# NASD OFFICE OF HEARING OFFICERS

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| DEPARTMENT OF ENFORCEMENT<br><br>Complainant,<br><br>v.<br><br>JERICHO NICOLAS<br>(CRD No. 2030192),<br><br>ANGEL CRUZ<br>(CRD No. 1988787),<br><br>and<br><br>ANTHONY JOSEPH MARTINEZ<br>(CRD No. 1568443),<br><br>Respondents. | Disciplinary Proceeding<br>No. CAF040052<br><br>**HEARING PANEL DECISION**<br><br>Hearing Officer – SW<br><br>Date: June 5, 2006 |

**The Respondents are barred in all capacities because they participated in a fraudulent scheme, as alleged in count one of the Complaint, thereby violating: (i) Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2120 and 2110; and (ii) NASD Conduct Rule 2110 by violating Section 17(a)(1) of the Securities Act of 1933 and by causing their Firm to violate Section 15(c) of the Securities Exchange Act of 1934 and SEC Rule 15c1-2 thereunder.**

**In light of the bar, the Hearing Panel does not impose separate sanctions for the failures to (i) provide accurate confirmations, (ii) provide best execution, (iii) maintain accurate books and records, or (iv) submit accurate trade reports, as alleged in counts two, three, four, and five of the Complaint.**

## Appearances

Gary A. Carleton, Esq., Senior Counsel, and Paul M. Schindler, Esq., Counsel, Washington, D.C., for the Department of Enforcement.

Alvin L. Fishman, Esq., San Francisco, CA, for Respondent Jericho Nicolas.

Thomas M. Knepper, Esq., Chicago, IL, for Respondent Angel Cruz.

Respondent Anthony Martinez, pro se.

## DECISION

## I. PROCEDURAL BACKGROUND

On July 30, 2004, the NASD Department of Enforcement ("Enforcement") filed a five-count Complaint in this disciplinary proceeding concerning the involvement of Respondent Jericho Nicolas ("Respondent Nicolas"), Respondent Angel Cruz ("Respondent Cruz"), and Respondent Anthony Martinez ("Respondent Martinez") (collectively, the "Respondents") in the trades that Kirlin Securities, Inc. ("Kirlin" or the "Firm") executed on behalf of customer EH from October 1999 through December 1999.

Count one of the Complaint alleges that the Respondents committed fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2120 and 2110. Count one also alleges that the Respondents' actions violated NASD Conduct Rule 2110 because (i) the conduct violated Section 17(a)(1) of the Securities Act of 1933 ("Securities Act"), and (ii) the conduct caused Kirlin to violate Section 15(c) of the Exchange Act and SEC Rule 15c1-2 thereunder. In the alternative, count one of the Complaint alleges that the Respondents violated Conduct Rule 2110 by (i) negligently failing to disclose to customer EH material information about the compensation that Kirlin earned on the EH trades, and (ii) by violating Sections 17(a)(2) and 17(a)(3) of the Securities Act.

Count two of the Complaint alleges that the Respondents failed to provide accurate confirmations to customer EH in 1999, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2) thereunder, and NASD Conduct Rules 2210, 2230, 3110, and 2110.

Count three of the Complaint alleges that Respondent Martinez failed to provide EH with best execution, in violation of NASD Conduct Rules 2110 and 2320.

Count four alleges that: (i) the Respondents violated NASD Conduct Rule 2110 by causing Kirlin to violate Section 17(a) of the Exchange Act, SEC Rules 17a-3(a)(6), 17a-3(a)(7), and 17a-4 thereunder, by failing to make or keep accurate records of EH's orders; and (ii) the Respondents violated Section 10(b) of the Exchange Act, SEC Rule 10b-10 thereunder, and NASD Conduct Rules 2230, 3110, and 2110, by keeping and maintaining false documents provided to customer EH.

Count five of the Complaint alleges that Respondent Martinez failed to file accurate trade reports regarding customer EH's trades, in violation of NASD Marketplace Rules 4632, 6130, 6420, and NASD Conduct Rule 2110.

The Respondents denied any wrongdoing. At the Hearing, the Respondents acknowledged that Kirlin's consistent practice of executing trades in its proprietary account that perfectly matched and were offset by customer EH's subsequent trades was possible because execution of EH's customer trade orders was being delayed until after Kirlin executed a corresponding trade in its proprietary account. However, each Respondent stated that: (i) he did not delay the execution of EH's customer orders; (ii) he did not cause the execution of EH's customer orders to be delayed; and (iii) he did not know that the execution of EH's customer orders was being delayed. The Hearing Panel did not find such denials credible.

The Extended Hearing Panel, consisting of a former member of the District 2 Committee, a former member of the District 3 Committee, and a Hearing Officer, conducted a Hearing in San Francisco, CA, on August 8-12, 2005, and August 15-16, 2005.[1]

[1] Hereinafter, "Tr." refers to the transcript of the Hearing held on August 8-12, 2005, and August 15-16, 2005; "CX" refers to Enforcement's exhibits; "Cruz Exhibits" refers to Respondent Cruz's exhibits; and "JX" refers to the joint exhibits filed by the Parties.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The primary issues to be determined are: (i) whether Kirlin's trading with customer EH from October 1999 to December 1999 amounted to a fraudulent scheme; and (ii) if a fraudulent scheme existed, whether each of the Respondents participated in it.

### A. Background

#### 1. The Participants

##### *a. Respondent Martinez*

In 1995, Kirlin hired Respondent Martinez as its head equity trader in its home office located in Syosset, New York. (Tr. pp. 462-463, 605). He was Kirlin's head equity trader from June 19, 1995 to April 19, 2001. (CX-10, p. 5). Respondent Martinez is not currently registered in the securities industry.[2] (CX-10, p. 4).

##### *b. Respondent Cruz*

Respondent Cruz worked for Kirlin from September 18, 1998 until Kirlin's San Francisco branch closed on August 31, 2004.[3] (CX-9, p. 2; Tr. p. 212). Although Ailin Dorsey was listed as the branch manager of Kirlin's San Francisco office from 1998 to 2001, the Hearing Panel finds that in 1999 Respondent Cruz was the de facto branch

[2] Respondent Martinez was last employed in the industry at Brokerageamerica, LLC from April 15, 2002 to December 17, 2004. (CX-10, p. 4). Enforcement filed the Complaint in this proceeding on July 30, 2004, prior to the termination date of Respondent Martinez's registration, and the Complaint alleges misconduct occurring before Respondent Martinez's registration terminated. Accordingly, NASD has jurisdiction over Respondent Martinez.

[3] In 1998, Respondent Cruz established Kirlin's San Francisco branch office by bringing together a group of registered representatives from his former firm, H.J. Meyers & Co., Inc., including, but not limited to, Respondent Nicolas and Ailin Dorsey. (Tr. p. 213).

manager.[4] (Tr. pp. 47, 213). Respondent Cruz is currently employed at The Shemano Group, Inc. ("Shemano") as a general securities representative and a general securities principal. (CX-9, pp. 1, 4).

***c. Respondent Nicolas***

Respondent Nicolas worked as a general securities representative for Kirlin in its San Francisco branch office from September 18, 1998 through August 5, 2004. (CX-8, p. 6). Respondent Nicolas is currently employed at Shemano as a general securities representative. (Tr. p. 40; CX-8, pp. 1, 5).

***d. Customer EH***

Customer EH is a sophisticated investor, based in Hong Kong, with numerous accounts at various broker-dealers. (Tr. p. 130).

**2. Customer EH's Trades with Kirlin**

***a. Kirlin's Agreement with EH***

In June 1999, after being introduced to Respondent Nicolas via the telephone, customer EH opened three accounts (collectively, "EH's accounts") at Kirlin; Respondent Nicolas was the registered representative on each of the accounts.[5] (Tr. pp. 53, 56; JX-8). Consistent with the custom and practice of the registered representatives in Kirlin's San Francisco office to negotiate and reach an agreement with their clients

[4] At H.J. Meyers, Ms. Dorsey was Respondent Cruz's administrative assistant. (Tr. p. 47). Ms. Dorsey described her duties as Kirlin's branch manager as similar to her H.J. Meyers administrative duties, except at Kirlin she also signed off on order tickets. (Tr. pp. 1060-1061). Although Ms. Dorsey was designated as the branch chief, Ms. Dorsey generally did not participate in the daily meetings that Respondent Cruz held with the brokers at 5:30 a.m. (Tr. pp. 325-326, 1113). Ms. Dorsey did not have a separate office. (Tr. p. 1058). Respondent Cruz was designated as the managing director of the San Francisco office and participated in the hiring of new brokers for Kirlin's San Francisco branch office. (Tr. pp. 213, 349).

[5] On June 10, 1999, EH completed and signed a Kirlin account application. (JX-8, p. 1). On June 14, 1999, EH completed and signed Kirlin account applications for Cosmopolitan Properties and Securities Limited, and for Hotung Investment China Limited. (JX-8, p. 2; JX-8, p. 3; Tr. pp. 53-54). EH terminated his trading with Respondent Nicolas in 2001. (Tr. pp. 126-127).

about transaction costs, Respondent Nicolas and EH reached a verbal agreement whereby Kirlin agreed to charge EH $0.03 - $0.05 per share for trades of 10,000 or more shares, and $0.06 - $0.08 per share for trades of 9,999 shares or less, whether the trades were executed on an agency basis or on a principal basis.[6] (CX-39, p. 1; Tr. pp. 128, 296, 1150, 1300).

EH was an active trader and generally traded in large blocks averaging in excess of 10,000 shares per trade.[7] (Tr. pp. 109, 865). Kirlin's general practice was that customer orders in excess of 10,000 shares, or in excess of $100,000, or to be executed as principal trades were called into Kirlin's New York trading desk rather than input directly into the Firm's direct order routing system for execution. (Tr. pp. 69, 239, 241, 268). Accordingly, Kirlin's San Francisco office generally called EH's trades into the Kirlin trading desk for execution by Respondent Martinez or his staff. (Tr. p. 69).

### *b. The Respondents' Description of the Order Taking and Execution Process*

Respondent Nicolas testified that he would receive a trade order from EH or his representative via the telephone, and that he would then complete a customer order ticket or direct someone else to complete the order ticket for the particular trade.[8] (Tr. pp. 62-64). Respondent Nicolas would deliver the completed order ticket to Respondent Cruz or

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[6] In an agency trade, the broker-dealer executes the trade for the account of a customer with another professional or retail investor and a commission is typically charged. In a principal trade, typically the broker-dealer is buying or selling for its own account and risk, from its own customers, other retail investors, or other professional investors. See NASD Glossary of Terms available at http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_011116

[7] EH's accounts were delivery versus payment ("DVP") accounts, which are unlike cash accounts that hold moneys or securities in the account. (Tr. pp. 143-144). In a DVP account, the cash or securities for a trade come from a third party. (Id.). In EH's case, the bulk of the cash and securities came from the Bank of Austria. (Id.).

[8] The trade information would include whether the trade was a buy or a sell, the name of the security, the quantity, and the markup, markdown, or commission that Respondent Nicolas established for the transaction, which ranged from $.03 to $.08 per share.

Ms. Dorsey, depending on who was available. (Tr. pp. 64-65). Respondent Nicolas denied ever discussing an EH trade order with anyone before he delivered the order ticket to be executed. (Tr. pp. 138-139, 178).

Upon receipt of the completed customer order ticket, Respondent Cruz or Ms. Dorsey would call Kirlin's New York trading desk to execute the trade. (Tr. p. 1073). Respondent Cruz testified that he or Ms. Dorsey would time and date-stamp the customer order ticket, concurrently with the customer order being called into the trading desk.[9] (Tr. pp. 356, 1088, 1103). Kirlin's San Francisco branch office would then wait for EH's customer order to be filled. (Tr. pp. 158-159, 199).

Respondent Martinez testified that upon receiving a customer order from Kirlin's San Francisco branch office, he or another member of the trading department would (i) complete a trade ticket with the customer trade information, (ii) time and date-stamp the trade ticket, (iii) execute the trade order, (iv) time and date-stamp the trade ticket to show execution,[10] and (v) call Kirlin's San Francisco branch office with the execution price and the concession earned on the trade. (Tr. pp. 354, 1131).

To execute the customer trade, Kirlin could (i) act as an agent by purchasing or selling the particular stock from or to another retail investor or professional trader for EH; or (ii) act as a principal by purchasing or selling the particular stock from or to its own inventory from EH. If Kirlin acted as an agent, EH would pay a commission plus the price paid to the third party for the stock. If Kirlin acted as a principal, EH would pay Kirlin its cost of the stock plus the markup or markdown.

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[9] There were at least two time-stamp machines in Kirlin's San Francisco office, one in Respondent Cruz's office and one in the office with the wire operator, which office Ms. Dorsey shared beginning in August 1999. (Tr. pp. 205, 1080-1081).

[10] NASD Marketplace Rules 4632 and 6420 require that NASD members time-stamp trade tickets at the time of execution.

Respondent Martinez explained that, for example, if Kirlin purchased 5,000 shares of a stock in which the Firm was not a market maker at $40 per share, and subsequently, on the same day, sold the 5,000 shares to a customer at the then current price of $41 per share plus a $.02 per share markup as established by the registered representative who submitted the customer order, the net price to the customer was $41.02 per share. (Tr. pp. 646-647). This resulted in a total concession to Kirlin of $1.00 per share. (Tr. pp. 646-647). Kirlin calculated the concession earned on a trade as the total markup or markdown on the stock minus $.02 per share.[11] (Id.). The concession was generally disclosed on the ticket as both a dollar amount and a percentage amount. (Tr. p. 209). The portion of the concession paid to the registered representative, which for Respondent Nicolas was 50% of the concession, was known as a sales concession. (Tr. p. 81).

Upon receiving the execution information from the trading department, Respondent Cruz or Ms. Dorsey would post the execution price and the concession on the customer order ticket.[12] (Tr. pp. 354-355, 1104). Ms. Dorsey would initial one copy of the customer order ticket, hand it to Respondent Cruz for his review, and distribute another copy of the order ticket to Respondent Nicolas through a mailbox system. (Tr. pp. 359-360, 1071, 1089).

Concurrently with the execution of the EH trade, the New York trading department recorded the trade in its general ledger through the Brass Service Bureau and

[11] The total markup or markdown was the difference between the net price of the stock to EH and the cost of the stock to Kirlin. (Tr. pp. 81, 633).

[12] Ms. Dorsey testified that she routinely received executed order tickets from Respondent Cruz, i.e., order tickets that he had called into the trading department. (Tr. pp. 1076-1077).

Order Management System ("BRASS")[13] and/or directly input the trade into Kirlin's clearing firm's system. (Tr. pp. 422, 639). The clearing firm would create a confirmation for the trade based on the information shown in the BRASS system or the information that was input directly into its system. (Tr. pp. 610, 1130).

The confirmation, a formal memorandum from a broker to a client giving details of the securities transaction, would disclose among other things: (i) the trade price of the stock as it was reported to the Automated Confirmation Transaction ("ACT") system;[14] (ii) the net price of the stock to be paid by the customer; (iii) the difference between the trade price and the net price paid by the customer as Kirlin's compensation; and (iv) the capacity in which Kirlin acted in the trade. (JX-1). In the example discussed above, the confirmation would disclose: (i) the $41.00 trade price of the stock; (ii) the $41.02 net price paid by the customer; (iii) Kirlin's compensation as $100 (5,000 shares at $.02 per share); and (iv) that Kirlin acted as a principal in the transaction. However, the confirmation did not disclose the entire concession, which in the above example was $5,000 (5,000 shares at $1.00 per share).[15] (Id.). Kirlin's clearing firm would then mail the confirmation of the trade to EH. (Tr. pp. 149, 422).

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[13] In 1999, BRASS was an order routing system operated by Automated Securities Clearance, Ltd. ("ASC"). ASC provided system users with software and hardware that enabled users to enter orders into the system which were then routed to an exchange or Nasdaq for execution. BRASS software enabled a broker to report executed transactions and to monitor, among other things, trading positions and profit/loss margins. See Regulation of Exchanges and Alternative Trading Systems, Exchange Act Rel. No. 40,760, n. 74 (1998), available at http://www.sec.gov/rules/final/34-40760.txt.

[14] ACT is an automated system owned and operated by The Nasdaq Stock Market, Inc., that compares trade information entered by ACT participants.

[15] The markup, markdown, or commission disclosed to EH was the transaction cost written by Respondent Nicolas on the order ticket, i.e., the difference between the reported trade price and the net price paid by the customer. (JX-1).

In addition to receiving confirmations from Kirlin's clearing firm, EH requested and received a daily report of the activities in his accounts. (Tr. p. 70). The daily report generally consisted of a facsimile transmittal page from Respondent Nicolas initialed by Ms. Dorsey and labeled "confirmation," and the additional pages that set forth the specific trades.[16] (CX-28).

The information on the daily report was derived from the executed customer order tickets, which included the full markup, markdown, or commission. Nevertheless, the daily report, similar to the official confirmation, disclosed the markup, markdown, or commission as equal to the transaction cost written by Respondent Nicolas on the order ticket; it did not disclose Kirlin's trading profits, or concessions, earned on the trade. (Tr. p. 1096; CX-28).

### *c. EH Trades the Subject of this Proceeding*

When investigating the concessions earned by Kirlin, Enforcement focused on the concessions earned during the period October 1999 through December 1999, and particularly on the concessions earned on EH trades. (Tr. p. 857). In reconstructing the trading pattern in the EH accounts, the NASD staff reviewed: (i) the order tickets from Kirlin's San Francisco branch office; (ii) the trade tickets from Kirlin's New York trading desk; (iii) EH's customer confirmations; (iv) Kirlin's daily trading ledger from the BRASS system; (v) EH's account statements; (vi) correspondence with customer EH; (vii) telephone records from the Firm; and (viii) compensation records of certain individuals. (Tr. pp. 857-858).

[16] The pages set forth: (1) EH's name; (2) the account number; (3) information concerning the specific trades executed that day, i.e., the trade date, the quantity of shares purchased or sold, the description of the security, the executed price per share, and the total price; and (4) a disclaimer stating "[i]t is not the intent of this report to replace your confirmation, statement and/or 1099." (CX-28).

Enforcement also obtained trading data from the internal NASD system called VISTA, the acronym for "View for Internal Surveillance in Trading Analysis," which obtains trading information as it is reported to ACT. (Tr. p. 862). The VISTA report showed all reported activity by Kirlin in stock that EH purchased or sold for October, November, and December 1999 that Kirlin reported to ACT or that was reported by the other firms with which Kirlin had traded. (Tr. p. 883; CX-19).

Based upon the review of the above documents, NASD demonstrated that there were 185 trades executed in EH's accounts in the fourth quarter of 1999.[17] Even though Kirlin was a market maker in only four of the 49 different securities that EH traded, Kirlin issued confirmations to EH that disclosed that in 151 of the 185 EH trades, Kirlin acted as a principal, i.e., Kirlin filled the EH trade order by selling or purchasing the stock to or from its proprietary account.[18] (JX-1; CX-23, p. 1; CX-40; Tr. p. 865).

Kirlin filled the EH orders not from its pre-existing inventory but by executing principal trades in its proprietary account, supposedly before Kirlin received EH's trade orders, that were perfectly offset by subsequent EH trades on the same day. If the Respondents' stories were accepted as true, Kirlin was somehow able to correctly anticipate EH's orders every time, and thereby make a profit or avoid a loss in every principal trade with EH. Kirlin was able to guess that EH intended to trade not 10 shares,

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[17] The 185 EH trades are referred to, in the testimony and the exhibits, including the schedules prepared by Enforcement, as transaction one, two, etc., through transaction 187, because, through a numbering error, there were no transactions labeled 157 and 158. (Tr. p. 868).

[18] Kirlin was a market maker in the securities for seven of the EH principal trades--transactions 50, 71, 74, 88, 89, 94, and 131. (CX-40). In four EH principal trades--transactions 50, 71, 89, 131--Kirlin earned undisclosed profits; in three principal trades--transactions 74, 88, and 94--Kirlin avoided losses. (Id.).
A market maker is any broker-dealer that maintains a firm bid and offer price in a given security by standing ready to buy or sell at publicly-quoted prices. A broker/dealer may become a market maker if the firm meets capitalization standards set down by NASD. See NASD Glossary of Terms available at http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_011116.

or 100 shares, or even a 1,000 shares, but on average, in excess of 10,000 shares. (Tr. p. 865).

For example, with respect to transaction 33 (EH's sale of 50,000 shares of Schwab for $1,807,375), on October 28, 1999, Kirlin executed six transactions, beginning at 11:23:11 a.m., and ending at 12:41:32 p.m., in which the Firm sold short an aggregate of 50,000 shares of Schwab in its proprietary account. At 12:57 p.m., approximately 90 minutes after Kirlin began selling Schwab shares short in its proprietary account, Kirlin's San Francisco office called the New York trading department with EH's customer order to sell 50,000 shares of Schwab. (CX-51.33; CX-40, p. 2).

According to the trade ticket, at 12:57:32 p.m., Kirlin purchased EH's shares to cover its previous short sales in its proprietary account, earning a concession of $21,625.00, of which $19,625.00 was not disclosed to EH on his confirmation or the temporary confirmation provided by the San Francisco Kirlin branch office. (CX-51.33; JX-1, p. 45).

Similarly, with respect to transaction 34, on October 29, 1999, the Firm purchased an aggregate of 60,000 shares of Schwab for its proprietary account in 19 separate transactions beginning at 9:51:45 a.m. (CX-51.34). Subsequently, at 15:08 (3:08 p.m.), Kirlin's San Francisco office date and time-stamped an order ticket for EH to purchase 60,000 shares of Schwab. (Id.). Kirlin sold the 60,000 shares of Schwab from its proprietary account to EH at 15:08:06 for $2,342,400 and earned an undisclosed trading profit of $16,512. (CX-51.34; CX-40, p. 2).

In October 1999, there were 34 EH trades. (CX-40, pp. 1-2). Kirlin disclosed to EH that Kirlin acted in the capacity of principal in 27 of the 34 EH trades. (Id.). Kirlin

failed to disclose to EH that it had earned trading profits equaling $142,683.50 on 23 of the 27 principal trades.[19] (CX-40, pp. 1-2).

There were 80 EH trades in November 1999. (CX-40, pp. 2-4). Kirlin disclosed to EH that Kirlin acted in the capacity of principal in 59 of the 80 trades. (Id.). Kirlin failed to disclose to EH that it had earned trading profits equaling $159,124 on 36 of the 59 principal trades.[20] (Id.).

There were 71 EH trades in December 1999. (CX-40, pp. 4-6). Kirlin disclosed to EH that Kirlin acted in the capacity of principal in 65 of the 71 EH trades. (Id.). Kirlin failed to disclose that it had earned trading profits equaling $392,864.12 on 41 of the 65 trades.[21] (Id.).

In total, for the three months ending December 1999, Kirlin disclosed to EH that Kirlin acted in the capacity of principal in 151 of the 185 EH trades. (CX-40). Kirlin failed to disclose that it had earned trading profits totaling approximately $695,000 on 100 of the 151 principal trades. (CX-40; Tr. p. 866).

In 88 of the 100 profitable principal trades, the Firm clearly began acquiring its proprietary stock position in advance of the time that the EH order ticket was date and time-stamped in the San Francisco branch office.[22] (Tr. p. 894; CX-50, p. 2a). On average, the Firm began acquiring its stock position in its proprietary account 53 minutes

[19] Seven of the October 1999 EH trades were treated as agency transactions, labeled as transactions 3, 6, 11, 12, 20, 21, and 23. (CX-40, pp. 1-2).

[20] Twenty-one of the November 1999 EH trades were listed as agency transactions. (CX-40, pp. 2-4).

[21] The six December 1999 agency transactions were labeled transactions 121, 135, 153, 154, 173, and 182. (CX-40, pp. 4-6).

[22] In the other 12 profitable transactions, there was so much trading activity in the stock in Kirlin's proprietary account prior to the EH customer order that it was impossible for the NASD staff to determine which of the trades in the proprietary account were linked to the EH trade. (Tr. p. 888). However, it is clear that Kirlin viewed some of the trades in the proprietary account as linked to the EH trades because Kirlin's trading department calculated a concession for the 12 EH trades. (Tr. p. 695).

before the EH customer order was supposedly received. (CX-50, p. 2a). On average, the disclosed markup or markdown on the EH trades was $0.04 per share, and the average undisclosed trading profit on the 100 profitable EH trades was $0.85 per share (Tr. p. 905).

In addition to the 100 profitable EH principal trades, there were 51 EH principal trades on which Kirlin did not earn a trading profit because the price of the security went against Kirlin from the time that Kirlin took a position in the security until Kirlin offset the position with EH's trade. Instead of Kirlin charging EH the prevailing price at the time the customer trade ticket was date and time-stamped, Kirlin charged EH its cost of taking the stock position in its proprietary account. In other words, Kirlin favored its own interests over customer EH's interest no matter which way the market moved. Accordingly, the Firm never lost money when trading with EH. (Tr. p. 867).

#### *d. The Respondents Explanation for the Existence of Trading Profits*

Respondents Cruz and Nicolas had no explanation for the extraordinary ability of the trading department to anticipate EH's customer orders or why there were trading profits on the EH transactions that could be shared with the registered representatives. (Tr. p. 138). Respondents Cruz and Nicolas each testified that they promptly delivered the EH order for execution when received, and they disavowed any responsibility for, or understanding of, whether a particular trade would be executed as a principal trade or an agency trade.

However, based on (i) the time-stamps recorded in the Firm's proprietary account ledger for the matching transactions, (ii) the time-stamps on the EH order tickets in the San Francisco office, and (iii) the time-stamps on the EH trade tickets in New York, it is clear that Kirlin's San Francisco branch office routinely time-stamped EH's order tickets

for a particular stock as received, after Kirlin's New York trade desk had taken a position in the particular stock in the Firm's proprietary account.[23] (CX-40).

Accordingly, the Hearing Panel finds that Respondent Cruz caused or directed customer EH's orders to be delayed. The only credible explanation for Kirlin's consistent ability to accumulate offsetting positions for EH's orders is that, upon receipt of EH's orders, Respondent Cruz notified or directed Ms. Dorsey to notify the trading department of EH's orders, and then waited until after Kirlin's trading department had completed offsetting trades in its proprietary account before time-stamping EH's orders as received. In addition, the Hearing Panel finds that Respondent Nicolas knew that EH's orders were being delayed because Respondent Nicolas had the opportunity to review the time-stamps on the order tickets. In doing so, he must have noticed that EH's orders were being held up.[24] (Tr. pp. 75-76).

Respondent Martinez explained the existence of Kirlin's trading profits on the EH transactions as the result of the practice of permitting Kirlin's branch office liaisons and registered representatives in Kirlin's New York office to direct the trading department to establish positions in Kirlin's proprietary account to be used to solicit customer business. (Tr. p. 528). Respondent Martinez testified that, as directed by Kirlin management, Kirlin's trading department would establish a long or short securities position in the Firm's proprietary account in response to a request from individuals designated as branch office liaisons or from registered representatives located in New York. (Tr. pp. 532-533).

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[23] Pursuant to Marketplace Rule 6953, each member's business clocks are required to be synchronized to a time source designated by NASD. This requirement became effective for all types of business clocks on July 1, 1999. See Notice to Members 98-33 (Mar. 1998).

[24] Respondent Nicolas did not generally wait until the end of the trading day to review the status of EH's orders. (Tr. pp. 75-76). Respondent Nicolas testified that he frequently contacted EH or his agent to provide him with information on how EH's order had been filled, after he received the executed order ticket. (Id.).

Upon execution of the request, the trading desk would report the existence of the stock position in Kirlin's proprietary account to the requesting liaison or representative. (Id.).

Respondent Martinez explained that the trading department staff was willing to execute such an order for the Firm's proprietary account because they expected the liaison or representative to successfully solicit a customer order to offset the proprietary position. (Tr. pp. 696, 714). Subsequently, if the expectation was realized, Kirlin would receive a customer order that offset the Firm's original position. (Tr. pp. 534, 538, 695). In the interim, Kirlin was at risk, because it could not be sure how long the solicitation process would take, or whether in the end customers would purchase all of the proprietary position.

Accordingly, when Kirlin was successful, the offsetting customer transactions were reported as principal transactions, which could generate trading profits for Kirlin equal to the difference between the cost to the Firm of acquiring the proprietary position and the price paid by the customer.[25] (Tr. pp. 464, 551, 597).

Respondent Martinez admitted that the trading department's practice of accepting order for trades in its proprietary account from the branch liaisons to be offset by subsequent customer orders was for the purpose of generating sales concessions for the registered representatives.[26] (Tr. p. 714). However, Respondent Martinez denied knowing that the branch had a customer order in hand at the time that the branch liaison requested that an order be executed in the proprietary account. (Tr. p. 578). The Hearing

[25] Respondent Martinez testified that it was on the advice of Kirlin's compliance department, as well as counsel for Kirlin, that the linked transactions were reported as principal trades. (Tr. pp. 464, 551-552).

[26] Respondent Martinez confirmed that the trading department did receive $.02 per share on each transaction and that he had expected to earn a bonus in excess of the $60,000 that he received for his market-making activities in 1999. (Tr. pp. 541, 467).

Panel does not find Respondent Martinez's denial credible, at least as related to the EH orders.

As explained above, Kirlin consistently built large positions that precisely matched EH's "subsequent" orders. Either Respondent Martinez knowingly participated in the scheme or he consciously avoided knowing about it. At a minimum, it should have been as apparent to Respondent Martinez as it is to the Hearing Panel that positions of such magnitude could not be so precisely matched to orders of a single customer, unless the customer order was already in hand.

***e. Kirlin's Trading Profits Were the Result of Executing Riskless Principal Transactions***

Robert Gales, a trader designated as an expert witness for Enforcement,[27] testified that Respondent Martinez took multi-million dollar positions in Kirlin's proprietary account, often in excess of Kirlin's net capital, including short positions in volatile stocks, in a bull market, and then consistently waited to offset the trades in the proprietary account with the EH trades regardless of what the security was otherwise doing in the market.[28] (Tr. p. 787; CX-52). Mr. Gales testified that Kirlin's trading pattern with EH indicated that the Firm had a customer order in hand when the Firm established the stock position in its proprietary account, and thus the Firm was never at risk. (Tr. pp. 776, 778).

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[27] Although the Hearing Officer granted the request of Respondents Cruz and Nicolas to designate Mr. Richard Tucker as an expert witness on July 7, 2005, after the testimony of Mr. Gales, Respondents Cruz and Nicolas decided not to present his testimony. (Tr. pp. 1144-1145).

[28] There was a bull market in the fourth quarter of 1999, and prices of securities were generally rising. (Tr. p. 140). It would have been very risky to take a short position in a rising market, which could have resulted in the Firm's capital being severely depleted unless Respondent Martinez knew there was an existing customer order available to offset the stock position in the proprietary account. During the period, Kirlin's net capital was $2.6 million. (CX-21, p. 4). Eighteen of EH's trades (not all involving short sales) involved amounts in excess of Kirlin's $2.6 million capital amount. (CX-49).

The Hearing Panel agrees with Mr. Gales' analysis. Therefore, contrary to the testimony of the Respondents, the Hearing Panel finds that Kirlin executed transactions in its proprietary account only after receipt of an EH customer order. Accordingly, although Kirlin provided EH with written confirmations stating that Kirlin acted as principal, the Hearing Panel finds that, in fact, Kirlin acted as a riskless principal. In a riskless principal transaction, the dealer, after receiving a customer order for a security, purchases the security from another firm for its own account, and then contemporaneously sells that security to the customer.[29]

**B. Count One: Fraud**

Enforcement argued that, by delaying the execution of EH's trades, effecting riskless principal trades in EH's accounts, and failing to disclose the entire markup or markdown on the transactions to EH, the Respondents committed fraud in violation of Section 17(a)(1) of the Securities Act through NASD Conduct Rule 2110, Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2120 and 2110; and caused Kirlin to violate Section 15(c) of the Exchange Act and SEC Rule 15c1-2.[30]

[29] Waide, 50 S.E.C. 922, at 933 n. 2 (1966).

[30] In the alternative, Enforcement argued that the Respondents violated NASD Conduct Rule 2110 by (i) negligently failing to disclose to EH the entire markup or markdown that Kirlin earned on the EH trades, and (ii) violating Sections 17(a)(2) and 17(a)(3) of the Securities Act. The Hearing Panel found fraud, rather than negligence set forth in the alternative theory.

Section 17(a) of the Securities Act proscribes fraudulent conduct in the offer or sale of securities, while Section 10(b) of the Exchange Act[31] and Rule 10b-5 proscribe fraudulent conduct in connection with the purchase or sale of securities. The anti-fraud provision of Section 15(c) of the Exchange Act and SEC Rule 15c1-2 is a narrower provision than Section 10(b) of the Exchange Act because, unlike Section 10(b) which applies to "any person," Section 15(c)(1) applies only to broker-dealers.[32]

Conduct Rule 2120 parallels SEC Rule 10b–5 and provides that no member shall effect any transactions, or induce the purchase or sale of any security, by means of any manipulative, deceptive, or fraudulent device.[33] It is well settled that any conduct that violates the securities laws and regulations or NASD rules also violates NASD Conduct Rule 2110.[34]

All of the above anti-fraud provisions prohibit essentially the same type of fraudulent conduct. In general, to find a violation of these anti-fraud provisions there must be a showing that (1) misrepresentations and/or omissions were made in connection with the purchase or sale of securities, (2) the misrepresentations and/or omissions were

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[31] Section 10(b) of the Exchange Act provides:
"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:
(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors."

[32] Richard H. Morrow, Exchange Act Rel. No. 40,392, 1998 SEC LEXIS 1863, at *2 n.2 (1998). (The finding that Morrow was a primary violator of Section 15(c) and SEC Rule 15c1-2 was set aside because Morrow was not found to be a broker-dealer).

[33] Prime Investors, Inc., Exchange Act Rel. No. 38,487, 1997 SEC LEXIS 761, at *24 (Apr. 8, 1997) (making material misstatements of fact in connection with a sale of a security is a violation of Conduct Rule 2120). See also DBBC v. Euripides, 1997 NASD Discip. LEXIS 45, at *18 (NBCC, July 28, 1997).

[34] See Ramiro Jose Sugranes, Exchange Act Rel. No. 35,311, 1995 SEC LEXIS 234, at **3-4 (Feb. 1, 1995). See also Stephen J. Gluckman, 1999 SEC LEXIS 1395, at *22 (July 20, 1999) (finding that a violation of Rule 10b-5 or NASD Conduct Rule 2120, constitutes a violation of NASD Conduct Rule 2110).

material, and (3) the misrepresentations and/or omissions were made with the requisite intent, i.e., scienter.[35]

On the other hand, no scienter requirement exists for violations of Sections 17(a)(2) or 17(a)(3) of the Securities Act[36] and NASD Conduct Rule 2110, which also prohibit persons from employing misleading omissions of material facts in the solicitation of investors; negligence alone is sufficient.[37]

**1. Material Omissions: Undisclosed Trading Profits**

There is no dispute that EH was not advised that Kirlin was earning substantial trading profits on his transactions and paying sales concessions to its registered representatives based on the trading profits.

Liability for an omission arises only if, under the circumstances, failure to disclose a fact is misleading, and the fact is material. "Silence, absent a duty to disclose, is not misleading under Rule 10b-5."[38] SEC Rule 10b-10 requires that the broker-dealer disclose to its customers the compensation received by the broker-dealer in a securities transaction. The method of calculating the broker-dealer's compensation varies

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[35] For the federal securities laws, the transactions must also involve interstate commerce or the mails, or a national securities exchange. The Respondents used a means and instrumentality of interstate commerce when they communicated with EH and his agents via telephone and when they used the mails to send confirmations and account statements to EH. See SEC v. Hasho, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992), 1992 U.S. Dist. LEXIS 1322, at **148-149 (1992).

Unlike a private litigant, NASD need not show justifiable reliance upon the alleged misrepresentation, omission or fraudulent device, or damages resulting from such reliance. See DBCC v. Coastline Financial, Inc., No. C02950059, 1997 NASD Discip. LEXIS 9 (Mar. 5, 1997).

[36] Section 17(a)(2) of the Securities Act prohibits a person, in the offer or sale of any securities, from obtaining money by means of an untrue statement of a material fact or any misleading omission of a material fact. Section 17(a)(3) prohibits a person, in the offer or sale of any securities, from engaging in any transaction, practice or course of business that operates or would operate as a fraud or deceit upon the purchaser.

[37] Michael Alan Leeds, Exchange Act Rel. No. 32,437, 1993 SEC LEXIS 1423 (June 9, 1993).

[38] Basic Inc. v. Levinson, 485 U.S. 224, 239 n. 17 (1988).

depending on the method of trade executed by the broker-dealer. Specifically, in a riskless principal trade, SEC Rule 10b-10 defines compensation as the difference between the net price to the customer and the dealer's contemporaneous purchase or sale price, i.e., the full markup or markdown. Accordingly, the failure to disclose the full markup or markdown in a riskless principal trade is misleading.

Further, the undisclosed facts must be material, which means that there is a substantial likelihood that a reasonable investor would consider them important in making an investment decision and would view disclosure of them as significantly altering the total mix of information made available.[39] A registered representative, as a securities professional, has an obligation to disclose known material facts or material facts that were "reasonably ascertainable."[40]

Pursuant to Rule 10b-10, the SEC has determined that the full markup or markdown in a riskless principal transaction is material information.[41] The purpose of requiring dealers to disclose their markups or markdowns in riskless principal transactions is to "enable customers to make their own assessments of the reasonableness of transaction costs in relation to the services offered by broker-dealers."[42] The rule recognizes the economic reality that certain offsetting transactions, although executed at different times and with different parties, are so inextricably linked that it is appropriate

[39] Id.; TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[40] Hanley v. SEC, 415 F.2d 589, 597 (2d Cir. 1969).

[41] Securities Confirmations, Exchange Act Rel. No. 15,219 (Oct. 6, 1978) (the SEC announced that it had adopted the requirement that a dealer effecting riskless principal trades must disclose markups in its customer confirmations).

[42] Marc N. Geman, 2001 SEC LEXIS 282 (Feb. 14, 2001) aff'd., 334 F.3d 1183 (10th Cir. 2003).

to compress them together and view them as a single economic event.[43] Where transactions are so linked, although no charge is paid directly by the retail customer, the customer is entitled to know the extent of the firm's profit as a means to evaluate the execution received.

Accordingly, the Hearing Panel finds that Kirlin's practice of executing riskless principal trades with customer EH and the compensation earned by Kirlin on each such transaction was material information. The aggregate undisclosed profits to Kirlin for the EH trades was approximately $695,000. (CX-47). The Respondents knew that the total compensation being earned by Kirlin was not being disclosed. Especially egregious, Respondents Cruz and Nicolas knew that there was an agreement with EH regarding the compensation to be paid to Kirlin, and that compensation earned by Kirlin on the EH trades greatly exceeded the agreement.

Respondents Cruz and Nicolas argued that, even if they had a duty to disclose Kirlin's additional financial interest in EH's trades, they had satisfied their duty through the language on the back of the confirmation. Kirlin's confirmations sent to EH had the following disclosure on the back side: "Principal Trades: For trades in which we acted as principal, the price shown may reflect revenue received by us in addition to any amount under Commission/Mark. Details will be furnished upon written request to the firm servicing your account." (Cruz Ex. 3; Tr. pp. 150-151).

Readiness and willingness to disclose are not equivalent to disclosure. The statutes and rules discussed above make it unlawful to omit to state material facts irrespective of alleged (or proven) willingness or readiness to supply that which has been

[43] Id.

omitted.[44] Thus, where there is an affirmative obligation to disclose a fact to avoid misleading the customer, the obligation cannot be satisfied by transferring the burden to the customer to seek out the fact. Instead, the fact must be affirmatively disclosed, which the Respondents failed to do.

The Hearing Panel further finds that the material information concerning Kirlin's practice of executing trades in order to earn concessions and the approximately $695,000 in total undisclosed profits was information that meets the "in connection with" requirement of Section 10(b) of the Exchange Act because such information was reasonably calculated to influence the average investor to purchase or sell a security with a particular broker.[45] Accordingly, the Respondents made material omissions in connection with the purchase or sale of securities.

**2. Each of the Respondents Acted with Scienter**

In addition to showing that material omissions were made in connection with the purchase or sale of securities, Enforcement must prove that the Respondents acted with scienter. Scienter may be established by a showing that the Respondents acted either intentionally or recklessly.[46]

Recklessness has been defined as "[a] highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware

[44] Hughes v. SEC, 174 F.2d 969, 976, 1949 U.S. App. LEXIS 2138 (D.C. Cir. 1949).

[45] Hasho at 1110 ("any statement that is reasonably calculated to influence the average investors satisfies the 'in connection with' requirement of Rule 10b-5").

[46] Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994), 1994 U.S. App. LEXIS 3326 at **14 (1994).

of it."[47] Proof of scienter need not be direct, but may be "a matter of inference from circumstantial evidence."[48]

### *a. Respondents Nicolas' and Cruz's Participation and Knowledge of the Scheme*

The Hearing Panel finds that Respondent Nicolas and Cruz intentionally participated in a scheme whereby Kirlin (i) delayed the execution of EH's trades, (ii) effected riskless principal trades in EH's accounts, and (iii) failed to disclose the entire markup or markdown on the transactions to EH.

Respondent Nicolas denied knowing whether a particular transaction would be transacted as a principal or agency transaction. (Tr. p. 123). Respondent Nicolas testified "I just placed the order, and I got my ticket back at the end of the day. There sometimes was a sales concession. Sometimes there wasn't. I didn't ask for it or go looking for it." (Tr. p. 122). Respondent Nicolas argued that he would have no reason to know of the trading department's practices and such knowledge should not be imputed to him regarding the manner of trading by Kirlin's New York office on a day-to-day basis with respect to EH or any other customer. The Hearing Panel does not find his denial credible.

However, even if Respondent Nicolas was not initially told of Kirlin's practice, Respondent Nicolas must have been aware of the practice when he received EH's orders, knew when they were executed, and knew or should have known that they were held while Kirlin established an offsetting position. Respondent Nicolas also received a sales concession of 50 percent of the agreed upon transaction costs and 50 percent of the

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[47] David Disner, 52 SEC 1217, 1222 n. 20 (1997) (citing Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc)).

[48] Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir. 1986).

trading profits on 100 profitable EH transactions between October 1, 1999, and December 31, 1999. (Tr. p. 117; CX-27). Thus, Respondent Nicolas received an economic advantage when the EH orders were delayed. In the three-month period ended December 1999, he earned sales concessions of $347,336 based on EH's undisclosed trading profits.[49] (CX-47). He knew that the sales concessions were a result of the principal trades with EH, and he understood that in order to do a principal trade the Firm would have to take a proprietary position of the same size or larger than the EH order and earn a trading profit. (Tr. pp. 122, 192, 236).

In addition, although Respondent Nicolas negotiated the compensation agreement with EH and although he saw every order ticket with the executed price and the entire concession, Respondent Nicolas never disclosed to customer EH (i) Kirlin's total compensation earned on each EH transaction, (ii) that he was being compensated based on the entire concession, or (iii) the possibility, indeed the likelihood, that he would receive a sales concession.[50] (Tr. pp. 123, 128-129). The Hearing Panel finds that Respondent Nicolas had to have known about Kirlin's scheme and that he intentionally decided to participate in the scheme.

As explained above, the Hearing Panel found that Respondent Cruz held EH's orders or directed that they be held, while the offsetting position was established, and caused them to be time-stamped long after they were received. Respondent Cruz clearly

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[49] EH was a very important client to Respondent Nicolas, the Kirlin San Francisco branch, and the Firm. (Tr. pp. 104, 140-141, 258). EH's transactions produced approximately 90% of Respondent Nicolas' total 1999 compensation.

[50] In every instance in which Kirlin earned a trading profit on an EH trade, Respondent Nicolas admitted that Kirlin paid him the sales concession. (Tr. p. 203). Respondent Nicolas received a sales concession on transaction 34 executed on October 29, 1999, an EH customer order that Mr. Mendoza, another registered representative in Kirlin's San Francisco branch office, testified that he completed on behalf of EH. (JX-1, p. 46; Tr. pp. 1151, 1174-1175). Mr. Mendoza testified that he recognized his handwriting on the completed EH customer order ticket for transaction 34. (Id.).

called in some of the EH trades; he admitted that he spoke with Respondent Martinez every day in the fourth quarter of 1999.[51] (Tr. pp. 47, 234-235). He also admitted that the Firm shared trading profits with its representatives based on trades with every customer.[52] (Tr. p. 232). In describing the number of times that sales concessions were paid to the San Francisco brokers, he testified that the exhibit listing such concessions would resemble a telephone book. (Tr. p. 267).

Respondent Cruz had an arrangement with Kirlin that he would receive 25% of the net profit of the San Francisco office.[53] (Tr. p. 220). Accordingly, he received a percentage of the concessions received by Respondent Nicolas, as well as other registered representatives in the San Francisco branch office.[54] (Tr. p. 159). The Hearing Panel finds that Respondent Cruz knew about Kirlin's scheme and intentionally participated in the scheme.

The Hearing Panel finds that the failure of Respondents Nicolas and Cruz to disclose the full markup or markdown presented a known or obvious danger of misleading investors and that they were, at the very least, reckless in determining that EH would not have wanted to know such information.[55]

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[51] Respondent Nicolas testified that he never spoke with Mr. Martinez. (Tr. pp. 47, 234-235).

[52] Ms. Dorsey prepared a daily report for Respondent Cruz indicating the compensation earned by each registered representative in the Kirlin San Francisco branch office. (Tr. pp. 1085, 1100).

[53] In 1999, Respondent Cruz's compensation from Kirlin came from four sources, gross commissions, net profit from Kirlin's San Francisco branch office, a forgivable loan, and net profits from Kirlin's San Diego branch office. (Tr. p. 221). Respondent Cruz also received bonuses in the form of stock of Kirlin. (Tr. p. 361).

[54] Respondent Cruz received a percentage of the concessions whether he was in or out of the office. (Tr. p. 220).

[55] Respondents Nicolas and Cruz argued that other representatives did not disclose the sales concessions that they earned. The fact that others at Kirlin may also have violated the federal securities laws and NASD rules during the relevant period neither explains, nor mitigates, their behavior.

### *b. Respondent Martinez*

Respondent Martinez testified that he did not know that the orders executed in Kirlin's proprietary account at the request of the Kirlin branch offices were based on existing EH customer orders, although he routinely offset his proprietary positions with "subsequent" EH customer orders. The Hearing Panel does not find his testimony credible.

Even if Respondent Martinez did not know that the initial transaction that he executed in the proprietary account was based on a particular EH order, when he executed the offsetting EH order, he knew that the transaction in the proprietary account was linked, and that this occurred time and time again with remarkable precision on very large orders. Thus, Respondent Martinez knew or should have known that the EH trades should be reported as riskless principal transactions.[56] Respondent Martinez knew that, for a riskless principal transaction, a broker-dealer is required to disclose on the confirmation the difference between the cost of the stock to the broker-dealer and the price paid by the customer. (Tr. p. 591). In addition, Respondent Martinez knew or should have known these amounts were not being reported on EH's confirmations because he did not report the trades as riskless principal transactions.

Whether Respondent Martinez or someone else in the trading department executed the offsetting EH transactions, Respondent Martinez was aware of the linked transactions through his access to the BRASS system, and he was the principal responsible for overseeing equity trading at Kirlin. (Tr. pp. 571-572).

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[56] In an SEC no-action letter, the SEC addressed the question of how to determine whether a transaction is a riskless principal trade. The SEC concluded that trades covered on the same trading day, regardless of sequence, are considered riskless principal trades where the transactions are in fact designed to be offsetting. See Buys-MacGregor, SEC No-Action Letter, 1980 SEC No-Act LEXIS 2851 at *3-4 (Jan. 2, 1980).

The Hearing Panel finds that Respondent Martinez intentionally reported the EH riskless principal trades as principal trades, and that his failure to disclose the entire markup and markdown on the riskless principal trades presented a known or obvious danger of misleading EH.[57]

### 3. Respondents Violated the Antifraud Provisions

Accordingly, applying the above standards, the Hearing Panel finds that Enforcement proved by a preponderance of the evidence that the Respondents participated in a fraud.[58] The Hearing Panel concludes that each of the Respondents violated the antifraud provisions of Section 17(a)(1) of the Securities Act through NASD Conduct Rule 2110, Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2120, by failing to disclose to EH the entire concessions earned on each EH trade. By this conduct, the Respondents also failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of NASD Conduct Rule 2110.

## C. Count Two: Falsified Confirmations

Count two of the Complaint alleges that the Respondents violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2) thereunder, and NASD Conduct Rules 2210, 2230, 3110, and 2110 by causing Kirlin to issue false confirmations to EH.

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[57] Prior to joining Kirlin, Respondent Martinez had never heard of executing principal trades in non-market making stocks. (Tr. p. 687).

[58] Although each of the Respondents affirmatively participated in Kirlin's scheme, the Hearing Panel also noted that because the scheme was so entrenched, it did not matter whether Respondent Nicolas or another representative took the call from EH, whether Respondent Cruz or Ms. Dorsey received the order ticket, or whether Martinez or another trading department employee actually executed the EH trade.

NASD Rule 2210 prohibits providing misleading communications to customers.[59] SEC Rule 10b-10[60] and NASD Rule 2230[61] prescribe information that a broker or dealer must disclose to its customers relevant to their securities transactions. SEC Rule 10b-10 and NASD Rule 2230 require a broker-dealer to send customers written confirmations of each transaction, disclosing, inter alia, the date and time of the transaction, and the identity, price, and number of shares of the security purchased or sold, whether the broker-dealer is acting as agent, principal, or market maker, and the amount of compensation earned by the broker-dealer.

Specifically, Rule 10b-10(a)(2) provides that, when a broker-dealer acts as a riskless principal and is not a market maker in the subject security, the broker or dealer must provide the customer with written confirmation that discloses "the amount of any

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

[60] Rule 10b-10 provides, in relevant part, that it is unlawful for a broker-dealer to effect any transactions for the customers' account unless the broker-dealer, at or before completion of the transaction, provides the customer with written notification disclosing "[t]he amount of any remuneration received or to be received by the broker from such customer in connection with the transactions."

[61] Rule 2230 provides that "[A] member at or before the completion of each transaction with a customer shall give or send to such customer written notification disclosing (a) whether such member is acting as a broker for such customer, as a dealer for his own account, as a broker for some other person, or as a broker for both such customer and some other person; and (b) in any case in which such member is acting as a broker for such customer or for both such customer and some other person, either the name of the person from whom the security was purchased or to whom it was sold for such customer and the date and time when such transaction took place or the fact that such information will be furnished upon the request of such customer, and the source and amount of any commission or other remuneration received or to be received by such member in connection with the transaction."

mark-up, mark-down, or similar remuneration received in [the] equity security."[62]

Accordingly, inaccurate confirmations violate Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2) thereunder, and NASD Conduct Rules 2210, 2230, 3110, and 2110 Rule 10b-10.[63]

As discussed above, the Hearing Panel found that each of the Respondents intentionally participated in a scheme whereby Kirlin delayed the execution of EH's trades, effected riskless principal trades in EH's accounts, and failed to disclose the entire markup or markdown on the transactions to EH. Accordingly, the Hearing Panel also finds that each the Respondents was aware that the confirmations on 100 EH transactions that failed to disclose Kirlin's intra-day trading profits were false, and that none of the Respondents took steps to correct the false records.[64]

Accordingly, because each of the Respondents was responsible for Kirlin's issuance of false confirmations to EH, each of the Respondents violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2) thereunder, and NASD Conduct Rules 2210, 2230, 3110, and 2110.

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[62] SEC Rule 10b-10(a)(2)(ii)(A) provides that it shall be unlawful for any broker or dealer to effect for or with an account of a customer any transaction unless the broker or dealer, at or before the completion of the transaction, sends the customer a confirmation that discloses whether the broker or dealer is acting as an agent or as a principal for its own account and, if the broker or dealer is acting as a principal, whether it is a market maker in the security. Additionally, the rule requires that, if a broker or dealer is acting as principal for its own account and is not a market maker, and if, after having received an order to buy from a customer, the broker or dealer purchased the security from another person to offset a contemporaneous sale to the customer or, after having received an order to sell from a customer, the broker or dealer sold the security to another person to offset a contemporaneous purchase from the customer, the broker or dealer must disclose in the confirmation the difference between the price to the customer and the dealer's contemporaneous purchase or sale price.

[63] Bison Sec., Inc., 51 S.E.C. 327, 333 (1993).

[64] Respondents Cruz and Nicolas argued that none of Kirlin's registered representatives was told to disclose to the customers the Firm's receipt, or potential receipt, of trading profits. (Tr. pp. 232, 1152). The Hearing Panel did not find that such an argument justified their conduct. Hasho, at 1107 (a stockbroker's special duties to his customers of fair dealing and full disclosure cannot be avoided by relying on his employer).

**D. Count Three: Failure to Provide Best Execution**

Count three of the Complaint alleges that Respondent Martinez violated NASD Conduct Rules 2110 and 2320, by failing to provide EH with best execution when he caused Kirlin to take trading profits on 100 riskless principal trades and when he executed 51 principal trades at prices less favorable than the prevailing inter-dealer price at the time that the EH order was date-stamped.

Pursuant to the duty of best execution, a broker is required to use reasonable diligence to ascertain the best inter-dealer market for a security, and to buy or sell in that market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. The basis for the duty of best execution is the mutual understanding that the client is engaging in the trade and retaining the services of the broker as his agent solely for the purpose of maximizing his own economic benefit, and that the broker receives his compensation because he assists the client in reaching that goal.[65]

NASD Rule 2320(a) provides that "[i]n any transaction for or with a customer, a member and persons associated with a member shall use reasonable diligence to ascertain the best inter-dealer market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions." NASD Rule 2320 (b) provides that "[i]n any transaction for or with a customer, no member or person associated with a member shall interject a third party between the member and the best available market except in cases where the member can demonstrate that to his knowledge at the time of the transaction the total cost or proceeds of the transaction, as confirmed to the member acting for or with the customer, was better

[65] See Geman, at n. 56.

than the prevailing inter-dealer market for the security." NASD Rule 2320 (f) provides that "[t]he obligations described in paragraphs (a) through (e) above exist not only where the member acts as agent for the account of his customer but also where retail transactions are executed as principal and contemporaneously offset."

The Hearing Panel finds that, rather than executing the EH customer order promptly, Respondent Martinez, the head of trading, participated in a scheme whereby Kirlin would wait to fill the order after it completed its proprietary position. By delaying execution of EH's order, Kirlin executed EH's trade when the prevailing market price had moved away from its acquisition cost, thereby yielding Kirlin trading profits at the expense of EH. In those 51 instances in which the market moved unfavorably in relation to the position Kirlin had established pursuant to the EH order, Kirlin executed trades with the customer at prices that stopped a loss for Kirlin.

By engaging in these trading practices, Kirlin improperly realized from EH thousands of dollars in excessive per share profits on transactions that involved effectively no risk to Kirlin.[66] Interpositioning that results in customers' paying higher prices is inconsistent with a broker's obligation to obtain the best prices for his or her customers.[67] In some instances, Respondent Martinez affirmatively participated in Kirlin's scheme; in other instances, as the head of trading and a principal of the Firm, he did not prevent others in the trading department from participating in the scheme about which he knew.

Accordingly, the Hearing Panel finds that Respondent Martinez violated NASD Rules 2110 and 2320, as alleged in count three of the Complaint.

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[66] See Knight Securities, Exchange Act Rel. No. 50,867 (Dec. 16, 2004), available at http://www.sec.gov/litigation/admin/34-50867.htm.

[67] H.C. Keister & Company, 43 S.E.C. 164, 168-169 (1966).

## E. Count Four: Failure to Make or Keep Accurate Books and Records

In connection with the EH transactions, Kirlin created two types of records: (i) memoranda of the brokerage orders, i.e., order tickets and trade tickets; and (ii) confirmations.

Count four of the Complaint alleges that: (i) the Respondents violated NASD Conduct Rule 2110 by causing Kirlin to violate Section 17(a) of the Exchange Act and SEC Rules 17a-3(a)(6), 17a-3(a)(7), and 17a-4 thereunder, by failing to make and keep accurate records of EH's orders; and (ii) the Respondents violated Section 10(b) of the Exchange Act, SEC Rule 10b-10 thereunder, and NASD Conduct Rules 2230, 3110, and 2110 by keeping and maintaining false documents provided to customer EH.

### 1. Memoranda of the Brokerage Orders

NASD Conduct Rule 3110 requires each member to make and preserve books, accounts, records, memoranda, and correspondence in conformity with applicable rules, including SEC Rules 17a-3 and 17a-4. SEC Rule 17a-3 requires broker-dealers to prepare and maintain accurate books and records, including memoranda (order tickets) of each brokerage order and of each purchase and sale of securities for the account of the member, broker, or dealer showing the price, and, to the extent feasible, the time of

execution.[68] SEC Rule 17a-4 provides that every broker or dealer shall preserve the books and records created pursuant to SEC Rule 17a-3 for a specified period of time, e.g., six years for certain records and two years for certain other records. The requirement that records be kept embodies the requirement that they be accurate.[69]

***a. False or Lack of Time Stamps***

As discussed above, the Hearing Panel found that the Kirlin time-stamps on the EH order and trade tickets were generally false, because the original customer orders were received before Kirlin established its proprietary positions. For example, in transaction 33, EH's order to sell 50,000 shares of Schwab was time-stamped as received at 12:57 p.m., on October 28, 1999, but the Hearing Panel found that Kirlin had the customer order when it began selling Schwab short beginning at 11:23:11 a.m., on October 28, 1999. The order ticket and the trade ticket should have been date and time-stamped before 11:23:11 a.m. (CX-51.33).

The Hearing Panel expressly finds that Respondents Cruz and Martinez stamped, or caused EH's order tickets and trade tickets, respectively, to be stamped, with times that

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[68] SEC Rule 17a-3 provides, in part, that every broker or dealer who transacts a business in securities shall make and keep current the following books and records relating to its business:

(6) A memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. The memorandum shall show the terms and conditions of the order or instructions and of any modification or cancellation thereof; the account for which entered; the time the order was received; the time of entry; the price at which executed; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer. The term *instruction* shall include instructions between partners and employees of a member, broker or dealer. The term *time of entry* shall mean the time when the member, broker or dealer transmits the order or instruction for execution.

(7) A memorandum of each purchase and sale for the account of the member, broker, or dealer showing the price and, to the extent feasible, the time of execution; and, in addition, where the purchase or sale is with a customer other than a broker or dealer, a memorandum of each order received, showing the time of receipt; the terms and conditions of the order and of any modification thereof; the account for which it was entered; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer or, if a customer entered the order on an electronic system, a notation of that entry.

[69] James F. Novak, 47 S.E.C. 892, 897 (1983).

did not accurately reflect the times when the order tickets and trade tickets were actually received. In addition, in transactions 101 and 130, Respondent Cruz failed or permitted Kirlin to fail to date and time-stamp two customer EH order tickets. (CX-51.101; JX-1, p. 157; CX-51.130, p. 4; JX-1, p. 211). In transaction 101, Respondent Martinez created, or permitted Kirlin to create, an EH trade ticket without any date and time-stamp. (CX-51.101, p. 4; JX-1, p. 212).

***b. Other Inaccurate Information***

In addition to the false or missing time-stamps on the order tickets, the Hearing Panel expressly finds that Respondent Nicolas caused the order tickets to inaccurately disclose whether the trades were solicited or unsolicited. Although Respondent Nicolas testified that most of the transactions were initiated by EH, i.e., unsolicited, Respondent Nicolas failed to indicate the unsolicited status of the trades, listing 169 of the 185 transactions as solicited transactions. (Tr. p. 104; CX-40).

In addition to the false or missing time stamps on the trade tickets, the Hearing Panel expressly finds that Respondent Martinez: (i) caused Kirlin, with respect to the 51 principal trades in which Kirlin avoided losses, to report the stock prices at the time that Kirlin executed its trades in its proprietary account rather than at the time that Kirlin executed EH's offsetting trades, and therefore failed to make and keep accurate records of the prices at which 51 orders were executed; and (ii) failed to note on more than 40 of the 185 EH transactions that Kirlin crossed the EH trades with trades from another Kirlin customer, a hedge fund, block trader, known as PTJP, and thus failed to disclose the

amount of compensation Kirlin earned on the cross trades.[70]

On more than ten of the EH agency trade orders, Kirlin, through Respondent Martinez, reported trades as executed, which filled EH's agency orders, before the EH trade tickets were inaccurately date and time-stamped as received. For example, the customer trade ticket for transaction 3, an agency trade, was date–stamped as received at 10:42 a.m., on October 5, 1999, but the two transactions which filled the EH agency trade were reported to ACT as being executed at 10:40:26 a.m., and 10:41:35 a.m.[71] (CX-51.3, p. 1).

In more than 10 of the EH/PTJP cross trades, Respondent Martinez reported the transactions to ACT as executed before time-stamping as received the order tickets for EH and PTJP orders. (CX-41). For example, the PTJP ticket associated with transaction 4 was time-stamped as executed at 11:17 a.m., but Kirlin reported completing the transaction to ACT at 11:15:09 a.m.[72] (CX-41).

In four of the EH/PTJP cross trades, Respondent Martinez entered PTJP's transaction in Kirlin's record-keeping system before time-stamping the hedge fund's trade tickets. (CX-41). For example, the PTJP ticket associated with transaction 14 was

[70] Respondent Martinez said that Kirlin failed to accurately disclose the cross trades because the clearing firm system did not provide the ability to reflect agency cross trades. (Tr. pp. 490-491). PTJP requested that all of its transactions with Kirlin be done on an agency basis, so that the PTJP transactions were reported as agency vs. principal trades to ACT. (Tr. p. 488). The following EH transactions should have been reflected as cross trade transactions in Kirlin's records: Transactions 4, 9, 13, 14, 16, 28, 29, 31, 37, 39, 41, 42, 43, 51,56, 56, 57, 61, 62, 63, 64, 65, 66, 69, 70, 72, 73, 75, 76, 78, 85, 92, 93, 94, 96, 97, 101, 102, 109, 110, 111, 120, 123, 124, 124, 124, 127, 134 and 136. (CX-41).

[71] See also EH Transactions 6, 11, 20, 23, 38, 48, 95, 115, 121, 135, and 138. (CX-51.6; CX-51.11; CX-51.20; CX-51.23; CX-51.38; CX-51.48; CX-51.95; CX-51.115; CX-51.121; CX-51.135; CX-51.138).

[72] See also EH Transactions 13, 14, 37, 63, 65, 66, 68, 75, 79, 124, 126, 140, 142, 143, and 170. (CX-51.13; CX-51.14; CX-51.37; CX-51.63; CX-51.65; CX-51.66; CX-51.68; CX-51.75; CX-51.79; CX-51.124; CX-51.126; CX-51.140; CX-51.142; CX-51.143; CX-51.170; CX-41).

date-stamped as executed at 12:00 p.m., but it was entered into the BRASS system at 11:12 a.m.[73] (CX-41).

#### *c. The Respondents Knowingly Caused Kirlin to Record Inaccurate Information*

The Hearing Panel finds that Respondents Nicolas and Cruz were responsible for the inaccurate information on the order tickets, and that Respondent Martinez, as principal in charge of trading, was responsible for the inaccurate information on the EH trade tickets. The Hearing Panel finds that each of the Respondents knew the records were inaccurate, and took no steps to correct them.[74]

Accordingly, the Hearing Panel finds that Enforcement proved by a preponderance of the evidence that (i) Respondents Nicolas and Cruz violated NASD Conduct Rules 3110 and 2110 by causing Kirlin to fail to make and keep accurate records of EH's order tickets, and (ii) Respondent Martinez violated NASD Conduct Rule 2110 by causing Kirlin to fail to make and keep accurate records of EH's trade tickets, in violation of Section 17(a) of the Exchange Act, SEC Rules 17a-3(a)(6), 17a-3(a)(7), and 17a-4 thereunder.

### 2. Confirmations

As discussed previously, each of the Respondents was aware that the confirmations issued on 100 EH transactions were false because they failed to disclose Kirlin's intra-day trading profits, and each of the Respondents failed to correct the false records.

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[73] See also the PTJP tickets associated with transactions 63, 68, and 70. (CX-41).

[74] Sharon M. Graham, 53 S.E.C. 1072, 1085 n.35 (1998) (noting that a respondent is a "cause" of another's violation if the respondent "knew or should have known" that his or her act or omission would contribute to such violation), aff'd., 222 F.3d 994 (D.C. Cir. 2000).

However, in addition to failing to disclose the amount of remuneration received by Kirlin from EH, although required by SEC Rule 10b-10,[75] the confirmations failed to disclose information on the cross trades that Respondent Martinez executed. Respondent Martinez also caused Kirlin to send EH confirmations for four transactions that affirmed the trades as agency trades while reporting the same transactions to ACT as principal trades, and caused Kirlin to send EH confirmations for five transactions that affirmed the trades as principal trades while reporting the same trades to ACT as agency trades.[76]

Accordingly, because each of the Respondents contributed to the false information on the confirmations, each of the Respondents violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2) thereunder, and NASD Conduct Rules 2210, 2230, 3110, and 2110.[77]

**F. Count Five: Trade Reporting Violations**

Count five of the Complaint alleges that Respondent Martinez violated NASD Marketplace Rules 4632, 6130, 6420, and NASD Conduct Rule 2110 by failing to report three of the cross trades between customer EH's and another customer's account, i.e., PTJP; by reporting the remaining cross trades as principal trades when they were in fact riskless principal trades; and by failing to submit or report 11 of EH's trades to ACT.

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[75] SEC Rule 10b-10(a)(2) and NASD Rule 2230 require that, when a broker-dealer acts as an agent for both the customer and some other person, the broker-dealer disclose to the customer the name of the person from whom the security was purchased or sold and the amount of remuneration by the broker-dealer received from the other person.

[76] On some occasions, Respondent Martinez input the incorrect information directly; on others, as the principal in charge of the trading department, he permitted the incorrect information appearing on the confirmations to be input by personnel in Kirlin's trading department and electronically transmitted to Kirlin's clearing agent for printing, in violation of Conduct Rule 2110. (Tr. p. 1130).

[77] In addition to not preventing the clearing firm from issuing false confirmations, Respondent Nicolas also faxed to EH a list of each day's trades that failed to disclose the intra-day trading profits of Kirlin on 100 transactions, which was a material omission. By this conduct, Respondent Nicolas violated Section 10(b) of the Exchange Act, SEC Rule 10b-10 thereunder, and NASD Conduct Rules 2230, 3110, and 2110.

NASD Marketplace Rule 6420 sets forth an NASD member's reporting obligations in exchange-listed securities effected in the over-the-counter market, whereas NASD Marketplace Rule 4632 sets forth the member's reporting obligations in Nasdaq-listed securities.[78] NASD Marketplace Rule 6130 provides that NASD members must comply with the Rule 6100 Series when reporting transactions pursuant to Rules 4630 and 6400, and sets forth the requirements for inputting trade information to ACT.

Marketplace Rules 4632 and 6420 require that broker-dealers date-stamp trade tickets at the time of execution and transmit to ACT the sale reports for transactions during normal market hours within 90 seconds after execution. Marketplace Rule 6130 requires that an ACT report include: (i) a symbol indicating whether the trade is a buy, sell, sell short, sell long, or cross trade; (ii) a unique order identifier; (iii) a unique market participant symbol identifier; and (iv) the time of execution expressed in hours, minutes and seconds. Respondent Martinez admitted that there were errors on the time-stamps of trade orders. (Tr. p. 603).

The Hearing Panel finds that Respondent Martinez failed to report or permitted Kirlin to fail to report three cross trades, transactions 101, 139, 145, to ACT. (CX-40, pp. 4-5). Respondent Martinez never submitted or permitted Kirlin to fail to submit 11 EH trades to ACT. (CX-41).

Accordingly, the Hearing Panel finds that Enforcement proved by a preponderance of the evidence that Respondent Martinez violated NASD Rules 2110, 4632, 6130, and 6420.

[78] Notice to Members 00-43 (July 2000).

## III. SANCTIONS

For intentional or reckless material omissions of fact, as alleged in count one of the Complaint, the NASD Sanction Guidelines provide for fines ranging from $10,000 to $100,000, suspension for a period of 10 business days to two years, and, in an egregious case, a bar.[79]

Enforcement recommended that the Respondents be barred for their fraudulent omissions, arguing: (i) that the Respondents' conduct was reckless or intentional; (ii) that the conduct resulted in substantial financial benefit to Respondents Nicolas and Cruz and potential benefit to Respondent Martinez;[80] and (iii) that the conduct involved a large number of transactions over an extended period of time.

Respondent Martinez was Kirlin's head trader and the manager of the Firm's trading department, with many years of experience as a trader. Therefore, the Hearing Panel finds that Respondent Martinez cannot absolve himself of responsibility for compliance with the NASD Rules or federal securities laws and regulations simply by relying on the directives of his superior to treat such trades as "at risk" principal transactions. The Hearing Panel finds that by furthering the Firm's best interests at the expense of its customers, Respondent Martinez abused the Firm's customer's trust.

Respondents Cruz and Nicolas denied any responsibility for the trades claiming that the execution of the trades was solely the responsibility of the trading department although they shared in the additional $695,000 profit that Kirlin derived from the trading scheme, which scheme could not have occurred without the active participation of Respondent Cruz and the active participation or, at minimum, the acquiescence of

[79] NASD Sanction Guidelines, p. 93 (2006).

[80] Respondent Martinez had expected to earn a substantial bonus in 2000 for his 1999 performance. (Tr. pp. 616-617).

Respondent Nicolas. The Hearing Panel finds that Respondents Cruz and Nicolas completely abdicated their duty of fair dealing to EH.

The Hearing Panel finds that the Respondents' actions were egregious and they should be barred for participating in the fraudulent scheme as alleged in count one of the Complaint.

In light of the bar, the Hearing Panel does not impose separate sanctions for the failures to (i) provide accurate confirmations, (ii) provide best execution, (iii) maintain accurate books and records, or (iv) submit accurate trade reports, as alleged in counts two, three, four, and five of the Complaint.

## IV. ORDER

Respondent Jericho Nicolas, Respondent Angel Cruz, and Respondent Anthony Martinez are barred from association with any NASD member firm in any capacity for committing fraud, as alleged in count one of the Complaint.

In addition, with respect to the $11,341.60 costs of the Hearing, which include an administrative fee of $750 and hearing transcript costs of $10,591.60, the Hearing Panel orders that: (1) Respondent Martinez pay $3,780.54 of the costs; (2) Respondent Nicolas pay $3,780.53 of the costs; and (3) Respondent Cruz pay $3,780.53 of the costs.

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after the date this decision becomes the final disciplinary decision of NASD, except that if this decision becomes NASD's final disciplinary action, the bars will

become effective immediately, upon this Decision becoming the final disciplinary action of NASD.[81]

**HEARING PANEL.**

By:_____
Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
June 5, 2006

Copies to:
Anthony Martinez (via FedEx and first class mail)
Jericho Nicolas (via FedEx and first class mail)
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Rory C. Flynn, Esq. (via electronic and first class mail)

[81] 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.