DIGEST

On October 10, 1997, the Department of Enforcement ("Enforcement" or "Complainant") served a Complaint on Respondents ___________ ("_______"), ______________, ("_______"), and ______________ ("_______")\(^1\) alleging two (2) causes of action. Cause One alleged that on or about September 10, 1996, Respondent _______ executed an unauthorized purchase of stock in the

\(^{1}\) Where appropriate, Respondents _______. _______. and _______ will be referred to collectively as "Respondents."
account of a public customer in violation of NASD Conduct Rule 2110. Cause Two alleged that from on or about April 26, 1996, through on or about December 20, 1996, Respondent _______, acting through Respondent _______, failed and neglected to exercise reasonable and proper supervision over Respondent _______ in violation of NASD Conduct Rules 2110 and 3010.

The Hearing Panel found that Respondent _______ did not have an order from his client to purchase the stock at issue and, thus, violated NASD Conduct Rule 2110 as alleged in Count One of the Complaint. Further, the Hearing Panel found that Respondent _______ did not appreciate or understand the difference between a customer's "expression of interest" in an initial public offering and an order to buy. Accordingly, as to Respondent _______, the Hearing Panel determined that a fine of $7,500 and requalification for Series 7 within thirty (30) days of the effective date of this decision were appropriate sanctions.

With respect to Respondents _______ and _______, the Hearing Panel concluded that there was no reason to suspect that Respondent _______ was a problem broker prior to the transaction which resulted in the Complaint. The Hearing Panel found that other customer complaints involving Respondent _______ were fully investigated and did not raise sufficient red flags to require that Respondent _______ be subject to heightened supervision. The Hearing Panel also found that immediately after the transaction giving rise to the Complaint, in conjunction with other customer complaints involving the same offering, Respondent _______ was subject to heightened supervision. Accordingly, the Hearing Panel found that Respondents _______ and _______ did not violate NASD Conduct Rules 2110 and 3010 as alleged in Count Two of the Complaint.

As to costs, the Hearing Panel found that at least half of the Hearing related to Count Two, the claims against Respondents _______ and _______. Further, the Hearing Panel found that
Enforcement’s evidence as to the violations alleged against Respondents ______ and ______ was deficient. Accordingly, the Hearing Panel determined it would be unfair to assess the entire costs of the Hearing against Respondent ______ and, thus, apportioned only some of the costs of the Hearing against Respondent ______.

APPEARANCES

Henry Sanchez, Jr., Esq., Regional Counsel, NASD Department of Enforcement, District No. 5, New Orleans, LA. Rory C. Flynn, Esq., Chief Litigation Counsel, NASD Regulation, Inc., Department of Enforcement, Washington, D.C., of counsel.

_________, Esq., _________________________________, New Orleans, LA and ____________, General Counsel, ______________________, Ft. Lauderdale, FL., for Respondents ______ and ______.

_________, Esq., _________________________________, Miami, FL, for Respondent ______.

DECISION

I. Introduction

On October 10, 1997, Enforcement served a Complaint on Respondents. The Complaint includes two (2) causes of action alleging violations of NASD Conduct Rules 2110 and 3010.2

Cause One alleges that on or about September 10, 1996, Respondent ______ 3 bought 200 shares of an initial public offering ("IPO") of The Harmat Organization ("Harmat") in the account of

2 Attached to the Complaint were two Exhibits: "Exhibit A" was the "Syndicate Order Ticket for the Alleged Unauthorized Trade in the Account of RM" and "Exhibit B" was the "List of Customer Complaints filed against James ______.

3 Respondent ______ entered the securities industry as a General Securities Representative with Respondent ______ in 1992. At all periods relevant to the Complaint, Respondent ______ was employed by Respondent ______. Respondent ______ currently is registered with the Association and associated with another member firm. Stipulation (March 10, 1996) ("Stipulation") at ¶7.
public customer, RM, without the customer’s knowledge or consent. This conduct is alleged to violate NASD Conduct Rule 2110.

Cause Two alleges that from on or about April 26, 1996, through on or about December 20, 1996, Respondent _______, acting through Respondent ________, failed and neglected to exercise reasonable and proper supervision over Respondent ________. More specifically, Cause Two alleges that Respondent ________ was the subject of various customer complaints and a customer-instituted arbitration, but that Respondent ________, in the capacity of ________ compliance officer, failed and neglected to exercise additional supervision over Respondent ________. Such acts, practices, and conduct are alleged to constitute separate and distinct violations of NASD Conduct Rules 2110 and 3010 by Respondent ________ and Respondent ________.

Respondents ________ and ________ filed an Answer on November 19, 1997, denying the allegations of the Complaint as they pertain to them. Respondent ________ filed an Answer on December 2, 1997, denying the allegations of the Complaint as they pertain to him. Respondent ________ also raised certain affirmative defenses.

On February 13, 1998, pursuant to Code of Procedure Rule 9264, Respondents ________ and ________ filed a Joint Motion for Summary Disposition as to the allegations set forth in the Complaint.

4 Respondent ________ is a registered broker/dealer with the Securities and Exchange Commission and a current member of the Association. Stipulation at ¶1. Among other things, Respondent ________ is a market maker in speculative securities which involve a high degree of risk. CX-20 at 4. References to Enforcement’s Exhibits admitted at the Hearing are designated as "CX-". References to Respondents ________ and ________ Exhibits admitted at the Hearing are designated as "RX-". Respondent ________ submitted only a few exhibits separate from those of the other Respondents. They are referred to as "_______’Ex."

5 At all relevant times, Respondent ________ was the Director of Compliance for Respondent ________. He is registered with the Association as a General Securities Principal, a Municipal Securities Principal, and a Financial and Operations Principal. Stipulation at ¶3.
against them. Respondents _______ and _______ argued that summary disposition was appropriate since the facts did not support the charge of inadequate supervision or that _______ acted unreasonably by not subjecting _________ to heightened supervision prior to the RM transaction.

In support of summary disposition, Respondents _______ and _______ discussed each of the five customer complaints which purportedly occurred prior to the RM complaint. Respondents _______ and _______ demonstrated that such complaints were investigated fully by _______ and either determined to be without merit or, in one instance, was not a complaint against Respondent _______. Respondents _______ and _______ also demonstrated that in September 1996, following complaints by RM and others who purchased Harmat through Respondent _______, heightened supervision was implemented.

Respondents _______ and _______ also argued that they were entitled to summary disposition as a matter of law since reasonable supervision was exercised with respect to Respondent _______ and because neither the timing, nature, nor number of the pre-RM customer complaints triggered the need for heightened supervision.

6 Joint Motion by _______________. and _______________ for Summary Disposition of Complaint against Them and for Oral Argument, Memorandum in Support, and Statement of Undisputed Facts ("Motion").

7 Memorandum in Support ("Respondents' Mem.") at 15-16. In support of summary disposition, moving Respondents also filed a "Statement of Undisputed Facts" and an Affidavit of ______________.

8 Id. at 8-13. Enforcement relied on these customer complaints to demonstrate that Respondents _______ and _______ acted unreasonably in not subjecting Mr. _______ to heightened supervision prior to the RM complaint.

9 Id.

10 Id. at 13-14. As discussed more fully in this decision, several of the other alleged customer complaints against Respondent _______ on which Enforcement relied occurred at or about the same time as the RM complaint.

11 Id. at 16-28.
Enforcement filed an opposition to the Motion. In its Opposition, Enforcement argued that there were genuine issues of material fact which precluded summary disposition. Enforcement also argued that moving Respondents were not entitled to summary disposition as a matter of law.

Enforcement's Opposition was not persuasive. Enforcement did not submit a statement of controverted facts or an affidavit to refute the "Statement of Undisputed Facts" and the Affidavit submitted in support of summary disposition. Moreover, Enforcement did not provide citations to any evidence of record to support its assertions that there were disputed facts. Rather, Enforcement improperly relied only on the allegations of the Complaint. In addition, the legal authorities relied upon by Enforcement presented situations that were distinguishable from the facts of the instant case. In summary, in opposing the Motion, Enforcement did not present sufficient evidence or legal authority to support its contention that Respondents _______ and _______ acted unreasonably or that supervisory procedures were inadequate with respect to Respondent _______.

Notwithstanding these deficiencies, after reviewing the filings and the arguments of the Parties, the Hearing Panel decided to give Enforcement an opportunity to present its case. Accordingly, the Hearing Panel deferred decision on the Motion pending the disciplinary hearing. The Parties presented evidence to a Hearing Panel in a two (2) day Hearing held in New Orleans, Louisiana on March 17-18, 1998. Enforcement called nine (9) witnesses in its direct case,

\[\text{Complainant's Response to Joint Motion by Respondents } \ldots \text{for Summary Disposition and Oral Argument and Complainant's Motion to Strike ("Complainant's Opposition").} \]

\[\text{See Fed. R.Civ.P.56(e).} \]

\[\text{Cf. Enforcement's Opposition at 11-17 with Respondent's Mem. at 14-27.} \]

\[\text{The parties were informed of the Hearing Panel's decision to defer ruling on the Motion during the March 12, 1998 Final Pre-Hearing Conference and, again, at the commencement of the Hearing on March 17, 1998.} \]
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most of whom appeared as "hostile witnesses" and, in fact, were listed as witnesses on behalf of Respondents in pre-hearing submissions.\textsuperscript{16} The principal witnesses testifying for Enforcement were __________ ("_________"), a Senior Compliance Examiner for District 5, RM, the customer who lodged the complaint giving rise to this disciplinary action, and RM's secretary.

Principal witnesses whose testimony supported Respondents’ positions were ____________, a branch manager for Respondent _______ and, formerly, Respondent _______' branch manager;\textsuperscript{17} __________, a sales assistant for Respondent _______ and, formerly, Respondent _______ sales assistant;\textsuperscript{18} and __________, the branch cashier in the New York office of Respondent ______ where Respondent _______ formerly worked.\textsuperscript{19} In addition, both Respondents _______ and _______ testified in support of their respective defenses.\textsuperscript{20}

\textbf{II. Background of the Proceeding and Position of the Parties}

The alleged violations which form the basis for this disciplinary proceeding arise as a result of a complaint made by RM, a public customer, concerning a purported unauthorized purchase transaction in his account by Respondent _______. Respondent _______ was employed as an account executive

\begin{itemize}
\item \textsuperscript{16} These included Messrs. __________, __________, __________, Ms. __________, and Respondents _______ and _______. The purpose of calling such witnesses in Enforcement’s direct case was not apparent to the Hearing Panel since their testimony tended to support Respondents’ position and did not assist Enforcement in meeting its burden of proof. Since a majority of these witnesses were from out-of-town, Respondents were permitted to examine such witnesses immediately following Enforcement’s examination, obviating the need for recalling such persons to testify in Respondents’ direct case.
\item \textsuperscript{17} Mr. _______ was the branch manager in the New York office of Respondent _______ where Respondent _______ worked at the time of the RM complaint. Mr. _______ was responsible for supervising all brokers in _______ New York office. Stipulation at 9 and Tr. at 199-200. References to testimony in the hearing transcript are designated "Tr."
\item \textsuperscript{18} Tr. at 417-19.
\item \textsuperscript{19} Tr. at 426-27.
\end{itemize}
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and sales manager in Respondent ______ New York office in September 1996, the time of the RM transaction. 21

With respect to Cause I, Enforcement's position is that Respondent _______ purchased stock without RM's authorization. 22 Respondent _______' position is that he had a *bona fide* "indication of interest" from RM to purchase the Harmat shares for his account. 23 Respondent _______ contends that, at worst, there was a misunderstanding between himself and RM concerning the purchase of Harmat shares, nothing more. 24

With respect to Cause Two, Enforcement’s position is that Respondent _______ should have been subject to “heightened supervision” prior to the RM transaction because of a number of purported customer complaints that had been made against him. 25 Respondents _______’s and _______’s position is that the several customer complaints against Respondent _______ prior to the RM complaint were fully investigated and that such complaints did not raise any issues with respect to Mr. ______ integrity or sales practices sufficient to justify the imposition of heightened supervision. 26

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20 Mr. ______, another _______ broker who opened accounts for Respondent ______, who first contacted RM and sold him shares of American Express, also testified for Respondents. Tr. at 389-90 and 391-92.

21 Stipulation at ¶¶8 and 9; Respondents' Mem. at 5-7; CX-21 at 8.

22 See Tr. at 17-18, 54, and 307. See also CX-28 at ¶6. (Affidavit of RM).

23 Tr. at 43-44, 448, and 453. As will be discussed in this decision, Mr. ______ tested that it is his understanding, that with respect to an IPO, a customer's "expression of interest" is an order. Tr. at 460-63.

24 Tr. at 47 and 554.

25 Tr. at 18-19, 54-55. Enforcement also alleged that Respondents _______ and _______ did not take appropriate steps to subject Respondent _______ to heightened supervision even after the RM complaint.

26 See, e.g., Tr. at 29-35, 511-521. Respondents _______ and _______ position also is that heightened supervision was imposed in September 1996 after three complaints were made against Respondent _______ involving Harmat trades. Tr. at 29.
III. Findings of Fact and Conclusions of Law

A. Cause One

1. Evidence Presented at the Hearing

The investigation of Respondent _______ which resulted in the Complaint was based on a complaint letter sent to District 5 by RM.\(^\text{27}\) Based on information received from RM, NASD Regulation staff conducted an investigation.\(^\text{28}\) Enforcement presented evidence that on or about September 10, 1996, Respondent _______ purchased two hundred shares of Harmat for the account of RM.\(^\text{29}\) During the course of the investigation, RM provided information to the NASD Regulation examiner who conducted the underlying investigation, Ms. _______, regarding his communications with _______ and told her that the Harmat trade was not authorized. He also signed an Affidavit she prepared on his behalf.\(^\text{30}\)

Cross-examination of Ms. _______ revealed that she did not attempt to verify or investigate the accuracy of several statements reflected in RM’s Affidavit. Rather, she accepted what he told her.\(^\text{31}\)

\(^{27}\) Tr. at 51; CX-18. RM is the Chairman and CEO of a large real estate company in New Orleans who first opened an account with Respondent _______ on August 14, 1996. Tr. at 296; CX-21 at 13-16, and CX-28 at ¶2 (Affidavit of RM). On August 14, 1996, RM purchased 100 shares of American Express through another _______ broker, Mr. _______. Stipulation at ¶10 and Tr. at 392.

\(^{28}\) Tr. at 50-51. Ms. _______ was responsible for conducting the investigation of the RM complaint and also for gathering information from Respondent _______ as to other customer complaints against Respondent _______. She also was responsible for preparing Exhibit B to the Complaint. Tr. at 54.

\(^{29}\) CX-1 at 9 (“Exhibit A” to Complaint); Tr. at 53; Stipulation at ¶11. The Stipulation states the purchase was made on September 10, 1996. The trade date is confirmed by CX-21 at 23.

\(^{30}\) Tr. at 54. When she was assigned the customer complaint, Ms. _______ contacted RM and asked him for documents which would support his allegations. She received and reviewed those documents and contacted RM to discuss the circumstances surrounding his complaint. She then asked him if he would sign an affidavit prepared by District 5 staff, which he did. Tr. at 63-64 and CX-28 (“RM Affidavit”). RM’s complaint first was received by District 5 on September 13, 1996; however, his affidavit wasn’t signed until May 20, 1997, eight (8) months later. Tr. at 171-72.
Ms. _______ also admitted that she did not review any phone records maintained by _______ to determine whether Mr. _______ attempted further communications with RM on September 9 and 10 prior to finalizing the Harmat trade for his account. She based the statements in the RM Affidavit solely on the information provided to her by RM, either orally or in documents.

Mr. _______ testimony corroborated that RM complained that the Harmat transaction was unauthorized. Mr. _______ testified that he received a phone call from Respondent _______ on September 11, 1996 concerning RM's complaint and that there was a phone conversation later that day between himself, Respondent _______, and RM. Mr. _______ testified that RM made clear that he did not want the Harmat shares in his account and instructed Mr. _______ to cancel the trade and close his account. Mr. _______ also testified that after reviewing the matter, it was his opinion that there

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31 Tr. at 185-86, 188. For example, RM complained about the Harmat transaction on or about September 11, 1996 in a phone call to Respondent _______ and the evidence establishes that there was a phone call later that day between RM and Messrs. _______ and _______ concerning the alleged unauthorized trade. See CX-18, RX-9, RX-10, and Tr. at 185, 202, and 204. Ms. _______ admitted that she knew of the September 11, 1996 communication at the time RM's affidavit was prepared and signed. Tr. at 185. Yet RM's Affidavit contains the inaccurate statement that there were no phone calls between Mr. _______ and RM between September 5-12, 1996. Tr. at 186. When questioned, Ms. _______ testified she never pointed out this inaccuracy to RM because she "didn't want to put words into his mouth." Id.

32 Tr. at 178.

33 Tr. at 188-89.

34 Mr. _______ had been Respondent _______ branch manager only for a short period of time prior to the RM complaint. CX-43 at 5. Respondent _______ previously had been located in _______ Bethesda, Maryland office, which was closed at the end of August 1996. Respondent _______ began working in the New York office on or about August 26, 1996. Tr. at 200, 226-27. Mr. _______ testified that _______ was Respondent _______ branch manager in Maryland. Tr. at 201, 227.

35 Tr. at 202, 205-205 and RX-10. The statement Mr. _______ prepared in response to a request for information from Ms. _______ reflects that he reviewed the RM transaction with Respondent _______ before the telephone conversation and Respondent _______ indicated to him that he had a "bona fide indication of interest" from RM prior to the Harmat offering. CX-29 at ¶h. See also Stipulation at ¶12.

36 Tr. at 204-09. During the phone conversation on September 11, 1996, RM also instructed Mr. _______ to transfer the American Express shares in his account to another firm. Id.
was a misunderstanding between Respondent _______ and RM respecting the Harmat trade.\(^{37}\) Both RM and Respondent _______ testified as to their communications concerning the Harmat transaction. There was conflicting and confusing testimony as to when Respondent _______ and RM first spoke,\(^{38}\) whether RM indicated an interest in IPOs,\(^{39}\) whether RM gave Respondent _______ a firm expression of interest to purchase Harmat shares worth between $50,000-$60,000,\(^{40}\) whether Respondent _______

\(^{37}\) Tr. at 251-52 and RX-11. In a September 11, 1996 letter to Mr. _______, after the phone conversation, RM stated that Respondent _______ "admitted he had no authority" to purchase the Harmat shares. See CX- 18. Mr. _______ testified, however, that he had no specific recollection of Respondent _______ making such statement. Tr. at 253 and 256.

\(^{38}\) Respondent _______ testified that the first time he spoke with RM was on September 5, 1996. Tr. at 442. RM's Affidavit also states that he was contacted on September 5, 1996 by Respondent _______ who was soliciting his investment in Harmat and that he told Respondent _______ he was not interested in purchasing shares. CX-28 at ¶4 and Tr. at 300. At the Hearing, RM's testimony on this issue was confused and inconsistent. See e.g., Tr. at 313-14 and 323-24. He testified that paragraph four of his Affidavit was in error and he was contacted by Respondent _______ on August 4, 1996. Tr. at 301. The testimony that follows, however, relates to a phone conversation RM had with another _______ broker, Mr. _______, not with Respondent _______. Also, RM's Affidavit recites that he received a phone call on August 14, 1996 from Mr. _______ when he opened an account with _______ by purchasing shares of American Express. CX-28 at ¶1. See also CX-21 at ¶¶13-16 (RM new account forms). The Affidavit says nothing about an earlier phone conversation with Respondent _______ and is worded to convey that the August 14 communication with Mr. _______ was the first with anyone from _______. Moreover, RM testified that he did receive a phone call from Respondent _______ on or about September 5, 1996 to discuss the Harmat IPO and the tenor of his testimony suggests that this was the first contact by Respondent _______. Tr. at 303-04. See also CX-28 at ¶4. The corroborating evidence of record also supports the conclusion that the first contact between Respondent _______ and RM was on September 5, 1996 and concerned the Harmat IPO. See, e.g., Ex-1 (_______ Call Detail Report showing phone call to RM's office on September 5, 1996), Ex-2 (_______ Call Detail Report showing fifteen (15) minute phone call to RM's home on September 5, 1996), and Tr. 375-76. See also Tr. at 392-93 (testimony of Mr. _______) and Tr. at 442 (testimony of Respondent _______).

\(^{39}\) There was conflicting testimony as to whether RM expressed an interest in IPOs and needed to pursue such investments through a firm such as _______ since his daughter was a broker at another firm. Tr. at 303, 322-23, 335-36, 338, 395, 396-97, 399, 409, and 442. RM admitted that Mr. _______, "told [him] that ________ participated in initial public offerings * * *." CX-28 at ¶1 and Tr. at 339. Mr. _______ testified that RM expressed an interest in IPOs and he could not get them through his daughter, a broker. Tr. at 397. Respondent _______ testified that he contacted RM on September 5, 1996 to discuss the Harmat IPO based on conversations he had with Mr. _______ concerning RM's interest in IPOs. Tr. at 442 and 446-47. For purposes of the Hearing Panel's decision, such testimony largely was irrelevant except in evaluating the credibility of the witnesses.

\(^{40}\) Cf. Tr. at 43-44, 47, 48, 448 and 453 (testimony of Respondent _______) and Tr. at 401-408 (testimony of Mr. _______) with Tr. at 305, 308, 312, 324, 333 (testimony of RM).
attempted to contact RM prior to finalizing the transaction on his account,\footnote{See, e.g., Tr. at 451-52 (testimony of Respondent _______), Tr. at 377-381 (cross-examination of RM), and _______' Exs-3, 4, and 5 (_______ Call Detail Reports for September 9 and 10, 1996).} and how and when RM received confirmation that 200 shares of Harmat had been purchased for his account.\footnote{Although RM's Affidavit (at CX-28 at ¶5) states that he received confirmation of the Harmat trade on or about September 12, 1996, the record establishes that RM contacted _______ to complain about the trade on September 11, 1996. See, e.g., CX-18, RX-1 at 6, 9, 10, and 11. See also Tr. at 352-354.}  

2. Findings

On balance, as between RM and Respondent _______, the Hearing Panel finds Respondent _______ the more credible witness. His recollection of most of the facts concerning his communications with RM was consistent both internally and with the testimony of other witnesses. It also was corroborated by the documentary evidence admitted at the Hearing.

By comparison, RM's testimony was unresponsive, vague, internally inconsistent, and, often, rambling.\footnote{RM's secretary attempted to corroborate his testimony. Among other things, RM's secretary testified to conversations she allegedly overheard between Mr. _______ and RM, between Respondent _______ and RM, and between Respondent _______ and RM. See, e.g., Tr. at 270, 273-75, 277-79, 283-85, 290-91. The Hearing Panel found most of her testimony to be irrelevant and, in part, not credible. For example, RM's secretary testified that she overheard a ten (10) to fifteen (15) minute phone call between Respondent _______ and RM. Tr. at 284-85. Other evidence, however, including RM's testimony, established that the only lengthy telephone call between Respondent _______ and RM took place at RM's home and that she could not possibly have overheard the conversation. Tr. at 374-76, and ______' Ex.2 (_______ Call Detail Report). RM's secretary's testimony did not assist Enforcement in meeting its burden of proof. Cf. Tr. at 301-02 with Tr. at 398. At the hearing, RM testified that paragraph 4 of his Affidavit was in error and that his memory was better three (3) weeks before the hearing than in May 1997 when he signed the Affidavit. Tr. at 329-30. The Hearing Panel found that the Affidavit probably reflected a better recollection of events than RM's testimony ten (10) months later. Further, RM's credibility was not assisted by his demeanor at the Hearing which was often flippant and evasive. Twice the Hearing Officer instructed RM not to confer with counsel for Enforcement during questioning by opposing counsel. Tr. at 377-78. The credibility of RM's version of the facts also was suspect since he appeared to make misleading statements. Cf. CX-28 at ¶2 (RM Affidavit) with Tr. at 335-37.} It also was contrary to statements in his own Affidavit, other documentary evidence, and the testimony of other witnesses.\footnote{Cf. Tr. at 301-02 with Tr. at 398. At the hearing, RM testified that paragraph 4 of his Affidavit was in error and that his memory was better three (3) weeks before the hearing than in May 1997 when he signed the Affidavit. Tr. at 329-30. The Hearing Panel found that the Affidavit probably reflected a better recollection of events than RM's testimony ten (10) months later. Further, RM's credibility was not assisted by his demeanor at the Hearing which was often flippant and evasive. Twice the Hearing Officer instructed RM not to confer with counsel for Enforcement during questioning by opposing counsel. Tr. at 377-78. The credibility of RM's version of the facts also was suspect since he appeared to make misleading statements. Cf. CX-28 at ¶2 (RM Affidavit) with Tr. at 335-37.} The Hearing Panel, however, found no dispute between the testimony of Respondent _______ and RM with respect to the critical fact. Respondent _______ never had an
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order to purchase shares of Harmat for the account of RM. At best, all Respondent had from RM was an "indication of interest" to purchase shares of Harmat worth between $50,000-$60,000. Respondent own testimony reveals that he mistakenly believed an "indication of interest" gave him authority to purchase the Harmat shares for RM's account.

The Hearing Panel also found that Respondent did not appreciate the difference between an expression of interest and an order to purchase shares. In response to questions from one Hearing Panelist, Respondent gave the following responses:

Hearing Panelist: Let’s go back then, for a minute to the -- as I understand it, your testimony is that you had a conversation with him on the 5th in which you got what you considered to be an indication of interest?

Respondent: Correct.

* * *

Hearing Panelist: Do you believe that there is a difference between the receipt from a client of an indication of interest and the receipt from a client of an order? Are those two things different?

This was made clear by Respondent own testimony as well as Mr. written statement. Tr. at 43-44, 47, 448, 453, and 461-62; CX-29 at ¶h. In fact, in his opening statement, Respondent counsel stated "Mr. firmly believes that when RM told him he wanted to invest fifty thousand dollars ($50,000) in Harmat that he had an order from that client, or more technically, an indication of interest since it was an initial public offering." Tr. at 44 (emphasis added). See also Tr. at 554-55.

Respondent testified that it was his general practice, prior to finalizing a trade in an IPO, to call the client back to discuss the exact amount of shares allocated to that client, but that this was the only purpose in going back to the client. Tr. at 451 and Tr. at 462-65. Respondent testified that he attempted to reach RM before the Harmat offering became effective, but was unable to do so. Tr. at 451-52. Thus, Respondent decided to purchase some shares of Harmat for RM, although far less than RM's indication of interest. Tr. at 453-54. In response to a question from his own counsel, Respondent also admitted that "[t]he mistake was that I hadn't more carefully gone through my order tickets and, I guess, pulled out any ticket that a client -I did not go over the exact amount, and that that (sic) has definitely proven, due to the fact that we are here, to be a mistake." Tr. at 466-67.
Respondent _______: In an IPO, an indication of interest, in my opinion, is an order.\textsuperscript{48}

The Hearing Panel finds that an expression of interest in a particular offering is not an order to purchase shares.\textsuperscript{49} Thus, the Hearing Panel concludes that Respondent _______ purchased Harmat shares without RM's consent in violation of NASD Conduct Rule 2110.

\textbf{B. Cause Two}

1. Evidence Presented at the Hearing

As part of her investigation, Ms. _______ requested and received from Respondent _______ information as to other customer complaints against Mr. _______. Based on that information, she prepared Exhibit B to the Complaint, the basis for the allegations in Count Two.\textsuperscript{50} She also spoke with and received documents from several of the customers identified by Respondent _______ as having made complaints against Respondent _______.\textsuperscript{51} She also used that information in preparing Exhibit B to the Complaint.\textsuperscript{52}

\textsuperscript{48} Tr. at 460-462.

\textsuperscript{49} See, e.g., District Business Conduct Committee for District No. 4 v. Shelvy, Complaint No. KC-419, 1989 NASD Discip. LEXIS 16 (NBCC February 28, 1989). For this reason, Respondent _______ reliance on District Business Conduct Committee for District No. 8. v. Tompkins, No. C8A930064 (NBCC May 4, 1995) is misplaced. This is not a mere misunderstanding between a broker and a customer, but a failure by the broker to understand the difference between an “indication of interest” and an order to buy. Further, as the National Business Conduct Committee noted in Tompkins, and as recognized by Respondent _______ (Tr. at 448-49, 451, 462-65), it is general practice to confirm an “indication of interest” in an IPO prior to execution.

\textsuperscript{50} Tr. at 54-55. Exhibit B to the Complaint identifies eight (8) customers in addition to RM who allegedly complained about Respondent _______: RS, LA and RK who jointly filed an NASD arbitration claim, DL, MB, PM, CB, and RB. The NASD arbitration claim filed by LA and RK is captioned ________________ v. ________________. (“_______________”) (CX-17). In addition to Respondent _______, the _________ named several other employees and brokers as respondents.

\textsuperscript{51} Tr. at 63. Ms. _______ testified that she spoke with five (5) of the eight (8) individuals identified in Exhibit B.

\textsuperscript{52} Tr. at 84.
Ms. _______ admitted that there were several mistakes reflected in Exhibit B, which had not been corrected as of the date of the hearing. First, Exhibit B incorrectly lists the date of the PM complaint concerning Harmat. Second, Exhibit B incorrectly characterizes the resolution of the __________ as an arbitration award when, in fact, the matter was settled. Moreover, only one of the claimants in that proceeding -- LA -- had a claim against Respondent _______. Further, with respect to the RB complaint, Ms. _______ testified that RB did not complain about Respondent _______ by name and also that the matter was investigated by District 5 and no action was taken because there wasn't sufficient evidence to support a violation of NASD rules. The Parties also stipulated that RB did not complain about Respondent _______.

During Enforcement's presentation of its case, the Hearing Panel determined that two (2) of the other customer complaints allegedly made against Respondent _______ also involved the

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53 Tr. at 80-81 and 85. In addition to mistakes involving other customer complaints, Exhibit B also incorrectly records the date of the RM complaint to _______ as September 13, 1996, rather than September 11, 1996. See, e.g., Tr. at 119-20, 185-86 and CX-18.

54 The date of the PM complaint concerning Harmat was September 17, 1996, not October 11, 1996 as reflected. Tr. at 28, 79-81 and CX-15 at 6.

55 Tr. at 85 and 125.

56 Tr. at 125-26, 129-130, and 195-96.

57 Tr. at 55 and 88.

58 See Stipulation at ¶17 and Tr. at 59-60.
Harmat offering and occurred at or about the same time as the RM transaction. The Hearing Panel ruled that those complaints, as well as two (2) other customer complaints, were irrelevant with respect to the issue of whether Respondent _______ should have been subject to heightened supervision before the RM complaint. The Hearing Panel instructed Enforcement to focus its case on any pre-RM complaints which supported the allegations of Count Two that Respondents _______ and _______ should have imposed heightened supervision prior to the RM complaint. Other than introducing documents received from customers identified in Exhibit B, Enforcement offered no further evidence to support such allegations.

Ms. _______ cross-examination focused on the several pre-RM customer complaints allegedly made against Respondent _______. As to the ____________ filed by LA and RK, she admitted that she never saw any document evidencing any claim by RK or someone else on his behalf alleging that Respondent _______ acted in an improper or unlawful manner in handling RK’s account. After reviewing the ____________, she also admitted that there was no allegation in the statement of claim

59 The other two complaints relating to the Harmat IPO involved customers PM and MB. See CX-15, CX-40 at ¶8-9 and Tr. at 80-81 (relating to the PM complaint) and CX-16 and CX-33 at ¶5 (relating to the MB complaint). Exhibit B reflects another complaint by PM concerning an earlier transaction, that was not communicated to _______ until October 1996. Tr. at 80-82, CX-15 at 7 and CX-40 at ¶5. The Hearing Panel also was troubled by the fact that Exhibit B contained errors that Enforcement was aware of prior to the Hearing.

60 Tr. at 105. The other two complaints that the Hearing Panel found irrelevant to the issue of whether heightened supervision should have been imposed prior to the RM complaint involved CB and RB. Id. CB’s complaint, although recorded as September 25, 1996, referred to an earlier transaction. Tr. at 85-86, 246-47 and CX-27 at 22-23. And RB’s complaint was not against Respondent _______. Stipulation at ¶17. The Parties stipulated that only four (4) of the complaints listed on Exhibit B -- RS, LA, RK, and DL -- occurred prior to the Harmat IPO. Stipulation at ¶13.

61 Tr. at 105-06.

62 Tr. at 126. Ms. _______ also admitted that she never saw any document suggesting that Respondent _______ opened an account for RK or made any trades on his behalf. Tr. at 126-27. Further, she never submitted any request to RK asking for any documents or an affidavit. Tr. at 127 and 131.
that RK ever “dealt with ________ in any form or fashion.”63 In response to a question from a Hearing Panelist, Ms. ______ testified that, based on the evidence, Exhibit B should not include RK.64

Ms. ______ testified that in providing information to District 5 staff about LA’s complaint, she had no information or knowledge that Respondent ______ ever defrauded or made any misrepresentations to LA.65 Moreover, the amount of damages claimed by LA in his Affidavit was inconsistent with his statement of damages in the ______________.66

With respect to the complaint of RS, Ms. ______ testified that Respondent ______ conducted an investigation and responded to RS’s complaint in a timely manner.67 She also indicated that she was aware that RS, after receiving ______ response to his complaint, hired a lawyer and threatened to sue ______.68 Moreover, Ms. ______ testified that despite threatening a lawsuit, RS continued to express an interest in doing business with ______.69

Mr. ______ also testified concerning the pre-RM complaints. Mr. ______ testified that he participated in the investigation of the RS complaint and that he concluded that claim was without merit

63 Tr. at 130.
64 Tr. at 195-96.
65 Tr. at 151-52. The only information Ms. ______ had was provided to her orally by LA, which she then reflected in his Affidavit. Tr. at 155 and 157.
66 LA’s Affidavit (CX-39 at ¶8) states his losses to be $80,000. The ______________ states LA’s losses to be $30,000. RX-21 at 6 and Tr. at 160-61.
67 Tr. at 142-145. The Hearing Panel found that the other RS complaint (dated January 28, 1994) listed on Exhibit B merely was a request by RS that the description of the trade be changed from “unsolicited” to “solicited” and did not rise to the level of a “customer complaint.” Tr. at 196-98 and CX-27 at 6.
68 Tr. at 143-46.
69 Tr. at 146-148 and RX-18 and 19. Ms. ______ admitted that she was not in any position to evaluate whether a customer complaint has merit or totally lacks merit. More specifically, she testified that she was not in a position to evaluate whether the claims made by RS, LA, and DL had any merit. Tr. at 149-50, 168.
and that RS was not credible. Mr. _______ testified that he did not believe that RS's claim raised any questions about Respondent _______ integrity.

Mr. _______ also was aware of the claim of DL and characterized it as a “case where we had a customer and an account executive playing telephone tag and trying to sell securities.” Mr. _______ asked ________, Respondent _______ former branch manager, to investigate the claim. Then, in order, to rectify the situation, _______ put through a trade at the price the customer wanted which satisfied DL. Mr. _______ testified that Mr. ______ never suggested that this incident raised any question about Respondent _______ integrity; nor did Mr. ______ believe such a question was raised.

The _________________ which included the joint claims of LA and RK was handled by outside counsel for _______. Mr. _______ testified that after the arbitration was filed, up to and including the time of the RM complaint, he received information from _______ lawyers concerning the case. Counsel reviewed the documents and “felt this was a very, very defensible

70 Tr. at 509-10. In support of his conclusions, Mr. _______ testified that RS threatened litigation and then backed off and later contacted Mr. ________, at least twice, for the purposes of continuing to do business with _______. Id. See also CX-27 at 6-20 and RX-12 through RX-19 (exchange of correspondence between RS and _______).

71 Tr. at 510.

72 Tr. at 512. The contemporaneous memoranda of this dispute reflect that DL instructed Respondent _______ sales assistant to sell certain stock and she told him she was not registered and could not do so. CX-14 at 5-7. Respondent _______ then attempted to call DL, but was unable to reach him so he left messages. Id. at 7. The stock was sold on June 27, 1996, the same day as DL’s written complaint was received, at no loss to the customer. Id. at 9 and 10. See also CX- 37 (Affidavit of DL).

73 Tr. at 512.

74 Id.

75 Tr. at 513.
Case and that we should proceed with defense of the arbitration.”  

Mr. _______ testified that the arbitration had not been resolved by the date of the RM complaint.

As to RK's claim in the _______________, Mr. _______ testified that Respondent _______ never was RK’s broker and that he never made a trade for RK. In fact, Mr. _______ testified that in a meeting with counsel for Enforcement in September 1997, before the complaint was filed, he made clear that Respondent _______ had no part at all in RK's claim even though it was joined with LA's claim in the _______________.

Based on his knowledge and investigations of the pre-RM complaints, Mr. _______ testified as to his conclusions why Respondent _______ was not subject to heightened supervision. Specifically, Mr. _______ noted that RS's complaint was received in the early part of 1994 and, in the next two year period, before the _______________ was filed, there were no complaints whatsoever against Respondent _______. As to the _______________, _______, based on the information received from counsel, had every reason to believe that its defenses would be successful.

Concerning DL’s complaint, Mr. _______ testified that there was no pattern of any problems in the past about failures to sell, or any delays in selling, and that the problem appeared to arise because of

76 Tr. at 514-15.
77 Tr. at 515.
78 Tr. at 516. This was consistent with Ms. _______ testimony that Exhibit B should not include RK.
79 Tr. at 518-19.
80 Tr. at 520-21.
81 Id.
82 Tr. at 521.
a delayed communication between Respondent _______ and DL.  Mr. _______ further testified that, based on _______ investigation of these matters, he concluded that "[t]here is no discernible pattern. They’re all unrelated, and there wasn’t sufficient -- there’s no merit here to warrant any heightened supervision of * * * [Respondent _______] * * *."

Respondents _______ and _______ also presented evidence that Respondent _______ was subject to heightened supervision after the RM complaint. Mr. _______ testified that at or about the time of the RM complaint, two other customers of Respondent _______ complained about the Harmat offering. In response, Respondent _______ was subject to heightened supervision.

Mr. _______ testified as to the nature of the heightened supervision imposed on Respondent _______. Mr. _______ instructed Respondent _______ sales assistant, Ms. _______, who handled all his phone calls, that if Respondent _______ got more than two phone calls from a customer which were not returned to let Mr. _______ know. Further, Mr. _______

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83 Id.

84 Tr. at 521. Mr. _______ testified that when _______ Maryland office was closed, he spoke with Mr. _____ concerning the brokers (including Respondent _______) transferring to the New York office. Tr. at 228-29. See also CX-43 at 3 and 6. This was done pursuant to the instructions of Mr. _______. Tr. at 505-06. Mr. Kane did not indicate to Mr. _______ that there were any special supervisory requirements over Respondent _______. Tr. at 201-02, 229-30 See also CX-43 at 5. Mr. _______ also testified that Mr. Kane never told him that Respondent _______ was a problem broker. Tr. at 507.

85 The two other customers who complained about Harmat were MB and PM. Tr. at 203, 237. MB, interestingly, complained that Respondent _______ did not allocate to him as many shares of Harmat as he thought he was getting. CX-16 (exchange of correspondence between MB and _______). See also Tr. at 454-55.

86 Tr. at 237-38.

87 Tr. at 238-39. See also CX-43 at 3-5.

88 Mrs. _______ maiden named was Ms. _______ and she is referred to in the transcript both as _______ and _______.

89 Tr. at 239.
_______ instructed Ms. _______ and Mr. ________, the branch cashier, that he wanted to see every order ticket put in by Respondent _______. Mr. _______ also spent more time monitoring Respondent _______ phone calls.

Mr. _______ testified that, although he did not believe an unauthorized trade took place in RM's account, _______ imposed heightened supervision after the RM complaint because of other complaints occurring at that time. Mr. _______ confirmed Mr. _______ description of the heightened supervision imposed on Respondent _______.

Ms. _______ and Mr. _______ corroborated Mr. _______ testimony. Ms. _______ testified that, in September 1996, Mr. _______ instructed her to tell him if any customer had difficulty getting in touch with Respondent _______ after two attempts. Mr. _______ also instructed her to tell him if any customer complained about Respondent _______ and to give Mr. _______ all order tickets for review before execution. Mr. _______ testified that Mr. _______ instructed him that he (Mr. _______) wanted to review any order tickets submitted by Respondent _______ before they were entered into the system.

90.Id.
91.Tr. at 239-40.
92.Tr. at 480-81.
93.Tr. at 481 and 483.
94.Tr. at 508-09.
95.Tr. at 420-22; RX-28 (Statement of ___________ to Enforcement); CX-43 at 9 (same).
96.Id.
97.Tr. at 428. See also RX-27 (Statement of Charles _______ to Enforcement); CX-43 at 8 (same).
2. Findings

The Hearing Panel finds that Enforcement failed to meet its burden to prove the allegations of Count Two of the Complaint.\(^98\)

Prior to the RM complaint, only three customers (RS, LA, and DL) complained about Respondent _______ during the four years he had been at _______. Of these three, two (RS and LA) alleged that Respondent _______ had been dishonest.\(^99\) Of these two, only LA appears to have had a legitimate complaint against Respondent _______. The legitimacy of this complaint, however, still was pending at the time of the RM complaint. Based on the evidence, the Hearing Panel finds that there were no reasonable grounds for Enforcement to allege that Respondent _______ should have been subject to heightened supervision before the Harmat IPO.

Similarly, the Hearing Panel finds no basis for Enforcement's allegations that Respondent _______ was not subject to heightened supervision after the Harmat IPO. Enforcement provided no supporting documentation or other testimony to support this claim. Moreover, the evidence readily demonstrates that even some of the few details provided by Enforcement in Exhibit B with respect to the three (3) post-RM complaints are inaccurate.\(^100\) The Hearing Panel finds that

\(^98\) The testimony at the Hearing demonstrates that Enforcement's pre-Complaint investigation was incomplete and not fully developed. For example, affidavits prepared by District staff contained errors, Exhibit B to the Complaint was inaccurate, and testimony at the Hearing indicates that District staff apparently knew of such inaccuracies prior to filing the Complaint.

\(^99\) DL complained that Respondent _______ ignored two of his phone calls. See RX-22.

\(^100\) For example, Exhibit B erroneously suggests that the PM complaint concerned a post-RM Harmat trade when, in fact, the trades occurred on the same day -- September 10, 1996. See CX-15 at 6. Moreover, although Exhibit B reflects that CB complained about a failure to sell and an unauthorized trade, it also records that CB retained the stock and retracted the claim. CX-27 at 4 and 23. The Hearing Panel fails to understand how this “complaint” evidences inadequate supervision. The same is true with respect to the RB complaint reflected on Exhibit B. Enforcement knew, prior to the Hearing, that RB did not complain about Respondent _______, but did not correct or amend its Complaint.
Enforcement had no basis for relying on these other complaints to support an allegation of inadequate supervision.

The Association’s own instructions to members concerning heightened supervision\(^\text{101}\) make clear that isolated customer complaints, standing alone, whether valid or not, do not trigger a duty to impose heightened supervision. NTM 97-19 discusses the profile of registered representatives that should be considered for heightened supervision.\(^\text{102}\) More particularly, NTM 97-19 states that heightened supervision may be appropriate for registered representatives whose CRD record discloses sales practice problems, disciplinary actions, or arbitrations.\(^\text{103}\)

NTM 97-19 informs members that while a history of disciplinary actions, complaints, or arbitrations resolved in a manner adverse to the registered representative may indicate a situation appropriate for heightened supervision, pending isolated complaints simply may be indicative of a history that should be reviewed. Further, NTM 97-19 makes clear that the review of either final or pending matters need not result in a conclusion that heightened supervision is warranted. Rather, in each case, the conclusion reached is to be reasonable and supportable in view of all the evidence.\(^\text{104}\)

\(^{101}\) Notice to Members 97-19 ("NTM 97-19"), "The Joint Regulatory Sales Practice Sweep: Heightened Supervisory Procedures" (April 15, 1997).

\(^{102}\) NTM 97-19 at 159.

\(^{103}\) Id.

\(^{104}\) NTM 97-19 also suggests that red flags alone trigger no duty to impose heightened supervision. See Id. at 157. Rather, by way of example, NTM 97-19 states that a review procedure for a registered representative should be considered if the representative is named, during a one-year period, in three customer complaints alleging sales practice abuse. There is no such evidence here. Similarly, NTM 96-32, “Members Reminded To Use Best Practices When Dealing in Speculative Securities” (May 9, 1996), states that heightened supervisory is appropriate when a firm hires a representative who has a pattern of serious customer complaints, or a disciplinary history, or for an existing representative who becomes the subject of such problems. Prior to the RM complaint there is no evidence of any pattern of serious customer complaints against Respondent _______.

23
Even though NTM 97-19 was issued after the customer complaints on which Enforcement bases its claims, the Hearing Panel finds that Respondents _______ and _______ did exactly what the Association expects its members to do. The pre-RM complaints were thoroughly investigated. Based on the results of those investigations, the Hearing Panel finds that _______ decision not to impose heightened supervision on Respondent _______ was rational and supportable.105

Further, the Hearing Panel finds that after receiving three complaints about Respondent _______ in a relatively short period of time concerning the Harmat IPO, _______ also did exactly what it should have done. It imposed heightened supervision on Respondent _______ which remained in effect until he left the employ of _______ in April 1997.106 The Hearing Panel finds that the evidence offered by Respondents _______ and _______ demonstrating that heightened supervision was imposed on Respondent _______ after the Harmat IPO is uncontroverted.

Based on the evidence, the Hearing Panel concludes that Respondents _______ and _______ did not violate NASD Conduct Rules 2110 and 3010 as alleged in Count II of the Complaint.

105 When given the opportunity to offer legal support for its position that heightened supervision should have been imposed prior to the RM complaint, Enforcement failed to provide any relevant cases. The three cases primarily relied upon by Enforcement in its Opposition all are distinguishable from the facts here and stand only for the well known position that, in appropriate cases, line supervisors may be held responsible for inadequate supervision. Cf. Respondents’ Mem. at 14-27 with Opposition at 11-17. See also Tr. at 34-37.

106 Tr. at 26-27, 237 and 246. Even though Exhibit B reflects that received CB’s complaint after the complaints concerning the Harmat IPO, it relates to a transaction which predated that offering. CX-27 at 22-23. After heightened supervision was imposed, Respondent _______ did not engage in any conduct which gave rise to a customer complaint. Tr. at 246-47.
IV. Sanctions as to Respondent _______

The NASD 1998 Sanction Guidelines (“Sanction Guidelines”) recommend a fine of $5,000 to $75,000 for an unauthorized transaction. The Sanction Guidelines also recommend that the Hearing Panel consider whether respondent misunderstood his authority and also consider the relevant factors listed at pages 8-9 of the Sanction Guidelines.

Here, the relevant considerations include (1) respondent’s disciplinary history; (2) whether respondent engaged in a pattern of misconduct; (3) whether respondent engaged in misconduct over an extended period of time; (4) whether respondent attempted to conceal his misconduct; (5) whether respondent’s misconduct resulted in the potential for monetary or other gain; (6) the number, size, and character of the transaction at issue; (7) the level of sophistication of the injured or affected customer; and (8) whether respondent’s conduct resulted in injury either to the customer or the investing public.

There is no evidence of any prior disciplinary history of Respondent _______. The Hearing Panel also finds no evidence that Respondent engaged in a pattern of misconduct. The pre-RM complaints, to the extent they are valid, do not reflect any pattern of unauthorized trading or other sales practice abuses. Similarly, the two (2) other complaints relating to the Harmat offering did not involve unauthorized transactions. Rather, PM complained that Respondent _______ discouraged him from immediately selling some of the Harmat shares he

107 Sanction Guidelines at 86.

108 Stipulation at ¶7.
purchased in the IPO.\(^{109}\) MB complained that he thought he was getting more Harmat shares than allocated to him by Respondent _______.\(^{110}\)

The Hearing Panel also finds no evidence that Respondent _______ engaged in any misconduct over an extended period of time. The pre-RM customer complaints were spread over a two year period. The complaints relating to the Harmat IPO all occurred at the time of the offering. Further, Respondent _______ did nothing to conceal the alleged misconduct of which he is accused. The record demonstrates that all customers received timely confirmations of the transactions executed on their behalf. In fact, RM testified that he received the confirmation for the Harmat transaction on September 11, one day after the shares were purchased for his account. And Respondent _______ efforts to reach RM\(^{111}\) are inconsistent with a conclusion that he attempted to conceal an unauthorized trade.

The record also is clear that the size of the RM transaction was small and there was no monetary or other gain to Respondent _______. Although RM gave Respondent _______ an indication of interest to purchase shares of Harmat worth between $50,000-$60,000, Respondent _______ only allocated 200 shares to RM at a cost of approximately $1,150.00.\(^{112}\) The record establishes that Respondent _______’ commission for the RM transaction was approximately $20.00

\(^{109}\) CX-15 at 2 and 3. On September 10, 1996, PM purchased 1000 Harmat shares at 5 3/4 and 1500 shares at 7. On September 13, 1996, PM called Respondent _______ to sell the shares he purchased at 5 3/4 and Respondent _______ is alleged to have discouraged him from selling the shares at that time. CX-15 at 6. PM’s complaint may reflect a different disciplinary problem than the one at issue in this proceeding. Nevertheless, the Hearing Panel considered this Harmat related complaint in determining appropriate sanctions.

\(^{110}\) CX-16 at 2.

\(^{111}\) See _______ Call Detail Reports, _______ ’Exs.1-5.
and that he incurred a $15.00 Federal Express charge to send a "red herring" to RM prior to the offering. Respondent _______ also paid a ticket charge of $15.00 to $20.00 even though the trade was canceled. Thus, Respondent _______ actually lost money on this transaction.

Further, there is no question that RM is a very sophisticated businessman. He freely gave information as to his substantial net worth and testified that he knew how to deal with brokers who were soliciting his business. In fact, RM testified, and his Affidavit reflects, that he told Mr. _______ that his daughter was a stockbroker in order to get rid of him. There also is no dispute that RM was not injured by the Harmat purchase for his account. At his request, the trade was promptly canceled at no cost to him.

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112 Tr. at 453-454. Respondent _______ explained that he only was allocated so many shares of Harmat and, accordingly, he had to look at several factors in allocating shares among his customers. Id. at 454. See also CX-24 at 3.

113 Tr. at 455. There is no question that RM received the "red herring" for the Harmat offering. Tr. at 271-73 and 304.

114 Tr. at 255, 455-56.

115 Mr. _______ confirmed Respondent _______ testimony that he was responsible for paying the Federal Express charge, that Respondent _______ account was debited $20.00 when the RM trade was canceled, and that the most Respondent _______ could have made from the RM transaction was $20.00. Tr. at 212, 253-55 and CX-22 at 19. Enforcement admitted that Respondent _______ made no profit on the RM trade. Tr. at 255.

116 RM testified that he does not own a lot of stock, but is "very heavy in real estate." Tr. at 300 and CX-28 at ¶2. See also Tr. at 207-08. Although RM testified he has not bought IPOs, he is familiar with IPOs since he sat on the board of a company that was preparing to go public. Tr. at 332. RM's secretary testified that he purchased shares in a private placement and also that he invested $500,000 in an IPO. Tr. at 293-94.

117 Tr. at 334 and CX-28 at ¶2.

118 Id. at and 336-37.

119 Tr. at 336-37 and CX-28 at 2. RM testified that to get rid of brokers, he tells them that his daughter is a stockbroker and that he has a broker in New Orleans. Tr. at 337. He further testified that Mr. _______ phone call was a "hard sell" and that he knew how to terminate such calls. Tr. at 341-42. RM also testified he never bought stock from his daughter and he did not have an account with his daughter. Tr. at 335-36.

120 Tr. at 311 and RX-11. In fact, RM testified that he would have been able to assume the entire loss of the transaction - $1,150.00. Id. at 311-12.
Nevertheless unauthorized trading is a serious violation. The Hearing Panel is especially troubled by Respondent ______ lack of appreciation or understanding as to the difference between an "indication of interest" and an order to buy. Respondent ______ is not an inexperienced broker. He has worked in the securities industry since 1992 and he should understand the difference between the two.

In addition, by Respondent ______ own admission, his troubles could have been avoided if he had followed accepted practice and confirmed the trade with RM prior to execution or, in the absence of such communication, not put the order through. Although the Hearing Panel finds there was no intent to engage in an unauthorized trade, Respondent ______ may have been overanxious to show RM what he could do in order to capture his business for other trades.121

The Hearing Panel finds no other aggravating or mitigating factors. Accordingly, having considered all the evidence submitted by the Parties,122 the Hearing Panel determines that a fine of $7,500 and requalification for Series 7 within thirty (30) days of the effective date of this decision is an appropriate sanction for the violation of NASD Conduct Rule 2110 alleged in Cause One of the Complaint against Respondent ______. A portion of the costs of the Hearing, $1,562.00123 also are assessed against Respondent ______.

121 There is some evidence of this from Mr. ______ contemporaneous memorandum to file regarding the conversation between himself, Respondent ______, and RM which reflects that Respondent ______ "stated he put RM in for 200 to show him how great our IPO's are and that he should like it because it was profitable already." RX-10. Also, the other complaints regarding Harmat -- those of MB and PM --- reflect that Respondent ______ may have been too aggressive on this IPO.

122 The Hearing Panel 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.

123 The total hearing costs attributable to the expense of the transcript and the administrative fee were $3,124.00. The Hearing Panel determined that Respondent ______ only should pay a portion of those costs.
These sanctions shall become effective on a date set by the Association, but not before the expiration of 45 days after the date of this decision.

Hearing Panel

By __________________________
Ellen A. Efros
Hearing Officer