

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RYAN J. KIRKPATRICK  
(CRD No. 4459488),

Respondent.

Disciplinary Proceeding  
No. 2006004666601

Hearing Officer – MAD

**HEARING PANEL DECISION**

March 28, 2011

**Respondent violated Conduct Rule 2110 by selling unregistered securities in violation of Section 5 of the Securities Act of 1933. For this violation, Respondent is fined \$25,000, suspended from associating with any member firm in any capacity for six months, and ordered to disgorge commissions of \$91,466.**

**Appearances**

For Complainant: Jonathan I. Golomb, Washington, DC, and David L. Friedman, New York, NY, FINRA, DEPARTMENT OF ENFORCEMENT.

For Respondent: Pro se.

**DECISION**

**I. INTRODUCTION**

The Department of Enforcement (“Enforcement”) brought this disciplinary proceeding against Respondent Ryan J. Kirkpatrick (“Kirkpatrick”), alleging that he sold unregistered securities, in violation of Section 5 of the Securities Act of 1933 (“Securities Act”), and violated

Conduct Rule 2110.<sup>1</sup> The Complaint alleges that he sold millions of shares of a thinly-traded penny stock, Sniffex, Inc. (“Sniffex”), resulting in proceeds exceeding \$9.3 million for his customers.<sup>2</sup>

## **II. BACKGROUND AND PROCEDURAL HISTORY**

FINRA’s investigation into the sales of Sniffex stock was triggered by its receipt of a spam e-mail touting the stock in June 2005. FINRA learned that the Sniffex stock was not registered with the Securities and Exchange Commission (“SEC”). In addition, the e-mail revealed that a third party was paid \$22,000 to promote the Sniffex stock. In light of these factors, FINRA initiated an investigation regarding a possible unlawful distribution of unregistered securities.

Enforcement filed a Complaint with the Office of Hearing Officers on March 30, 2010. Kirkpatrick filed his answer on June 17, 2010. The Hearing Panel, which is comprised of the Hearing Officer and two current members of the District 6 Committee, held the hearing in Dallas, Texas, on January 11, 2011. Enforcement presented three witnesses and introduced 56

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<sup>1</sup> As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. See Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Respondent’s alleged misconduct.

<sup>2</sup> The Complaint also named Patrick F. Harte, Jr. (“Harte”) as a Respondent. However, because Harte failed to appear for the final pre-hearing conference and a subsequent show cause hearing, the Hearing Officer issued an Order holding Harte in default on January 7, 2011. Pursuant to Rule 9269, default matters may be considered by the Hearing Officer only. Accordingly, the Hearing Officer will issue an Order following the issuance of this decision, which shall govern that Default proceeding. The caption of this proceeding has been amended to reflect only Respondent Kirkpatrick.

exhibits.<sup>3</sup> Kirkpatrick testified on his own behalf; he did not call any other witnesses or introduce any exhibits.

Based upon a careful review of the entire record, the Hearing Panel makes the following findings of fact and conclusions of law.

### **III. FINDINGS OF FACT**

#### **A. Respondent**

Respondent Kirkpatrick was first registered with FINRA in 2001 as a Direct Participation Programs Representative.<sup>4</sup> From 2003 to 2008, Kirkpatrick was a registered representative at Barron Moore, Inc. (“Barron Moore”),<sup>5</sup> a former FINRA member firm in Dallas, Texas when the conduct at issue took place.<sup>6</sup> He is currently registered with another FINRA member firm as a General Securities Representative.<sup>7</sup>

#### **B. Sniffex and the Issuance of Sniffex Stock**

Sniffex was incorporated in Nevada on October 27, 2004, as Snissex, Ltd.<sup>8</sup> On November 1, 2004, the Board of Directors changed the company’s name to Sniffex, Inc.<sup>9</sup> The company claimed that it manufactured and marketed a device that could detect explosives. The inventor of

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<sup>3</sup> Enforcement’s exhibits are labeled “CX” followed by the exhibit number. Kirkpatrick and Enforcement stipulated to the admissibility of Enforcement’s exhibits.

<sup>4</sup> CX-8, at 5.

<sup>5</sup> Barron Moore was a FINRA member from 2003 to 2008. The firm was expelled on July 23, 2008, for participating in the sale of unregistered securities and failing to supervise in connection with those violations. Its business was comprised largely of receiving and liquidating securities of low priced Pink Sheet or Penny stocks. Tr. 60-62; CX-5, at 3.

<sup>6</sup> CX-8, at 2.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> CX-16, at 3.

<sup>9</sup> *Id.* at 1.

the device is a Bulgarian national.<sup>10</sup> The inventor's business partner, also a Bulgarian national, is Petar Mihaylov ("Mihaylov"), a stock promoter.<sup>11</sup>

Mihaylov controlled Sniffex.<sup>12</sup> He developed a plan for Sniffex to issue 15 million shares of "free-trading" stock.<sup>13</sup> For assistance in executing his plan, Mihaylov approached Mark Lindberg ("Lindberg"), a former stock promoter who had worked on previous deals with Mihaylov, and Lindberg agreed to assist him.<sup>14</sup> Lindberg was in the business of taking companies public, following which he would manipulate the stock price through promotional activities and sell the stock into the market.<sup>15</sup> To manipulate the stock price without detection, Lindberg hid the actual participants in the stock distribution through the use of nominees, family members' names, or offshore corporations.<sup>16</sup>

In order to obtain the 15 million shares of Sniffex "free-trading" stock, Lindberg utilized a state-qualified registration in Nevada under Federal Rule 504 whereby a registration statement is filed with the state instead of the SEC.<sup>17</sup> On February 28, 2005, Sniffex filed a registration statement with the Securities Division of the Nevada Secretary of State for the sale of up to 15 million shares of common stock pursuant to Rule 504 under Regulation D of the Securities Act and Chapter 90.490 of the Nevada Administrative Code.<sup>18</sup> In reality, none of the 15 million

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<sup>10</sup> Tr. 9.

<sup>11</sup> Tr. 33, 36.

<sup>12</sup> Tr. 36-37.

<sup>13</sup> Tr. 36.

<sup>14</sup> Tr. 33. Lindberg participated in numerous reverse mergers with shell companies. Tr. 20-21. In fact, he had utilized Barron Moore to sell the shares for approximately 50-75 shell company merger deals. Tr. 27. Lindberg pled guilty to conspiracy to commit securities fraud and wire fraud in the Northern District of Oklahoma. Tr. 21-22. As part of his plea agreement, he agreed to provide truthful testimony to prosecutors and regulators. Tr. 22.

<sup>15</sup> Tr. 20, 23, 29.

<sup>16</sup> Tr. 23.

<sup>17</sup> Tr. 33.

<sup>18</sup> CX-24, at 2-28.

shares would be “free-trading” because every share had Mihaylov or his nominees designated as the final recipients.<sup>19</sup>

The registration statement was approved by the state on April 6, 2005.<sup>20</sup> It named six different entities that were recipients of the Rule 504 stock.<sup>21</sup> Each entity was under the control of Mihaylov, Lindberg, or one of Mihaylov’s nominees. Two of the six entities were PU Partners, Inc., which received 6.3 million shares, and Interim Capital Corp., which received 3.245 million shares.<sup>22</sup> At Mihaylov’s direction, those two entities transferred most of their shares to two nominees: YM, the inventor’s mother, and AS, the inventor’s uncle.<sup>23</sup> Pursuant to Mihaylov’s plan, YM and AS each received 3.75 million shares of Sniffex stock.<sup>24</sup>

### **C. Opening of Accounts at Barron Moore**

On March 23, 2005, Barron Moore opened accounts in the names of YM and AS.<sup>25</sup> Kirkpatrick was the registered representative for both of the accounts.<sup>26</sup> According to the new account documents, YM was a retired, 72-year-old resident of Sofia, Bulgaria, with no investment experience.<sup>27</sup> Her annual income was less than \$25,000, and her liquid net worth was

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<sup>19</sup> Tr. 36.

<sup>20</sup> CX-24, at 1. On April 22, 2005, Sniffex filed a Form D, Notice of Sale of Securities, with the SEC regarding the sale of the shares issued pursuant to the Nevada Rule 504 offering. CX-25.

<sup>21</sup> Tr. 36.

<sup>22</sup> Tr. 63-64.

<sup>23</sup> Tr. 41-42, 64, 72, 109; CX-30.

<sup>24</sup> CX-27, at 3-4, 7-8; CX-28, at 2, 6.

<sup>25</sup> Tr. 74, 77; CX-34, 39.

<sup>26</sup> Tr. 72. The accounts were transferred to Kirkpatrick from Josh Lankford, a registered representative and one of Barron Moore’s owners. Tr. 112. Lankford was Lindberg’s business partner. Tr. 26, 45.

<sup>27</sup> CX-34, at 1-2.

less than \$50,000.<sup>28</sup> Her new account form indicated that her risk tolerance was "High Risk," and her investment objective was "Active or Day trading."<sup>29</sup>

The new account form for AS indicated that he was a 47-year-old resident of Sofia, Bulgaria, working as a self-employed consultant, with three years of experience investing in stocks.<sup>30</sup> Similar to YM, he had less than \$25,000 in annual income and less than \$50,000 in liquid net worth.<sup>31</sup> AS's new account form also stated that his risk exposure was "High Risk," and his investment objective was "Active or Day trading."<sup>32</sup>

Although Kirkpatrick signed the new account forms for YM and AS, he did not review them in depth.<sup>33</sup> In addition, he neither met nor spoke with YM or AS.<sup>34</sup> He communicated with them solely via e-mail and instant message.<sup>35</sup>

As noted above, YM's and AS's accounts were nominee accounts under Mihaylov's control.<sup>36</sup> Mihaylov used e-mail accounts created for YM and AS to communicate with Kirkpatrick regarding the trading in their accounts.<sup>37</sup>

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<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.*

<sup>30</sup> CX-39, at 1-2. Barron Moore also had a revised new account form for AS. CX-40. That form stated he had 10 years of investment experience; however, another area on the same page stated that his investment experience was "1-5 years." *Id.* at 2. This new account form appears to have been created after the fact because the date on the form, indicating the version of the form, states "Revised on June 7, 2005," yet, the document is signed on May 23, 2005. *Id.*

<sup>31</sup> CX-39, at 2.

<sup>32</sup> *Id.*

<sup>33</sup> Tr. 137, 144.

<sup>34</sup> Tr. 108, 127-28.

<sup>35</sup> Tr. 127-28. Lankford directed Kirkpatrick to only communicate with YM and AS via e-mail. Tr. 128.

<sup>36</sup> Tr. 44-45.

<sup>37</sup> Tr. 46-48.

#### **D. Initiation of the Market for Sniffex**

Sniffex stock was not publicly traded prior to April 2005.<sup>38</sup> On April 8, 2005, a Sniffex stock holder requested that Barron Moore sell 5,000 shares of Sniffex at \$.05 per share.<sup>39</sup> In response, Kirkpatrick's supervisor contacted Nasdaq's Market Data Integrity Symbols group and requested a symbol for Sniffex.<sup>40</sup> Sniffex was assigned the symbol "SNFX," and its stock became available for quoting on the Pink Sheets system on April 12, 2005.<sup>41</sup>

#### **E. Sniffex Stock Deposits**

On May 12, 2005, YM and AS each deposited 3.75 million shares of Sniffex stock into their accounts at Barron Moore.<sup>42</sup> The certificates, dated May 10, 2005, bore no restricted legend.<sup>43</sup> Kirkpatrick did not request or review the certificates.<sup>44</sup> The shares were not registered with the SEC.<sup>45</sup>

YM and AS also completed "Incoming Stock Questionnaires" ("Questionnaires"), documents used by Barron Moore to obtain information from customers who deposited stock at the firm. YM's Questionnaire indicated that her shares were purchased from a third-party, non-affiliated shareholder, but it did not identify the shareholder.<sup>46</sup> There were two Questionnaires for AS, both dated August 30, 2005.<sup>47</sup> The first one stated that he had purchased his shares in a

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<sup>38</sup> Tr. 68-69.

<sup>39</sup> CX-29; Tr. 68.

<sup>40</sup> Tr. 68-69; CX-29.

<sup>41</sup> Tr. 69; CX-29.

<sup>42</sup> CX-35, at 1; CX-41, at 1.

<sup>43</sup> CX-28, at 5-6.

<sup>44</sup> Tr. 108, 115.

<sup>45</sup> CX-22; Tr. 57.

<sup>46</sup> CX-36.

<sup>47</sup> CX-42.

third-party transaction, but it did not indicate from whom his shares were purchased.<sup>48</sup> The second stated that he had purchased his shares from the Issuer, i.e., Sniffex.<sup>49</sup> Kirkpatrick did not review the Questionnaires.<sup>50</sup>

#### **F. Sales of Sniffex Stock**

From mid-May 2005 through April 2006, Kirkpatrick sold approximately 3.4 million shares of Sniffex into the public markets on behalf of YM and AS.<sup>51</sup> During that time, the stock price increased from approximately \$.05 for the initial trade to a high of \$6.00 on July 29, 2005.<sup>52</sup> No registration statement covering these sales was ever filed with the SEC.<sup>53</sup>

On May 16, 2005, within days of depositing the Sniffex stock, YM began selling shares of Sniffex through her account at Barron Moore.<sup>54</sup> Between May 16, 2005 and April 25, 2006, Kirkpatrick sold 2,332,542 Sniffex shares on behalf of YM in 55 transactions.<sup>55</sup> YM realized approximately \$5.8 million in proceeds from these sales, which were periodically wired out of the account to a Swiss bank.<sup>56</sup> The sales generated at least \$303,000 in commissions.<sup>57</sup>

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<sup>48</sup> CX-42, at 1.

<sup>49</sup> CX-42, at 2.

<sup>50</sup> Tr. 119, 122, 124.

<sup>51</sup> CX-31.

<sup>52</sup> Tr. 90-91; CX-32. CX-32 reflects the symbol HSFC, which is Sniffex's successor company, Homeland Safety International, Inc. Tr. 90.

<sup>53</sup> CX-22; Tr. 57.

<sup>54</sup> CX-37, at 1.

<sup>55</sup> CX-31.

<sup>56</sup> *Id.*; CX-35; Tr. 84, 144-45.

<sup>57</sup> CX-31.



Between August 2, 2005 and January 24, 2006, Kirkpatrick sold 1,079,882 Sniffex shares on behalf of AS in 21 transactions.<sup>58</sup> AS realized approximately \$3.5 million in proceeds from these sales, which were also periodically wired out of his account to a Swiss bank.<sup>59</sup>

The total commissions generated for these sales were \$481,398.<sup>60</sup> Kirkpatrick received a 19% payout from the commissions, totaling \$91,466.<sup>61</sup>

### **G. Failure to Conduct Due Diligence**

Kirkpatrick failed to conduct the necessary due diligence prior to the Sniffex stock sales from the YM and AS accounts. The circumstances surrounding the Sniffex stock and the firm's customers presented numerous red flags of a possible unlawful stock distribution.

Sniffex was a little-known development-stage company whose stock had only recently begun trading publicly in April 2005.<sup>62</sup> The accounts for YM and AS were opened at Barron Moore approximately one month before Sniffex began trading. In addition, both YM and AS deposited substantial amounts of Sniffex shares into their accounts within weeks of Sniffex's initial trade. Although Kirkpatrick never requested or reviewed the Sniffex stock certificates, they were newly-issued, dated just two days before YM and AS deposited the stock into their accounts.<sup>63</sup> Further, the goal of both accounts was to liquidate their Sniffex positions.<sup>64</sup> YM began liquidating her shares within a few days after depositing them into her Barron Moore

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*; CX-41; Tr. 84.

<sup>60</sup> CX-31.

<sup>61</sup> Tr. 137. Kirkpatrick's income increased from approximately \$80,000 in 2003 and 2004, to \$700,000 in 2005. Tr. 145.

<sup>62</sup> Tr. 84.

<sup>63</sup> Tr. 115.

<sup>64</sup> Tr. 114, 127.

account.<sup>65</sup> Kirkpatrick noticed that the two accounts seemed to have the same trading pattern, yet, he failed to investigate it.<sup>66</sup>

While both YM and AS had incomes less than \$25,000, a liquid net worth of under \$50,000, and limited investment experience, each deposited millions of shares of Sniffex stock that was worth millions of dollars within a year. Despite YM's and AS's stated limited financial resources and lack of investment experience, when communicating with Kirkpatrick, they used terminology that evidenced familiarity with the operation of the U.S. markets and sophisticated market-related strategies.<sup>67</sup> For example, YM sent Kirkpatrick e-mails referring to "Level 2 offers;" market makers, using a four letter identifier for a specific market maker; and the abbreviation "GTC" for "good till canceled" orders.<sup>68</sup> In addition, YM, a 72-year-old Bulgarian national, sent Kirkpatrick an instant message using American slang: "you are the man."<sup>69</sup> Kirkpatrick testified that he suspected that YM and AS were being coached, but he did not follow up on his suspicions.<sup>70</sup>

Kirkpatrick also failed to make any effort to determine the source of YM's or AS's shares.<sup>71</sup> He failed to review the Questionnaires for the YM and AS accounts or obtain the same information directly from his customers.<sup>72</sup> In an e-mail exchange with YM, Kirkpatrick learned that she received her Sniffex shares from her son, the inventor of the Sniffex device.<sup>73</sup> However,

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<sup>65</sup> Compare CX-35, at 1 with CX-37, at 1.

<sup>66</sup> Tr. 127.

<sup>67</sup> See CX-45-56.

<sup>68</sup> See e.g., CX-45, at 1; CX-47, at 1.

<sup>69</sup> CX-49.

<sup>70</sup> Tr. 131-32.

<sup>71</sup> Tr. 115-22.

<sup>72</sup> *Id.*

<sup>73</sup> Tr. 109.

after receiving this information, he made no effort to determine whether YM was affiliated with Sniffex.<sup>74</sup> He also never questioned AS about how he acquired his shares or whether he was affiliated with Sniffex.<sup>75</sup>

Notwithstanding these facts and circumstances, Kirkpatrick sold his customers' stock without taking the necessary steps to determine whether his customers' unregistered Sniffex shares could be sold in compliance with Section 5 of the Securities Act. Kirkpatrick admitted that he did not determine if a registration statement was in effect with respect to YM's or AS's Sniffex shares, or if there was an applicable exception.<sup>76</sup> He relied on the issuer's transfer agent to determine if the Sniffex stock deposited by YM and AS could be sold.<sup>77</sup>

#### **IV. VIOLATION OF SECTION 5 OF THE SECURITIES ACT**

Securities Act Section 5(a) prohibits any person, directly or indirectly, from selling a security in interstate commerce unless a registration statement is in effect as to the offer and sale of that security or there is an applicable exemption from the registration requirements. Securities Act Section 5(c) prohibits the offer or sale of a security unless a registration statement as to such security has been filed with the SEC, or an exemption is available.<sup>78</sup> The purpose of the registration requirements is to "protect investors by promoting full disclosure of information

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<sup>74</sup> Tr. 115-20.

<sup>75</sup> Tr. 120-24.

<sup>76</sup> Tr. 134.

<sup>77</sup> Tr. 134-35.

<sup>78</sup> 15 U.S.C. § 77e(a) and (c); see also *Jacob Wonsover*, Exchange Act Rel. No. 41123, 1999 SEC LEXIS 430, at \*15-16 (Mar. 1, 1999), *aff'd*, 205 F.3d 408 (D.C. Cir. 2000).

thought necessary to informed investment decisions.”<sup>79</sup> A violation of Section 5 of the Securities Act constitutes a violation of Conduct Rule 2110.<sup>80</sup>

To establish a *prima facie* case of a violation of Sections 5(a) and 5(c) of the Securities Act, Enforcement must show that (1) no registration statement was in effect as to the securities; (2) Respondents sold or offered to sell these securities; and (3) interstate transportation or communication were used in connection with the sale or offer of sale.<sup>81</sup> A showing of scienter is not required because “[t]he Securities Act of 1933 imposes strict liability on offerors and sellers of unregistered securities.”<sup>82</sup>

Here, no registration statement was in effect with respect to the Sniffex securities that are the subject of the Complaint, and Kirkpatrick admitted that he sold the securities on behalf of his clients. The sales involved interstate activity because the shares were sold into the over-the-counter market, thereby entering interstate commerce. In addition, they were quoted on the Pink Sheets, a national communications medium. Enforcement has established a *prima facie* case.

“Once Enforcement establishes a *prima facie* case, the burden shifts to [Kirkpatrick] to show that the transactions were exempt from the Securities Act’s registration requirements.”<sup>83</sup> Kirkpatrick did not present any evidence that the Sniffex shares were exempt from the registration requirements of Section 5 of the Securities Act. He admitted that he did not ascertain

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<sup>79</sup> *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953).

<sup>80</sup> *Alvin W. Gebhart*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93, at \*54 n.75 (Jan. 18, 2006) *rev’d and remanded in part on other grounds sub. nom Gebhart v. SEC*, 2007 U.S. App. LEXIS 27183 (9<sup>th</sup> Cir. Nov. 21, 2007) (“Further, because we have consistently held that a violation of a Commission or NASD rule or regulation is inconsistent with just and equitable principles of trade, we find that the Gebharts’ sale of the unregistered MHP notes also constitutes a violation of NASD Conduct Rule 2110.”); *Stephen J. Gluckman*, Exchange Act Release No. 41628, 1999 SEC LEXIS 1395 (July 20, 1999); *see William H. Gerhauser*, Exchange Act Release No. 40639, 1998 SEC LEXIS 2402 (Nov. 4, 1998).

<sup>81</sup> *Gebhart*, 2006 SEC LEXIS 93, at \*52; *SEC v. Cont’l Tobacco Co.*, 463 F.2d 137, 155 (5<sup>th</sup> Cir. 1972).

<sup>82</sup> *Gebhart*, 2006 SEC LEXIS 93, at \*53 n.73 (quoting *Swenson v. Engelstad*, 626 F.2d 421, 424 (5<sup>th</sup> Cir. 1980)).

<sup>83</sup> *Dep’t of Enforcement v. Midas Securities*, No. 2005000075703, slip op. at 6 (N.A.C. Mar. 3, 2011).

whether any particular exemption from registration was available before the sales took place. Accordingly, the Hearing Panel finds that Kirkpatrick violated Section 5 of the Securities Act and thereby violated Conduct Rule 2110.<sup>84</sup>

## V. SANCTIONS

The FINRA Sanction Guidelines (“Guidelines”) for the sale of unregistered securities provide for a fine of \$2,500 to \$50,000 and consideration of a suspension or bar in egregious cases.<sup>85</sup> The Guidelines further set forth specific considerations for such violations, three of which are applicable to this case: (1) whether the respondent attempted to comply with an exemption from registration; (2) share volume and dollar amount of transactions involved; and (3) whether the respondent disregarded red flags suggesting the presence of unregistered distribution.<sup>86</sup> In addition, the Hearing Panel considered the Principal Considerations in Determining Sanctions.<sup>87</sup>

At no time did Kirkpatrick attempt to ascertain if the stock was registered or if an exemption from registration applied, relying instead on Sniffex’s transfer agent to clear the stock for sale. The law is clear that reliance on transfer agents that a stock was “free trading” will not

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<sup>84</sup> See e.g., *id.* at 9; *Dep’t of Enforcement v. Morgan Keegan & Co.*, No. CAF040073, 2006 NASD Discip. LEXIS 24, at \*40 (O.H.O. July 21, 2006).

<sup>85</sup> FINRA Sanction Guidelines 24 (2010), [www.finra.org/sanctionguidelines](http://www.finra.org/sanctionguidelines).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 6-7.

excuse a broker's failure to make a reasonable inquiry into the facts.<sup>88</sup> It is also inadequate for representatives to rely solely on their firms to conduct the necessary investigation.<sup>89</sup>

The Hearing Panel noted that a large number of shares were sold to members of the public. In total, YM and AS sold approximately 3.4 million shares, generating sales proceeds greater than \$9.3 million and commissions of \$481,398. Clearly, the volume of sales and the dollar amount involved created the potential for significant harm to investors. In addition, Kirkpatrick profited from these sales as he received \$91,466, representing a 19% payout on the total commissions. He made no inquiry about the registration of Sniffex and willingly accepted his commissions for selling the stock.

The Hearing Panel found Kirkpatrick's failure to conduct any due diligence to be problematic. There were ample red flags, which should have caused a securities professional to inquire further, including, but not limited to, the following: First, substantial blocks of Sniffex stock were deposited at Barron Moore within days of being issued.<sup>90</sup> Second, the issuer of the shares was an unknown, development-stage company with no trading history.<sup>91</sup> Third, after the sales of the unregistered Sniffex stock, the customers wired the proceeds to Swiss banks. Further,

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<sup>88</sup> See *Wonsover*, 1999 SEC LEXIS 430, at \*29-30 (finding that reliance on transfer agent and respondent's firm did not relieve the individual broker of his obligation to explore whether shares are freely tradable); *Robert G. Leigh*, Exchange Act Rel. No. 27667, 1990 SEC LEXIS 153, at \*14 (Feb. 1, 1990) ("the transfer agent's willingness to reissue the certificates without restrictive legends did not relieve [the registered representative] of his obligation to investigate.").

<sup>89</sup> See *Wonsover*, 1999 SEC LEXIS 430, at \*29 (stating that the SEC has rejected the "truncated view" that a representative could function as a "mere order taker" and rely on his firm and the transfer agent to conduct the appropriate inquiry).

<sup>90</sup> See *Steven E. Scott*, Exchange Act Release No. 43656, 2000 SEC LEXIS 2635, at \*10 (2000) (stating that if a broker is asked to sell a substantial amount of a thinly-traded security, he must take all necessary steps to make sure that controlling persons are not involved); *Distribution by Broker-Dealers of Unregistered Secs.*, Exchange Act Rel. No. 6721, 1962 SEC LEXIS 74, at \*4-5 (Feb. 2, 1962) (discussing how it must be assumed that the issuer is the source of unregistered securities appearing in substantial amounts in the market over a short period of time).

<sup>91</sup> See *Charles F. Kirby*, Exchange Act Rel. No. 47149, 2003 SEC LEXIS 46, at \*21-22 (Jan. 9, 2003) (discussing how petitioner failed to make an appropriate showing where company at issue had limited assets, limited trading history, and very little public information regarding the company's business).

the sales greatly exceeded the customers' reported annual income and liquid net worth. Fourth, Kirkpatrick never spoke to either of his Sniffex customers, communicating with them solely by e-mail or instant message. He failed to inquire further upon receipt of e-mails that were inconsistent with his customers' backgrounds.

Taking all of the foregoing factors into consideration, and in the absence of any mitigating factors, the Hearing Panel finds that the following sanctions are warranted: Kirkpatrick is fined \$25,000, suspended in all capacities for six months, and ordered to disgorge the commissions he received for the unlawful Sniffex sales, which totaled \$91,466.<sup>92</sup>

## **VI. ORDER**

For violating Conduct Rule 2110 by selling unregistered securities, Kirkpatrick is fined \$25,000, suspended from associating with any FINRA member firm in any capacity for six months, and ordered to disgorge \$91,466, which represents the commissions he earned on the sales of the unregistered securities. The fine and disgorgement shall be due and payable upon Kirkpatrick's return to the securities industry.

Kirkpatrick is also ordered to pay costs in the amount of \$2158.90, which includes a \$750 administrative fee and the cost of the hearing transcript. The costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter.

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<sup>92</sup> Cf. *Dep't of Enforcement v. Padilla*, No. 2006005786501, 2010 FINRA Discip. LEXIS 42 (O.H.O Oct. 18, 2010).

If this decision becomes FINRA's final disciplinary action, the suspension shall begin at the opening of business on Monday, May 16, 2011, and end at the close of business on Tuesday, November 15, 2011.<sup>93</sup>

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Maureen A. Delaney  
Hearing Officer  
For the Hearing Panel

Copies to: Ryan Kirkpatrick (*via overnight courier, e-mail, and first-class mail*)  
Patrick F. Harte, Jr. (*via e-mail and first-class mail*)  
David L. Friedman, Esq. (*via e-mail and first-class mail*)  
Jonathan I. Golomb, Esq. (*via e-mail and first-class mail*)  
David R. Sonnenberg, Esq. (*via e-mail*)

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<sup>93</sup> The Hearing Panel has considered and rejects without discussion all other arguments of the parties.