

FINANCIAL INDUSTRY REGULATORY AUTHORITY¹
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KIRLIN SECURITIES, INC.
(CRD No. 21210),

ANTHONY J. KIRINCIC
(CRD No. 1499511),

DAVID O. LINDNER
(CRD No. 1305774),

ANDREW J. ISRAEL
(CRD No. 41980476),

Respondents.

Disciplinary Proceeding
No. EAF0400300001

**Extended Hearing
Panel Decision**

Hearing Officer – SNB

November 28, 2007

Respondent Kirincic engaged in market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder and Rules 2110 and 2120, and falsified customer signatures on stock certificates and letters of authorization, in violation of Rule 2110. For these violations, Respondent Kirincic is barred. Charges that Kirincic failed to establish, maintain and enforce an adequate supervisory system and written supervisory procedures, in violation of Rules 2110 and 3010(a) and (b), are dismissed.

Respondent Lindner failed to comply with best execution requirements for a customer order, in violation of Rules 2110 and 2320. For this violation, Respondent Lindner is barred. Charges that Lindner failed to establish, maintain and enforce an adequate supervisory system and written supervisory procedures, in violation of Rules 2110 and 3010(a) and (b), are dismissed.

Respondent Israel engaged in market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder and Rules 2110 and 2120, and failed to comply with best execution requirements for a customer order, in violation of Rules 2110 and 2320. For these violations, Israel is barred.

¹ As of July 30, 2007, NASD consolidated with the member firm regulation functions of the NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority (“FINRA”). References in this decision to FINRA include, where appropriate, NASD.

Respondent Kirlin Securities engaged in market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Rules 2110 and 2120, and failed to comply with best execution requirements for a customer order, in violation of Rules 2110 and 2320. For these violations, Respondent Kirlin Securities is expelled. Charges that Kirlin Securities failed to establish, maintain and enforce an adequate supervisory system and written supervisory procedures, in violation of Rules 2110 and 3010(a) and (b), are dismissed.

Respondents Kirlin Securities, Lindner, and Israel shall jointly and severally pay restitution in the amount of \$26,163, in connection with their violation of best execution requirements under Rules 2110 and 2320.

Appearances

Gary A. Carleton, Esq., and Philip J. Berkowitz, Esq., (Rory C. Flynn, Esq., and Mark P. Dauer, Esq., Of Counsel) for the Department of Enforcement.

Ross J. Ellick, Esq., for Respondent Kirlin Securities; Martin P. Russo, Esq., for Respondent Anthony J. Kirincic; Martin H. Kaplan, Esq., for Respondent David O. Lindner; Joseph A. Sack, Esq., for Respondent Andrew J. Israel.

DECISION

I. Procedural History

On December 1, 2005, the Department of Enforcement (“Enforcement”) filed an amended Complaint against Respondents Kirlin Securities, Inc., Anthony J. Kirincic, David O. Lindner, and Andrew J. Israel. Count One of the Complaint charges that Kirlin Securities, Kirincic and Israel used deceptive techniques to manipulate the price for securities of Kirlin Holding Corp. (“KILN”), in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder and FINRA Rules 2110 and 2120. Count Two charges that Kirincic forged customer signatures on stock certificates and letters of authorization, in violation of Rule 2110. Count Three charges that Kirlin Securities, Lindner and Israel failed to comply with best execution requirements for a customer order, in violation of Rules 2110 and 2320. Count Four charges that Kirlin Securities, through Kirincic and Lindner, failed to establish, maintain and

enforce an adequate supervisory system and written supervisory procedures, in violation of Rules 2110 and 3010(a) and (b).

Respondents filed Answers to the Complaint, denied the allegations and requested a hearing. The Hearing Panel, composed of a FINRA Hearing Officer and two former members of the District 10 Committee, held the hearing on this matter in New York, New York on ten hearing days.²

The individual Respondents testified on their own behalf, and five additional witnesses testified. Respondents also called Richard Tucker to testify as an expert witness.³ On March 12, 2007, the Parties submitted post-hearing briefs and proposed findings of fact.

II. Respondents

A. Respondent Kirlin Securities, Inc. (“Kirlin”) became a FINRA member in March 1988. CX-10 p. 2. Just prior to the hearing in this matter, Kirlin filed a form BDW, which is still pending, to withdraw from FINRA membership. CX-8.

B. Respondent Anthony J. Kirincic (“Kirincic”) has been registered as a General Securities Representative, General Securities Principal, Registered Options Principal, and Financial and Operations Principal with Kirlin since March 1988. CX-11 p. 5. Kirincic served as co-CEO of Kirlin during the time at issue in the Complaint. Kirincic owns approximately 20% of Kirlin Holdings Corp.

² References to the testimony set forth in the transcripts of the Hearing are designated as “Tr. __,” with the appropriate page number. References to the exhibits provided by Enforcement are designated as “CX-___,” and Respondents’ exhibits are designated as “RX-___.” Joint exhibits are designated as “JX-___.” Respondents’ exhibits RX-23, 27-35, 48-49, 64, 67, 69, 73, 78, 82, 84, 86-87, 92, 95, 99-100, 111, 120-123, 125, 128, 132, 173, 183, 188, 208, 214-215, 228-229, 232, 234-235, 243, 245, 264, 273-274, and 282-286, Enforcement’s exhibits CX-8-14, 17, 20-28, 30, 32-48, 50-63, 71-77, 80, 82-84, 86-87, 90-92, and 100-109, and JX-1 were admitted into the record.

³ Enforcement also called an expert witness to testify, but he became ill and was unable to complete his testimony. Accordingly, the Hearing Officer issued an Order striking his report and testimony from the record. See Order dated November 12, 2007.

C. Respondent David O. Lindner (“Lindner”) has been registered as a General Securities Representative and General Securities Principal with Kirlin since March 1988. CX-12 p. 5.

D. Respondent Andrew J. Israel (“Israel”) has been registered as a General Securities Representative at Kirlin since October 1989. CX-13 p. 4. He was Kirlin’s Head Equity Trader during the time frame at issue in the Complaint. Tr. 1364-1365.

III. Facts

A. Background on KILN and Kirlin Holdings

Kirlin was founded by Kirincic and Lindner in 1987. Tr. 1610. The name Kirlin derives from a combination of the first three letters of the founders’ names. Kirlin was organized as a 100%-owned subsidiary of Kirlin Holdings Corp. Tr. 74.

In 1995, Kirlin Holdings Corp. became a publicly traded company, and its securities began trading on the NASDAQ Small Cap Market under the symbol KILN. CX-21 p. 9; Tr. 128. KILN transferred its listing to the NASDAQ National Market when it reached the required listing standards in 1999. Id., Tr. 129-130. Kirincic and Lindner have served as co-CEOs and board members of KILN since its inception, and Lindner has also served as KILN’s Chairman. Tr. 1611. In 2002, Kirincic and Lindner each owned about 20% of KILN’s outstanding shares. Tr. 89, 1618-1619. At one point, KILN shares traded as high as \$50 per share, and, as a result, Kirlin and Lindner each held shares worth more than \$30 million. Tr. 1798.

In order to establish a base of operation in Manhattan, on September 1, 2001, Kirlin closed on the acquisition of MS Farrell, a 50-person, Manhattan-based firm. Tr. 83. The timing of this transaction was unfortunate for Kirlin, as less than two weeks later the September 11 tragedy occurred. Id. Kirlin was required to shut down its Manhattan office and maintain its existing headquarters in Syosset, New York. Tr. 90-91.

In the Spring of 2002, Kirlin's Syosset headquarters was a 20,000 square-foot facility, where the executive offices, trading department, back office and compliance operations were located. Id. Kirlin also had eight branch offices. Id. Kirincic, Lindner and Israel maintained their offices in the Syosset headquarters.

Israel initially worked in the trading department, but was promoted to Head Equity Trader in the spring of 2002, and served in that capacity during the trading at issue in this case. Tr. 1364. Kirlin was a "\$5,000 Broker," meaning that it was permitted to operate with just \$5,000 in net capital under SEC Rule 15c3-1(a)(2)(vi), and was not permitted to engage in proprietary trading.⁴ Therefore, Israel's function as head trader was to process the orders that he received, rather than to make markets in securities. Tr. 1473. Because Israel was the Head of Equity Trading and there was just one other equity trader, Israel generally handled Kirincic's orders. Tr. 1364, 1370, 1374-1375, 1389-1394. In those few instances when Israel may not have handled an order, he would have reviewed the order ticket as part of his supervisory responsibilities. Tr. 1375.

B. Spring 2002 - The Nature and Liquidity of KILN

In April 2002, KILN had a public float of 8.5 million shares. Tr. 679. Approximately 80 percent of KILN's outstanding shares were held in accounts of Kirlin customers during this period. Tr. 1416. Therefore, Israel testified, a firm interested in purchasing KILN would probably come to Kirlin as the most likely source of stock. Tr. 1415. KILN was an illiquid stock with limited trading volume, few market-makers and limited institutional ownership. Tr. 1592. As Israel testified, ... "[w]e were the people who had interest in the stock. There's

⁴ As a "\$5,000 Broker," Kirlin 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.

really no outside interest.” Tr. 1584. In the months leading up to the trading at issue, KILN’s average daily trading volume was generally less than 10,000 shares. CX-47. As a result, a large buy or sell order could cause the stock price to go up or down dramatically. Tr. 1592-1593.

C. February 20, 2002 - KILN Receives a Delisting Notice from NASDAQ

In 2000, KILN stock began to decline. For the year ended December 31, 2000, it reported an \$11 million net loss.⁵ CX-21 p. 14. For the year ended December 31, 2001, KILN reported a \$3.7 million net loss. Id. For the first two months of 2002, KILN had a \$400,000 net loss. Tr. 82-84. Kirincic attributed these losses to KILN’s attempts, in 1999 and 2000, to expand its brokerage operation through the acquisition of other brokerage firms. Tr. 557-560.

On February 20, 2002, KILN received notification from NASDAQ of a possible delisting, based upon its failure to meet the \$1 minimum continued listing bid price requirement. CX-20; Tr. 137-138. NASDAQ notified KILN that, in accordance with Rule 4450(e)(2), it had 90 calendar days, until May 21, 2002, to regain compliance with the bid price requirement for a minimum of ten consecutive days, or it faced delisting from the NASDAQ National Market. Id.

D. March 5, 2002 - Kirincic Family Members Buy and Sell 140,000 Shares of KILN in Cross-Transactions

Kirincic had a close-knit family, which included his parents, his sister SP, his parents-in-law, and his cousin.⁶ Tr. 2285-2288. Kirincic was the patriarch of the family, and some family members gave him authority over their funds, dating back to when Kirincic was a teenager. Tr. 2741-2742. Kirincic was also the account executive for all the various accounts held by his family members. Tr. 125. As discussed below, Kirincic executed many trades in KILN on behalf of his family members’ accounts.

⁵ \$3.8 million of this loss was attributable to the sale of ParentNet, Inc. CX-21 p. 13.

⁶ His cousin later joined KILN’s board of directors. Tr. 123.

On March 5, 2002, Kirincic placed a number of orders through Israel to sell KILN shares for his family members. Tr. 1433. Specifically, Kirincic placed an order to cross four separate sell orders (78,000 shares from his father’s IRA account; 12,000 shares from his mother’s account, 41,500 shares from his mother-in-law’s account, and 8,500 shares from his parents-in-law’s account) with a buy order for 140,000 shares from his parents’ joint account. Kirincic arranged to cross these orders at a price of \$.85 per share.⁷ Id.; RX-245. Kirincic testified that he did not recall discussing or soliciting these orders. Moreover, Kirincic did not know whether it was a coincidence that these four sell orders from various family members happened to add up to the 140,000 shares that his parents purchased that day. Tr. 183-226.

E. March 7–March 15, 2002 – Kirincic’s Parents Purchase Additional KILN Shares on the Open Market

Over the next several weeks, from March 7 through March 15, 2002, Kirincic placed orders to purchase KILN for his parents’ account, as follows:

Date	Number of Shares	Price per Share
3/7/02	2,800	\$.75
3/8/02	500	\$.73
3/11/02	100	\$.73
3/13/02	622	\$.71
3/13/02	581	\$.73
3/14/02	1,378	\$.76
3/15/02	2,000	\$.6499
3/15/02	2,000	\$.64
3/15/02	1,000	\$.65

RX-245 pp. 2-3.

⁷ On that day, KILN opened at \$.85 per share, and closed at \$.80 per share. Tr. 250.

Kirincic placed these purchase orders on the open market, and they were routed through Kirlin's clearing firm at the time, Bank of New York ("BNY"), for execution by Herzog, a KILN market maker. CX-42 pp. 1-2. Kirincic said he had no recollection of why his parents continued to purchase KILN. Tr. 254.

As the chart above indicates, KILN's price generally continued to drop over this period. Tr. 250-251. On March 15, 2002, Kirincic stopped purchasing KILN in his parents' accounts, at least through June 30, 2002. RX-245 pp. 3-14.

However, as discussed below, on the next trading day, March 18, 2002, Kirincic began to place orders to purchase KILN in the account of his sister, SP, by using a different order routing technique. Tr. 294-298.

F. March 18, 2002 – Kirincic, through Israel, Begins Purchasing KILN in SP's Account

On March 18, 2002, Kirincic began to place purchase orders for KILN securities on behalf of SP's account—her first KILN purchases since November 8, 2001.⁸ At the time, SP was a divorced, unemployed⁹ mother of three, and her income consisted of a \$3,600 monthly payment from her ex-husband. Tr. 2270-2273, 2291-2292.¹⁰

SP testified at the hearing that, despite her limited resources, beginning on March 18, 2002, she instructed her brother to purchase KILN in large increments in the tens of thousands of dollars, as a legacy to her children. Tr. 2265. Some of these purchases were paid for by funds transferred from Kirincic's parents, which SP claimed were loans. Tr. 2266.

⁸ RX-35 p. 56-61, RX-173 p. 1. The SP account sold 10,000 KILN on November 29, 2001. Id.

⁹ SP testified that, about a year earlier, she left a position as an assistant store manager for Pier 1 Imports. Tr. 2292.

¹⁰ SP's New Account Form with Kirlin, updated in January 2002, confirmed her lack of employment, and showed a slightly higher annual income of \$50,000 to \$75,000, liquid net worth of \$150,000 to \$250,000 and total net worth, excluding her home, of \$500,000 to \$1 million. CX-40 p. 12. SP testified that she had approximately \$500,000 in liquid assets, which included her KILN holdings. Tr. 2295-2299.

Kirincic and SP maintained that they never discussed the wisdom of SP's decision to purchase KILN stock, and Kirincic never recommended it. Tr. 2289. Both testified, however, that SP gave Kirincic instructions to purchase KILN beginning in March 2002. Tr. 303, 2264-2265. Kirincic does not recall precisely when he received instructions or exactly what the instructions were. Tr. 313-314. He did recall, however, that he had time and price discretion, and he made all decisions regarding display and reserve sizes on orders placed for the account. Tr. 297-298, 314, 583-584. SP testified that she gave Kirincic instructions to purchase KILN in various dollar amounts, such as \$25,000 or \$50,000, depending on what she was comfortable with at the time. Tr. 2265. However, SP did not recall specifying the per share price to be paid. Tr. 2320. SP testified that news announcements were not relevant to her decision to purchase KILN. Tr. 2330. And although SP testified that she recalled telling her brother to spend as much as \$75,000 on a single order to purchase KILN, she did not recall why the size of her orders increased over time. Tr. 2337-2339.

Unlike the purchases in his parents' accounts, Kirincic generally used an ECN for the SP purchase orders. Kirincic specified to the trading desk, generally to Israel, a display amount and reserve amount.¹¹ The trading desk, generally Israel, then entered the order, which was immediately displayed on the ECN. Tr. 1390-1391. Any purchase orders displayed with a bid above the inside bid price automatically resulted in a new, higher, inside bid price. Tr. 2496-2498, 2646. Also, by using an ECN, Kirincic could maintain anonymity as to the source of the purchases.

¹¹ On an ECN, it is possible to place a large purchase or sale order, but display to the market only a portion of the order. This masks the full size of the order from the market, which is important because a large order, if displayed, could affect the market. As the displayed order is filled, another portion is automatically displayed. This continues until the order is filled or cancelled.

During the several months leading up to this trading, KILN trading volume was light. In the months prior to March 18, 2002, the average daily trading volume was generally less than 10,000 shares. CX-47. Even including the 280,000 shares traded among Kirincic family accounts on March 5, 2002, the average daily trading volume from January 12 through March 15, 2002, was 15,395 shares. Id.

Beginning on March 18, 2002, the trading activity in KILN increased. On that day, Kirincic ordered, and Israel placed, three purchase orders for SP's account using BRUT ECN, with 500 shares displayed, and several thousand shares in reserve. Despite the fact that each order was receiving executions at the bid price Kirincic selected, he cancelled pending orders, at intervals of approximately one hour, and entered higher priced orders. As a result, the inside bid price for KILN rose from \$.64 per share to \$.76, and SP purchased 14,053 shares of KILN.¹² CX-43 p. 1. As discussed below, Kirincic, through Israel, continued to employ this same trading strategy over the next several months.

G. March 19, 2002 - KILN Board Meets to Discuss Possible NASDAQ Delisting

On March 19, 2002, KILN's Board of Directors ("Board") held a special meeting to discuss the notice of possible delisting that KILN received on February 20, 2002. CX-20, RX-213; Tr. 144. The Board was comprised of five members: Lindner, Kirincic, Edward Casey, Howard Paul, and Marty Schacker.¹³ Tr. 118.

¹² Specifically, at 9:33:39 a.m., at Kirincic's direction, Israel placed the first order on BRUT ECN for 7,000 shares at \$.68 per share, with 500 shares displayed, and 6,500 in reserve. CX-43 p. 1. Within an hour, the order received a fill on 2,500 shares, based on three executions. Rather than waiting for the rest of the order to be filled, at 10:43:44 a.m., Kirincic directed the order to be cancelled and replaced with an order for 4,400 shares, with 500 displayed and 3,900 in reserve, at a price of \$.74—six cents higher than the partial fill in the prior hour. Id. That order was in turn cancelled at 11:37:33 a.m. after another partial fill of 1,500 shares in three executions. Id. At 1:00:08 p.m., Kirincic ordered, and Israel posted, a third order of the day on BRUT ECN for the SP account. This third purchase order for 10,000 shares, with 1,000 displayed and 9,000 in reserve, was at a higher price still—\$.76 per share. This order was filled at 3:53:32 p.m. Id.

¹³ Edward Casey was Kirincic's counsel, Marty Schacker was the former Chairman of MS Farrell, and Howard Paul was a securities attorney. Tr. 118.

During the meeting, the Board discussed various actions it could take, including phasing down to the NASDAQ Small Cap Market where the deficiency grace period would be longer, conducting a repurchase of KILN stock in the open market, or effectuating a reverse stock split. CX-28. Kirincic expressed his hope that KILN would regain compliance with the bid price requirement on its own merit. The Board decided to allow some time for this to happen, and agreed to reconvene on March 27, 2002, to discuss the matter further. Tr. 147-149.

H. March 19–27, 2002 - Kirincic, through Israel, Continues to Purchase KILN in SP's Account

During the period from March 19 through March 27, 2002, Kirincic and Israel used much the same technique they used before, placing orders on BRUT ECN, cancelling them before they were completely filled, and replacing them with higher priced orders. For example, on March 19, 2002, Kirincic, through Israel, placed increasing purchase orders, from \$.78 to \$.81 to \$.84, all of which were cancelled and replaced before they were completely filled, and the last of which was placed only six minutes before the close of the market. On that day, SP's account purchased 6,100 shares of KILN, and the inside bid price for KILN rose from \$.68 per share to \$.84 per share. CX-43 p. 1, RX-215.

In the five trading days from March 20 through March 26, 2002, Kirincic ordered, and Israel placed, 19 orders to purchase KILN for the SP account on BRUT ECN. CX-43 pp. 2-3. During this time, SP's account purchased 43,200 shares of KILN, and on March 26, 2002, the closing inside bid price for KILN reached \$.90 per share. CX-43 p. 3.

On March 27, 2002, KILN had no trading volume on the NASDAQ National Market. On March 28, 2002, KILN's trading volume was 8,400 shares. CX-47. SP's account made three purchases that day through BNY (not BRUT ECN) totaling 4,000 shares, at prices from \$.9099

to \$.9496 per share. CX-40 p. 23. The inside bid price for KILN was \$.91 at the end of the day. RX-215.

I. KILN Board Adopts Share Buy-Back Plan to Address Bid Price Deficiency

On March 27, 2002, KILN stock remained below the \$1 bid price requirement, so the Board met again to discuss an appropriate course of action.¹⁴ CX-28. After considering the issue, the Board determined to adopt a stock buy-back plan to address the bid price deficiency.

The Board resolved that:

[E]ffective April 1, 2002, the officers of the Corporation are hereby authorized to repurchase up to \$1 million dollars of the Corporation's common stock *in the open market* from time to time.

Id. (emphasis added). Kirincic did not tell the Board that he knew anyone who might be interested in selling stock to KILN as part of the stock repurchase program, or that his relatives might sell their KILN stock into the repurchase program. Tr. 180.

The Board authorized Kirincic and Lindner to purchase KILN stock for the repurchase plan, and they were designated as brokers for the KILN Account. Tr. 445-446, 1635-1637. Kirincic's recollection is that the Board set an upper limit in the \$1.30 range for the repurchase program. Tr. 680-681. No price parameters were reflected in the Board Minutes. CX-28.

J. April 1, 2002 - No KILN Purchases - Inside Bid Price Drops to \$.77

On April 1, 2002, Kirincic placed no orders for the SP account. CX-42 p. 8, CX-43 pp. 3-4. Kirincic testified that he did not place any orders that day because KILN was planning to issue a news announcement after the close of trading, and he did not want to trade ahead of the announcement. Tr. 360, 363-364. Kirincic acknowledged that there had been no negative news that day that would have caused the inside bid price to decline. Tr. 366. However, after opening

¹⁴ Although in March 2002, Kirin received approximately \$2.5 million as a rebate from its clearing firm, BNY, this did not have a positive impact on KILN's declining stock price. CX-23 p. 23; Tr. 567-569.

with an inside bid price of \$.91, the inside bid price dropped \$.14 per share during the day and closed at \$.77, on volume of less than 2,000 shares. CX-47, CX-42 p. 8, RX-215 p. 9; Tr. 364-366.

K. KILN Issues Positive Press Release - No Kirincic Purchases, No Market Reaction

After the close of trading on April 1, 2002, KILN issued a news announcement reporting a decrease in its net loss from \$11 million for the year ended 2000 to \$3.6 million for the year ended 2001. Kirincic described the news as positive, but the market did not react to it. RX-188; Tr. 368. KILN opened on April 2, 2002, at a \$.73 inside bid, below the prior day's closing bid of \$.77. RX-215 p. 9.

L. The Morning of April 2, 2002 - Stock Buyback Press Release - No Kirincic Purchases, No Market Reaction

During the morning of April 2, 2002, market-makers continued to quote inside bid prices in the range of \$.73-\$.75, with an inside asking price of \$.95. RX-215 pp. 9-10. At 11:08 a.m., KILN issued a news release announcing its plans to “repurchase up to \$1 million of its common stock in the open market from time to time.” (Emphasis added) CX-24 pp. 1, 3. This announcement, like the announcement the prior day, had no impact on the market - KILN hovered around an inside bid price of \$.74. RX-215 pp. 9-10.

M. The Afternoon of April 2–April 22, 2002 - Kirincic and Israel Resume KILN Purchases in SP's Account, Stock Price Increases to Over \$1

Less than an hour after the April 2, 2002, press release, Kirincic resumed his purchases of KILN stock for SP's account by placing a series of orders through BNY's market-maker, Herzog. He priced these orders as much as \$.20 over the inside bid price, and at, or slightly

below, KILN's inside asking price.¹⁵ By approximately 3:00 p.m., the inside bid price climbed from \$.74 to \$.99. RX-215, CX-42 p. 8. Kirincic purchased these KILN shares for the SP account without the assistance of Israel, who was on vacation and out of the office from April 2 through April 5, 2002.

Towards the end of the trading day on April 2, 2002, Kirincic shifted his strategy. This time, instead of using Herzog, he opted to display partial purchase orders with reserves on BRUT ECN. Placing an order on an ECN instead of through a market-maker meant that the order was immediately displayed on the ECN, where an order above the pre-existing inside bid price would automatically result in a new inside bid price. Tr. 2646. An ECN order also allowed Kirincic to maintain undisclosed reserves that would be displayed automatically when the disclosed portion of the order was filled, so that Kirincic could maintain a constant presence in the market. In addition, an ECN order afforded greater anonymity.

¹⁵ At 11:52:03 a.m., Kirincic placed an order to purchase 2,000 shares of KILN for the SP account through Herzog at \$.9479 per share, just \$.0021 below the inside asking price, and \$.20 more than the inside bid price. CX-42 p. 8; Tr. 380-382. Almost simultaneously, at 11:52:09 a.m., Kirincic purchased another 400 shares of KILN for SP at \$.95, in the same manner. Id. And just five seconds later, at 11:52:15 a.m., Kirincic purchased another 100 shares of KILN for SP at a penny more—\$.96 per share, again, using Herzog. Id. In response to these purchases, at 11:52:17 a.m., the inside bid price moved from \$.74 to \$.96. RX-215 p. 10; Tr. 380.

Later that same day, at 1:39:18 p.m., Kirincic placed and executed a 2,000 share order to purchase KILN with Herzog for \$.9798, well above the inside bid price of \$.96, but just \$.0002 below the inside asking price of \$.98. CX-42 p. 8, RX-215. Seconds later, at 1:39:38 p.m., Kirincic purchased another 1,000 shares of KILN for SP with Herzog, at the inside asking price of \$.98. Id. Again, five seconds later, at 1:39:43 p.m., Kirincic purchased another 1,000 shares of KILN for SP at \$.98 using Herzog, when the bid and ask spread was \$.96 by \$.99.

Five minutes later, at 1:45:45 p.m., Kirincic purchased another 2,000 shares of KILN for SP's account at \$.9897, just \$.0003 below the inside asking price. Less than a minute later, at 1:46:06 p.m., Kirincic bought another 500 shares of KILN at \$.99, just \$.01 below the inside asking price. CX-42 p. 9. Following this transaction, the inside bid price moved up to \$.99. CX-42 p. 9. Between 2:06:54 p.m., and 2:53:44 p.m., Kirincic executed yet another four purchases for the SP account through Herzog, for 4,500 shares, all at \$.99 per share. CX-42 p. 9, RX-215.

Within the last 30 minutes of trading, Kirincic increased the size of his orders from 5,000 to 25,000 and 50,000 shares, displaying 2,500 shares and reserving the rest. The first of these orders, at \$1.02, was above not only the inside bid price, but also above the inside asking price.¹⁶

Kirincic did not wait for additional executions at or below his existing BRUT ECN orders. Instead, he cancelled the orders before they were filled, and replaced them with higher priced orders, and, as a result, the inside bid price moved higher, closing at \$1.04.¹⁷ KILN therefore met the \$1 minimum bid price requirement that day. If the bid price of KILN shares remained above \$1 for a minimum of ten trading days, it would no longer be subject to NASDAQ National Market delisting. CX-20.

On the next day, April 3, 2003, Kirincic used much the same strategy, and the inside bid price reached \$1.03 while Kirincic was in the market.¹⁸ However, during five-minutes when Kirincic was not in the market, the inside bid price drifted downward to \$.89.¹⁹ Kirincic quickly returned to the market, placing an order at \$1.01—above both the inside bid price and above the inside asking price.

¹⁶ At 3:29:15 p.m., Kirincic placed an order for execution for the SP account on BRUT ECN for 50,000 KILN at \$1.02 per share, displaying 2,500 shares, and reserving the rest. CX-43 p. 4. At the time that order was placed, the inside bid price was \$.97 per share and the inside asking price was \$1, so Kirincic's offer, at \$1.02, was above the asking price. At 3:29:17 p.m., 24,800 shares were executed at \$1, with only 200 shares executed at \$1.02 at 3:35:45 p.m. The inside bid for KILN moved to \$1.05 per share—giving it a bid price at or over \$1 for the first time since January 2002. CX-42 p. 9.

¹⁷ At 3:39:12 p.m., Kirincic cancelled his pending order with BRUT ECN and placed a new order to buy 25,000 shares at a higher price - \$1.04, with 2,500 shares displayed and 22,500 in reserve. CX-43 p. 4. Within seconds, 400 shares of this order were executed, the last 200 shares of which were executed at \$1.04. After these transactions, the inside bid price rose again, to \$1.04, with the inside asking price at \$1.09. RX-215 p. 11.

¹⁸ On the morning of April 3, 2002, the inside bid price for KILN stock was in the \$1.01 to \$1.02 range, with the inside asking price ranging from \$1.09 to \$1.10. RX-215 p. 11. At 1:16:11 p.m., Kirincic placed a 10,000 share order for KILN on BRUT ECN at \$1.03, with 500 shares displayed and 9,500 shares in reserve. CX-43 p. 4. Over the course of the next hour and a half, this order was executed, in six separate transactions, and at 2:40:28 p.m., it was completely filled. Id.

¹⁹ KILN reached an inside bid price of \$.89 at 2:42:36 p.m., where it remained until 2:46:06 p.m., when Kirincic came back in the market, placing another 10,000 share order on BRUT ECN at \$.95, with 1,500 shares displayed and 8,500 shares in reserve. CX-43 p. 4; RX-215 p. 13.

Throughout the afternoon, Kirincic again employed a strategy of placing orders with reserves on BRUT ECN, cancelling these orders before they were filled, and replacing them with higher orders above the inside bid price—in one case also exceeding the inside asking price.²⁰ And again, thirty minutes before the close of trading, Kirincic placed a very large, 50,000 share order, with 5,000 shares displayed and 45,000 shares in reserve. Just after that, at 3:31 p.m., Kirincic also placed a good until cancelled (“GTC”) order for 2,000 shares of KILN at a price of \$1.01. RX-23; Tr. 396-399. As a result, the market showed two participants placing orders. Tr. 399. Of course, with Kirincic’s pending 50,000 share order for KILN at \$1.02 with BRUT ECN, the limited liquidity for KILN shares, and the limited time left before the close of the market, it was highly unlikely that the order with Herzog at \$1.01 would be filled that day. Id.; CX-43 p. 4.

Kirincic testified that he does not specifically recall why he placed the GTC order. Tr. 398. However, the order did cause the market to reflect two orders, and served as an additional safety net to keep the inside bid price for KILN from dropping below \$1.01. Moreover, in the event that the order was filled, Kirincic and Israel would receive notice that the market was dropping.

In fact, on the next day, April 4, 2002, the price of KILN dropped to \$1.01 and Kirincic received a partial fill on the GTC order for 1,000 shares at the 9:30 a.m. open of the market. RX-23; Tr. 398. After that, the inside bid for KILN moved to \$1.02 where it remained until 3:46:57 p.m., when it moved up to \$1.03. RX-215 p. 14. Kirincic did not place any orders

²⁰ At 2:59:25 p.m., when the inside bid to ask spread was \$.89 to \$.99, Kirincic increased the price of the SP account’s order for KILN to \$1.01, \$.02 *above* the asking price, using the same 1,500 share display and 8,500 share reserve. CX-43 p. 4, RX-215 p. 13. Of course, this order received immediate executions, and SP’s account purchased 4,100 shares at \$.99, and 1,500 shares at \$1.01. Although the remaining 4,400 share balance of the order was not filled, at 3:30:27 p.m., 30 minutes before the close of the market, Kirincic increased his bid price to \$1.02 on a new, much larger, order for 50,000 shares, with 5,000 shares displayed, and 45,000 shares in reserve.

through BRUT ECN that day, but his unfilled order with BNY for the remaining 1,000 shares of KILN remained open. As discussed below, this GTC order stayed open until April 22, 2002. RX-23.

On April 5, 2002, Kirincic continued with his strategy of placing large orders for SP's account on BRUT ECN, cancelling and increasing them before each order was filled.²¹ The closing inside bid price that day was \$1.06.²² On April 8, 2002, Israel was back in the office to assist Kirincic, who could not enter ECN orders himself. Tr. 1414.

Over the next several days, from April 8 through April 10, 2002, Kirincic and Israel used the same strategy: placing 50,000 share orders on BRUT ECN to purchase KILN for the SP account, at prices over \$1, with 500 shares displayed and the rest in reserve.²³ The closing inside bid price for these days increased from \$1.02, to \$1.05, to \$1.06. RX-215 pp. 17-19.

On April 12, 2002, Kirincic and Israel continued with this strategy, but increased the size of the purchase orders for SP's account on BRUT ECN to 75,000 shares, with 1,500 shares displayed. SP claims that she requested that Kirincic place orders for 75,000 KILN shares, but she had no recollection as to why the size of her orders increased over time. Tr. 2337-2339.

²¹ At 9:39:59 a.m., he placed a 25,000 share purchase order for KILN at \$1.04, with 1,500 displayed and the rest in reserve. In this manner, the SP account purchased 10,000 shares at \$1.04 in four transactions over a three-hour period ending at 12:21:32 p.m. CX-43 p. 5. At 12:45:30 p.m., Kirincic cancelled the balance of the order on BRUT ECN, and the inside bid price drifted down to \$1.02. Less than a minute later, Kirincic placed a new, 50,000 share order for the SP account on BRUT ECN, this time at \$1.02, with 500 shares displayed, and 49,500 in reserve. CX-43 p. 5. There were no executions at this \$1.02 price, and at 3:34:01 p.m., another market maker posted an inside bid price of \$1.06, where the market closed, again satisfying the NASDAQ listing requirement. RX-215 p. 15.

²² Id.

²³ For example, at 9:16:19 a.m. on April 8, 2002, just before the market opened, Kirincic, through Israel, placed a 50,000 share order to purchase KILN at \$1.02 on BRUT ECN, with 500 shares displayed, and 49,500 shares in reserve. CX-43 p. 5. That day, the SP account purchased 26,000 shares at \$1.02 in a series of seven transactions. Id. This is illustrative of the trading during the next two days. Id.

As usual, Kirincic's orders were placed at above the inside bid price and one order was placed above the asking price.²⁴ The market closed that day with an inside bid price of \$1.09. On the next trading day, April 15, 2002, when Kirincic was not in the market, less than 2,000 shares traded, and the closing inside bid price dropped to \$1.05. CX-42, CX-43, RX-215 p. 20. On April 16, 2002, Kirincic and Israel resumed placing orders on BRUT ECN for KILN shares at above the inside bid price. Again, one of these orders was above the inside asking price of \$1.10.²⁵ CX-42. The bid price that day closed at \$1.15.

Also on April 16, 2002, the SP account received \$75,000 in cash from Kirincic's parents, just after they had received over \$260,000 in proceeds from the sale of KILN stock into the repurchase plan. CX-36 p. 18; Tr. 967-969. The transfer of these funds was facilitated by a letter of authorization that Kirincic falsified, by signing his parents' names.²⁶ This was the first of four cash transfers totaling \$325,000 that SP received from her parents' account over the next several months. CX-71-73; Tr. 970. SP testified that these funds were a loan from her parents. She explained that she needed the funds to purchase KILN stock, and she did not want to wait for her ex-husband to pay her the money she was owed, or to liquidate other holdings. Tr. 2347, 2350, 2353-2354. She claimed that her parents were financially secure, so they did not need this money to live on, and that she had borrowed money from her parents her whole life. Tr. 2265-

²⁴ At 9:09:14 a.m., Kirincic displayed the first of these orders at a price of \$1.07, when the inside asking price was \$1.08. There were no executions. RX-208 p. 16. At 10:41:18 a.m., Kirincic, working with Israel, cancelled and replaced the purchase order with a new purchase order at \$1.09—this time above the inside asking price of \$1.08. CX-43 p. 6, RX-215 p. 15. 5,000 shares of this order were executed—500 shares at \$1.08 and 4,500 shares at \$1.09. CX-43 p. 6.

²⁵ At 9:42:41 a.m., Kirincic, through Israel, placed a 25,000 share order for KILN with BRUT ECN at a price of \$1.08, with 1,000 shares displayed and the rest in reserve. CX-43 p. 6. This order moved the inside bid from \$1.04 to \$1.08. RX-215 p. 21. However, there were no executions. At 1:19:34 p.m., Kirincic, through Israel, cancelled the order, and the inside bid immediately dropped to \$1.04. Kirincic and Israel replaced the order with another 25,000 share order at \$1.15—above the inside asking price of \$1.10. CX-43, RX-215 p.21.

²⁶ Kirincic's falsification of this letter of authorization is the subject of Count Two of Enforcement's Complaint in this matter, and is discussed below.

2266, 2403. She also claimed that she did not tell her parents why she needed such a large loan. Tr. 2355. She testified that there was no set timeframe for repayment, and she claimed that she paid her parents back over time. Tr. 2348. However, no documentary evidence of either the loan or the repayment was presented at the hearing.

On April 18, 2002, Kirincic and Israel placed another large order on behalf of SP for KILN on BRUT ECN with a display and reserve. The order was cancelled several hours later when only 3,900 shares had been purchased, but Kirincic still had in place a GTC order for the SP account for 1,000 shares of KILN at \$1.01. RX-23. In the event that the inside bid price dropped to \$1.01, this order would have been executed, thus preventing, at least temporarily, the stock from dropping below NASDAQ's \$1 minimum bid price requirement. In fact, on that day NASDAQ Staff notified Kirincic by email that KILN met the \$1 requirement, but cautioned that NASDAQ would continue to monitor the stock through April 19, 2002, and would issue a formal notice of compliance on April 22, 2002. CX-25; Tr. 440-441.

On April 19, 2002, Kirincic and Israel placed no purchase orders for the SP account using an ECN. CX-43. However, the 1,000 share GTC order at \$1.01 for SP's account remained unfilled. On that day, the market drifted downward from a \$1.10 inside bid price and a \$1.19 inside asking price in the morning, to a \$1.04 inside bid price and a \$1.18 inside asking price at the close. RX-215 p. 23, RX-23 p. 7. Only 500 shares traded that day. CX-42 p. 17.

N. Trading in KILN on April 22, 2002 - Inside Bid Price Remained Above NASDAQ's \$1 Minimum Bid Price Requirement - KILN Repurchased Family Shares at the Inside Bid Price, but Repurchased Unrelated Client Shares at Significantly Below the Inside Bid Price

The market for KILN opened on April 22, 2002, with an inside bid price of \$1.04 and an inside asking price of \$1.18. RX-215 p. 23. While Kirincic and Israel had no ECN orders in the market, they maintained their GTC order for 1,000 shares at \$1.01 with Herzog.

At mid-day, the market for KILN was at its highest point since it failed to meet the \$1 minimum bid price in January 2002. CX-20. Moreover, it appeared that KILN had regained compliance with the NASDAQ requirements for continued listing; consequently, a key stated objective of KILN's stock repurchase plan had been achieved. Nonetheless, KILN's repurchase plan had its most active day ever—mostly purchasing stock from Kirincic family members. Instead of purchasing the shares on the open market, as the KILN Board had authorized and KILN publicly announced, KILN, through Kirincic, Lindner, and Israel, purchased the shares in pre-arranged cross transactions.

Specifically, just before 1:00 p.m., Kirincic, through Israel, purchased 114,502 shares of KILN from Kirincic's cousin, as part of KILN's repurchase plan. CX-42 p. 18. Acting on KILN's behalf, Kirincic paid \$1.05 for these shares—above the inside bid price.²⁷ CX-42 p. 18, RX-208 p. 19.

After that, the market drifted down to an inside bid price of \$1.01 and an inside asking price of \$1.02.²⁸ RX-215 p. 23. Almost immediately, Kirincic's GTC order with Herzog that had been pending since April 2, 2002, was filled at \$1.01. RX-23.

Seconds later, at 12:58:40 p.m., Kirincic, through Israel, arranged for KILN to repurchase another large block of stock from a family member, again, at a premium to the inside bid price.²⁹ Specifically, KILN repurchased 125,498 shares of KILN from Kirincic's parents. CX-42 p. 18; RX-208 p. 19. Like the 114,000 share transaction five minutes earlier, this Kirincic family sale to the KILN repurchase plan was executed at \$1.05 per share—a premium over the inside bid price. Id.

²⁷ At 12:53 p.m., the inside bid price for KILN was \$1.04 and the inside asking price was \$1.17. RX-215 p. 23.

²⁸ This occurred at 12:57:50 p.m.

²⁹ The GTC order at Herzog was executed at 12:58 p.m., and the 125,498 share repurchase was reported at 12:58:40 p.m. RX-23; RX-208 p. 19; CX-12 p. 18.

Two minutes later, Kirincic, through Israel, returned to the strategy of placing large orders with reserves for SP's account on BRUT ECN.³⁰ Kirincic, who claimed that he was out of the office, called Israel at the trading desk to place the order. Tr. 1502. Kirincic's purchase order, at \$1.10, was \$.05 above the inside asking price of \$1.05. RX-215 p. 24. Within one minute, this order was hit three times—100 shares at \$1.05, 100 shares at \$1.06, and 100 shares at \$1.07. Thereafter, this order caused BRUT ECN to move the inside bid price to \$1.10. RX-215 p. 24.

Then, something unexpected happened. Sometime between 12:53 p.m. and 1:24 p.m., Kirlin received a fax transmission—a letter signed by Kirlin customer DL,³¹ requesting Kirlin to liquidate the securities in his account, including 114,000 shares of KILN that DL had acquired in the 1990's, prior to KILN's initial public offering. CX-38, CX-80, RX-86; Tr. 1048. The letter was addressed to Patrick E. Byrne ("Byrne"), who was DL's registered representative at Kirlin.³² CX-83; Tr. 1881. Byrne was out of the office that day, so his assistant, LG, called Byrne and faxed DL's letter to him at home. Tr. 957-958, 1493, 1495, 1892. Israel testified that LG also informed him of DL's request to liquidate over 100,000 KILN shares, and he advised her to call Byrne and confirm the order with the client. Tr. 1493-1495.

At 2:21 p.m., Lindner made a one minute call from his cell phone to Kirincic's cell phone. CX-62 p. 7, Tr. 487-489. Four minutes later, at 2:25 p.m., Kirincic called Lindner back,

³⁰ At 1:01:23 p.m., Kirincic, through Israel, placed a 25,000 share purchase order for KILN at \$1.10, with 2,000 shares displayed, and 23,000 shares in reserve. CX-43 p. 7.

³¹ DL's AT&T bill for a dedicated fax line shows a call to Kirlin at 12:24:25 p.m. on April 22, 2002. CX-84. DL's office is in the Central Time Zone, while the Kirlin offices are in the Eastern Time Zone, indicating that Kirlin should have received the call at 1:24 p.m. Tr. 1067. However, Kirlin's copy of the fax has a received mark of 12:53 p.m. RX-86.

³² DL was a wealthy individual with a net worth of over \$75 million, and he was seeking to consolidate his securities holdings after a confrontation with health issues relating to esophageal cancer. Tr. 1051, 1053, 1054-1057, 1075.

and they spoke for four minutes. CX-61 p. 5. Neither Lindner nor Kirincic claims to remember much about this conversation, but they both testified that they spoke about the KILN repurchases from Kirincic family members earlier in the day. Lindner acknowledged that he was aware that KILN had repurchased approximately \$250,000 in KILN shares. Tr. 1713-1714. While Lindner claimed during the hearing that he did not know the seller of the shares to KILN, during his on-the-record (“OTR”) testimony, Lindner testified “I am pretty sure he mentioned a name.” CX-116 p. 47. Given Lindner’s OTR testimony, the fact that all past repurchases by KILN were from Kirincic family members, and given that Kirincic and Lindner spoke within hours after the repurchases, the Panel finds that Lindner was informed that Kirincic family members sold their shares to KILN that day. Tr. 1715-1716. Both Kirincic and Lindner claim that they did not speak about DL’s pending order to sell KILN shares during their call. Tr. 487, 1718.

At 2:43 p.m., Byrne contacted DL’s office and asked to speak with DL. CX-63; Tr. 1894. DL’s assistant (with whom Byrne had spoken previously) said that DL was “incapacitated,” and confirmed DL’s request to liquidate his securities holdings, as stated in DL’s letter. Tr. 1894-1895. From this, and the fact that the proceeds of the liquidation were to be transferred to a trust account, Byrne got the impression that DL was on his deathbed.³³ Id.

At 2:45 p.m., Byrne called his assistant at Kirlin and asked her to write an order ticket for a market order to sell the securities in DL’s account. RX-282 p. 1; Tr. 1897-1899. Byrne did not instruct her to put a price on the order ticket—he relied upon the trading desk to get the best

³³ In fact, DL was quite ill at the time, recovering from chemotherapy and radiation. Tr. 1053. He survived and testified at the hearing.

price for the shares. Tr. 1897-1902. Byrne's assistant would have taken this ticket directly to Israel at the trading desk without delay.³⁴ Tr. 1898-1899.

At 2:53 p.m., Byrne called and spoke with Israel about DL's liquidation order. RX-282; Tr. 951-952, 1898-1899. At this time, SP had a pending order on BRUT ECN to buy 24,700 shares of KILN at \$1.10. Tr. 1505-1506, 1902-1903. However, Israel did not mention this to Byrne. Tr. 1902. Israel also made no mention of the current market for KILN securities, nor did he disclose that KILN had repurchased two large blocks of KILN stock from Kirincic family members at above the inside bid price just hours earlier.³⁵ CX-43 p. 7; Tr. 1901-1903. Byrne recalled that Israel said he would talk to Kirincic about the price for the shares. Tr. 1900.

Next, Israel attempted to contact Kirincic. Despite Kirincic's earlier instruction, which caused SP's order to purchase 24,700 shares at \$1.10 to be displayed on BRUT ECN at the time, Israel was unwilling to execute it against DL's order without further confirmation from Kirincic. Tr. 1571. Israel did not offer a credible reason for this. He simply testified that "you always call Tony [Kirincic] first," and noted that Kirilin had an unwritten procedure that the trading desk would contact KILN management any time a Kirilin customer placed an order to sell 10,000 or more KILN shares. Tr. 1447-1449, 1500, 1512. In essence, Israel testified that he was just following orders.

³⁴ Israel claimed that he was unable to process the trade because he did not receive DL's order ticket to sell the KILN shares until much later and claimed that he did not process the trade until Byrne's assistant brought him the order ticket at approximately 3:18. Tr. 1500. However, in the face of Byrne's credible testimony that his assistant would have given Israel the ticket with a blank as to the price minutes after 2:45, when he instructed her to do so, and Israel's ability to process the order based upon the facsimile from DL or his 2:53 telephone call with Byrne, and Israel's liquidation of another DL order at 3:05 to sell other holdings, the Panel did not find Israel's testimony to be credible. Tr. 1896-1897.

³⁵ Israel's testimony on this point was unclear. He said that Byrne "was aware of the shares in Kirilin earlier that day from the conversation" without specifying the conversation to which he referred. Tr. 1499. Given the ambiguity of Israel's testimony, the clarity and credibility of Byrne's testimony that he was unaware of trading activity in KILN, and the demeanor of the witnesses, the Panel finds that Israel did not inform Byrne that KILN had repurchased shares from Kirincic family members earlier in the day. CX-83.

Israel claimed that he was unable to reach Kirincic at home, and he did not have Kirincic's cell phone number. Tr. 1503. Instead, he reached Lindner, who he claimed was also out of the office, and told him about DL's pending order to sell 114,000 shares of KILN. Tr. 1569. SP's order to purchase 24,700 shares at \$1.10 was pending at the time that Israel and Lindner spoke. Tr. 1519. Israel recalled discussing with Lindner the market for KILN and trading that occurred earlier that day, including KILN's repurchase of approximately 240,000 shares of KILN at \$1.05. Tr. 1515-1516. However, Israel claimed that they did not discuss SP's pending order to purchase 24,700 shares of KILN at \$1.10. Tr. 1506, 1524, 1745.

Lindner's account of this conversation contradicted Israel's. Lindner claimed that, instead of speaking with Israel about DL's order to sell 114,000 shares of KILN, he spoke with Byrne. Tr. 1723, 1731. Lindner claimed that Byrne called him, and it was during this telephone call that Lindner arrived at a price of \$.80 for the 114,000 KILN shares. Tr. 1730-1732. However, Byrne credibly testified that he did not speak with Lindner that day, and Byrne's telephone records corroborate this. CX-63. Israel also testified that he spoke with Lindner, which is contrary to Lindner's assertion, but consistent with Byrne's. Therefore, the Panel concluded that Lindner spoke with Israel, not Byrne.

Moreover, the Panel found that, at the time of his conversation with Israel, Lindner would have been aware of SP's pending order to purchase a large amount of KILN at above market price for several reasons. First, Lindner and Kirincic were close; they served as co-CEOs of both Kirlin and KILN, firms that they founded and named after themselves. Lindner was also Chairman of the Board for Kirlin and KILN; he held approximately 22% of KILN's voting common stock; and, he, along with Kirincic, was authorized to repurchase shares on KILN's behalf. Tr. 1615-1616, 1636-1637. Due to his financial stake and position in KILN and Kirlin, and his close relationship with Kirincic, Lindner had to be aware that SP was a significant

purchaser of KILN. Given this, and Lindner's professed reticence to purchase shares for the KILN repurchase plan, the Panel did not find credible that Israel and Lindner did not discuss the possibility that SP would purchase DL's shares.

Based on these circumstances, Lindner also had to know that the KILN's repurchase plan was not buying shares in the open market. Rather, KILN had purchased only Kirincic family member shares, at prices at or above the inside bid price. Given this, Lindner and Israel must have discussed, or, at least, independently contemplated, the inconsistency in purchasing DL's shares at a price substantially below the price that KILN had always paid, when purchasing KILN from Kirincic family members.

Despite this, Israel and Lindner refrained from causing DL's order to sell KILN to be filled, in part, at \$1.10 per share, against SP's pending purchase order. Nor did Lindner purchase the shares as part of KILN's repurchase plan, at the same price paid by Kirincic family members. Instead, Lindner determined that KILN would pay just \$.80 per share for the entire 114,000 share order. Tr. 1517-1518.

At 3:08 p.m., Kirincic called the trading desk. During this call, Kirincic cancelled SP's order to purchase 24,700 shares of KILN for \$1.10. CX-61; Tr. 492. SP's account stayed out of the market for approximately 30 minutes. CX-43 p. 7. While Kirincic admits that he called the trading desk to cancel the SP order, neither he nor Israel recall having a conversation about this trade cancellation. Tr. 494-495. Moreover, Kirincic claimed he did not recall why he cancelled the trade. Id. Kirincic also did not recall that anyone told him that Israel was trying to reach him, or, that a Kirin customer wanted to sell a large amount of KILN, which SP, as a significant buyer of KILN, might be interested in purchasing. Tr. 497-499.

Given (i) the size of DL's order to sell KILN, (ii) Israel's testimony that "you always call Tony first," (iii) Kirincic's past purchases of KILN on behalf of the KILN repurchase plan, (iv)

Kirincic's purchases of large amounts of KILN for SP's account, (v) Kirincic's 3:08 p.m. call to cancel SP's pending KILN order, and (vi) Lindner's conversation with Kirincic that day, the Panel found that Kirincic was informed of DL's request to liquidate 114,000 shares of KILN. Moreover, given (i) the significant activity in KILN that day, (ii) Kirincic's history of being at the center of that activity, and (iii) the importance of maintaining the \$1 minimum bid price in KILN until NASDAQ sent written confirmation of compliance, the Panel found that Kirincic would have spoken with Israel about DL's pending order when Kirincic called at 3:08 p.m.

Based upon the circumstantial evidence presented, the Panel found that after Kirincic and Israel spoke about DL's pending order to sell 114,000 KILN shares, Kirincic decided to cancel SP's pending order so that SP would not be in the market offering to purchase 24,700 shares of KILN at \$1.10 at the same time that DL was selling his shares to KILN for \$.80. The Panel further found that based upon Lindner's prior cell phone conversation with Kirincic, and his discussions with Israel, Lindner was fully aware of KILN's prior repurchases of approximately 240,000 KILN shares at \$1.05 per share. Further, the Panel found that Lindner was aware of SP's pending order to purchase 24,700 shares of KILN at \$1.10 at the time he discussed DL's order with Israel. Moreover, based upon these circumstances, the Panel found that Kirincic, Israel, and Lindner provided false testimony regarding their conversations.

At 3:18:14 p.m., Israel executed KILN's purchase of 114,000 KILN shares from DL, at Lindner's price of \$.80. CX-42 p. 18. This transaction, like the transactions with Kirincic's parents and cousin earlier in the day, was part of the KILN repurchase plan. However, unlike Kirincic family members, all of whom were paid at or above the prevailing inside bid price, DL was paid \$.24 per share less than the inside bid price of \$1.04. DL was the only person who was not a member of Kirincic's family who sold shares into KILN's repurchase plan, and DL's sale

was the only sale into the KILN repurchase plan that was executed at a discount to the inside bid price.

Just 20 minutes later, on 3:38:27 p.m., Kirincic called the Kirlin trading desk again, and placed an order on BRUT ECN for SP's account to purchase 5,000 shares at \$1.01. CX-43 p. 7; Tr. 505. There were no executions on this order, and KILN's inside bid price closed that day at \$1.01. CX-43 p. 7, RX-215 p. 25.

In a letter dated April 22, 2002, NASDAQ notified KILN that it was in compliance with the minimum bid price requirement.³⁶ After that, while SP's account continued to purchase KILN to some extent, the size and frequency of the purchases was greatly diminished. In the remaining six trading days in April 2002, SP's account purchased less than 5,000 shares of KILN. CX-40 p. 28. And for the first three weeks of May 2002, the account purchased KILN on only four days—purchasing a total of 10,450 KILN shares. CX-40 p. 32. SP's purchases increased again beginning on May 24, 2002, but only after DL's representatives complained about the price DL received for his sale of KILN stock. CX-40 p. 28-38; Tr. 1063-1064. Over the course of the next several months, SP continued to purchase KILN. However, within the same year, in December 2002, her position in KILN liquidated when she sold 600,000 shares of KILN, for proceeds of \$250,000. CX-40.

O. Kirincic Signs His Parents' Names on Account Documents

In connection with the transactions discussed above, between April 2002 and June 2002, Kirincic signed his parents' names to four KILN stock certificates representing more than

³⁶ Based upon the fax receipt indicated at the top of the letter, Kirlin may not have received this notification until 11:42 a.m., on April 24, 2002. CX-25; CX-26; Tr. 441-442.

465,000 shares.³⁷ CX-52-55; Tr. 508, 518-520, 524, Respondents' Answer to Paragraph 50 of the Complaint. The signatures on these stock certificates enabled Kirincic to deposit KILN stock into his parents' account allowing the stock to be sold into the repurchase plan on April 10, 2002, April 22, 2002, and June 20, 2002. CX-36 p. 18, 25, CX-37; Tr. 506-508.

There is no dispute that Kirincic also signed his parents' names to letters of authorization during April, May and June 2002, to transfer \$325,000 of the proceeds of the sale of the 465,000 shares of KILN to the account of Kirincic's sister, SP. CX-36; CX-40; CX-77; Tr. 518-519. Although Kirincic does not now dispute this fact, that has not always been the case. During his OTR, Kirincic testified that his parents signed the four certificates and two letters of authorization. JX-1. Just before concluding the OTR, however, Kirincic's counsel asked whether Kirincic wanted to clarify his testimony, to which Kirincic responded, "upon further reflection, I believe that I signed these documents for my parents with their full authorization as an administrative convenience."³⁸ JX-1 p. 39-42.

At the hearing, Kirincic maintained that he signed the certificates with the full authority and knowledge of both parents. Tr. 509. Respondents' expert, Richard Tucker ("Tucker"), testified that Kirincic told him that he had a power of attorney that dated back to the time that Kirincic was a teenager. Tr. 2742. However, Tucker did not see the power of attorney, Kirincic did not provide it, and Kirin did not have a power of attorney on file. Moreover, Kirincic did not call his parents to testify to corroborate his revised version of events.

³⁷ He signed his parents' names just above a notice that stated: "The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatsoever." Id.

³⁸ Kirincic testified that his mother might have signed one of the documents. JX-1 pp. 41-42.

P. Kirlin's Supervisory Procedures in Spring 2002

There was little evidence offered at the hearing as to alleged supervisory violations, and it was given short shrift in Enforcement's Post-Hearing Brief as well. Kirlin's 259 page supervisory procedures manual was admitted into evidence. RX-67, CX-90. However, Enforcement did not point to specific procedures that were lacking, other than to say that the violative conduct went unsupervised, and additionally to claim that Kirlin, through Kirincic and Lindner, unreasonably delegated supervisory responsibilities to Tom Gallo, who had a disciplinary history involving a failure to supervise.³⁹ Enforcement's Post-Hearing Brief at p. 27.

IV. Violations

A. Manipulation (Kirlin, Kirincic and Israel)

Count One of the Complaint charges that Respondents Kirlin, Kirincic and Israel used deceptive techniques to manipulate the securities of KILN, in violation of Section 10(b) of the Exchange Act,⁴⁰ SEC Rule 10b-5 thereunder,⁴¹ and Rule 2120,⁴² which prohibit the use of any manipulative, deceptive, or otherwise fraudulent device or contrivance in connection with the purchase or sale of securities.

³⁹ Enforcement offered no evidence to establish that Tom Gallo in fact failed in his supervisory responsibilities at Kirlin, other than its assertion that violations occurred while he was there

⁴⁰ "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."

⁴¹ "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."

⁴² "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."

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.

Pagel, Inc., 48 SEC 223, 226 (1985), aff’d, 803 F.2d 942 (5th Cir. 1986).

Transactions “that are intended to mislead investors by artificially affecting market activity,” 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.” Edward J. Mawod & Co., 46 S.E.C. 865, 871-872 (1977), aff’d, 591 F.2d 588 (10th Cir. 1979).

Where, as here, the Complaint alleges fraudulent manipulation, Enforcement must show that Respondents acted with scienter—“a mental state embracing intent to deceive, manipulate, or defraud ... sometimes established through a showing of recklessness amounting to an extreme departure from the standards of ordinary care” Dep’t of Market Reg. v Morgan Stanley & Co., Complaint No. CMS960235, 2000 NASD Discip. LEXIS 1 at **60-61 (NAC Jan. 18, 2000). That element can be established through circumstantial evidence. See, e.g., Meyer Blinder, Exchange Act Rel No. 31095, 1992 SEC LEXIS 2019 at *33 (Aug. 26, 1992).

Based upon the record evidence, the Panel finds that Kirilin, through Kirincic, who was assisted by Israel, engaged in a fraudulent scheme to artificially inflate the market for KILN

securities. In reaching this finding, the Panel considered that Respondents had a motive for manipulating the price of KILN upward, the pattern of placing orders appeared designed to achieve this, and the explanations offered by Respondents for their trading activity in KILN were not credible.

1. Respondents' Motive to Manipulate KILN

Enforcement established that Kirincic and Kirlin had a motive. KILN's stock price had dropped below the \$1 minimum bid price required for continued listing on the NASDAQ National Market. While Kirincic, in particular, tried to minimize the importance of maintaining a NASDAQ National Market Listing, the KILN Board was certainly focused on regaining compliance, even to the extent of committing \$1 million to fund a stock repurchase program in the hope of addressing the bid price deficiency. From an investor and liquidity standpoint, a NASDAQ National Market listing would be superior to a listing on the NASDAQ Small Cap Market or the Over the Counter Bulletin Board.

Respondents point out that NASDAQ had recently increased its listing standards, and it was likely that KILN would not qualify for continued listing on the NASDAQ National Market when these standards took effect. However, because the new standards were not due to take effect until many months later—in November 2002—KILN would receive the benefit of the listing until then, and would have additional time to find a means of maintaining its NASDAQ National Market listing. RX-92 p. 4, note 5.

In addition, the Panel found that there was another motive to maintain an artificially high price for KILN stock—it enabled Kirincic family members to sell large blocks of stock at higher prices through the KILN repurchase plan.

Israel also had a motive to participate in the scheme—his continued livelihood. According to Israel's own testimony, his career was stalled at an Assistant Trader position for a number of

years, and he had been promoted to Head Equity Trader only recently. Tr. 1364. Israel also made clear that he was not willing to question Kirincic, the implication being that, if he did, there would be consequences. Tr. 1394-1395, 1500. Based upon Israel's testimony and demeanor at the hearing, the Panel found that Israel was intimidated by Kirincic, and, in order to continue his employment, Israel had a motive to keep quiet and do whatever Kirincic asked of him.⁴³

2. Manipulative Trading in KILN

The manner of the trading over the period at issue showed that Kirincic and Israel had the intent to artificially increase the price of KILN. Kirincic, through Israel, used a strategy of placing, small, successively higher, purchase orders for KILN, generally on BRUT ECN, so that each new purchase order would result in a new inside bid price. There are numerous examples of Kirincic and Israel placing orders on BRUT ECN, cancelling each one before it was filled, and replacing it with a higher priced order, resulting in a higher closing bid price. By using an ECN, Kirincic and Israel were able to conceal the identity of the purchaser, and give the appearance of increasing market interest.

According to Respondents' own analysis, from March 18 through April 22, 2002, Kirincic and Israel placed 61 orders to purchase KILN on BRUT ECN for SP's account, at or above the inside bid price.⁴⁴ RX-208 p. 20; Tr. 2500. These 61 orders represented 93.84 percent of the purchase orders for KILN placed by Kirin during this period. Id. Moreover, almost all of the KILN trading by Kirin during the review period was for relatives of Kirincic.⁴⁵ Of the total

⁴³ As it turned out, in the summer or fall of 2002, not long after the events at issue, Israel was promoted to Head of Trading, overseeing both equity and debt trading. Tr. 1366.

⁴⁴ As noted above, a comparison of CX-43 and RX-215 indicates that in a few instances, on April 12 and April 16, 2002, Kirincic and Israel displayed orders above the inside asking price.

⁴⁵ The only non-family member trade Kirin executed during this period was for DL. As discussed below, this transaction is the subject of Enforcement's Best Execution Charge.

KILN volume reported to ACT between March 18 and April 22, 2002, 62.32 percent of the volume was executed at Kirlin, and another 28.17 percent of the total KILN volume consisted of trading at other firms leading to Kirlin executions. In all, 90.49 percent of the volume was executed by Kirlin, or in connection with a Kirlin order.⁴⁶ CX-46; Tr. 752.

In addition to dominating the trading volume, Kirlin also effectively controlled the supply of KILN. According to Israel's estimate, approximately 80 percent of the company's outstanding shares were held in accounts of Kirlin customers during this period. Tr. 1416. Courts have long held such market domination and control of the supply of stock to be "classic elements" of manipulation. Randolph K. Pace, 51 S.E.C. 361, 363 (1993).

3. Respondents' Far-Fetched Explanations of Kirincic Family Account Activity

The Panel also evaluated Respondents' explanation of the activity in Kirincic family accounts relating to trading in KILN securities. As discussed below, the Panel concluded that Respondents' explanations were not credible.

a. Kirincic's Explanation of Initial Purchases by Kirincic's Parents and In-Laws Was Not Credible

As noted above, Kirincic contended that on March 5, 2002, Kirincic's mother and father independently decided to sell 78,000 shares and 12,000 shares of KILN, respectively, from their tax-free IRA at precisely the same time that his mother-in-law and father-in-law independently decided to sell 41,500 shares and 8,500 shares of KILN, respectively. Moreover, the aggregate of these sales happened to exactly match the 140,000 share amount that his parents had decided to purchase in their taxable account.

⁴⁶ When Kirincic was not in the market, it sometimes tended to drift downward. For example, on April 1, 2002, KILN opened with an inside bid of \$.91, which dropped \$.14 per share during the day and closed at \$.77, on volume of less than 2,000 shares. CX-47, CX-42 p. 8; Tr. 364-366.

The Panel found Respondents' version of events was not credible for several reasons. First, there is little chance that several customers would independently decide to sell shares on the same day, and that Kirincic's parents would simultaneously happen to purchase the same number of shares that his in-laws sold. In addition, his parents' transactions involved well over \$100,000, and KILN was thinly traded and hard to liquidate. The Panel found Kirincic's testimony that his parents decided to make this purchase on their own, and that he received and processed their orders without discussion, not credible, particularly given the fact that Kirincic was close with his parents, speaking with them as frequently as three to four times a week. CX-36 p. 1; Tr. 254-255, 573.

Instead, based upon these circumstances, the Panel finds that Kirincic initiated the transactions and coordinated them so that they matched in size, and family members, if aware of the transactions, deferred to Kirincic's judgment. As a result, a large block of family shares were consolidated in one family account, from which later repurchase transactions would and did occur.

b. SP's Explanation for KILN Purchases as a Legacy Was Not Credible

Similarly, for several reasons, the Panel did not find credible Respondents' explanation, as presented through SP's testimony, that SP purchased KILN stock in 2002 as part of her longstanding plan of a legacy for her children.⁴⁷ Tr. 2307, 2309-2310.

First, SP's claim was inconsistent with her earlier sales of KILN. Specifically, SP sold \$83,450 worth of KILN shares in June and July 1999, and an additional \$250,356 in KILN

⁴⁷ SP testified that she viewed KILN as a family business, because, in addition to her brother's ownership and involvement, her ex-husband, RP, was a partner, joining KILN one year after it was formed. Tr. 2255. According to SP, she and RP separated in October 1996, and she received shares of KILN as part of the terms of the divorce which was final in April 1997. She and RP agreed that the KILN stock was to be gifted to each of their children in trusts and custodial accounts over about five years, as SP wanted her children to have the shares as a legacy. Tr. 2256-2257, 2261-2263, 2407.

shares in January and February 2000. At the hearing, she claimed that she sold the stock because she needed additional funds to renovate her home and “do a few things.” RX-214; Tr. 2268-2270.

In fact, this history of financial need, and SP’s financial situation generally, also undercut her claim that she initiated and funded KILN purchases in 2002. SP was, at the time, a divorced, unemployed mother of three children (two in college and one in high school), whose income consisted of a monthly payment of \$3,600 from her ex-husband. Tr. 265-267, 2269-2273, 2291-2293. Given this, the Panel did not find credible the notion that SP would place orders in a single day that exceeded her annual income.

Precisely because SP had limited assets, she could not maintain the pace of the KILN purchases occurring in her account. As a result, funds were transferred from her parents’ account to cover the KILN purchases, which Kirincic facilitated by forging his parents’ signatures on letters of authorization. SP claimed that she simply borrowed \$325,000 from her parents’ account. The Panel did not find SP credible on this point, given her lack of resources to repay the loan, and the fact that her parents were elderly and appeared to have limited sources of income themselves.

Moreover, the timing of SP’s decision to build her legacy in KILN stock was suspect, as it came precisely when KILN was under great pressure, as a result of the NASDAQ notice, to raise the bid price for KILN stock. In addition, SP had not accumulated an appreciable amount of KILN stock in the several preceding years.

Additionally, the Panel found that SP did not, on her own, initiate the purchases of KILN, or give Kirincic instructions as to the price she would be willing to pay. In reaching this finding, the Panel considered that Kirincic was particularly close with his sister, and spoke with her two to three times a week. Tr. 270, 2285. Kirincic frequently dined with her, and they vacationed

together every year. Tr. 270, 2287. Kirincic drove by SP's house on his way to work every day, and was the godfather to two of SP's three children. Tr. 2285-2287. The Panel also considered SP's limited financial means, her lack of employment, and the considerable expenses associated with raising three children and putting them through college. Given these factors, it is not credible that Kirincic would, without discussion, allow his sister to buy large amounts of a highly speculative stock, even to the point of forging his parents' signatures on documents to transfer large sums of money to her for that purpose.

c. Kirincic's Claim that SP Initiated Purchases Was Not Credible

The Panel also considered that while SP claimed she gave Kirincic instructions on the purchases of KILN, she was unable to recount any of these instructions. Tr. 2317-2320. SP claimed that "I gave him the order and he had the discretion to fill it in his time," and that her instructions to Kirincic were generally based upon dollar amounts that she was willing to spend at the time. Tr. 2317. "The bottom line was always the same ... I wanted to eventually ... invest several hundred thousand dollars over a period of time." Tr. 2318-2319. The sheer number of orders and frequent changes to them, including, in particular, Kirincic's decision to withdraw the order for SP's account from the market for 30 minutes on April 22, 2002, so that DL's repurchase order could be executed, belies SP's assertion that she was directing the activity in the account. The Panel found that SP's confused explanation was not credible.

Moreover, SP was unable to explain how she determined the parameters for KILN purchases. She testified that she did not look at the price, wanted to buy KILN regardless of news announcements or KILN's prospects at the time, and, even though she was aware that KILN faced delisting, she claimed that it had no impact on her decision to purchase KILN. Tr. 2320-2330, 2264. In fact, SP could cite to nothing in support of her decision to purchase KILN stock, other than her "legacy" claim, which the Panel did not find credible. Tr. 2313-2314.

d. SP's Explanation of Her Later Sales of KILN Is Not Consistent with Her Justification for Earlier KILN Purchases

On December 24, 2002, just eight months after SP's account purchased hundreds of thousands of KILN shares, supposedly as a "legacy" to her children, SP sold 600,000 shares for \$270,000.⁴⁸ CX-40 p. 60. She explained that her ex-husband was in financial straits. He owed her money, could not pay rent, and was concerned that he would lose his job. Moreover, she had two children in college and a third in high school; she had four car leases; and she was just about to take a \$20,000 trip to Europe. Tr. 2270-2273. While the Panel understood SP's motivation to sell KILN stock, her explanation only served to undercut her earlier claimed logic for building a legacy, as many of the reasons that she chose to sell KILN were also present while she was buying it earlier in the year.

B. Summary of Panel Finding of Manipulation

When the Panel compared the explanation of events offered by Kirincic and Israel with objective evidence and credible testimony from others, it concluded that, based upon the preponderance of the evidence presented, the trades in SP's account did not reflect SP's legitimate retail interest, but rather were placed by Kirincic, with Israel's assistance, to mislead investors and artificially inflate the bid price for KILN. Kirincic intentionally engaged in the manipulative activity, and Israel was at least reckless in assisting Kirincic in his scheme. Kirilin is liable for the actions of Kirincic and Israel in the course of their employment at Kirilin. See, Dep't of Enforcement v. Yankee Financial Group, Inc., Richard F. Kresge and Joseph C.

⁴⁸ Kirincic made much of the fact that SP continued to purchase KILN, even after KILN regained compliance with NASDAQ listing requirements on April 22, 2002. However, a review of this later trading shows that SP's purchases in May 2002 were quite different. In the first three weeks of May SP purchased only 10,450 shares of KILN, and was only in the market on four of 17 days. While SP's purchases increased beginning on May 24, 2002, this increase occurred after DL's representatives complained about the price that DL received on the execution of his order to sell KILN shares, and so Kirincic could have anticipated greater scrutiny about KILN trading activity. CX-40 p. 30-38, Tr. 1063.

Korwasky, Complaint No. CMS030182, 2004 NASD Discip. LEXIS 56 **60-61 (NAC Aug. 4, 2006), aff'd in part, remanded as to sanctions, Exchange Act Rel No. 55988, 2007 SEC LEXIS 1407 (June 29, 2007).

Accordingly, the Panel found that Kirlin, Kirincic and Israel engaged in market manipulation with respect to KILN shares, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5 promulgated thereunder, and NASD Rules 2120 and 2110.⁴⁹

C. Forgery (Kirincic)

Count two of the Complaint alleges that Kirincic forged his parents' signatures on stock certificates and letters of authorization, in violation of Rule 2110. While Kirincic now admits that he signed his parents' names to account documents, he claims he had their authority and, therefore, he did not violate Rule 2110.

Rule 2110 provides "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." It is well established that forgery violates this standard. Dep't of Enforcement v. Cooper, Complaint No. C04050014, 2007 NASD Discip. LEXIS 15, at *9 (NAC May 7, 2007).

Consistent with this, Kirlin's written supervisory procedures specifically prohibited employees from signing documents on behalf of their customers under any circumstances. According to § 2.10.11 of Kirlin's written supervisory procedures, "[e]mployees are not permitted to sign documents on behalf of customers, even when doing so is meant to accommodate a customer's request. Customer signatures must be original by the customer on all documents." CX-90 pp. 28-29. See, Dep't of Enforcement v. Bukovcik, Complaint No. C8A050055, 2007 NASD Discip. LEXIS 21, at **9-11 (NAC July 25, 2007).

⁴⁹ Although Rules 2110 and 2120 discuss only FINRA members, Rule 115 states that FINRA rules shall apply to all members, as well as to "persons associated with a member."

Kirincic now admits that he signed his parents' names on KILN stock certificates and related letters of authorization, but claims that he had authority to sign his parents' signatures. This belated and convenient change of story was not credible to the Panel, particularly because Kirincic did not call his parents to testify, offered no documentation of the claimed authorization, failed to place a notation on the stock certificates or letters of authorization indicating that he was signing on behalf of his parents, and failed to advise anyone at the firm that he was signing his parents' names to the documents. In short, the only evidence that Kirincic had authority to sign his parents' names is his own self-serving testimony, which the Panel rejected.

Accordingly, the Panel concluded that Kirincic forged stock certificates and letters of authorization in violation of Rule 2110.

D. Best Execution (Kirlin, Lindner and Israel)

Count Three of the Complaint alleges that Kirlin, through Lindner and Israel, violated Rules 2110 and 2320, by failing to provide DL with best execution on his order to sell 114,000 shares of KILN on April 22, 2002.

Rule 2320(a) provides “[i]n any transaction for or with a customer of another broker-dealer, a member and persons associated with a member shall use reasonable diligence to ascertain the best 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.”⁵⁰

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

⁵⁰ Rule 2320 sets forth five criteria for evaluating whether a member or associated person used “reasonable diligence to ascertain the best inter-dealer market for the subject security”: (1) the character of the market for the security, e.g., price, volatility, relative liquidity, and pressure on available communications; (2) the size and type of transaction; (3) the number of primary markets checked; (4) the accessibility of the quotation; and (5) the terms and conditions of the order which result in the transaction, as communicated to the member and persons associated with the member.

of maximizing his own economic benefit, and that the broker receives his compensation because he assists the client in reaching that goal. Marc N. Geman, 54 S.E.C. 1226, n.56 (2001), aff'd, 334 F.3d 1183 (10th Cir. 2003); Dep't of Enforcement v. Nicolas, Complaint No. CAF040052, 2006 NASD Discip. LEXIS at 14, **56-57 (OHO June 5, 2006).

In this case, DL placed an order to sell 114,000 shares of KILN, which his broker relayed to Israel; Israel, in turn, consulted with Lindner. They spoke about sales of KILN to the repurchase plan at \$1.05 that occurred earlier in the day. They were both aware of SP's pending order to purchase 24,700 shares of KILN, and her ongoing large purchases of KILN. Israel asked Lindner what he should do with DL's order.

Lindner and Israel did not cross DL's sell order with SP's 24,700 share purchase order for \$1.10 per share. Rather, Lindner purchased DL's shares for \$.80 per share through the KILN repurchase plan. Israel does not dispute that he owed DL the duty of best execution. Lindner, on the other hand, claimed that he did not have a duty of best execution for DL, because he represented the KILN repurchase plan. However, this had no bearing on Lindner's failure to advise Israel to execute DL's order against SP's pending purchase order. As a registered representative of Kirlin, let alone its CEO, Lindner had an obligation to treat Kirlin customers fairly. The Panel found that the duty of best execution required, at a minimum, the execution of DL's sell order against SP's pending order to purchase 24,700 shares at \$1.10. Accordingly, the Panel found that Lindner, Israel and Kirlin violated the duty of best execution when they did not do so.

Next, the Panel considered the treatment DL's order received. Lindner determined to purchase DL's shares for the KILN repurchase plan, and he determined the price that would be paid. While Kirincic family members always were paid at or above the prevailing inside bid price, Lindner determined to pay DL, a non-family member, \$.24 per share less than the inside

bid price of \$1.04, and \$.30 per share less than SP's order. DL's sale was the only sale into the KILN repurchase plan that was executed at a discount to the inside bid price.

Lindner claimed that DL was fortunate, and the repurchase was an act of charity, noting that block sales are typically subject to a discount. While the Panel agreed that block sales are often executed at a discount, the history of sales to the KILN repurchase plan proved to be unique; every other KILN repurchase was executed at or above the prevailing inside bid price. In fact, only hours earlier Israel had executed two agency cross transactions whereby KILN had repurchased approximately 240,000 shares of KILN from Kirincic family members at \$1.05—above the inside bid price. Although Lindner and Israel offered no explanation for this unfair discrepancy, Respondents' expert did, claiming "family always comes first." Tr. 2726, 2785-2787.

The Panel was unwilling to apply the best execution rule to KILN's purchase of DL's shares, because KILN did not have a pending purchase order. However, the Panel found that the uneven treatment of customers, or, the "family comes first" approach adopted by Lindner and Israel, was unethical and in bad faith, and constituted a violation of Rule 2110's requirement that members and associated persons observe high standards of commercial honor and just and equitable principles of trade.

Accordingly, the Hearing Panel found that Kirilin, Lindner and Israel violated Rules 2110 and 2320 by failing to execute DL's sell order against SP's pending buy order. In addition, the Panel found that Kirilin, Lindner and Israel violated Rule 2110 by providing inferior execution of DL's order as compared to Kirincic family members.

E. Failure to Supervise (Kirlin, Kirincic and Lindner)

Count Four charges that Kirlin, through Kirincic and Lindner, failed to establish, maintain and enforce an adequate supervisory system and written supervisory procedures, in violation of Rules 2110 and 3010(a) and (b).

Rule 3010 requires that FINRA members “establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with the Rules of [FINRA].” Rule 3010(b)(1) requires that member firms “establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives and associated persons.”

The Complaint alleges that Kirincic and Lindner, as co-CEO’s of Kirlin, failed in their responsibility to establish and maintain an adequate supervisory system reasonably designed to achieve compliance with applicable laws and regulations, and to maintain and enforce Kirlin’s written procedures. The essence of these charges relates to the lack of supervisory systems to prevent the misconduct alleged in the Complaint.

However, at the hearing Enforcement failed to point out where the written procedures were lacking. Rather, Enforcement asserted that because violations occurred, they were ipso facto caused by some unspecified lapse or insufficiency in Kirlin’s supervisory system or written supervisory procedures, or that the alleged violations could have been prevented if a different system had been in place. The Panel rejected the broad contention that the mere fact of a substantive violation is sufficient to establish a supervision violation, and therefore had nothing upon which to base a finding that supervisory violations occurred.

Accordingly, the Panel found that Enforcement failed to prove that Kirlin, through Kirincic and Lindner, failed to establish, maintain and enforce an adequate supervisory system and written supervisory procedures, in violation of Rules 2110 and 3010(a) and (b).

V. Sanctions

A. Manipulation

Kirlin, Kirincic, and Israel engaged in market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Rules 2110 and 2120. Enforcement requests that Kirincic and Israel be barred for this violation, and that Kirlin be expelled.

The FINRA Sanction Guidelines (“Guidelines”) do not specifically address market manipulation. The most relevant Guideline addresses misrepresentations or material omissions of fact. That Guideline recommends a fine of \$2,500 to \$50,000 and a suspension of up to 30 days in cases involving negligence; a fine of \$10,000 to \$100,000 and a suspension of 10 days to two years for intentional or reckless misconduct; and, in egregious cases, a bar, or, in the case of a firm, expulsion. Guidelines, p. 93 (2007 ed).

Market manipulation is a serious violation. As the National Adjudicatory Council observed in Market Surveillance Committee v. Markowski: “The 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.” Complaint No. CMS920091, 1998 NASD Discip. LEXIS 35, at **56-57 (NAC July 13, 1998), aff’d, Exchange Act Rel No. 43259, 2000 SEC LEXIS 1860 (Sept. 7, 2000), aff’d, 274 F.3d 525 (D.C. Cir. 2001). Because manipulation is a serious offense, there is “no basis for leniency”—the sanction must be

significant. Pagel, Inc., 48 SEC at 223; Dep't of Enforcement v. Levitov, Complaint No. CAF970011, 2000 NASD Discip. LEXIS 12, at *28 (NAC June 28, 2000).

In determining appropriate sanctions, the Panel weighed the principal considerations specified in the Guidelines. In particular, the Panel considered that the manipulative conduct was extensive, involving over one hundred trades spanning more than a month. Neither Kirlin, nor Kirincic, nor Israel has accepted responsibility for the misconduct. Rather, even with the benefit of hindsight, each vehemently maintains that the conduct was proper. Further, no subsequent corrective measures were taken.

Moreover, with respect to Kirincic, the Panel also considered that he was the architect of the manipulation, and had a strong financial motive for the misconduct, as he was able to sell family shares to the KILN repurchase plan at higher prices. Additionally, the Panel considered that Kirlin and Kirincic have a disciplinary history that, while not related to the current misconduct, evidences a disregard for regulatory compliance and investor protection. CX-11.

With respect to Israel, the Panel considered that he was not present during April 2–5, 2002, when Kirincic initiated more aggressive action to maintain the inside bid price at above \$1. However, the activity occurring before and after Israel's absence was so extensive and so blatant, that his brief absence did not justify a lesser sanction. Israel argued that he was not the architect of the misconduct; he simply followed Kirincic's directions. However, Israel was in a position to prevent the manipulation and did not do so. He knew, or was reckless in not knowing, that the orders he was executing were manipulative, so he cannot escape the consequences of his actions by claiming he was just following orders. Moreover, the Panel was concerned by the fact that Kirincic was able to intimidate Israel into doing things that Israel knew, or should have known, were wrong, indicating that Israel would be susceptible to intimidation by others in the future.

After weighing these factors, the Panel finds that Kirilin should be expelled, and Kirincic and Israel should be barred in all capacities. In light of the bars, no fines are imposed.

B. Forgery (Kirincic)

Kirincic forged customer signatures on stock certificates and letters of authorization, in violation of Rule 2110. Enforcement requests that Kirincic be barred for this violation.

For violations of Rule 2110 involving falsification of records, the Guidelines recommend a fine of \$5,000 to \$100,000, and a bar in egregious cases. Guidelines at 39.

In reaching an appropriate sanction, the Panel weighed the specific considerations listed in the Guidelines for this violation. These are: (i) the nature of the documents forged or falsified, and (ii) whether respondent had a good faith, but mistaken belief of express or implied authority. Guidelines at 39.

The nature of the forged documents was significant. Kirincic forged four stock certificates and three letters of authorization—important documents that facilitated the sale of hundreds of thousands of shares of KILN and the transfer of hundreds of thousands of dollars. These funds were used, in turn, to fund Kirincic’s market manipulation. Kirincic did not contend that he had a good faith but mistaken belief of express or implied authority. Instead, after initially denying that he forged the documents, he claimed he had express authority—a contention that the Panel rejected.

The Panel also looked to the Guidelines’ general considerations. In particular, the Panel considered that the forged documents were used in furtherance of Kirincic’s scheme to manipulate KILN. Moreover, despite the fact that this falsification was in direct violation of firm policies, Kirincic does not acknowledge that his actions were wrong.

After weighing these factors, the Panel finds that Kirincic should be barred in all capacities for his forgery of customer signatures, in violation of Rule 2110. In light of the bar, no fines are imposed.

C. Best Execution (Kirlin, Lindner and Israel)

Kirlin, Lindner and Israel failed to comply with best execution requirements for a customer order, in violation of Rules 2110 and 2320. Enforcement requests that Kirlin, Lindner and Israel be ordered to pay DL restitution for the loss suffered as a consequence of their misconduct. Enforcement requests that DL receive restitution for the difference between the \$.80 he received for his shares, and the \$1.05 per share that Kirincic's relatives received hours earlier on the same day. Enforcement further requests Lindner and Israel each be fined \$50,000 for their misconduct, and suspended for two years from association with a member firm in any capacity, and that Kirlin be expelled from FINRA membership.

For intentional or reckless failure to comply with the requirements for best execution under Rules 2320 and 2110, the Guidelines provide that adjudicators should consider imposing suspensions of up to two years, or, in egregious cases, a bar or expulsion. Guidelines at 52. In addition, the Guidelines recommend that adjudicators impose fines of up to \$200,000, and they provide that adjudicators "should order restitution or increase the recommended fine by adding the amount of the respondent's financial benefit." Id.

The Principal Considerations in the Guidelines provide that the Panel should consider whether the best execution violation was due to lack of timeliness or inferior pricing, and whether the violation was a result of a system malfunction. Here, the violation was clearly due to inferior pricing, and the price difference was significant—DL received a price \$.30 per share below SP's pending offer to purchase a significant portion of the order at \$1.10. Moreover, there

was no system malfunction here; the failure to execute DL's sale against SP's pending purchase order was intentional.

The Panel also looked to the Guidelines' general considerations. In particular, the Panel considered that, while the violation involved only one customer transaction, it was significant. Moreover, Israel and Lindner have shown no remorse—both continue to claim that the customer received best execution. In fact, Lindner maintained that he did the customer a favor. Tr. 1589. Despite their convenient lack of memory as to the specifics of their discussion at the time, even with the benefit of hindsight, they have not acknowledged that they should have, at a minimum, executed DL's order against SP's \$1.10 per share buy order.

After weighing these factors, the Panel finds that the conduct was egregious. Kirlin should be expelled, and Lindner and Israel should be barred in all capacities. In light of the bars, no fines are imposed.

However, the Panel has determined to award restitution. Restitution is “a traditional remedy used to restore the status quo where otherwise a wrongdoer would unjustly benefit or his victim would unjustly suffer loss.” David J. Dambro, 51 S.E.C. 513, 518 (1993); Toney L. Reed, 51 S.E.C. 1009, 1013 (1994 (restitution is “founded on the principle that a wrongdoer shall not be unjustly enriched by his wrongdoing, or that the wrongdoer should restore his victim to the status quo ante”). As the Guidelines direct, “[a]djudicators may order restitution when an identifiable person, member firm, or other party has suffered a quantifiable loss as a result of a respondent's misconduct, particularly where a respondent has benefited from the misconduct.” Guidelines at 4-5; see also, Reed, 51 S.E.C. at 1013 (SEC expressing the “desire to see that monetary amounts assessed by FINRA be turned over to wronged customers where they are identifiable”).

Given Respondents' manipulative scheme and their "family comes first" pricing approach, there is no way to determine what would have been the market for DL's shares. The Panel has therefore determined that restitution should be awarded based upon the prices selected by Respondents. Accordingly, Respondents Lindner, Israel and Kirlin will be ordered, jointly and severally to pay restitution to DL in the amount of \$26,163 plus interest, calculated pursuant to 26 U.S.C. § 6621(2)(2) from April 22, 2002, to the date of payment. This amount represents the additional proceeds over the \$.80 per share that DL would have received had Kirlin, Israel and Lindner executed his order against SP's pending order to sell 24,700 shares for \$1.10 per share (\$7,410), and sold the remainder of the shares at \$1.01 per share, the lowest price that the market would have reached that day, given the market manipulation discussed above (\$18,753).

VI. Conclusion

Respondent Kirincic engaged in market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder and Rules 2110 and 2120, and falsified customer signatures on stock certificates and letters of authorization, in violation of Rule 2110. For these violations, Respondent Kirincic is barred. Charges that Kirincic failed to establish, maintain and enforce an adequate supervisory system and written supervisory procedures, in violation of Rules 2110 and 3010(a) and (b), are dismissed.

Respondent Lindner failed to comply with best execution requirements for a customer order, in violation of Rules 2110 and 2320. For this violation, Respondent Lindner is barred. Charges that Lindner, failed to establish, maintain and enforce an adequate supervisory system and written supervisory procedures, in violation of Rules 2110 and 3010(a) and (b), are dismissed.

Respondent Israel engaged in market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder and Rules 2110 and 2120, and failed to

comply with best execution requirements for a customer order, in violation of Rules 2110 and 2320. For these violations, Respondent Israel is barred.

Respondent Kirlin engaged in market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Rules 2110 and 2120 and failed to comply with best execution requirements for a customer order, in violation of Rules 2110 and 2320. For these violations, Respondent Kirlin is expelled. Charges that Kirlin failed to establish, maintain and enforce an adequate supervisory system and written supervisory procedures, in violation of Rules 2110 and 3010(a) and (b), are dismissed.

Respondents Kirlin, Lindner and Israel, jointly and severally shall pay restitution to customer DL in the amount of \$26,163, plus interest.

Respondents, jointly and severally, shall pay costs in the amount of \$21,676.95, which includes an administrative fee of \$750 plus the cost of the hearing transcripts.

These sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this Decision becomes the final disciplinary action of FINRA, except that the expulsion and bars shall become effective immediately if this Decision becomes the final disciplinary action of FINRA.⁵¹

HEARING PANEL.

By: Sara Nelson Bloom
Hearing Officer

⁵¹ The Hearing Panel has considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

Copies to:

Martin H. Kaplan, Esq. (*via facsimile and first-class mail*)

Ross J. Ellick, Esq. (*via facsimile and first-class mail*)

Martin P. Russo, Esq. (*via facsimile and first-class mail*)

Joseph A. Sack, Esq. (*via facsimile and first-class mail*)

Gary A. Carleton, Esq. (*via electronic mail*)

Philip J. Berkowitz, Esq. (*via electronic mail*)

David R. Sonnenberg, Esq. (*via electronic mail*)

Anthony J. Kirincic (*via overnight and first-class mail*)

David O. Lindner (*via overnight and first-class mail*)

Andrew J. Israel (*via overnight and first-class mail*)