Stock Market prior to the presentment of the order; or (b) at the time the order is presented, the market maker is in the process of effecting a transaction and, immediately after the

---

<sup>12</sup> Tr. 30-31, 161-62, 271-72.

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

completion of such transaction, communicates a revised quotation price or size to The Nasdaq Stock Market.<sup>13</sup> Neither exception is applicable here, and Respondent does not contend otherwise.

Further, and of relevance here, the SEC, in its “Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the Nasdaq Stock Market” (the “21(a) Report”), has made clear that a market maker’s obligation to fill an order begins at the time the order is “presented,” regardless of how the order is transmitted to the market maker: “[t]he firm quote rule is triggered when an order is ‘presented’ to the market maker. Because all directed SelectNet orders are delivered to a particular market maker, the presentment of an order is readily ascertainable.”<sup>14</sup> Moreover, the SEC and NASD firm quote rules do not excuse inadvertent failures to comply. In this connection, the SEC emphasized, in its 21(a) Report, that “the fact that SelectNet orders may have scrolled off the most frequently used screen on the Nasdaq workstation terminal does not excuse traders from complying with the firm quote rule.”<sup>15</sup>

At the hearing, \_\_\_\_\_ ultimately conceded that it violated the “strict letter of the law” (Tr. 235-36), but claimed that its violative conduct should be excused because the firm adhered to the “strict letter of [its] **understanding** of the law” (Tr. 229) and complied with the “intent of the law.” (Tr. 235; see also Tr. 256.) In this connection, Mr. \_\_\_\_\_ testified,

it was our intention . . . not to allow an order to scroll off. And if it did scroll off and we were made aware of it, we would make immediate redress and honor our quotation.

---

<sup>13</sup> Similarly, NASD Conduct Rule 3320 provides: “[n]o member shall make an offer to buy from or sell to any person any security at a stated price unless such member is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell.” (Emphasis added.) NASD Marketplace Rule 4613(b) provides: “[a] market maker that receives an offer to buy or sell from another member of the Association shall execute a transaction for at least a normal unit of trading at its displayed quotations as disseminated in The Nasdaq Stock Market at the time of receipt of any such offer.”

<sup>14</sup> 21(a) Report, pp. A-54-55, 1996 SEC LEXIS 2123, at \*210 (Aug. 8, 1996).

<sup>15</sup> Id.

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

So we were not in violation of the intent of the law, but we were in violation of the strict letter of the law as interpreted by the NASD . . . . (Tr. 235-36.)

\_\_\_\_\_ thus contends that it complied with the “intent” of the SEC and NASD firm quote rules by filling NETW’s subsequent order to sell LASX – approximately four minutes after the presentment of NETW’s original LASX order – before the firm updated its quotations for that security. Respondent also contends that it did not “back away” from its obligation to honor its quotations for ZNRGW. In this regard, \_\_\_\_\_ cites to the fact that – after receiving a telephone call from VKCO seeking execution (Tr. 190-91) – it filled VKCO’s original order to buy 2,500 ZNRGW at \$1.625 by sending VKCO a preferenced SelectNet to sell 2,500 ZNRGW at \$1.625, which VKCO executed approximately 15 minutes after the presentment of its original order. (Tr. 157-58, 162, 234.)<sup>16</sup> Similarly, Respondent suggests that it would have executed the missed VLNT orders if requested to do so by the order entry firms. (Tr. 176.)

That Respondent may have complied with its own interpretation of the firm quote rules is simply not a defense. A member cannot substitute its interpretation (or its view of the purpose) of a rule for the plain language of the rule to avoid liability for violative conduct. The SEC firm quote rule is clear and unambiguous on its face. It does not excuse inadvertent failures to comply and does not excuse a market maker from honoring its quotes, if it thereafter remediates its misconduct by executing missed orders when they are brought to the market maker’s attention. To the contrary, the SEC has made clear that, absent the existence of one of the two exceptions set forth in SEC Rule 11Ac1-1(c), a

---

<sup>16</sup> Both Mr. \_\_\_\_\_ and Mr. \_\_\_\_\_ testified that, in their view, no violation of the firm quote rules occurred if a firm failed to execute a preferenced SelectNet order, but did not change its quotations after presentment of the order. (Tr. 167, 215, 234.)

market maker has a fundamental obligation to honor its quotations and execute liability orders upon presentment.<sup>17</sup>

Moreover, the Hearing Panel is concerned about the practical ramifications of Respondent's position: it improperly shifts the burden to the order entry firm to send a subsequent order, telephone the market maker, or pursue some other means to obtain execution of its order. In addition, it places the order entry firm in the unfair position of not knowing whether its order has been properly acted upon or declined. This impairs pricing efficiency and the orderly operation of the Nasdaq market, and is potentially detrimental to investors. The Hearing Panel is particularly troubled by Respondent's interpretation of the law as applied to the VLNT orders. There, despite the fact that the firm was aware it missed several SelectNet orders, it took no steps to determine if the respective order entry firms were interested in obtaining execution of their orders. Instead, \_\_\_\_\_ waited for the order entry firms to contact it, if they were interested in transacting. In this connection, Mr. \_\_\_\_\_ testified:

Q. Did anybody raise the idea of picking up the telephone and scrolling back to those orders and calling those firms to see if they wanted their orders filled?

A. No, because they could very well have called us if they wanted the orders filled.

Q. So if you missed the order, and you know you have missed the order, you'll wait for them to call you because if they really want to trade they'll call you?

A. However long that was, by the time I got back the dust settled, and nobody called. So we assumed nothing happened because everybody else was dropping the stock.

Q. So unless there is a complaint you didn't feel an obligation to try and fill those trades?

A. Right.

---

<sup>17</sup> 21(a) Report, pp. A-47, A-54, 1996 SEC LEXIS 2123, at \*192-94, 210.

(Tr. 176.)

(4) Respondent's Objections to this Proceeding

\_\_\_\_\_ also objected on various grounds to the institution of this proceeding. The Hearing Panel has considered and rejected each of Respondent's objections.

(a) Selective Prosecution

\_\_\_\_\_ claimed that this proceeding represented "selective" or "uneven" enforcement" (Tr. 94-95, 216; see also JX 13)<sup>18</sup> and that the NASD used special "criteria to go after [it]." (Tr. 104.)

To establish selective prosecution, a respondent must demonstrate both that it was singled out for enforcement action while others similarly situated were not, and that the action was motivated by arbitrary or unjust considerations, such as race, religion, or the desire to prevent the exercise of a constitutionally protected right. United States v. Huff, 959 F. 2d 731, 735 (8<sup>th</sup> Cir.), cert. denied, 506 U.S. 855 (1992); In re Michael Markowski, 51 S.E.C. 553, 559 n.23 (1993), aff'd 34 F.3d 99 (2d Cir. 1994) (rejecting respondent's claim that he was "singled out" for prosecution for failing to respond to requests for information, when the NASD did not seek to obtain the information from any of the principals at the firm); In re George H. Rather, Exchange Act Release No. 36688, 1996 SEC LEXIS 85, at \*6 (Jan. 5, 1996) (rejecting respondent's claim that he was a victim of selective prosecution when the NASD was aware of, but did not prosecute, more serious violations committed by his firm and other employees); District Business Conduct Committee No. 2 v. Gallison, Complaint No.

---

<sup>18</sup> \_\_\_\_\_ suggested that the Market Regulation Department's statistical analysis that led to the institution of this proceeding, which involved, among other things, a comparison of its missed SelectNet liability orders with an industry average (see JX 10), was not "an evenhanded evaluation." (JX 13.) According to \_\_\_\_\_, because it receives relatively few SelectNet orders, its percentage of missed SelectNet liability orders would likely be higher than a firm that receives thousands of SelectNet orders. (Tr. 34.) \_\_\_\_\_ also argued that it was prosecuted based on a statistical anomaly, and that a statistical analysis of its compliance with the firm quote rules during the prior and subsequent review periods demonstrates that this proceeding should not have been brought. (Tr. 115-16.)

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

C02960001, 1999 NASD Discip. LEXIS 8, at \*61 (NAC Feb. 5, 1999) (rejecting respondents' claim that the disciplinary proceeding was motivated by the NASD's "animus" toward penny stock firms).

\_\_\_\_\_ simply has not presented a theory of selective prosecution that satisfies the elements of such a claim.<sup>19</sup>

(b) Abuse of Prosecutorial Discretion

In a similar vein, \_\_\_\_\_ argued that Enforcement abused its prosecutorial discretion by instituting this proceeding because the Complaint does not allege that Respondent engaged in a pattern of "backing away." Respondent suggests that, absent a pattern, a disciplinary action for violations of the SEC and NASD firm quote rules is per se inappropriate, and that it had no prior notice that isolated incidents of "backing away" might be the subject of disciplinary action.<sup>20</sup> In support of these arguments, Respondent relies on Special NASD Notice to Members 97-67 (October 1997) (the "Notice to Members"), in which the NASD, in the context of advising firms about the institution of the Firm Quote Compliance System, indicated that its surveillance efforts would focus on "patterns of behavior indicative of potential violations of Rule 11Ac1-1."<sup>21</sup> Respondent also relies on the so-called "Wells

---

<sup>19</sup> There is in fact nothing in the record to suggest that \_\_\_\_\_ was singled out for prosecution. At the hearing, there was considerable testimony about the statistical analyses, procedures, and parameters used by NASDR's Market Regulation Department to determine what firms to select for potential disciplinary action. (See, e.g., Tr. 42-58, 96-98, 102-08.) No special criteria were applied to single out \_\_\_\_\_. And, although firms that received less than 100 orders per month generally were excluded from review (Tr. 51, 102-03), \_\_\_\_\_ did not fall into this category. During the four-month review period, the firm received a total of 692 SelectNet liability orders or an average of 173 SelectNet liability orders per month. (Stip. ¶¶ 15-18.)

<sup>20</sup> As a related matter, Respondent also contends that the ten incidents of "backing away" involving VLNT should be treated, for purposes of liability (as well as sanctions) as one incident, because the firm's failures to execute the orders arose out of a single event. The Hearing Panel rejects this argument. Each of the VLNT orders at issue was a separate order represented by a unique SelectNet reference number. (JX 7; CX 3; Tr. 85.) The SEC firm quote rule does not contemplate "batching" orders for the purpose of ascertaining how many violations occurred: the rule refers to a market maker's obligation to "execute any order to buy or sell a . . . security . . ." (Emphasis added.)

<sup>21</sup> 1997 NASD LEXIS 95, at \*1.

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

letter” issued by the Market Regulation Department, which indicated that the investigation underlying this proceeding focused on “patterns” of non-compliance with the firm quote rules.

Respondent’s arguments, whether cast as an abuse of prosecutorial discretion or as a lack of notice,<sup>22</sup> are insufficient to avoid a finding of liability for its failures to honor the SEC and NASD firm quote rules. To be sure, the Complaint does not allege a pattern of misconduct, but rather 12 discrete incidents where the firm violated the SEC and NASD firm quote rules by failing to honor its published quotations. However, there is no “safe harbor” in either the SEC or NASD’s firm quote rules for isolated incidents of “backing away”: as the SEC stated, “Nasdaq market makers must consistently honor their quotes to safeguard the integrity of Nasdaq as a viable dealer market.”<sup>23</sup> (Emphasis added.)

Nor has the NASD, in the Notice to Members or otherwise, created a “carve-out” that would insulate firms from disciplinary action alleging isolated incidents of “backing away.” The Notice to Members describes, among other things, how the NASD will process alleged backing away complaints and respond to other potential rule violations identified by the Firm Quote Compliance System. The Notice to Members does include the following statement: “NASD Regulation will not pursue immediate disciplinary action for an individual backing-away complaint in which a contemporaneous trade execution is obtained or offered.” (Emphasis added.) This language, however, contemplates a specific situation, which is not present here. Moreover, in the very same paragraph, the NASD indicates that, under certain circumstances, disciplinary proceedings may be brought to redress individual instances of

---

<sup>22</sup> To the extent Respondent suggests that the firm quote rules were, in 1997, “new” rules (Tr. 24, 217), it is mistaken. The Hearing Panel also notes that, although the NASD is not obligated to remind its members to comply with the federal securities laws and rules, and the NASD’s rules, the NASD – years before issuing Special Notice to Member 97-67 – reiterated that members must comply with the firm quote rules. See NASD Regulatory & Compliance Alert, Vol. 8, No. 2, “NASD Reiterates Members’ Firm-Quote Obligations” (June 1994). Finally, Respondent’s purported lack of notice that the NASD would “strictly” enforce the firm quote rules is belied by Mr. \_\_\_\_\_’s testimony that he received and read the SEC’s 21(a) Report soon after it was issued in August 1996. (Tr. 249.)

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

backing away. In sum, there is simply nothing in the Notice to Members that limits the NASD's prosecutorial discretion to institute proceedings alleging isolated incidents of backing away. Further, that the Market Regulation Department's investigation may have focused on "patterns" of non-compliance does not preclude the institution of disciplinary proceedings alleging isolated violations.

The Hearing Panel also notes that, in the federal system, courts will not exercise their authority to review claims of abuse of prosecutorial discretion absent facts demonstrating selective prosecution,<sup>24</sup> which the Panel already has found to be absent in this case. Federal courts routinely defer to the prosecutorial authorities to discharge their responsibilities in an appropriate fashion.<sup>25</sup> "The decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." Wayte v. United States, 470 U. S. 598, 607 (1985).<sup>26</sup> The Hearing Panel believes that, although this is a businessman's forum and not a court of law, these general precepts are equally applicable here and, therefore, declines to "second guess" Enforcement's decision to institute this proceeding. The Hearing Panel is especially unwilling to do so

---

<sup>23</sup> 21(a) Report, p. 28, 1996 SEC LEXIS 2123, at \*62.

<sup>24</sup> See United States v. Niedelman, 356 F. Supp. 979, 984 (S.D.N.Y. 1973). See also United States v. Hsia, 24 F. Supp. 2d. 33, 48 (D.D.C. 1998) ("Prosecutorial discretion is not unlimited, and its exercise is subject to constitutional constraints. (Citation omitted.) A prosecutor may make legitimate choices but may not select to prosecute an individual on the basis of race, religion or other arbitrary classifications.").

<sup>25</sup> See, e.g., United States v. Archer, 486 F.2d 670, 678 (2d Cir. 1973) (the "responsibility for keeping . . . investigations and prosecutions within the bounds appropriate on the assumptions inherent in a federal system should rest, in the first instance, with United States Attorneys under the active guidance of the Attorney General").

<sup>26</sup> See also, e.g., United States v. Campo, No. 83 Cr. 243-CSH, 1983 U. S. Dist. LEXIS 15629, at \*17 (S.D.N.Y. July 7, 1983) ("The decision to prosecute . . . entails the weighing and balancing of numerous factors, many of which are not proper subjects for judicial inquiry absent, at the very least, a clear indication of prosecutorial overreaching.").



**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

given the SEC's previously expressed concerns about the NASD's lack of vigilance in enforcing the firm quote rules<sup>27</sup> and its mandate requiring the NASD to strictly enforce the rules.<sup>28</sup>

(c) The Absence of a Prior Warning

\_\_\_\_\_ also argued that where the violations are de minimis and Respondent did not have a history of firm quote rule violations, Enforcement or the NASD, before instituting any disciplinary action, should have issued a "warning" so that the firm could take appropriate corrective action, before instituting disciplinary action. (Tr. 240, 235-36.) There is simply no statute or rule that requires a self-regulatory organization to give a member firm the opportunity to correct a violation as a predicate to the institution of disciplinary action.<sup>29</sup>

(5) Conclusion

The Hearing Panel, having rejected \_\_\_\_\_'s defense that it complied with the "spirit" of the law and having rejected its objections to this proceeding, concludes that \_\_\_\_\_ failed to honor its published quotations, in violation of the SEC and NASD firm quote rules, as alleged in the Complaint. By doing so, Respondent also violated Conduct Rule 2110.

**C. \_\_\_\_\_'s Failure to Establish, Maintain,**

---

<sup>27</sup> 21(a) Report, p. 36-38, 1996 SEC LEXIS 2123, at \*79-82 (criticizing the NASD's laxity in enforcing the firm quote rules and its failure to enforce the rules absent the filing a written complaint by an aggrieved party).

<sup>28</sup> 21(a) Report, p. 45, 1996 SEC LEXIS 2123, at \*98 ("The frequency of backing away uncovered in the [SEC's] investigation requires prompt and strict enforcement of the firm quote rule."). Moreover, the NASD agreed to "take . . . appropriate action" to enforce the firm quote rules in connection with its settlement of the SEC matter. In re National Association of Securities Dealers, Inc., Exchange Act Release No. 37538, 1996 SEC LEXIS 2146, at \*5 (Aug. 8, 1996) (Order Instituting Public Proceedings Pursuant to 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions).

<sup>29</sup> In this connection, the Hearing Panel also notes that the NASD's failure to warn a firm about potential violations does not operate as a defense or as an estoppel against later action. In re W. N. Whelen & Co., Exchange Act Release No. 28390, 46 S.E.C. Docket 1544, 1990 SEC LEXIS 3029, at \*4 (Aug. 28, 1990). See also Market Regulation Committee v. Castle Securities Corp., Complaint No. CMS940100, 1996 NASD Discip. LEXIS 37, at \*26 (NBCC Oct. 21, 1996) ("We reject as inapposite the respondents' claim that the absence of staff objection to its supervisory procedures in prior NASD examinations constitutes a defense.").

***and Enforce Written Supervisory Procedures (Cause Two)***

Conduct Rule 3010 requires member firms to establish, maintain, and enforce a supervisory system that is reasonably designed to achieve compliance with applicable securities laws and regulations, and NASD rules. Rule 3010 further requires, as a component of any supervisory system, that each member “establish, maintain and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives and associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations,” and NASD rules.

The SEC has indicated that, in order to comply with Rule 3010, a firm’s written supervisory procedures must: (a) include some mechanisms for ensuring compliance with applicable laws, regulations, and rules; (2) identify a person who will be responsible for ensuring compliance by the firm and its registered representatives; and (3) establish specific functions to be followed by a person identified as responsible for ensuring compliance by the firm and its registered representatives. In re Gary E. Bryant, Exchange Act Release No. 32357, 1994 SEC LEXIS 1347 at \*19-20 (May 24, 1993). Absent delegation of particular functions to an identified person, a firm’s president is responsible for compliance with all of the requirements imposed on the firm. Id., at \*19; see also G. K. Scott & Co., Inc., Exchange Act Release No. 33485, 1994 SEC LEXIS 155, at \*24 (Jan. 14, 1994).

During the relevant period, \_\_\_\_\_’s written supervisory procedures to achieve compliance with the SEC and NASD firm quote rules consisted of no more than a general prohibition against “backing away.” In one sentence, the firm advised its “trading personnel” that they were

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

prohibited from “backing away from current quotations.”<sup>30</sup> And, although Mr. \_\_\_\_\_ was admittedly ultimately responsible for enforcing the firm’s written supervisory procedures (Tr. 226), it is not clear what steps, if any, he took to achieve compliance with the firm quote rules. It appears that \_\_\_\_\_ implicitly expected its traders to abide by the rules: when asked, on direct examination, how he implemented the firm’s supervisory procedures pertaining to the firm quote rules, \_\_\_\_\_’s President testified, “[w]e always had an understanding that we would honor quotations that we entered on the system.” (Emphasis added.) (Tr. 220.) Although Mr. \_\_\_\_\_ claimed that the firm’s traders were made aware of their obligations pursuant to the firm quote rules, he did not specify how this was accomplished.<sup>31</sup> Mr. \_\_\_\_\_ testified that he never had any conversations with Mr. \_\_\_\_\_ about the firm quote rules, and could not recall having discussions with anyone at the firm or receiving any written materials regarding the firm quote rules. (Tr. 167-69.) Indeed, Mr. \_\_\_\_\_ had, at best, an incomplete comprehension of the scope of the rules and, in particular, did not seem to understand that the rules impose an unqualified obligation on a market maker to execute SelectNet liabilities upon presentment. (Tr. 166-67.)<sup>32</sup>

The Hearing Panel further observes that the firm had no procedures for reviewing, on a systematic basis, unexecuted SelectNet liabilities so that it proactively could contact the respective order entry firms to fill their orders. Instead – and even when \_\_\_\_\_ was aware that it had missed

---

<sup>30</sup> The Parties submitted as a joint exhibit \_\_\_\_\_’s written supervisory procedures relating to compliance with the SEC and NASD firm quote rules that were in effect during the relevant period and at least until June 1998. See JX 12; Tr. 90-92.

<sup>31</sup> Mr. \_\_\_\_\_ testified only that, as a general matter, “it was [his] habit” to distribute compliance newsletters to \_\_\_\_\_’s traders. (Tr. 224-25.)

<sup>32</sup> In this regard, Mr. \_\_\_\_\_ testified that he understood “backing away” to apply only to situations where “someone presents you with something and you don’t make a print, [but] you adjust your market.” (Tr. 166.)

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

orders (as was the case with respect to the VLNT orders) – the firm routinely waited for an order entry firm to contact it before offering to execute a missed transaction. (Tr. 255.) Apparently, the firm also did not require, either routinely or on any other basis, its traders to adjust the configuration of their Nasdaq workstation terminal screens to display more than three lines of SelectNet orders – in an effort to mitigate the “scrolling effect.” (Tr. 164-65.)

Enforcement argued that not only were \_\_\_\_\_’s written supervisory procedures deficient, but that they were non-existent. \_\_\_\_\_ asserted that it is impossible for a firm to address every conceivable event in its written supervisory procedures. Although, as a theoretical matter, Respondent’s argument may have some merit, in this case, Respondent simply had no procedures – let alone meaningful procedures – to ensure compliance with the firm quote rules.

\_\_\_\_\_’s one-sentence prohibition against backing away fell far short of the requirements of Rule 3010. Indeed, the SEC previously has found procedures that provide “nothing more than a list” of prohibited business practices to be wholly inadequate. Gary E. Bryant, Exchange Act Release No. 32357, 1994 SEC LEXIS 1347, at \*20 (the firm’s procedures “established no mechanisms for ensuring compliance . . . . Furthermore, the firm’s structure included no specific controls or supervisory procedures designed to deter and detect misconduct”).<sup>33</sup>

---

<sup>33</sup> See also Market Regulation Committee v. Castle Securities Corp., Complaint No. CMS940100, 1996 NASD Discip. LEXIS 37, at \*24-26 (NBCC Oct. 21, 1996) (finding that the firm’s written supervisory procedures were deficient because they completely failed to address the determination of fair prices and mark-ups in a dominated and controlled market, and no directives had been established to prevent and detect the firm’s domination and control of issues it had underwritten), aff’d, In re Castle Securities Corp., Exchange Act Release No. 39523, 66 S.E.C. Docket 531, 1998 SEC LEXIS 24 (Jan. 7, 1998); In re G. K. Scott & Co., Inc., Exchange Act Release No. 33485, 1994 SEC LEXIS 155, at \*24-25 (Jan. 14, 1994) (upholding finding that the firm’s supervisory manual was deficient because, among other things, it failed to include any procedures to ensure even a minimum level of compliance with markup standards and, with respect to the free-riding and withholding interpretation, provided nothing more than a description of persons who were prohibited from purchasing “hot issues”).

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

Based on the foregoing, the Hearing Panel concludes that \_\_\_\_\_ violated Rule 3010, as alleged in the Complaint. Respondent's failure to establish, maintain, and enforce adequate written supervisory procedures also did not comport with "high standards of commercial honor and just and equitable principles of trade," and therefore constitutes a violation of Rule 2110.

### **III. Sanctions**

#### **A. *Violations of the Firm Quote Rules***

The NASD Sanction Guidelines recommend, for a "First Action" against a member firm, the imposition of fines ranging between \$1,000 and \$2,000 for violations of the SEC and NASD firm quote rules. Absent a finding that the violation was egregious, no other sanction is recommended.<sup>34</sup> In addition to the principal considerations that adjudicators generally should

---

<sup>34</sup> In egregious cases, adjudicators also should consider suspending the firm with respect to any and all activities or functions. NASD Sanction Guidelines 46 (1998 ed.).

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

consider whenever imposing sanctions,<sup>35</sup> the Sanction Guideline for “backing away” suggests that adjudicators should consider “whether respondent offered contemporaneous trades or otherwise remediated the failures to execute.”<sup>36</sup>

Although the Hearing Panel has found that \_\_\_\_\_ violated the SEC and NASD firm quote rules and NASD Conduct Rule 2110 by failing to execute 12 SelectNet liabilities, the firm’s violations do not warrant sanctions other than a fine. There is no evidence in the record to suggest that Respondent failed to execute its liabilities for some improper purpose or for potential monetary gain. To the contrary, the evidence indicates that Respondent’s failures to execute were inadvertent. Further, in two of the 12 incidents of backing away, i.e., those involving the order to sell LASX and the order to buy ZNRGW, \_\_\_\_\_ remediated its failures to execute – albeit only after the respective order entry firms brought the missed SelectNet orders to Respondent’s attention. The evidence also suggests that the 12 incidents involved in this proceeding were not reflective of the firm’s subsequent record of compliance with its firm quote obligations.<sup>37</sup> Although these considerations argue in favor of a minimal fine, the Hearing Panel is troubled by Respondent’s failure to take any steps to remediate its failure to execute the VLNT orders – despite the fact that it was well aware it had missed those orders.

---

<sup>35</sup> NASD Sanction Guidelines 8-9 (1998 ed.). Adjudicators should consider, among other things, the respondent’s relevant disciplinary history, if any; whether respondent engaged in numerous acts and/or a pattern of misconduct; whether the respondent’s misconduct occurred over an extended period of time; whether the respondent’s misconduct was the result of an intentional act, recklessness, or negligence; whether the respondent member firm can demonstrate that the misconduct at issue was aberrant or not otherwise reflective of the firm’s historical compliance record; and the number, size, and character of the transactions at issue.

<sup>36</sup> NASD Sanction Guidelines 46 (1998 ed.).

<sup>37</sup> See RX 1.

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

Therefore, the Hearing Panel has determined that it is appropriate to impose a fine that is mid-point in the range recommended in the Guideline.<sup>38</sup> Accordingly, Respondent \_\_\_\_\_ is fined \$1,500 for its failure to honor the SEC and NASD firm quote rules.

***B. Violations of Rules 3010 and 2110***

The NASD Sanction Guidelines recommend the imposition of a fine ranging between \$1,000 and \$25,000 for a failure to establish, maintain, and enforce adequate written supervisory procedures. Absent a finding that the violation was egregious, no other sanction is recommended.<sup>39</sup> The applicable Sanction Guideline provides that adjudicators should consider whether deficiencies in written supervisory procedures allowed violative action to occur or escape detection, and whether the deficiencies made it difficult to determine the persons responsible for specific areas of supervision or compliance.<sup>40</sup>

In this case, Respondent's failure to establish procedures that would provide a mechanism for ensuring compliance with the firm quote rules and its failure to include specific procedures to detect and deter violations of the rules were symptomatic of the firm's failure to appreciate the importance of strict compliance with these rules. In addition, \_\_\_\_\_'s procedures failed to identify or designate a person who would be responsible for ensuring compliance with the firm quote rules. Although the

---

<sup>38</sup> The Hearing Panel declines to treat Respondent's disciplinary history as an aggravating factor for purposes of imposing sanctions for either the violations of the firm quote rules or the supervisory deficiencies. The 1999 AWC stemmed from an examination conducted by NASDR's District 8 Office that, in part, focused on the same review period as the Firm Quote Compliance review that led to this proceeding (Tr. 206; JX 14.), and therefore are not reflective of the firm's historical compliance record. And, in the Hearing Panel's view, \_\_\_\_\_'s other violations were minor and too dated to be a meaningful factor in assessing sanctions in this proceeding.

<sup>39</sup> In egregious cases, adjudicators also should consider suspending the firm with respect to any or all relevant activities or functions for up to 30 business days and, thereafter, until the supervisory procedures are amended to conform to rule requirements. NASD Sanction Guidelines 90 (1998 ed.).

<sup>40</sup> Id.

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

deficiencies in \_\_\_\_\_'s supervisory procedures may not have been the sole factor in allowing the violative conduct to occur, the procedures failed to provide a means for the firm to address its failures to execute preferenced SelectNet liabilities.

In sum, the Hearing Panel finds the absence of any supervisory procedures pertaining to firm quote compliance, while not egregious, disturbing. Accordingly, the Hearing Panel has determined that, consistent with the remedial purpose of sanctions in NASD disciplinary proceedings and to deter future misconduct, it is appropriate to impose more than the minimum fine recommended in the Sanction Guideline. At the same time, the Hearing Panel has considered that there is no evidence in the record that the deficiencies found are reflective of systemic supervisory failings at the firm. Therefore, Respondent \_\_\_\_\_ is censured and fined \$7,500 for its violations of Conduct Rules 3010 and 2110.

#### **IV. Order**

Therefore, having considered all of the evidence, \_\_\_\_\_ is censured and fined \$9,000. \_\_\_\_\_ also is ordered to pay costs in the amount of \$2,417.90, which includes an administrative fee of \$750 and hearing transcript costs of \$1,667.90. These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after the date of service of the decision constituting final disciplinary action of the NASD.<sup>41</sup>

Hearing Panel.

By: \_\_\_\_\_  
Ellen B. Cohn

---

<sup>41</sup> The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.



**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CMS980108.**

Hearing Officer