FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MAX INTERNATIONAL BROKER-DEALER, CORP. (BD No. 46039), Respondent.	Disciplinary Proceeding No. 20070072538-03 Hearing Officer – MC **AMENDED EXTENDED HEARING PANEL DECISION**[1] September 1, 2011

Respondent willfully charged fraudulent, excessive, undisclosed markups on penny stock sales to more than 100 customers, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and 2440. Respondent also failed to report equity trades, in violation of NASD Conduct Rule 2110 and Marketplace Rule 6620, and failed to create order memoranda and to keep accurate blotter records, in violation of SEC Rule 17a-3 and NASD Conduct Rules 2110 and 3110. In addition, Respondent failed to enforce its written supervisory procedures, in violation of NASD Conduct Rules 2110 and 3010, failed to maintain and enforce supervisory control procedures, in violation of NASD Conduct Rules 2110 and 3012, and failed to timely update its Form BD and file a required annual certification, in violation of NASD Conduct Rules 2110 and 3013. Finally, Respondent failed to notify FINRA of its intent to maintain electronic storage media and failed to store its electronic records properly, in violation of SEC Rule 17a-4 and NASD Conduct Rules 2110 and 3110. For these violations, Respondent is censured, fined $335,000, and is ordered to pay restitution of $482,111.27 plus accrued interest to customers. In addition to the fines and restitution, Respondent shall pay costs.

Appearances

Lara Thyagarajan, Senior Regional Counsel, New York, New York, and Mark Dauer, Deputy Chief Litigation Counsel, New Orleans, Louisiana, for the Department of Enforcement.

Martin H. Kaplan, Esq., New York, New York, for Respondent Max International Broker-Dealer, Corp.

[1] This decision is amended to correct and clarify how restitution is to be paid to the customers.

I. Introduction

A. The Charges

The Department of Enforcement filed the ten-cause Complaint in this case on December 7, 2009. The gravamen of the Complaint is that Respondent Max International Broker-Dealer Corp. ("Max International" or the "Firm") charged fraudulent, excessive, undisclosed markups when it sold customers large volumes of penny stock from its proprietary account on two occasions, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), SEC Rule 10b-5 promulgated thereunder, and NASD Rules 2120, 2440, and 2110. In addition, the Complaint charges Max International with:

- failing to report customer transactions, in violation of NASD Marketplace Rule 6620;
- failing to enforce its written supervisory procedures relating to markups and principal transactions with customers, in violation of NASD Conduct Rules 3010 and 2110;
- failing to maintain and implement adequate supervisory control procedures, in violation of NASD Conduct Rules 3012, 3013, and 2110;
- committing willful books and records violations of SEC Rule 17a-3 and NASD Conduct Rules 3110 and 2110; and
- failing to comply with applicable rules and regulations concerning electronic storage media, in violation of SEC Rule 17a-4 and NASD Conduct Rule 2110.

In its Answer, Max International denied the allegations. At the hearing, the Firm affirmatively asserted that it did not charge excessive markups. It did not contest the books and records and supervision violations but characterized them as insignificant. The parties tried the case before an Extended Hearing Panel ("Panel") in a four-day hearing that commenced on December 13, 2010, in New York City.

B. The Respondent and David S. Isolano

Max International is located in New York City and has been a FINRA member since April 1999.[2] As a registered FINRA member firm, Max International is subject to FINRA's jurisdiction.

David S. Isolano is Max International's sole shareholder and chief executive officer.[3] He was originally named as a respondent in this disciplinary proceeding. Prior to the hearing, Isolano submitted an uncontested Offer of Settlement. Pursuant to the terms of the Offer of Settlement, Isolano accepted a five-month suspension from associating with any FINRA member firm in any capacity, followed by a one-month suspension from associating with any FINRA member firm in any principal capacity, and a fine of $40,000.[4]

II. The Markups

A. Applicable Legal Principles

In the securities industry, the mandate of NASD Conduct Rule 2110 that member firms adhere to "just and equitable principles of trade" requires members to provide fair pricing for retail securities transactions. Indeed, the prices set by a firm for sales of securities "carry … an implied representation" that they "are reasonably related to the prices charged in an open and competitive market."[5]

In addition, NASD Conduct Rule 2440 expressly requires members to price customer transactions fairly. To promote fair pricing, FINRA has long established that a firm should take

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[2] Factual Stipulations at ¶ 1. The parties filed 27 stipulations, references to which are designated "Stip." with paragraph number. References to the testimony at the hearing are designated as "Tr. __." References to Enforcement's Exhibits are designated as "CX-___." References to Max International's Exhibits are designated as "RX-___."

[3] Stip. at ¶¶ 2, 5.

[4] CX-134. The Order Accepting Offer of Settlement (Corrected) included findings, which Isolano neither admitted nor denied, that (i) in connection with Max International's sales of DBSJ to customers, he engaged in a fraudulent markup scheme, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and 2440; and (ii) as the person designated as responsible for markups and proprietary trading at Max International, he failed to reasonably enforce Max International's supervisory procedures. CX-134, pp. 5-9.

[5] *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1469, 1996 U.S. App. LEXIS 31866, at *47 (1996).

into consideration a number of relevant factors to meet its obligation to provide its customers fair prices. Although FINRA has set no bright-line rule, it has long established as a guideline that a firm should not charge markups greater than five percent of the prevailing market price for securities sold to customers, while emphasizing that markups under five percent may be excessive.[6]

Because markups exceeding five percent are presumed excessive, when a firm charges more than five percent, it must "be fully prepared to justify its reasons."[7] Higher markups are suspect, and may be fraudulent. It has been held that "generally, markups of more than 10% are fraudulent, even in the sale of low priced securities."[8] Indeed, Max International's written supervisory procedures in effect during the period relevant to this case explicitly adopted the FINRA five percent guideline as firm policy, cited NASD Rule 2440, and specifically pointed out that the SEC has consistently found markups exceeding five percent to be presumed excessive and that markups exceeding ten percent are presumptively fraudulent.[9]

B. The Issue

In this case, Max International denies that it charged any markups at all. Instead, it claims that it executed short sales of the securities at issue, at the market price, and then, while at risk, searched for and found the securities to fill the customer orders. Enforcement, however, contends the sales were not short sales, but were riskless principal sales executed at an excessive, undisclosed markup from the significantly discounted price at which Max International had

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[6] NASD Notice to Members ("NTM") 92-16 (Apr. 1, 1992); IM-2440. IM-2440, titled "Mark-Up Policy," notes that a "5% Policy," adopted in 1943, remains in place after numerous reviews. Both NTM 92-16 and IM-2440-1 expressly state that the five percent policy is a guideline, that even markups of less than five percent may be deemed unreasonable or unfair, and that the percentage of a markup is only one of a number of relevant factors that must be considered. Therefore, particularly in riskless principal trades, involving securities that are readily available, even a five percent markup may be excessive and unfair.

[7] NTM 92-16.

[8] *James E. Ryan*, Exch. Act Rel. No. 18617, 1982 SEC LEXIS 1960, at *9 (Apr. 5, 1982).

[9] CX-78, pp. 23-26; CX-79, pp. 23-26.

previously arranged to obtain the securities. Resolution of this issue requires a detailed review of the testimony and other evidence adduced at the hearing.

C. The Facts

This case revolves around Max International's sales of two penny stocks on two separate occasions. Both stocks were introduced to Max International by David Farber, an equity trader who was registered with FINRA through member firm Park Financial Group ("Park Financial"). Farber had known Isolano and done business with Max International since 2001.[10]

With both stocks, events followed a similar course. Each time, knowing that Farber had clients willing to sell a large block of penny stock at a significant discount below the then-current market prices, Max International organized its sales staff to solicit buy orders from unsuspecting retail investors. With accumulated customer orders in hand, the Firm arranged to purchase a block of the penny stock in a principal account at a discount steeply below the market price. Then it sold shares of the stock from its proprietary account to customers at the market price, filling the orders by purchasing the stock at the previously agreed discount. The Firm reaped substantial profits from the difference between the purchase and sales prices of the stocks.

1. TOTG

In September 2005, Farber learned that two of his clients at Park Financial were interested in selling a large block of stock of a company called 2-Track Global, Inc. ("TOTG").[11]

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[10] Tr. 299-300, 307, 309. In 2009, Farber was the subject of a settled FINRA disciplinary action. Under the settlement terms, Farber consented to pay a fine of $25,000 and accepted a 30-day suspension for distributing unregistered securities. Tr. 339-40. The facts underlying the disciplinary action FINRA took against Farber were unrelated to this disciplinary proceeding. At the hearing, Farber was unable to recall the names of the unregistered securities that were the subject of that disciplinary action, but testified that millions of shares were involved, and that he subsequently stopped liquidating stock certificates for clients to avoid further involvement in what he termed "risky activity." Tr. 369-370.

[11] Tr. 303-304. In September 2005, TOTG traded over the counter and was quoted on the OTCBB. The company's business, according to an SEC Form 10-QSB filed on August 17, 2005, was "logistic-oriented technology including vessel and vehicle fleet management solutions and proprietary positional real-time integrity and status monitoring systems for containers and other remote assets." Stip. at ¶¶ 11-12. The company's public filings contained a going concern clause. Tr. 32; CX-108, p. 7 of 22.

One client owned an investment company and lived with Farber's friend and business associate, Bryan Collins.[12] The other was a foreign client who had given Farber discretionary authority to sell TOTG on his behalf.[13]

Farber testified that Isolano had previously asked him about purchasing blocks of stock at a discount.[14] With this in mind, Farber alerted Isolano to the availability of TOTG. Isolano said that he was interested.[15]

Farber testified that he then arranged a conference call among Isolano, Collins, and Collins' housemate, the investment company owner who wanted to sell TOTG.[16] As a result, Max International purchased 200,000 shares of TOTG through Park Financial on September 15, 2005, after the close of the market.[17] Max International paid $1.00 per share; the bid was $1.26 - $1.27.[18] On the same day, Max International, acting as principal, sold 186,494 shares of TOTG to 34 customers from its proprietary account for $1.27 per share, without disclosing the 27% same-day markup.[19] The markup earned Max International a total profit of $50,353.38.[20]

[12] Farber testified that he and Collins have known each other since 2003. The two have a social as well as business relationship. In September 2005, Collins had an account with Farber at Park Financial. Tr. 305-306, 309.
[13] Tr. 303-304.
[14] Tr. 302. Farber and Max International had a payment-for-order flow agreement pursuant to which Isolano sent Farber orders, which he executed for a commission. Tr. 300-301.
[15] Tr. 308.
[16] According to Farber, Collins participated in the call because he was mentoring his housemate, and in that capacity was helping Farber's client to negotiate a price with Isolano. Tr. 305, 306, 308, 309.
[17] Tr. 33-34; CX-4 – CX-6.
[18] Tr. 316; CX-9; Stip. at ¶ 14.
[19] Tr. 39-40, 42; CX-6; CX-7; CX-112 – CX-113. Although Enforcement was able to determine that Max International purchased and sold TOTG on the same day, it was unable to ascertain at what times of day it received the orders and executed the sales, because Max International did not produce order memoranda reflecting those times when requested to do so. Max International's clearing firm was unable to provide the times of order entry and execution because the TOTG customer sales were executed away from the clearing firm. Tr. 98-104.
[20] CX-113.

2. DBSJ

On September 5, 2006, Collins told Farber that he and members of his business group wanted to sell a block of shares of Database Solutions, Ltd. ("DBSJ").[21] Farber testified that he immediately contacted Isolano,[22] and that, once again, Isolano was interested.[23] Farber testified that he then initiated a conference call with Collins and Isolano to facilitate the transaction. According to Farber, during the call Collins and Isolano discussed terms, but did not agree on the price.[24]

Nonetheless, starting on September 7, 2006, three Max International brokers began soliciting customer orders for DBSJ. Segments of tape recorded conversations[25] reveal that the brokers told customers that Max International was about to acquire a large position in DBSJ[26] and would be able to provide customers with a "good deal" below market price.[27] The brokers made extravagant claims, including price predictions, and invoked the names of Merrill Lynch and Goldman Sachs in pitching DBSJ. For example, one broker told customers that this was an opportunity to join a "group of syndicates" that would control "the whole flow" and "the price of the stock;" that "whatever Merrill Lynch, Goldman Sachs is doing as far as bringing a stock public, you're going to be doing in the penny stock arena."[28] Another said that Max International and a market maker would control "[n]inety percent of the company" and predicted

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[21] Tr. 318-319, 324. In September 2006, DBSJ, a Canadian company, held itself out to be a software developer of products designed to enable insurance industry sales personnel to manage customer relations. DBSJ traded over the counter and was quoted on the Pink Sheets. Stip. at ¶¶ 16-17.
[22] Tr. 318-319.
[23] Tr. 320.
[24] Tr. 322-325. According to Farber, Isolano wanted a larger discount, 60%-70%, than the 30%-40% discount Collins was initially willing to give.
[25] Max International outfitted its brokers' computers with a program that enabled the brokers to record their telephone conversations. Tr. 149. Portions of conversations between brokers and their customers were received into evidence. The transcripts of those conversations are at CX-84-86, 88, 89, 92-94; disks containing the audio recordings are found at CX-123-124, 127, 128, 130-132.
[26] CX-85, p. 9; CX-88, p. 10.
[27] CX-88, p. 5; CX-93, p. 4.
[28] CX-92, pp. 2-3; CX-93, p. 3.

"a four hundred percent return on capital. … four times our money on this particular position."[29] By September 12, 2006, the brokers had accumulated orders from customers to purchase thousands of dollars worth of DBSJ.[30]

In the meantime, Farber had arranged a meeting with Isolano and Collins in New York City on September 8, 2006. At the meeting, Collins offered to provide Max International with a large block of shares of DBSJ at a 40% discount from the market price.[31] At the time, Farber believed that Max International would purchase the block of shares through Park Financial,[32] and that he would receive a substantial commission.[33]

Farber testified that after returning to his office in Florida the following Monday, September 11, 2006, he called both Isolano and Collins to finalize the deal, only to be put off when they told him that they needed more time.[34] Farber testified that he called them repeatedly that day to bring the matter to a close, but was unsuccessful.[35] The trade did not occur on September 11.[36]

The next day, according to Farber, Collins told him that the terms of the deal had changed. Now Max International would purchase the block of stock in segments; the first segment would not be handled through Park Financial, but through a different broker-dealer, Aegis Capital Corporation ("Aegis"), with succeeding pieces to be sold through Park Financial.[37]

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[29] CX-84, p. 6.
[30] The handwritten order memoranda for Max International customer orders for DBSJ comprise CX-13. They are undated, but were solicited in advance of the sales on September 12. Recordings of brokers' phone conversations soliciting orders begin as early as September 7, 2006. *See, e.g.*, CX-84-86, 88, 89, 92-94.
[31] Tr. 328.
[32] Tr. 329.
[33] Tr. 391. Farber thought his commission would be four percent of the value of the stock. Based on Max International's purchase of slightly more than eight million shares, he testified that if the purchase had been made through Park Financial, his commission would have been $32,000.
[34] Tr. 330.
[35] CX-109 shows Farber used his cell phone to call Isolano three times and Collins seven times on September 11, 2006.
[36] Tr. 330-331.
[37] Tr. 330-331.

Instead, on September 12, 2006, Max International purchased 8,122,315 shares of DBSJ into its proprietary account at $0.097 per share in an unsolicited order from an account owned by Collins at Aegis.[38] Park Financial played no role in the transaction.

The same day, Max International sold 7,792,317 shares of DBSJ from its proprietary account to 77 customers.[39] At Isolano's direction, Max International's chief compliance officer, Kevin Young, entered the orders at a single sitting, at $0.15 per share, which was the then-current trading price Young saw displayed on the Reuters screen on his computer.[40]

The result was that Max International's customers paid a total of $1,168,847.55 for virtually all of the DBSJ shares that the Firm acquired that day for $755,854.75, for a profit of $412,992.80. The markup, calculated from Max International's same-day acquisition cost, was 54.64%.[41] The Firm also charged 55 of its customers a commission.[42] The commissions increased Max International's profit on the DBSJ sales to $431,757.80.[43] If the commissions are included in the markup calculation, they increase the markup that Max International charged some customers to more than 60%. The Firm disclosed the commissions, but not the markups.[44]

D. Max International's Defense

Max International vigorously contests Enforcement's characterization of the TOTG and DBSJ trades as riskless principal transactions. Instead, Max International claims that it sold TOTG and DBSJ short to its customers at the prevailing market price and then found blocks of

[38] Tr. 71-72; CX-16, p. 9; CX-17, p. 3; CX-70; pp. 4-14.
[39] CX-114.
[40] Tr. 541-544. Young had never priced a security before. He started as a trainee at Max International in 2003. It was his first job after college. Isolano made him chief compliance officer in August 2006, approximately one month before the DBSJ trades. Tr. 518-520; 568-569.
[41] Tr. 132; CX-114; CX-115.
[42] Tr. 133-134; CX-14; CX-15.
[43] CX-115.
[44] Tr. 62-64, 133-134; CX-114.

TOTG and DBSJ of sufficient size to cover the short sales and fill the orders.[45] Because it claims to have sold short before purchasing stock to cover the sales, Max International argues that it was at risk, and thus was entitled to profit from the spread between its acquisition cost and the market price at which it had sold the stock to customers. Max International specifically denies prearranging its acquisitions of TOTG and DBSJ. For all of these reasons, it argues, it did not charge fraudulent markups.[46]

Max International's defense depended almost entirely on uncorroborated, questionable testimony from Isolano.

1. Isolano's Testimony

a. The Short Sale Claim

Isolano denied he had anything to do with the TOTG transactions.[47] As for DBSJ, he testified that he knew that Max International brokers had begun soliciting customer orders before September 12, 2006.[48] He claimed that after Max International had sold short almost eight million shares of the stock to customers on September 12, he was able to acquire the shares of DBSJ that Max International needed to cover the short sales with remarkable ease. Isolano testified that he called a trader at Aegis, whose name he claimed not to remember, told the trader he was looking for eight million shares of DBSJ, and "threw a low price at him. He said okay."[49] In his view, "[i]t worked out tremendously for the firm."[50]

The Panel does not credit these assertions for two reasons. First, Isolano's admissions that he did not borrow or place a locate for DBSJ, as required, and his inability to say whether or

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[45] Respondent's Post-Hearing Brief, p. 8.
[46] Respondent's Post-Hearing Brief, pp. 7, 8.
[47] Tr. 631.
[48] Tr. 661-663.
[49] Tr. 641. Isolano testified that he was surprised to be able to purchase DBSJ at so low a price. Isolano stated that the trader, who "sounded like a kid," simply accepted his offered price. Tr. 686.
[50] Tr. 675-676.

not DBSJ was a "hard to borrow" security cast doubt on his claim that the Firm sold DBSJ short.[51] Second, there is no documentary evidence to support the claim that the Firm sold TOTG and DBSJ stock short to its customers. The Firm's trade blotter and account statement for its proprietary account for September 15, 2005, the day of the TOTG sales, contain no short sale modifiers.[52] Handwritten order memoranda for the DBSJ transactions contain no short sale modifiers or other indications that the DBSJ customer sales were short sales.[53] In addition, there are no short sale modifiers or other indicators of short sales on either the DBSJ customer confirmations[54] or the trade blotter for Max International's proprietary account for September 12, 2006.[55]

b. The Agreements with Collins and Farber

Isolano denied negotiating with Farber to purchase shares of DBSJ for Max International, and denied having arranged access to shares of the security before the Firm's customer sales on September 12, 2006.[56] Critically, Isolano denied that there was a September 5, 2006, conference call to discuss DBSJ as described by Farber, denied knowing Collins, and denied meeting Collins with Farber on September 8.[57] Isolano also testified that he learned of DBSJ initially when he received an unsolicited fax about it,[58] thought the company had potential, and suggested to Max International brokers that they look into it.[59]

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[51] Tr. 695. Max International's procedures prohibited accepting a short sales order without first borrowing, arranging to borrow, or establishing reasonable grounds to believe it could borrow the security, and documenting it. CX-78, p. 37.
[52] Tr. 40; CX-6; CX-7.
[53] CX-13.
[54] CX-14.
[55] CX-17.
[56] Tr. 637.
[57] Tr. 633-634.
[58] Tr. 620.
[59] Tr. 622, 658, 661.

First, in evaluating Isolano's testimony, the Panel cannot credit his flat denial that he ever met, knew, or spoke to Collins.[60] The evidence clearly contradicts him. For example, Isolano's cell phone records show that he made six calls, from September 13 through September 28, 2006, to Collins' cell phone number.[61]

Other phone records further undermine Isolano's testimony and corroborate Farber's by linking Isolano and Collins, starting on September 5, 2006, when Farber began facilitating Max International's purchase of DBSJ from Collins. There were multiple calls between Farber's and Isolano's or Max International's phones,[62] between Farber's and Collins' numbers,[63] before, during, and after the period when Max International actively recommended DBSJ. Farber's cell phone records show a "three-way," or conference, call on September 5 that includes the cell phone numbers of Farber, Isolano, and Collins, consistent with Farber's testimony that he set up such a call.[64] In addition, Farber's phone records reflect other conference calls with Farber's, Isolano's, and Collins' phone numbers on September 12 and 14, 2006.[65] Based on the numerous

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[60] Tr. 633-635, 670.

[61] Tr. 306; CX-110, pp. 1-2.

[62] CX-109, p. 1, Items 8, 20, 32, 33, 36, 38, 39, 40, 61; p. 2, Items 93, 97, 103, 119, 139, 166; p. 3, Items 181, 191, 198, 202, 205, 206, 209; p. 4, Items 265, 267, 269; p. 5, Items 357, 363, 374, 382. Farber's cell phone bill shows additional calls made to Max International's main number. *See*, *e.g.*, p. 1, Items 31, 37, 38, 39, 61; p. 2, Items 94, 98, 99, 101, 102, 109, 140, 163, showing calls to (212) 809-3267, which is the Firm's number, as shown on Max International's Form BD (CX-1, p. 2), and as it appears on the Firm's office stationery, sent with correspondence to FINRA (CX-26, p. 1).

[63] CX-109, p. 1, Items 4, 7, 9, 11, 13, 14, 15, 19, 25, 26, 29, 34, 41, 42, 43, 45, 46, 47, 60, 62, 63, 73, 76, 78, 80; p. 2, Items 82, 84, 85, 92, 100, 104, 105, 110, 117, 118, 120, 121, 122, 125, 141, 150, 153, 161, 167, 170; p. 3, Items 171, 194, 199, 201, 203, 207, 222, 226, 228; p. 4, Items 264, 270, 283, 286, 296, 300, 304, 321, 328, 329, 335, 340, 346, 347, 348; p. 5, Items 358, 365, 368, 370, 375, 376, 381, 387, 389, 391, 404, 405, 412, 421, 436; p. 6, Items 27, 29, 47, 49, 59.

[64] The record shows calls on September 5, 2006, from Farber to Collins at 9:17 p.m., followed by a call at 9:21 p.m. from Farber to Isolano, marked "T" for a three-way, or conference, call, and a call at 9:37 p.m. to Collins' number, which Farber said added Collins to the call to discuss DBSJ. Tr. 322-325; CX-109, p. 1, Items 8- 9. Max International claims that Item 8 does not, even though marked with a "T," confirm that it was the first part of a conference call, but rather that it was followed by a separate call to Collins. Respondent's Post-Hearing Brief, pp. 5-7. The Panel notes that there is at least one other call marked "T" that does not identify the third-party participants. *See, e.g.,* CX-109, p. 1, Item 10.

[65] The record shows Farber called Collins on September 12 at 5:57 p.m. and added Isolano to the call at 5:58 p.m. CX-109, p. 2, Items 118-119. On September 14, Farber called both Collins and Isolano for a "three-way" call at 6:25 p.m. CX-109, p. 3, Items 201-202.

calls connecting Farber, Isolano, and Collins, including conference calls, the Panel finds that the telephone records strongly corroborate Farber's testimony, and the Panel credits it.

Second, the Panel does not credit Isolano's denial that he arranged to obtain DBSJ shares at a discount in advance of Max International's customer sales.[66] The recorded conversations show that Max International brokers anticipated that the firm was about to acquire a block of DBSJ when they began soliciting orders on September 7, 2006. Isolano signed a reporting agreement, referred to as an "Attachment 2" agreement, with Aegis on September 8, 2006.[67] Max International sold DBSJ to its customers on September 12, 2006. Isolano's claim that he then simply "called around to see who had the security"[68] immediately after Max International sold over eight million shares of DBSJ is not believable, particularly in light of the fact that Isolano purchased the stock from the account of Farber's friend Collins.[69]

2. The Offer of Settlement

In weighing Isolano's credibility, the Panel cannot ignore the significance of the Offer of Settlement Isolano signed on December 10, 2010, to resolve the disciplinary charges FINRA brought against him in connection with this matter. The Offer of Settlement recites many facts alleged in the Complaint, including the following:

- Between September 5 and 12, 2006, Isolano negotiated with Collins (identified in the Offer of Settlement as "BC") to purchase a large block of DBSJ for Max International below the quoted market price at the time;

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[66] Tr. 637.
[67] CX-73.
[68] Tr. 652.
[69] The Panel also does not credit Isolano's testimony that he learned of DBSJ from a fax he received about the company that he found "interesting," Tr. 672-673, and that he simply passed the information on to Max International's brokers to evaluate. The Panel finds Isolano's claim that he "[d]idn't even know [Aegis] existed before this transaction," Tr. 685, to be disingenuous, undermined by the fact that he signed the reporting agreement with Aegis on September 8, 2006, the same date on which he met with Farber and Collins in New York City. Max International argues that the September 8 agreement contradicts Farber's testimony that Collins asked him to introduce Isolano to Aegis on September 12. Tr. 732-734. In light of the overwhelming evidence of contact between Collins and Isolano, the Hearing Panel finds this argument unpersuasive.

- Isolano met with Collins and Farber (identified in the Offer of Settlement as "DF") in New York City to discuss the firm's purchase of DBSJ;

- While negotiating Max International's purchase price of DBSJ, Isolano told members of the firm's sales staff about DBSJ, and they arranged for customers to buy shares; and

- Max International purchased the stock into its proprietary trading account and, on the same day, sold DBSJ to retail customers at the publicly reported offer price, at a fraudulent and excessive markup.[70]

The Offer of Settlement required that Isolano "not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any allegation in the complaint."[71] As noted above, Isolano testified inconsistently with the facts recited in the settlement, and with numerous other allegations in the Complaint, in disregard of this term of the Offer of Settlement.[72] The Panel finds this undermines Isolano's credibility.

E. Discussion

The Panel finds that Max International charged markups that were fraudulent *per se*, because they substantially exceeded ten percent and were without justification. Furthermore, the Panel finds strong evidence that Max International charged the fraudulent markups intentionally.

First, in both cases, the transactions were riskless principal transactions.[73] With Farber's assistance, Max International had assured itself it could purchase the stocks at a discounted price. It then obtained customer orders and bought and sold the stock virtually simultaneously.

Second, Max International did not disclose the markups to its customers.

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[70] CX-134, pp. 2-3, 6.
[71] CX-134, p. 12.
[72] Isolano admitted that his testimony at the hearing was inconsistent with the terms of his Offer of Settlement. Tr. 647-649.
[73] "A 'riskless' principal transaction is the economic equivalent of an agency trade. A broker-dealer engaging in such trades has no market making function, buys only to fill orders already in hand, and immediately 'books' the shares it buys to its customers." *Paul George Chironis*, Exch. Act Rel. No. 63661, 2011 SEC LEXIS 33, at *10 (Jan. 6, 2011).

Third, Max International also charged commissions, which it disclosed, to 55 of the 77 customers to whom it sold DBSJ. By charging the commissions, the Firm implied to the 55 customers that the commissions represented all of Max International's profit from the transactions.[74]

Fourth, Max International failed to record trade details on order tickets and other records, failed to record the terms of the sales accurately, and failed to report the trades as required. The effect was to conceal the fraudulent markups from both customers and regulators.

The Panel finds, therefore, that all of the above factors, taken together, establish that Max International intentionally charged the fraudulently excessive markups in its sales of TOTG and DBSJ to customers. The Panel is satisfied that these charges are supported by more than a preponderance of the evidence presented.

F. Sanctions

For excessive markups, FINRA's Sanction Guidelines suggest a fine of $5,000 to $100,000. In egregious cases, the Guidelines suggest suspending the firm for up to two years with respect to any or all activities or functions, or expelling it. In addition, if restitution is not ordered, the Guidelines suggest adding the amount of the excessive markups to the fine.[75]

For a firm's intentional or reckless omissions of material facts, such as Max International's failure to disclose its markups, the Guidelines suggest imposing a fine of $10,000 to $100,000 and suspending the firm from performing any or all activities from 10 business days to two years.[76] In this case, the circumstances surrounding the excessive, fraudulent, undisclosed

[74] Max International brokers told other customers it would not charge commissions, to persuade them to make purchases. *See, e.g.*, CX-94, p. 2.
[75] *FINRA Sanction Guidelines*, p. 92 (2011).
[76] *Id*. at p. 90.

markups Max International charged its customers establish that the excessive markups resulted from intentional, fraudulent conduct.

Enforcement recommends imposition of a fine of $100,000 for the markup violations described in the First and Fourth Causes of Action. Enforcement also recommends requiring Max International to pay restitution to the customers in an amount at least equal to the amount by which the markups exceeded five percent.

The Panel finds that the seriousness of Max International's markup violations in its sales of TOTG and DBSJ requires a fine at the upper level of the Guidelines' range. Consequently, the Panel agrees with Enforcement's recommendation of a fine of $100,000 for charging its customers fraudulent excessive markups as reasonable and necessary to deter Max International, and other firms, from future similarly egregious misconduct.

In addition, the Guidelines direct adjudicators to consider eliminating ill-gotten gain when misconduct results in a financial benefit to a respondent by ordering disgorgement, and restitution to redress harm suffered by customers.[77]

As noted above, Max International acquired significant profits from its misconduct. For this reason, the Panel finds it appropriate to order that the Firm pay restitution to the customers in

[77] *Guidelines*, General Principle No. 6, p. 5. "Where quantifiable customer harm has been demonstrated, or a respondent has been unjustly enriched, [FINRA] generally will order restitution or disgorgement." NASD Notice to Members 99-86 (Oct. 1999).

the amount of the markups charged to customers who purchased TOTG and DBSJ, and repay the 55 DBSJ customers the commissions it charged them.[78]

III. The Trade Reporting Violations

A. The Applicable Rule

NASD Marketplace Rule 6620 governed Max International's transactions in TOTG and DBSJ. Rule 6620(a)(2) requires non-market makers to submit last sales reports of transactions in OTC Equity Securities within 90 seconds after execution to the OTC Reporting Facility. The Rule required Max International to report:

> (1) the symbol of the OTC Equity Security;
>
> (2) the number of shares;
>
> (3) the price of each transaction;
>
> (4) a symbol indicating whether the transaction was a buy, sell, sell short, or cross; and
>
> (5) the time of execution expressed in hours, minutes, and seconds based on Eastern Time, unless another provision of [FINRA's] rules required that a different time had to be included on the report.

There is no dispute that TOTG and DBSJ qualified as OTC Equity Securities under Rule 6620. Furthermore, it is clear that Max International did not report any of its customer transactions in TOTG[79] or DBSJ.[80]

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[78] Max International earned a total of $50,353.38 in markups on its sales of TOTG. *See* CX-113. Thus, Max International will pay this amount to the TOTG customers. From the excessive markups for the sales of DBSJ to 77 customers, Enforcement calculates that Max International earned $412,992.80. *See* CX-115. To avoid figures with fractions of pennies, the Hearing Panel orders the Firm to pay $412,992.89, plus interest, as restitution to the DBSJ customers. In addition, Enforcement calculates that the commissions Max International charged 55 DBSJ customers totaled $18,765.00 (CX-115), which Max International shall also pay, plus interest, in restitution to them. Schedules A and B, attached to this decision, break down how restitution to the customers who bought TOTG and DBSJ, respectively, shall be paid. The customers are specifically identified in an Addendum to this decision, which is served only on the parties.

[79] Tr. 217-219; CX-120.

[80] Tr. 225-226; CX-121. CX-120 and CX-121 are reports generated by VISTA, a FINRA proprietary data collection system, that allows FINRA to review all trades reported to market centers, such as the OTC Reporting Facility. They show that Max International did not report its transactions in TOTG and DBSJ.

B. Discussion

In Max International's defense, Isolano testified that he first learned that Max International had not reported the DBSJ customer sales during FINRA's investigation.[81] He testified that Max International did not have the capability of reporting the trades.[82] In the course of the investigation, Max International informed FINRA that it had a contract with National Financial Services ("NFS"), its clearing firm, by which Max International assumed NFS accepted the responsibility to report on Max International's behalf.[83] Max International argues it should therefore be excused from any violation of NASD Rule 6620.[84] It also argues that "industry practice" permitted Max International to delegate the responsibility of reporting the TOTG and DBSJ transactions, and that such a delegation is endorsed by NASD Conduct Rule 3230(a), providing that "clearing or carrying agreements" should state the responsibilities of the parties to agreements regarding acceptance of orders and execution of transactions.[85]

As noted by Enforcement, however, Rule 3230(a) does not abrogate a firm's obligation to comply with its reporting responsibilities, and NASD NTM 94-07 expressly states that the promulgation of Rule 3230 does not permit firms to avoid their "obligations or responsibilities" to report as required by the securities laws.[86]

Moreover, the facts do not support Max International's defense. First, the evidence shows that NFS merely cleared, it did not execute, Max International's sales of TOTG and DBSJ, and therefore was not obligated to report them.[87] Second, there is no evidence that Max

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[81] Isolano characterized the FINRA investigation as an "inquisition." Tr. 667, 689.
[82] Tr. 667.
[83] CX-50; CX-52. However, Isolano could not explain how NFS would know to report these trades, since they were executed away from the clearing firm by Max International, but he assumed that they were entered into the clearing firm's system. Tr. 667-668 .
[84] Respondent's Post-Hearing Brief, pp. 7, 21. NFS, however, did not report the trades. Tr. 214.
[85] *Id.* at p. 21.
[86] Department of Enforcement's Reply to Respondent's Post-Hearing Brief, pp. 5-6.
[87] Tr. 214, 234.

International's agreement with NFS transferred to the clearing firm the responsibility to report the details of transactions that Max International executed away from NFS.[88]

The Hearing Panel finds, therefore, that Max International failed to report its TOTG transactions with customers on September 15, 2005, and its DBSJ transactions with customers on September 12, 2006, in violation of NASD Rules 2110 and 6620.[89]

C. Sanctions

For a firm violating its equity trade reporting requirements under the applicable rules, the Guidelines recommend, for a first action, a fine of $5,000 to $10,000, and for a second action, a fine of $10,000 to $50,000. In egregious cases, the Guidelines recommend considering a fine greater than the high end of the recommended range.[90]

Enforcement argues that Max International's failures to report the TOTG and DBSJ customer transactions were egregious because the failures frustrated the important goal of market transparency. By not properly reporting the trades, Max International concealed from the market its sale at the prevailing market price of the large blocks of securities it had contemporaneously acquired at a price significantly below the market. As Enforcement points out, had Max International made accurate reports, a regulatory review may well have been triggered long before the improper markups finally came to light.[91] For these reasons, Enforcement recommends a fine of at least $50,000 for the trade reporting violations described in the Second and Sixth Causes of Action. The Panel agrees that a fine of $50,000 is appropriate to achieve the remedial goals articulated by the Guidelines, and to deter Max International and others from future similar misconduct.

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[88] Tr. 215.
[89] Violations of NASD Conduct Rules and federal securities laws are deemed to be violations of Conduct Rule 2110. *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12-13 (N.A.C. June 2, 2000).
[90] *Guidelines*, p. 68.
[91] Enforcement's Post-Hearing Brief, pp. 43-44.

IV. The Books and Records Violations

A. Discussion

NASD Conduct Rule 3110 obligates member firms to make and keep books and records as required by SEC Rules 17a-3 and 17a-4. SEC Rule 17a-3 requires firms to create and maintain a memorandum of each order providing the time of the receipt of the order, the time of its execution, and the price at which the order is executed.

The record shows that Max International simply did not create the order memoranda required by SEC Rule 17a-3 for its TOTG customer transactions.[92] For the DBSJ transactions, Max International generated what it called order memoranda, but the documents do not reflect the time and date of the receipt, entry, or execution of the customer orders. The memoranda do not show execution prices of a number of the DBSJ sales to customers, and in some cases they record the price inaccurately.[93]

SEC Rule 17a-3 requires firms to create and maintain a blotter in which they must record daily all purchases and sales of securities, showing the accounts in which the transactions are effected, identifying the securities, and displaying the amounts bought and sold and the prices. The blotters Max International created are deficient. They do not record accurately the terms of the customer orders. For example, the blotters purporting to record the details of customer purchases of TOTG make it appear that the customers bought twice as many shares as they actually purchased.[94]

Another requirement of SEC Rule 17a-3 is that firms maintain copies of confirmations of all securities bought and sold for customers. In this case, the evidence shows that Max

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[92] CX-41; CX-42.

[93] CX-13, a compilation of handwritten memoranda of DBSJ orders, shows different prices for executions of DBSJ. Hearing testimony and the customer confirmations (CX-14), however, establish that Max International sold DBSJ to all 77 purchasing customers at the same price, $0.15 per share.

[94] Tr. 43-47; CX-10; CX-19 – CX-21.

International solicited all TOTG and DBSJ customer sales, but failed to record them correctly as "solicited" on the trade confirmations.[95]

Max International retained all of its books and records in electronic format.[96] SEC Rule 17a-4(f)(2) requires that broker-dealers using electronic storage media ("ESM"), as Max International did, must inform FINRA of their intention to do so at least 90 days before initiating ESM storage procedures, and must employ a "write once – read many" ("WORM") format to prevent the electronically stored records from being altered or deleted.[97] Max International did not comply with this requirement: it did not inform FINRA of its intent to employ ESM;[98] it moved, deleted, and changed electronic files; and it did not maintain them in WORM format. Max International reused the backup tapes onto which documents were scanned after a week, instead of maintaining them as the Rule requires.[99] The firm had no system for scanning written documents, such as account forms, for storage. In addition, SEC Rule 17a-4(f)(3) requires firms using ESM to create and maintain a duplicate copy of the ESM. Max International failed to meet this requirement as well.[100]

E-mails are included within the definition of ESM. As with the other types of its electronic records, Max International failed to maintain its e-mail communications in conformity with SEC Rule 17a-4. E-mail communications were stored in what Young described as an

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[95] The customer confirmations contain statements to the effect that all orders are unsolicited unless specified as solicited, and none of them contain any indication that the TOTG and DBSJ sales were solicited. CX-4; CX-14. However, the fact that all customer sales of each security occurred on a single day, coupled with comments brokers wrote on the customer recommendation cards, establish that the TOTG and DBSJ orders were solicited. CX-11; CX-22; Tr. 52-54, 144-147.

[96] Tr. 483, 485; CX-30.

[97] Tr. 487.

[98] Tr. 486, 642-643.

[99] Tr. 488-490, 560.

[100] Tr. 507-508; CX-29; CX-30; CX-37 – CX-40.

"administrator inbox" that both Young and Isolano could access, and from which they could alter and delete messages at will, in violation of the Rule.[101]

Accordingly, based on the evidence, the Panel finds Max International liable for willfully violating SEC Rules 17a-3 and 17a-4 and NASD Conduct Rules 2110 and 3110, as alleged in the Complaint's Third, Fifth, and Tenth Causes of Action.

B. Sanctions

For recordkeeping violations of NASD Rule 3110 and SEC Rules 17a-3 and 17a-4, the Guidelines recommend a fine of $1,000 to $10,000 and, in egregious cases, a fine of $10,000 to $100,000, and consideration of suspension for 30 business days or more, or expulsion.[102]

At the hearing, Max International concurred that it failed to create and maintain appropriate books and records preserving the requisite information. It argues, however, that the resulting rule violations were "technical and/or the result of inadvertent failures (which have been materially cured)."[103]

Enforcement argues that Max International's recordkeeping violations were egregious. The absence of accurate blotters and records showing times at which Max International received, entered, and executed orders frustrated the FINRA investigators' review of the markup violations and limited FINRA's ability to reconstruct what occurred. Because Max International retained all of its records electronically, its failure to retain records and its wholesale noncompliance with requirements to maintain backup copies in WORM format meant that Max International was unable to produce essential documents when requested.

As a consequence of these deficiencies, Max International was unable to respond to routine FINRA data requests. For example, in response to a FINRA request to review e-mail

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[101] Tr. 516, 561.
[102] *Guidelines*, p. 29.
[103] Respondent's Post-Hearing Brief, p. 23.

communications for one year, the Firm was unable to produce any records of e-mail communications for an entire five-month period.[104] When FINRA staff sought to determine the time and date of the Firm's sales of DBSJ to the 77 customers, the order tickets Max International provided in response lacked time and date information for the receipt and execution of the orders.[105] Similarly, Max International did not provide FINRA with order memoranda for any of the 34 TOTG transactions.[106] These inadequacies were not inconsequential. They significantly impeded FINRA's ability to properly review, investigate, and reconstruct Max International's purchases and sales of TOTG and DBSJ. One result was that FINRA was unable to determine a precise timeline showing when Max International bought and sold TOTG and DBSJ.

For these reasons, the Panel concludes that Enforcement's recommended fine for these violations, totaling $100,000,[107] is insufficient to achieve the Guidelines' remedial and deterrent purposes. The Panel finds that a fine totaling $150,000 for Max International's recordkeeping violations is a more appropriately calibrated sanction to deter Max International and others from such a systemic failure to retain records, as described in the Third, Fifth, and Tenth Causes of Action.[108]

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[104] Tr. 478.
[105] Tr. 103-104.
[106] Tr. 99.
[107] Enforcement's Post-Hearing Brief, p. 45.
[108] Enforcement further recommends that the Panel require Max International to retain an independent consultant to review its record keeping procedures and ensure that Max International updates its procedures to bring the firm into compliance with SEC and FINRA record keeping requirements. Enforcement's Post-Hearing Brief, pp. 40-41. The Panel gave this recommendation careful consideration but declines to do so. Uncontroverted testimony at the hearing indicated that subsequent to the investigation leading to this Complaint, Max International acquired the necessary systems to store and maintain its electronic records in compliance with the relevant rules, and cured the deficiencies FINRA staff found when they conducted their examination. Tr. 644-645.

V. The Supervision Violations

C. Discussion

The Complaint contains three causes of action alleging supervisory violations. As with the books and records violations discussed above, Max International does not contest these charges; rather, it minimizes their significance, describing them as technical or inadvertent.[109]

The parties stipulate that Isolano was responsible for supervising markups and proprietary trading at Max.[110] In addition, Max's written supervisory procedures, in effect in 2005 and 2006, state expressly that "David Isolano, as the head (and currently only) trader for the firm's account, will oversee all proprietary trading activities." The written supervisory procedures contain a provision clearly prohibiting principal transactions with customers, quoted here as it appeared, in bold and underlined: "**<u>Max International does not undertake any principal transactions with customers</u>**."[111] As noted above, the written procedures also state that it was Max International's policy, consistent with FINRA rules and guidelines, that price markups in customer sales should not exceed five percent, and that markups exceeding 10% are "more often than not considered FRAUDULENT."[112] Despite the clarity of the application of these provisions of Max International's written procedures to the transactions of concern here, Max International engaged in numerous principal transactions with customers in its sales of TOTG and DBSJ, and charged markups grossly in excess of five percent.

Accordingly, the Panel finds that the evidence clearly establishes that Max International failed to enforce its supervisory procedures relating to markups and proprietary trading with

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[109] Respondent's Post-Hearing Brief, pp. 23-24.
[110] Stip. ¶ 22.
[111] CX-78, p. 29; CX-79, p. 29.
[112] CX-78, pp. 23-24; CX-79, pp. 23-24.

customers, and thereby violated NASD Conduct Rules 2110 and 3110, as alleged in the Complaint's Seventh Cause of Action.

NASD Rule 3012(a)(1) requires member firms to establish, maintain, and enforce a system of supervisory procedures and policies to "test and verify" that the firm's procedures are reasonably designed to ensure that the firm complies with the applicable rules and laws, and to designate a principal responsible to establish and enforce a system of supervisory control policies and procedures. Following his promotion to the position of chief compliance officer in August 2006, Young was responsible for Max's supervisory control program.[113] Young wrote a compliance report in 2006 to summarize Max's supervisory control program. However, the report did not address, or provide documentation of, procedures for testing and verifying the efficacy of procedures concerned with markups, proprietary trading, and maintenance of books and records.[114] Max International represented to FINRA that it demonstrated its testing and verification procedures to FINRA examiners during an on-site review.[115] This did not, however, fulfill Max's obligation to maintain evidence of the firm's testing and verification of its supervisory procedures. For these reasons, the Panel finds that Max International violated NASD Conduct Rules 2110 and 3012, as alleged in the Eighth Cause of Action.

NASD Rule 3013(a) requires Max International to identify on its Form BD the principal serving as the firm's chief compliance officer. Although Young began his service in that capacity starting in August 2006, Max International did not identify him in that capacity on its Form BD until April 2007.[116] Rule 3013 also requires Isolano as Max's CEO to certify annually that Max International has in place processes to establish, maintain, review, test, and modify its

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[113] Tr. 554.
[114] Tr. 559; CX-55; CX-82.
[115] CX-56.
[116] Stip. ¶¶ 23-24; CX-1, pp. 20-21.

written policies and procedures designed to achieve compliance with the applicable rules and securities laws. Isolano should have signed the 2006 certification by December 15, 2006, the anniversary date of the previous year's certification. Isolano, however, signed the 2006 certification 15 days late, on December 31, 2006.[117] For these reasons, the Panel finds that Max International violated NASD Conduct Rules 2110 and 3013, as alleged in the Ninth Cause of Action.

D. Sanctions

The Guidelines recommend consideration of a fine of $5,000 to $50,000 for a firm's supervision failures in violation of NASD Conduct Rules 2110 and 3110. In egregious cases, the Guidelines recommend consideration of suspension of any or all functions for up to 30 business days.[118]

Enforcement describes the supervisory failures depicted in the Seventh Cause of Action as egregious, and recommends a fine of $25,000.[119] The Panel agrees that Max International's failures to enforce its supervisory procedures governing markups and proprietary trading were certainly serious, if not egregious. The results were significant. Therefore, the Panel agrees that Enforcement's recommended fines are appropriate and properly remedial for Max International's failures to enforce its own procedures relating to markups and proprietary trading with customers, described in the Complaint's Seventh Cause of Action.

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[117] Tr. 624; Stip. ¶ 27; CX-81; CX-83.

[118] *Guidelines*, p. 105.

[119] Enforcement recommends here, too, that Max International retain an independent consultant to review its supervisory systems and procedures relating to markups and principal transactions with customers, and update them as necessary. The Panel declines to do so. As noted above, the Firm's written procedures emphatically prohibited the Firm from engaging in any principal transactions with customers, adopted FINRA's five percent guideline for markups, and reposed responsibility for supervising markups in Isolano. The procedures were adequate. Max International simply ignored them.

As for the violations of NASD Conduct Rules 2110, 3012, and 3013 described in the Eighth and Ninth Causes of Action, no Guidelines specifically address these supervision-related rules. The Guideline pertaining generally to failures to supervise is, however, applicable.

Enforcement's view is that these particular violations are not egregious. The Panel agrees. The Eighth Cause of Action entails a single report for 2006 that did not include a description of the nature of testing and verification Max International used to ensure the adequacy of its supervisory systems regarding maintenance of books and records, review of markups, and receipt of customer funds. The violation in the Ninth Cause of Action consisted of Max International filing a required annual certification of the identity of its chief compliance officer 15 days late. For these violations, the Panel has determined that a fine of $5,000 for the misconduct described in the Eighth Cause of Action, and $5,000 for that described in the Ninth Cause of Action, will suffice.

VI. Conclusion

Excessive Markups: First and Fourth Causes of Action

Max International charged fraudulent, excessive, undisclosed markups on September 15, 2005, when it sold 34 customers a total of 186,494 shares of TOTG from its proprietary account at $1.27 per share which the firm had arranged to purchase on the same day for $1.00 per share, for a markup of 27%. The Firm repeated this misconduct on September 12, 2006, when it sold 77 customers a total of 7,792,315 shares of DBSJ from its proprietary account at $0.15 per share which the Firm had arranged to purchase on the same day for $0.097 per share, for a markup of 54.64%. In addition, the Firm charged a commission to 55 of the customers who purchased DBSJ, increasing the markup for them to 64.2%. By this misconduct, Max International violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and 2440, as charged in the First and Fourth Causes of Action of the Complaint.

For these violations, the Panel censures and orders Max International to pay a fine of $100,000.

In addition, Max International is ordered to pay restitution to the 34 purchasers of TOTG in the amount of $50,353.38, the amount of the excessive, fraudulent markups, to be apportioned to each of the customers as shown in the attached Schedule A, plus interest accrued from September 15, 2005, to the date of repayment.[120]

The Panel further orders Max International to pay the 77 purchasers of DBSJ restitution in the amount of $412,992.89, the amount of the excessive, fraudulent markups, apportioned to each customer as shown in the attached Schedule B, plus interest accrued from September 12, 2006, to the date of repayment. The Panel also orders Max International to repay the 55 customers for the commissions it charged for their purchases of DBSJ, in the amount of $18,765.00, apportioned to each of them as shown in Schedule B, plus interest accrued from September 12, 2006, to the date of repayment.

Trade Reporting Violations: Second and Sixth Causes of Action

Max International failed to report equity trades in connection with the TOTG and DBSJ customer transactions, in violation of NASD Conduct Rule 2110 and Marketplace Rule 6620, as charged in the Second and Sixth Causes of Action of the Complaint. For these violations, the Panel censures and orders Max International to pay a fine of $50,000.

Books and Records Violations: Third, Fifth, and Tenth Causes of Action

Max International failed to create order memoranda and to keep accurate blotter records relating to the TOTG and DBSJ customer transactions, in violation of SEC Rules 17a-3 and 17a-4 and NASD Conduct Rules 2110 and 3110, as charged in the Third and Fifth Causes of Action

[120] Interest shall be paid at the rate set forth in the Internal Revenue Code at 26 U.S.C. 6621(b)(2). The interest rate, which is used by the Internal Revenue Service to determine interest due on underpaid taxes, is adjusted each quarter and reflects market conditions.

of the Complaint. The Firm also failed to notify FINRA of its intent to maintain electronic storage media and to store its electronic records properly, in violation of SEC Rule 17a-4 and NASD Conduct Rules 2110 and 3110, as charged in the Tenth Cause of Action of the Complaint. For these violations, the Panel censures Max International and orders it to pay a fine of $150,000.

Supervisory Violations: Seventh, Eighth, and Ninth Causes of Action

Max International failed to maintain and enforce its written supervisory control procedures pertaining to markups and proprietary customer trades, in violation of NASD Conduct Rules 2110 and 3010, as charged in the Seventh Cause of Action of the Complaint. For these violations, the Panel orders Max International to pay a fine of $25,000.

Max International also failed to maintain and enforce a system of supervisory control procedures that tested and verified that its supervisory procedures were reasonably designed to achieve compliance with applicable securities laws and regulations, and to maintain evidence of testing and verification of the firm's supervisory procedures for retention of electronic books and records, markups, and proprietary trading, in violation of NASD Conduct Rules 2110 and 3012, as charged in the Eighth Cause of Action of the Complaint. For these violations, the Panel orders Max International to pay a fine of $5,000.

Finally, Max International failed to timely update its Form BD to identify Young as its chief compliance officer, and to file timely an annual certification as required by NASD Conduct Rules 2110 and 3013, as charged in the Ninth Cause of Action. For these violations, the Panel orders Max International to pay a fine of $5,000.

Fines and Costs

In sum, for the violations described above, Max International is censured, and ordered: (i) to pay fines totaling $335,000; and (ii) to pay restitution to customers in the amount of $482,111.27, plus accrued interest.

In addition, Max International is ordered to pay the costs of the hearing, in the amount of $6,811.30, which includes an administrative fee of $750, the cost of production of the transcripts, and a fee of $270 for an interpreter.

These fines and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.[121]

HEARING PANEL.

By: Matthew Campbell
Hearing Officer

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[121] The Panel has considered and rejects without discussion all other arguments of the parties.