NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION, Complainant, v. ARA PROUDIAN (CRD No. 2488729), Respondent.	Disciplinary Proceeding No. CMS040165 **Hearing Panel Decision** Hearing Officer – SNB September 7, 2006

Respondent aided and abetted market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and NASD Rules 2110 and 2120. For this violation, Respondent is suspended from associating with any NASD member firm in any capacity for 90 days, fined $5,000, and required to requalify in all capacities. The charge of engaging in the unregistered distribution of securities in violation of NASD Rule 2110 is dismissed.

Appearances

Laurie A. Doherty, Esq., Ralph D. Martin, Esq., and Jeffrey K. Stith, Esq., for the Department of Market Regulation.

Martin Kaplan, Esq. and Janis Golubock, Esq., for Respondent Ara Proudian.

DECISION

I. Procedural History

On October 12, 2004, the Department of Market Regulation ("Market Regulation") filed a Complaint against Park Capital Securities, LLC ("Park Capital"), and 12 additional Respondents. The Complaint charges that the various Respondents engaged in a fraudulent scheme to profit from the sale of over $3.5 million in securities to Park Capital customers, through market manipulation, high pressure sales tactics, misrepresentations and omissions of

material facts, unauthorized trades, and sales of unregistered securities. All Respondents subsequently defaulted or settled the claims against them, except Respondent Ara Proudian ("Respondent"). Respondent is charged in two of the Complaint's five counts. Respondent is charged with engaging in market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), SEC Rule 10b-5 thereunder, and NASD Rules 2110 and 2120, or, in the alternative, aiding and abetting these violations.[1] The Respondent is also charged with engaging in sales of unregistered securities, in violation of NASD Rule 2110. These charges stem from Respondent's alleged involvement in executing orders in Cordia Corporation ("Cordia") securities during the period October 2002 through January 2003.

Respondent filed an answer to the Complaint, denied the allegations, and requested a hearing. The Hearing Panel, composed of an NASD Hearing Officer, a former member of the District 10 Committee, and a former member of the District 11 Committee, held the hearing on this matter in New York, New York.[2]

II. Jurisdiction

Respondent first became associated with Park Capital in July 2002, and, on August 8, 2002, became registered as a general securities representative. Tr. 635, 642. Respondent left Park Capital in January 2004. At the time of the hearing, he was not registered with an NASD member firm. NASD has jurisdiction over Respondent pursuant to Article V, Section 4 of the NASD By-Laws.

[1] While Respondent argues that aiding and abetting was not charged, the Panel finds that the Complaint's allegation that Respondent and others "knowingly or recklessly provided substantial assistance in these violations" suffices to charge aiding and abetting. Complaint, para. 95.

[2] References to the testimony set forth in the transcripts of the Hearing will be designated as "Tr. __", with the appropriate page number. References to the exhibits provided by Market Regulation are designated as "CX-___", and Respondent's exhibits are designated as "RX-___." Exhibits CX-1 through CX-13; CX-21 through CX-27;

III. Facts

A. Respondent

Respondent has been in the securities industry since June 1994, when he became registered as a general securities representative at Alexander, Wescott & Co., Inc. From 1995 to 2000, he served as Head Trader for the same firm, supervising eight traders and making a market in over 50 securities. CX-42, p. 4, CX-45. In December 2000, Respondent left Alexander Wescott following differences with its owner. Tr. 636, 637. In January 2001, Respondent took an unpaid position at Stone Harbor Financial Services, Inc., a firm started by friends. Respondent hoped that the firm would become profitable and he would eventually be paid. However, this never happened. Id. During this time, Respondent stayed at his parents' home and lived off savings and money he borrowed from his parents. Tr. 715.

B. Respondent Begins Employment with Park Capital

In July 2002, after approximately a year and a half without compensation, Respondent contacted Park Capital's Chief Executive Officer, Philip Orlando, to inquire about employment. CX-102 p. 14. Respondent was acquainted with Philip Orlando because they belonged to the same country club. Philip Orlando offered Respondent a straight salary job at Park Capital for $5,000 per month, with no additional compensation. Tr. 218, 640, 641, 643, 644, 655, 656, 710. Philip Orlando would supervise Respondent. Tr. 568. After a long period without income, Respondent was happy and relieved to accept employment with Park Capital. Tr. 636, 637, 711.

Respondent began work at Park Capital in mid to late July 2002. Philip Orlando assigned him to work on Park Capital's Application for Change of Business Operations under Rule 1017. Park Capital was a "$5,000 Broker," meaning that it was permitted to operate with just $5,000 in

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CX-37 through CX-46; CX-48 through CX-56; CX-71; CX-74; CX-75; CX-87; CX-91; CX-92; CX-109; and RX-5

net capital under SEC Rule 15c3-1(a)(2)(vi), and was not permitted to engage in proprietary trading.[3] Tr. 192, 193. However, Park Capital wanted to change its registration status so it could expand its operations and be a market maker. Philip Orlando told Respondent that when Park Capital received NASD approval for proprietary trading, Respondent would serve as the firm's head trader. Tr. 515.

C. Fraudulent Activity in Cordia Before Respondent Begins Processing Orders

From July to October 2002, when Respondent's job was to work on Park Capital's 1017 Application[4], there is evidence that Park Capital personnel engaged in fraudulent sales of Cordia stock. Philip Blackwell ("Blackwell"), a Park Capital retail broker, credibly testified that Anthony Orlando instructed him to sell Cordia stock to the firm's customers beginning in the spring of 2002.[5] Consistent with these instructions, Blackwell and others with the Park Capital sales force used a script which stated, among other things, that Cordia's share price would soon increase to $15. Tr. 309, 312, 315. Anthony Orlando told Blackwell to solicit as many purchases of Cordia as possible.

By the end of the summer, most of Blackwell's customers owned Cordia, in some accounts, Cordia was the only holding. Tr. 315. Blackwell was unhappy about this, and wanted his customers to sell their positions, but he was instructed not to sell Cordia, because sales would cause the price to drop. Tr. 322. Anthony Orlando told Blackwell that Park Capital had 80 to 90

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through RX-10, were admitted into the record.

[3] As a "$5,000 Broker," Park Capital was permitted to receive commissions for customer orders. It was also permitted to match customer transactions and receive a commission in exchange for introducing the customers and accomplishing the trade. These transactions are known as "agency cross" transactions.

[4] Park Capital never received NASD approval for this application.

[5] Blackwell agreed to a bar to settle NASD claims that he engaged in fraudulent sales of Cordia stock. Tr. 311, 312.

percent of the float in Cordia, and wanted to maintain it. Tr. 317. Accordingly, Anthony Orlando would only permit cross trades of Cordia between Park Capital clients. Tr. 316-322.

Blackwell testified that during this time he overheard Respondent discussing trading strategies to maintain Cordia's share price with Orlando. Tr. 323, 326, 329, 364, 365. Blackwell also testified that Philip Orlando introduced Respondent as a "trading expert," available to help the sales force "in terms of trading Cordia and getting our clients into and out of it." Tr. 323. However, Blackwell never discussed Cordia with Respondent, nor did he receive instructions from Respondent on how to price orders. Tr. 346, 362, 363. Moreover, Blackwell handed his order tickets to Craig Dixson. Respondent never processed any orders for Blackwell. Tr. 349, 352, 353.

Blackwell resigned in September. Tr. 356, 357. On September 13, 2002, Park Capital's then clearing firm, RBC Dain Rausher ("Dain"), terminated its clearing arrangement with Park Capital.[6] CX-40; Tr. 55. Accordingly, Park Capital was unable to purchase securities on behalf of its customers.[7] CX-2; Tr. 55, 67, 68.

C. Respondent Begins Processing Orders for Cordia Securities

On October 8, 2002, Park Capital entered into a new clearing arrangement with Wexford Securities ("Wexford"). Shortly thereafter, on October 11, 2002,[8] Respondent took

[6] Dain apparently terminated its clearing arrangement with Park Capital at least in part due to credit issues associated with a forged General Motors stock certificate. This credit issue was unrelated to the Cordia scheme. CX-39.

[7] At about the same time, a Park Capital investment banker, John O'Brien, sent an incendiary email to Orlando, accusing him of lying and stating that "I am going to the NASD with a complete rundown of every trade on Cordia since May 20th." CX-46. Respondent was copied on this email. However, Respondent did not take it seriously, because it immediately followed a dramatic physical confrontation in the office between O'Brien and Anthony Orlando, and O'Brien was well known in the office to have a drinking problem. Moreover, Respondent believed that O'Brien did not have access to information about the client account or Cordia trading. Tr. 337, 338, 342 - 345, 673, 674.

[8] October 11, 2002, is the first day on which Respondent's initials appear on the order tickets. CX-50; Tr. 166.

responsibility for processing order tickets at Park Capital, in order to free another Park Capital Employee to handle the firm's operations. Tr. 197, 199, 646, 647, 746, 747. Respondent did not enter orders prior to that time. Tr. 747.

Respondent's desk was located in the order room, adjacent to the sales floor. There, brokers handed him tickets or called on the telephone with instructions to enter orders for execution. Tr. 647, 648. As instructed by Park Capital's Compliance Officer, Respondent reviewed order tickets for completeness, initialed them to indicate his review, and faxed them to Wexford. CX-102 p. 25, 26; Tr. 649, 650, 718-21. Respondent did not set prices for transactions or determine when to cross transactions between Park Capital customers. Rather, he processed orders as indicated on the order tickets that the sales force gave him. Tr. 665, 720.

Respondent processed orders for a significant amount of Cordia stock. For example, from October 11 through November 18, 2002, Respondent processed approximately 57 trades for almost 376,350 shares of Cordia.[9] CX-5; Tr. 75, 76. Of this amount, approximately 53 trades, or 99% of the shares traded (372,250 shares) were matched transactions between Park Capital customers. Id. Respondent estimated that 20-25% of the orders that he processed related to Cordia stock. Tr. 775.

Of particular note, during October and November 2002, Respondent processed a series of orders to sell large blocks of Cordia stock held by ELEC Communications ("ELEC"). ELEC was controlled by Al and Keith Minella, the same people who controlled Cordia.[10] CX-24-26;

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[9] There is some dispute between the parties as to the number of transactions that Respondent processed during this time. Market Regulation claims that there were 67 trades. Respondent disputes this, and points to approximately ten trades that appear to be double counted. The Panel found that Respondent processed approximately 57 trades.

[10] Al and Keith Minella were barred by the NASD in three separate actions from 1989 through 1992. Two of these actions involved matched trades. CX-21, CX-22.

Tr. 595, 596, 602, 603. In these transactions, which occurred between October 25 and November 8, 2002, ELEC sold 100,000 shares to four Park Capital customers in blocks ranging from 15,000 to 30,000 shares, for $1.50 per share. This price was dramatically below the market price of Cordia shares, which ranged from $3.50 to $4.25 at the time.[11] CX-2 pp. 7, 8. Within two to nine trading days from these initial sales, during the period October 29, 2002, through November 12, 2002, Respondent processed cross trades he received from the sales force to a secondary group of Park Capital customers at market prices, ranging from $4.00 to $4.20. The following chart details this series of trades:

October 25, 2002		**October 29, 2002**
ELEC Sells 15,000 shares to A at $1.50 for $22,500.	→	A resells 10,000 shares to AA at $4.00 for $40,000.
October 31, 2002		**November 12, 2002**
ELEC sells 30,000 shares to V at $1.50 for $45,000.	→	V resells 12,500 shares at $4.20 to O and W for $52,500 (W fails to pay for purchases)
November 1, 2002		**November 4, 2002**
ELEC sells 20,000 shares to G at $1.50 for $30,000.	→	G resells 15,000 shares at $4.05 to AA for $60,750.
November 8, 2004		**November 13, 2002**
ELEC sells 15,000 shares to C at $1.50 for $22,500.	→	C resells 15,000 shares at $4.05 to AA for $60,750.
November 8, 2005		**November 12, 2002**
ELEC sells 20,000 shares to RJ at $1.50 for $30,000.	→	RJ resells 20,000 shares at $4.00 to H for $80,000. (H's check bounces - fails to pay for part of purchase).

Respondent generally testified that he checked market prices when he processed trades. Tr. 720. However, he claimed to have no recollection of these large, below market transactions. CX-102 p. 77. Following these transactions, on November 14, 2002, Wexford froze ELEC's account at Park Capital. CX-48; Tr. 56, 138, 139.

[11] These sales do not appear to be reported to the market. However, there is no evidence in the record explaining this lack of reporting. It is also unclear, as between Park Capital and Wexford, which had responsibility for reporting these transactions.

D. Delaplain Joins Park Capital

Robert Delaplain ("Delaplain") joined Park Capital as operations officer on November 18, 2002. Tr. 186, 386. When Park Capital's compliance officer resigned two weeks later, Delaplain also assumed the role of compliance officer.[12] Tr. 388. Delaplain soon learned that Wexford was threatening to terminate its clearing agreement unless Park Capital put up a significant amount of cash as a deposit. He also learned that Wexford was refusing to accept further purchase orders for Cordia. Tr. 411.

On November 20, 2002, Respondent received a copy of an email from Wexford showing that several of the secondary customers had failed to pay for over $100,000 in Cordia purchases in the prior week. CX-49. Wexford spoke with Delaplain about this, particularly focusing on a November 8, 2002, ELEC sale of 20,000 shares to RJ for $1.50 a share, or $30,000. These shares were resold two trading days later, November 12, 2002, to customer H for $4 per share, or $80,000. CX-74. H paid for the transaction by check, and the check bounced. There were only enough funds in the account to cover the purchase of 8,500 shares, resulting in a credit risk regarding payment for the remaining 11,500 shares. Tr. 429. Park Capital proposed returning the remaining 11,500 shares to RJ. Tr. 427. Wexford refused, insisting that the shares be billed to Park Capital's Error Account, or sold in the open market. Tr. 427-432. Wexford told Delaplain that the transaction "smelled" and that it looked like Park Capital was "parking" Cordia stock in customer accounts. Tr. 430. Ultimately, the 11,500 Cordia shares were placed in Park Capital's Error Account where they remained for several days, despite the fact that Park Capital was not permitted to maintain overnight balances in this account. CX-3 p. 33; Tr. 432, 433.

[12] There is nothing in the record to indicate why the prior compliance officer resigned.

Delaplain brought the issue to Respondent's attention, and told him to sell the shares in the open market.[13] Tr. 433, 434. Respondent told Delaplain that he should speak with Philip Orlando about it, noting that Orlando wanted to avoid selling on the open market, because it could drive down the stock price. Tr. 320, 433, 434. Upon reflection at the hearing, Delaplain acknowledged that Respondent did not have the authority to sell the shares without Philip Orlando's approval. Tr. 434.

Delaplain testified that, in addition to the credit concerns, Wexford complained that there were no open market trades in Cordia, only cross trades between Park Capital customers. Wexford also told Delaplain that it looked like Park Capital was dominating the market for Cordia and creating an artificial market. Tr. 412-414. Delaplain at one point claimed that he told Respondent about Wexford's other concerns. Tr. 421. However, Delaplain's later testimony on this issue was ambiguous and inconsistent. Delaplain later testified that Respondent "had no idea what took place and no involvement, to me, at that time". Tr. 556-558. Delaplain also testified "I wasn't maybe, at the time, if I recall, when this was going on, my second week, you know, of my experience there may be perhaps alone with Mr. Proudian, but I know Mr. Proudian was present when I was in the conversations with Philip Orlando in his office and Anthony Orlando, the same types of discussions that we had…and not street trades and the types of problems that were brought up by…Wexford". Tr. 426, 427. This testimony was generally indicative of Delaplain's testimony more generally, which the Panel found to be inconsistent and jumbled, and, therefore, unpersuasive.

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[13] Respondent did not have access to the Error Accounts, so he was not in a position to detect irregularities. Tr. 744.

Delaplain ultimately failed in his attempt convince Wexford to allow Park Capital to continue trading in Cordia. Tr. 411-413. As of November 18, 2002, Wexford no longer permitted Park Capital to purchase penny stocks, including Cordia, for customer accounts. Tr. 50, 57, 752.

E. Park Capital Begins Clearing Cordia trades through Carlin

Following Wexford's refusal to clear purchases of penny stocks, including Cordia, Orlando negotiated an arrangement with Carlin Securities ("Carlin"), whereby Park Capital customers would open Carlin accounts in order to purchase Cordia. Tr. 449-451, 664. As a result, beginning on December 16, 2002, Park Capital directed its customer trades of Cordia shares through Carlin. Tr. 57. In order to process purchases of Cordia under this arrangement, Philip Orlando instructed Respondent to call the Carlin order desk and relay pending orders as requested by the Park Capital brokers. Tr. 664, 665. Carlin reported the trades through ACT. Tr. 670. The next day, Carlin gave Park Capital reports reflecting the transactions. Tr. 742.

Park Capital's customers held approximately 80 percent of the float in Cordia stock, as of December 2002. CX-1; Tr. 52, 317. According to a chart provided by Market Regulation, Park Capital maintained or exceeded this position from mid October, 2002, through the end of January, 2003. Id.

Market Regulation also claims that Park Capital was responsible for 64 percent, 84 percent, and 73 percent of the buy volume of Cordia in October, November and December 2002, respectively, and 48 percent, 75 percent, and 62 percent of the sell volume, in these same months, respectively. CX-10. However, Market Regulation's volume calculations are based upon activity by only the top five broker dealers. Therefore, Market Regulation's calculations may slightly overstate Park Capital's volume percentage on days when more than five broker

dealers were trading Cordia. Tr. 202-204. In addition, Market Regulation's volume calculation only measures days on which Park Capital traded Cordia. This too, would tend to cause an overstatement of Park Capital's trading volume, to the extent that other firms traded Cordia on days when Park Capital did not. Nonetheless, the analysis did establish that Park Capital led the market in trading volume on those days that it traded Cordia. Moreover, given that Park Capital held 80% or more of the float, the Panel finds that Market Regulation's volume analysis does establish that Park Capital had a dominant position in the trading of Cordia shares during the relevant period.

On December 4, 2002, NASD conducted an unannounced on-site visit to Park Capital to obtain records relating to the firm's trading in Cordia. CX-52, 53; Tr. 445, 446. Respondent was not consulted, nor was he invited to a meeting between NASD Staff and Park Capital representatives, which included Philip Orlando and Delaplain. Respondent was also not involved in gathering information for the Staff. Respondent did not learn that the Staff was investigating trading in Cordia until some days after the Staff's visit. Tr. 758.

The Park Capital sales force was undaunted by NASD's visit, and, beginning on December 20, 2002, they gave Respondent orders to sell blocks of Cordia shares into the market on behalf of certain Park Capital customers. Respondent processed these sell orders through Wexford. CX-7 at p. 2, CX-8; Tr. 84. At the same time, tape recorded calls and trading records show that Respondent placed matching buy orders for other customer accounts through Carlin. In particular, orders were placed at the same price, amount, and time for: 10,000 shares on December 20; 3,000 shares on December 31; 8,500 shares on January 7; and 58,350 shares on January 23. CX-8. Moreover, on December 16, 2002, Respondent called Carlin with an order to cross 24,500 shares of Cordia at $3.35. CX-9 at p. 2; Tr. 783.

In addition, on December 20, 2002, Park Capital customer ELEC transferred 60,000 shares of Cordia to Park Capital customer GG. Delaplain was aware that the shares bore a restrictive legend, and he also noted that there was an outstanding debt in GG's account. CX-76, p. 9, CX-92 pp. 4, 9. Accordingly, on January 9, 2003, Delaplain emailed Respondent to advise him that GG held a total of 68,350 shares of Cordia, "of which 60,000 is restricted." Delaplain noted that 8,350 of the shares were unrestricted and, therefore, he suggested that these shares be sold to cover the outstanding debt in the account. CX-54; Tr. 451, 454. On the same day, legal counsel for Cordia issued an opinion letter to the transfer agent indicating that GG could sell 56,000 of the shares received by ELEC, subject to the restrictions contained in SEC Rule 144, which provides an exemption from the registration requirements of Section 5 of the Securities Act, provided certain requirements are met. CX-92 at pp. 1-2. A letter from Park Capital representing that it would not solicit orders to purchase the shares to be sold under the Rule 144 Safe Harbor was attached to the opinion letter. Id. at p. 3.

On January 23, 2002, Respondent processed an order from the sales force to sell 58,350 Cordia shares from GG's account, at $2.15. At about the same time, Respondent also processed six accompanying buy orders for an identical number of shares at $2.20. CX-4 at p. 3, CX-8, CX-9 at pp. 9-16, CX-55, CX-75; Tr. 467-469. These six purchases, which were solicited, were executed thirteen minutes after GG's sale.[14] Id. CX-102 p. 135; Tr. 470.

On the following morning, Delaplain reviewed the trade blotters and noticed the sales. He sent an "urgent" email to Philip Orlando, as follows:

> URGENT QUESTION: [GG ACCOUNT]…SELLS 58,350 @ 2.15 CORDIA THROUGH WEXFORD YESTERDAY, WHILE [CARLIN ACCOUNTS] BUY A TOTAL OF 58,350 SHARES AT CARLIN @ APPROX 2.20. IS THIS A

[14] Based on Park Capital's method of record keeping, since the "unsolicited" box was not checked on these order tickets, the purchases were solicited. Tr. 469, 470.

> COINCIDENCE OR ARE THESE TRADES ORCHESTRATED (ARRANGED) BY PARK CAPITAL? [GG] WAS SELLING UNDER 144 – AS "PRE-ARRANGED IS NOT PERMITTED. THIS TRADE SHOULD BE RUN BY CORPORATE COUNSEL, ESPECIALLY AS THE FIRM IS UNDER NASD INVESTGATION FOR TRADING IN CORDIA. ADDITIONALLY, ARA [RESPONDENT] DID NOT IDENTIFY THE SALE AS "UNDER RULE 144."

CX-56; Tr. 461-466.

Respondent was copied on the email. However, at that point, he had already processed the orders.[15] Respondent did not have access to Rule 144 information, and generally relied upon the broker to inform him of sales under Rule 144, so he did not feel that he had done anything wrong. Tr. 767.

V. Violations

A. Manipulation

Respondent is charged with violating Section 10(b) of the Exchange Act,[16] SEC Rule 10b-5 thereunder,[17] and NASD Conduct Rule 2120[18] which prohibit the use of any manipulative, deceptive, or otherwise fraudulent device or contrivance in connection with the purchase or sale of securities. In the alternative, Respondent is charged with aiding and abetting these violations.

[15] There is some dispute about whether Respondent followed up with Philip Orlando after receiving the email. During his on-the-record testimony during the investigation, Respondent testified that he did not recall receiving the email, and did not discuss it with anybody. CX-102 pp. 129-130. During the hearing, however, Respondent testified that he asked Philip Orlando about it, and was told that there was no problem – the stock was free trading, and the sales had been cleared by corporate. Tr. 766–769, 778, 779. Regardless, the email notified Respondent of the issue after Respondent had processed the trades, and so it was too late for him to refuse to process them.

[16] "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 . . . To use or employ, in connection with the purchase or sale of any security . . . 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 or for the protection of investors."

[17] "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, (a) to employ any device, scheme, or artifice to defraud, . . . or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

[18] "No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

In particular, the Complaint alleges that Respondent placed "manipulative buy orders for Cordia into the market for the purpose of raising the company's stock price, [entered] matched buy and sell orders into the market, and [crossed] Cordia shares between and among customer accounts at Park Capital."

The Securities and Exchange Commission ("SEC") has defined manipulation as follows:

> In essence, a manipulation is intentional interference with the free forces of supply and demand. Proof of manipulation almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces.

In re Pagel, Inc., 48 SEC 223, 226 (1985), aff'd, 803 F.2d 942 (5th Cir. 1986). As Market Regulation acknowledges, "agency cross" or "matched" transactions are not manipulative per se. Tr. 196. Such transactions "that are intended to mislead investors by artificially affecting market activity," however, do constitute manipulative devices in violation of Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. Santa Fe Industries v. Green, 430 U.S. 462, 476 (1977); Edward J. Mawod & Co. v. S.E.C., 591 F.2d 588, 595 (10th Cir. 1979).

The SEC has explained that "investors and prospective investors … are … entitled to assume that the prices they pay and receive are determined by the unimpeded interaction of real supply and real demand so that those prices are the collective marketplace judgments that they purport to be." In re Edward J. Mawod & Co., 46 S.E.C. 865, 871-72 (1977), aff'd, 591 F.2d 588 (10th Cir. 1979).

Respondent does not challenge Market Regulation's assertion that Park Capital and its employees engaged in a manipulative scheme relating to Cordia securities. Tr. 30, 41. Respondent does dispute, however, that he was involved with it. Id. The Panel finds that there was insufficient evidence to establish that Respondent was a primary violator under Section

10(b) and Rule 10b-5 thereunder. However, for the reasons set forth below, the Panel finds that Respondent aided and abetted these violations.

The Panel rejected the notion that Respondent was a primary violator based upon Respondent's limited role in the alleged misconduct, which consisted of faxing or calling in the trades indicated on order tickets provided by the sales force. Respondent did not set the prices at which shares traded; he did not arrange matching of orders; he had no contact with, or access to, customers; he did not have broad access to account and other information that the Compliance Director knew. Tr. 744. Respondent operated on the periphery of activities at Park Capital. When Park Capital personnel met with the NASD Staff during an on-site inspection, Respondent was not invited, and he did not participate in the document production to the NASD that followed. Respondent was also not included in Park Capital's meeting with Al Minella – a significant Park Capital customer who purportedly controlled both Cordia and ELEC. Tr. 537. Indeed, Respondent did not even know Al Minella. Tr. 655.

The testimony of Market Regulation's witnesses was also insufficient to prove that Respondent was a primary violator. Blackwell's testimony does tend to establish that certain Park Capital personnel were involved in a fraudulent scheme to manipulate the market for Cordia securities, but Blackwell was not at Park Capital during the time that Respondent is alleged to have participated in the manipulation. Market Regulation would have the Panel infer from Blackwell's earlier, non-specific, observations about conversations between Philip Orlando and Respondent that, at a later time, Respondent escalated his involvement and directed trading in Cordia. However, the Panel finds Blackwell's testimony insufficient to support such an inference.

Nor did the testimony of Park Capital's Compliance Officer, Delaplain, suffice to show that Respondent was a primary violator in the scheme to manipulate Cordia shares. Unlike Blackwell, Delaplain was employed by Park Capital during some of the time when Respondent processed orders, but the Panel found Delaplain's testimony to be inconsistent and unpersuasive regarding Respondent's alleged violations.

Finally, Market Regulation relies upon the nature of the orders Respondent processed to establish his involvement in a scheme to manipulate trading in Cordia. Here, the Panel finds that there were a number of red flags that should have caused Respondent to raise questions, particularly given Respondent's prior experience. Respondent's willingness to process Cordia trades without question, in light of these red flags gives rise to his liability for aiding and abetting the other Park Capital Respondents' manipulation of Cordia securities.

Three elements are necessary to find aiding and abetting liability: (1) a securities law violation by another party; (2) a general awareness or knowledge by the aider and abettor that his actions are part of an overall course of conduct that is illegal or improper; and (3) substantial assistance by the aider and abettor in the conduct constituting the violation. See Dep't of Enforcement v. J. Alexander Securities, et al., No. CAF010021, 2004 NASD Discip. LEXIS 16, at *32, (NAC August 16, 2004); Howard R. Perles, Exch. Act Rel. No. 45691, 2002 SEC LEXIS 847, at **13-14 (Apr. 4, 2002).

Regarding the first element, the Panel finds there is sufficient evidence that Park Capital employees engaged in manipulative trading of Cordia securities. "When individuals occupying a dominant market position engage in a scheme to distort the price of a security for their own benefit, they violate the securities laws by perpetrating a fraud on all public investors." In re Pagel, Inc., 48 SEC 223, 226 (1985), aff'd, 803 F.2d 942 (5th Cir. 1986). That is exactly what

occurred in this case. During the timeframe at issue, Park Capital used cross trades among its customers to maintain 80% or more of the float in Cordia securities. CX-1. To accomplish this, Park Capital's sales force matched essentially all customer sales of Cordia with purchases by other customers for the stated purpose of maintaining an artificially high price for Cordia, believing that if it sold any Cordia into the market, the price would fall. CX-5. In addition, the evidence establishes that Park Capital dominated the trading volume in Cordia stock to protect the price.[19] CX-10.

Turning to the issue of Respondent's knowledge, "[e]vidence showing that an aider or abettor acted with severe recklessness establishes scienter and thus satisfies the requirement that the aider and abettor possess a general awareness or knowledge that his actions are part of an overall course of conduct that is illegal or improper." See Graham v. SEC, 343 U.S. App. D.C. 57, 222 F.3d 994 (D.C. Cir. 2000). Severe recklessness exists when the aider and abettor encounters 'red flags' or 'suspicious events creating reasons for doubt' that should have alerted him to the improper conduct of the primary violator." Id. at 1006. Dep't of Enforcement v. J. Alexander Securities, 2004 NASD Discip. LEXIS 16 at *36.

Respondent was aware that virtually all Park Capital customer sales of Cordia were matched against purchases by other Park Capital customers. He knew that Cordia was a thinly-traded stock. Tr. 698. He also knew that Philip Orlando did not want sales of Cordia on the open market, because he was concerned that such sales might drive the price of Cordia down. Of particular concern, Respondent processed the series of October and November ELEC sales at $1.50 per share, followed shortly thereafter by resales at $3.50 to $4.20. This should have been a

[19] As noted above, the Panel found that there were weaknesses in Market Regulation's analysis that would tend to overstate the exact amount of trading volume attributable to Park Capital. Nonetheless, the analysis did establish that Park Capital led the market in trading volume on those days that it traded Cordia.

bright red flag of improper conduct - particularly given Respondent's admission that he had a practice of comparing the transaction price with the market price. Tr. 720. The Panel, therefore, finds the second element of aiding and abetting is satisfied.

Respondent, by processing orders in spite of these red flags, gave substantial assistance to the fraud. Respondent acknowledged that, upon reflection, the trading looked suspicious. However, he did not recognize that when the trading occurred. Respondent testified, "I have never really passed judgment on other people's trades. I didn't make a habit of evaluating what people were buying and selling. It wasn't my concern. I was strictly a conduit to get that trade executed." Tr. 754.

The Hearing Panel rejects this contention. In affirming the SEC's decision in another manipulation case, the court in Graham v. SEC stated:

> Graham further contends that she may not be regarded as substantially assisting Broumas since the execution of his trades was merely a 'ministerial' act on her part. She had '*no* discretion' with respect to the handling of Broumas' accounts, she asserts, because 'once Mr. Pasztor approved a trade, [she] *could not* refuse to execute it.' But Graham did have discretion. A registered representative can always refuse to execute a trade she knows may constitute a securities violation…Of course, doing so might have made Graham's career at VCI more difficult, but fear of such consequences does not excuse a violation of the securities laws." (additional citations omitted).

222 F.3d 994, *1004 (D.C. Cir. 2000).

The same analysis applies here. With blinders firmly attached, Respondent processed trades that he later acknowledged were suspicious. As a registered representative – particularly one with substantial prior experience as a head trader and market maker – Respondent should have recognized that the orders he was being asked to complete were suspicious, and should have either insisted on more information to assure himself that they were legitimate, or refused to process the trades. Accordingly, the Panel finds that Respondent aided and abetted violations

of Section 10(b) of the Exchange Act, SEC Rule 10b-5 promulgated thereunder, and NASD Conduct Rules 2120 and 2110.[20]

B. Sales of Unregistered Securities

The Complaint also alleges that Respondent violated Section 5 of the Securities Act of 1933 ("Section 5") by effecting unlawful sales of unregistered Cordia shares, and by doing so, violated Conduct Rule 2110.[21]

Section 5 prohibits the offer or sale of any security, unless there is a registration statement in effect as to that security, or there is an exemption available for that securities transaction. SEC v. Softpoint, Inc., 958 F. Supp. 846, 859 (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. 1998). To prove that Respondent violated Section 5, Market Regulation must establish that no registration statement was in effect or filed as to the securities and Respondent, directly or indirectly, sold or offered to sell the securities.[22] Market Regulation must also show that the sale was made through the use of interstate facilities or the mails. Scienter is not an element of a Section 5 claim. SEC v. Cavanagh, 1 F. Supp. 2d 337, 361 (S.D.N.Y. 1998), aff'd, 155 F. 3d 129 (2d Cir. 1998).

Market Regulation must also establish that Respondent was a "direct participant" or "substantial factor" in the sale of unregistered securities. SEC v. Friendly Power Company LLC,

[20] Although NASD Conduct Rules 2110 and 2120 discuss only NASD members, General Provisions Rule 115 states that NASD rules shall apply to all members, as well as to "persons associated with a member."

[21] The Complaint alleges that Respondent participated in the sale of restricted securities by ELEC, but Market Regulation's post hearing brief argued that Respondent was liable for unregistered sales by customer GG. However, the Panel determined to consider the GG sales, even though they were not specified in the Complaint for several reasons. First, GG received his Cordia shares from ELEC, which was identified in the Complaint. Moreover, substantial evidence was introduced regarding sales to GG at the hearing, and no objections were made, so there was no prejudice to Respondent.

[22] Once Market Regulation shows that a respondent sold unregistered securities, the respondent bears the burden of proving entitlement to an exemption. Busch v. Carpenter, 827 R.2d 653 (10th Cir. 1987). (citations omitted); SEC v. Lybrand, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002) (citations omitted).

49 F.Supp. 2d 1363, 1372 (S.D. Florida 1999); See, Softpoint, 958 F. Supp at 860 (holding that the actions were "clearly necessary and substantial and not simply 'de minimus'").

There is no dispute that unregistered sales of Cordia occurred, and Market Regulation also presented sufficient evidence to establish this at the hearing.[23] However, the Panel finds that there is insufficient evidence that Respondent was a substantial factor in the sales. Rather, for the reasons below, the Panel finds that Respondent's role in the sales of unregistered securities was de minimus.

The cases cited by Market Regulation generally involve sales personnel who interact with customers and determine the price and time of the transactions; or supervisory personnel who have direct oversight responsibility regarding sales of unregistered securities. In contrast, Respondent had no responsibility for ensuring compliance with Rule 144, nor was he in a position to do so. Respondent did not arrange the transactions or initiate the sales. He had no contact with the customers executing the transactions. He did not have access to the legal counsel or the transfer agent. Respondent was not in a position to monitor these transactions. Accordingly, the Panel finds that Respondent did not violate Rule 2110's proscription against the sale of unregistered securities by processing orders provided to him by sales personnel.

V. Sanctions

There is no sanction guideline for aiding and abetting market manipulation. The most comparable guideline addresses misrepresentations or material omissions of fact. That guideline recommends a fine of $2,500 to $50,000 and a suspension for up to 30 days in cases involving negligence; a fine of $10,000 to $100,000 and a suspension from 10 days to two years for

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[23] The Panel did not reach the issue of whether Respondent met his burden of establishing entitlement to an exemption from the registration requirements.

intentional or reckless misconduct; and in egregious cases, a bar. NASD Sanction Guidelines, p. 93 (ed. 2006). Market Regulation asserts that Respondent's conduct was egregious, and he should be barred.

Aiding and abetting manipulation is a serious violation. As the National Adjudicatory Council observed in Market Surveillance Committee v. Markowski, "[t]he integrity of the securities markets is paramount, and those who engage in activities that manipulate markets cause great harm not only to investors who are involved in the manipulated markets, but to the overall public perception that the markets are driven by the free forces of supply and demand." No. CMS920091, 1998 NASD Discip. LEXIS 35, at **56-57 (NAC July 13, 1998), aff'd, Exch. Act Rel. No. 43,259, 2000 SEC LEXIS 1860 (Sept. 7, 2000), aff'd, 274 F.3d 525 (D.C. Cir. 2001).

Looking to the general considerations in determining sanctions set forth in the Guidelines, the Hearing Panel notes that Respondent has not accepted responsibility for his misconduct. Rather, when asked whether, in hindsight, he would have done anything differently, Respondent stated, "I don't know if I could have done anything differently. I would have hoped to get market making accomplished, that is for sure." Tr. 777, 778. Respondent's answer shows his failure to appreciate the significance of the fraudulent activity occurring at Park Capital, as well as his role in it. Moreover, when asked whether he considered the possibility of wrongdoing when he processed Cordia trades, Respondent said he did not pass judgment on trades because "[i]t wasn't my concern." Tr. 754. But, as explained above, every registered representative must be concerned about red flags that suggest that unlawful activity may be occurring.

The Panel also considered that certain other factors weighed in Respondent's favor. Respondent received no additional compensation for processing Cordia trades, and the misconduct occurred over a fairly brief period of time. In addition, Respondent was an aider and abettor, not a primary violator.

After weighing these factors, the Panel finds that Respondent should be suspended from associating with any NASD member firm in any capacity for 90 business days. In addition, because Respondent does not appear to have a good grasp of his responsibilities as a registered person, he will be required to re-qualify in all capacities. In light of Respondent's lengthy unemployment and lack of funds, the Panel finds that a fine of $5,000, which in other circumstances would be viewed as light, is appropriately remedial in these circumstances.

VI. Conclusion

Respondent aided and abetted market manipulation, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120. For this violation, he is suspended in all capacities for 90 business days and fined $5,000. He is also required to re-qualify in all capacities after his suspension begins and prior to resuming any activities requiring registration.

These sanctions shall become effective on dates set by NASD, but not earlier than 30 days after this decision becomes NASD's final disciplinary action in this matter, except that if this decision becomes NASD's final disciplinary action, Respondent's suspension shall begin on

October 25, 2006, at the opening of the business day and end on January 19, 2007, at the close of the business day.[24]

HEARING PANEL.

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By: Sara Nelson Bloom
Hearing Officer

Dated: September 7, 2006

Copies to: Martin H. Kaplan, Esq. (*via facsimile and first-class mail*)
Laurie A. Doherty, Esq. (*via electronic and first-class mail*)
Ralph D. Martin, Esq. (*via electronic and first-class mail*)
Jeffrey K. Stith, Esq. (*via electronic and first-class mail*)

[24] 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.