# FINANCIAL INDUSTRY REGULATORY AUTHORITY OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION,

Complainant,

v.

ROBIN MARANDA OSCHER (CRD. No. 1901235),

Respondent.

Disciplinary Proceeding No. 20070092503-01

Hearing Officer-MAD

EXTENDED HEARING PANEL DECISION

June 24, 2015

The Department of Market Regulation failed to prove that Respondent Oscher violated: (1) Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder, NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010, by engaging in a stock price manipulation as described in the First Cause of Action; and (2) NASD Rules 3310 and 2110, IM-3310, and FINRA Rule 2010, by engaging in the publication or circulation of reports of non bona fide purchases or sales as described in the Second Cause of Action. The charges in the Complaint relating to Respondent Oscher are dismissed.

## Appearances

Michael T. Dyson, Esq., James J. Nixon, Esq., David E. Rosenstein, Esq., and Robert A. Marchman, Esq. for the Department of Market Regulation.

Larry Kars, Esq., for Respondent.

# DECISION

## I. INTRODUCTION

This disciplinary proceeding arose as a result of FINRA's market surveillance and investigation into suspicious trading of Search Help, Inc. ("SHLP"), an Over-the-Counter Bulletin Board ("OTCBB") security, at E.H. Smith Jacobs & Co., Inc. ("Smith Jacobs"), a family run, FINRA member firm. During the investigation, FINRA Staff observed SHLP trading at Smith Jacobs at the beginning and end of the day that set the opening and closing prices. As a result of FINRA's investigation, the Department of Market Regulation filed a five-count Complaint against Raymond Forbes, Christopher Forbes, Patricia Forbes, Marie-Regina Forbes (the "Forbes Respondents"), and Robin Maranda Oscher. The Forbes Respondents are co-owners of Smith Jacobs. The Complaint charges Raymond Forbes, Christopher Forbes, and Oscher, all traders at Smith Jacobs, with manipulative trading and publishing non bona fide

purchases and sales. It also charges Raymond Forbes, Patricia Forbes, and Marie-Regina Forbes with supervisory violations.<sup>1</sup> The Forbes Respondents entered into settlements with FINRA prior to the hearing.<sup>2</sup> Accordingly, this Decision focuses solely on the charges against Respondent Oscher.

The Complaint contains two causes of action against Oscher. The First Cause of Action alleges that, from February 1, 2007 through December 16, 2008 (the "Relevant Period"), Oscher willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010, by engaging in a scheme to manipulate the price of SHLP.<sup>3</sup> The Complaint alleges that Oscher engaged in a manipulative scheme individually and in concert with Raymond and Christopher Forbes (the "Forbes Traders"). Specifically, the Complaint alleges that, during the Relevant Period, Oscher made 18 SHLP purchases that marked the opening and closing prices in order to raise the price of SHLP or prevent further decline in the price of SHLP. The Second Cause of Action alleges that, in marking the opening and closing prices of SHLP during the Relevant Period, Oscher violated NASD Rules 3310 and 2110, IM-3310, and FINRA Rule 2010, by engaging in the publication or circulation of reports of non bona fide purchases or sales of SHLP.

The parties stipulated that Oscher made the 18 purchases described in the Complaint, all of which occurred near the open or the close of the market. Accordingly, the issue for the Extended Hearing Panel is whether Oscher made the SHLP purchases with a manipulative purpose. After careful consideration, the Panel determined that Market Regulation failed to establish that Oscher traded SHLP for any manipulative purpose, and therefore found Oscher not liable for the above charges.

# II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

# A. Respondent Oscher

Oscher entered the securities industry in 1988.<sup>4</sup> From 1999 through October 2011, Oscher was registered with FINRA as a General Securities Representative and an Equity Trader Limited Representative through her association with Smith Jacobs.<sup>5</sup> On October 28, 2011, Smith

<sup>&</sup>lt;sup>1</sup> Market Regulation filed the Complaint with the Office of Hearing Officers on October 23, 2013.

<sup>&</sup>lt;sup>2</sup> The hearing was held on September 9-10, 2014, in New York, New York.

<sup>&</sup>lt;sup>3</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>&</sup>lt;sup>4</sup> Stip. ¶ 1.

<sup>&</sup>lt;sup>5</sup> Stip. ¶ 2; CX-1, at 3.

Jacobs filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") terminating Oscher's registration.<sup>6</sup>

At Smith Jacobs, Oscher was a proprietary trader.<sup>7</sup> She day traded and had complete discretion to trade any stocks.<sup>8</sup> When trading, Oscher did not utilize any particular strategy. Rather, she described herself as a "gut trader," trading based on her gut sense of the market.<sup>9</sup> She stated that "[a]ll the action usually happens on the open or the close" of the trading day.<sup>10</sup>

Smith Jacobs compensated Oscher by paying her 50 percent of the net profits in her trading accounts.<sup>11</sup> As a security against any losses she might incur, Oscher paid Smith Jacobs a \$50,000 capital contribution.<sup>12</sup>

#### **B.** Background

SHLP was a company that sold computer disks that were designed to protect children against sexual predators online.<sup>13</sup> SHLP's officers performed road shows to promote the company and attract investors.<sup>14</sup> Raymond Forbes learned about SHLP when its president and chief financial officer came to Smith Jacobs to talk to him as part of their road show.<sup>15</sup> Raymond Forbes liked what he heard and subsequently invested in SHLP.<sup>16</sup> SHLP also appealed to Christopher Forbes who invested in SHLP.<sup>17</sup>

<sup>9</sup> Tr. 260.

<sup>&</sup>lt;sup>6</sup> Stip. ¶ 3. Although Oscher is no longer registered or associated with a FINRA member, she remains subject to FINRA's jurisdiction for purposes of this proceeding pursuant to Article V, Section 4 of FINRA's By-Laws, because: (1) the Complaint was filed within two years after the date upon which she ceased to be registered or associated with a FINRA member, namely, October 28, 2011; and (2) the Complaint charges her with misconduct committed while she was registered or associated with a FINRA member.

<sup>&</sup>lt;sup>7</sup> Stip. ¶ 2.

<sup>&</sup>lt;sup>8</sup> Tr. 216.

<sup>&</sup>lt;sup>10</sup> Tr. 261.

<sup>&</sup>lt;sup>11</sup> Tr. 217.

<sup>&</sup>lt;sup>12</sup> Tr. 216.

<sup>&</sup>lt;sup>13</sup> CX-64, at 6; Tr. 228.

<sup>&</sup>lt;sup>14</sup> CX-66, at 13.

<sup>&</sup>lt;sup>15</sup> CX-66, at 13.

<sup>&</sup>lt;sup>16</sup> CX-66, at 13.

<sup>&</sup>lt;sup>17</sup> CX-62, at 22-23; CX-64, at 6-8.

Christopher Forbes recommended SHLP to Oscher, describing it as "the next best thing."<sup>18</sup> Although Oscher was strictly a day trader, after she researched SHLP, she also bought and held SHLP.<sup>19</sup> SHLP was Oscher's only long term holding.<sup>20</sup>

Despite the fact that the Forbes Traders and Oscher believed that SHLP would be a profitable investment, the price of SHLP steadily declined throughout the Relevant Period.<sup>21</sup> In February 2007, SHLP traded at approximately \$0.44 per share, but by the end of 2008 the stock traded at \$0.05 per share.<sup>22</sup> At times during the Relevant Period, the SHLP stock price fluctuated intraday. For example, on October 12, 2007, a SHLP stock purchase was executed for \$0.15 per share, and approximately 30 minutes later, another SHLP purchase was executed for \$0.18 per share.<sup>23</sup> The spread between the SHLP inside bid price and the inside ask price could range from two to four cents, and at times even larger.<sup>24</sup> The SHLP volume also fluctuated. During the Relevant Period, SHLP was liquid some days and illiquid on other days.<sup>25</sup>

# C. Oscher Did Not Manipulate The Price Of SHLP

The First Cause of Action alleges that Oscher willfully violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010, by engaging in manipulative stock trading of SHLP. Specifically, the First Cause of Action alleges that, during the Relevant Period, Oscher, individually and in concert with the Forbes Traders, manipulated the price of SHLP by marking the open and the close on 18 SHLP purchases. The chart below identifies the 18 trades and the price movement associated with each trade, which Market Regulation calculated by comparing each of Oscher's trades to the prior independent trade in the market.

| Line | Trade Date | Execution | Closing | Executing | Quantity | Price | Buy   |
|------|------------|-----------|---------|-----------|----------|-------|-------|
|      |            | Time      | or      | Firm      |          |       | Price |
|      |            |           | Opening | (Sell)    |          |       | Move- |
|      |            |           | Price   |           |          |       | ment  |
| 1    | 05/14/2007 | 09:43:38  | Opening | ARCA      | 100      | 0.35  | 0.04  |
| 2    | 05/29/2007 | 15:57:20  | Closing | ARCA      | 300      | 0.3   | 0.001 |
| 3    | 06/12/2007 | 15:53:45  | Closing | ARCA      | 100      | 0.315 | 0.025 |
| 4    | 07/11/2007 | 15:46:13  | Closing | ARCA      | 1,000    | 0.28  | Equal |
| 5    | 07/20/2007 | 15:50:13  | Closing | ARCA      | 100      | 0.245 | 0.015 |
| 6    | 09/17/2007 | 15:42:29  | Closing | ARCA      | 100      | 0.2   | 0.02  |

<sup>18</sup> Tr. 223-24.

<sup>25</sup> Tr. 180-83.

<sup>&</sup>lt;sup>19</sup> Tr. 217, 228-29, 237; CX-57, at 9.

<sup>&</sup>lt;sup>20</sup> Tr. 237.

<sup>&</sup>lt;sup>21</sup> Tr. 187.

<sup>&</sup>lt;sup>22</sup> CX-57, at 4, 17.

<sup>&</sup>lt;sup>23</sup> CX-75, at 23.

<sup>&</sup>lt;sup>24</sup> Tr. 176; see CX-79, at 1 (reflecting a six cent spread on May 14, 2007).

| 7  | 12/11/2007 | 15:59:57 | Closing | ARCA | 100   | 0.16  | 0.02   |
|----|------------|----------|---------|------|-------|-------|--------|
| 8  | 12/31/2007 | 09:42:50 | Opening | ARCA | 1,000 | 0.205 | 0.015  |
| 9  | 04/08/2008 | 15:44:31 | Closing | ARCA | 100   | 0.13  | 0.01   |
| 10 | 06/20/2008 | 15:59:55 | Closing | ARCA | 100   | 0.175 | 0.005  |
| 11 | 08/11/2008 | 15:57:00 | Closing | ARCA | 100   | 0.14  | Equal  |
| 12 | 08/14/2008 | 15:48:05 | Closing | ARCA | 100   | 0.15  | 0.01   |
| 13 | 09/09/2008 | 15:53:22 | Closing | ARCA | 100   | 0.14  | 0.005  |
| 14 | 09/11/2008 | 15:53:08 | Closing | ARCA | 100   | 0.15  | 0.0025 |
| 15 | 09/24/2008 | 09:42:12 | Opening | ARCA | 9,500 | 0.055 | Equal  |
| 16 | 10/09/2008 | 15:48:51 | Closing | ARCA | 500   | 0.05  | 0.01   |
| 17 | 10/15/2008 | 15:58:24 | Closing | ARCA | 1,000 | 0.072 | 0.013  |
| 18 | 10/16/2008 | 15:57:41 | Closing | ARCA | 1,000 | 0.072 | 0.013  |

### 1. Legal Standard

Exchange Act Section 10(b), Rule 10b-5, and FINRA Rule 2020 (formerly NASD Rule 2120) prohibit fraudulent and deceptive acts and practices in connection with the offer, purchase, or sale of a security.<sup>26</sup> The Securities and Exchange Commission ("SEC") has defined manipulation as "intentional interference with the free forces of supply and demand."<sup>27</sup> Recently, the SEC articulated the test for establishing that marking the close constitutes a violation of Rule 10b-5.

In order to prove a marking-the-close violation of Exchange Act Section 10(b) [and] Exchange Act Rule 10b-5, . . . the Division must show that Respondent[] (i) engaged in conduct evidencing a scheme to mark the close -i.e., trading at or near the close of the market so as to influence the price of a security - and (ii) acted with scienter, defined as "a mental state embracing intent to deceive, manipulate, or defraud."<sup>28</sup>

Scienter can be established through circumstantial evidence.<sup>29</sup>

<sup>&</sup>lt;sup>26</sup> In addition to prohibiting nondisclosure and false and misleading statements, Exchange Act Rule 10b-5 prohibits "any device, scheme, or artifice to defraud" or any conduct "which operates or would operate as a fraud or deceit upon any person." Violations of Section 10(b) and Exchange Act Rule 10b-5 must involve the use of any means or instrumentalities of transportation or communication in interstate commerce, or the mails, or any facility of any national securities exchange. *See, e.g., SEC v. Hasho*, 784 F. Supp. 1059, 1105-06 (S.D.N.Y. 1992). In this case, the requirement of interstate commerce is satisfied because the SHLP trades at issue were traded on the OTCBB.

<sup>&</sup>lt;sup>27</sup> Pagel, Inc., 48 S.E.C. 223, 226 (1985), aff'd, 803 F.2d 942 (5th Cir. 1986).

<sup>&</sup>lt;sup>28</sup> *Donald L. Koch*, Exchange Act Release No. 72179, 2014 SEC LEXIS 1684, at \*33 (May 16, 2014) (citations omitted).

<sup>&</sup>lt;sup>29</sup> *Meyer Blinder*, Exchange Act Release No. 31095, 1992 SEC LEXIS 2019, at \*33 (Aug. 26, 1992). Scienter can also be established through "a showing of recklessness amounting to an extreme departure from the standards of ordinary care …" *Dep't of Mkt Regulation v. Morgan Stanley*, No. CMS960235, 2000 NASD Discip. LEXIS 1, at \*60-61 (NAC Jan. 18, 2000).

#### 2. Discussion

All of the 18 allegedly manipulative purchases were made in the open market at the SHLP ask price. Fifteen of the 18 purchases were made within 20 minutes of the close of the market, and the remaining three trades were made approximately 45 minutes after the opening of the market. Oscher does not dispute that she made the 18 SHLP purchases, but states that none of the purchases were done for any manipulative purpose.

After careful consideration of Oscher's trading and the circumstances surrounding her trading, the Panel concludes that Market Regulation failed to establish that she made the 18 purchases as part of a manipulative scheme or for any manipulative purpose. In reaching this determination, the Panel considered the following:

### a. Osher's 18 Purchases Do Not Exhibit A Pattern

Market Regulation argues that Oscher's 18 SHLP purchases display a pattern of manipulative trading.<sup>30</sup> However, the Panel finds that Oscher's 18 purchases do not exhibit a pattern. The trades do not occur on a regular basis. Some of the trades occur approximately two weeks apart, but others are separated by months. For example, one allegedly manipulative trade occurred on September 17, 2007, and the next allegedly manipulative trade occurred on December 11, 2007. After the December 11, 2007 purchase, the next allegedly manipulative trade trade occurred approximately four months later on April 8, 2008.

### b. Oscher Bought SHLP In Varying Quantities

Market Regulation states that Oscher bought SHLP stock in 100 share increments because that share amount (1) enabled the purchase to be reported to the media, and (2) provided the least amount of risk she needed to take to set the price.<sup>31</sup> However, Osher did not trade consistently in 100 share increments. In fact, seven of the 18 purchases were in quantities that ranged from 300 shares to 9,500 shares.

## c. Oscher Increased Her SHLP Position Throughout The Relevant Period

Market Regulation argues that Oscher manipulated SHLP because she was furious about losing money on her SHLP position.<sup>32</sup> However, Oscher continued to purchase SHLP throughout the Relevant Period although the price of SHLP declined.<sup>33</sup>

She testified that Christopher Forbes encouraged her to purchase more SHLP stock.<sup>34</sup> She stated that he told her that he and other Forbes family members still believed in the

<sup>&</sup>lt;sup>30</sup> Tr. 353-54.

<sup>&</sup>lt;sup>31</sup> Tr. 145.

<sup>&</sup>lt;sup>32</sup> Tr. 347.

<sup>&</sup>lt;sup>33</sup> CX-73.

<sup>&</sup>lt;sup>34</sup> Tr. 259-60.

company.<sup>35</sup> Throughout the Relevant Period, Oscher gradually increased her SHLP holdings.<sup>36</sup> By mid–2008, she held over 330,000 SHLP shares.<sup>37</sup> Although Oscher's position decreased slightly during the second half of 2008, she still held over 280,000 shares in December 2008.<sup>38</sup> Approximately one year after the Relevant Period, in late 2009 and early 2010, Oscher liquidated her SHLP positon and incurred a loss of more than \$100,000.<sup>39</sup>

# d. Oscher Typically Did Not Sell Any SHLP Stock Immediately After The 18 Purchases

Market Regulation argues that Oscher tried to manipulate the price of SHLP to turn around her losses and make a profit.<sup>40</sup> Yet, Oscher's trading after each of the 18 purchases reflects that she typically did not sell any SHLP stock after the allegedly manipulative purchases. In fact, her SHLP trading reveals that it was not uncommon for her to go weeks and sometimes months before selling any SHLP. She did not sell any SHLP stock between the first three purchases on May 14, May 29, and June 12, 2007.<sup>41</sup> After the June 12 purchase, Oscher did not sell any SHLP stock until June 27, 2007.<sup>42</sup> Between the September 17 and December 11, 2007 purchases, Oscher did not sell any SHLP stock.<sup>43</sup> After the April 8, 2008 purchase, Oscher continued to buy SHLP and did not sell any SHLP stock until May 13, 2008.<sup>44</sup> Oscher's purchase on June 20, 2008, was the only instance where she sold SHLP stock on the next trading day.<sup>45</sup>

<sup>36</sup> CX-73.

<sup>38</sup> CX-73, at 12.

- <sup>42</sup> CX-57, at 10.
- <sup>43</sup> CX-57, at 11.

<sup>&</sup>lt;sup>35</sup> Tr. 245, 259-60.

<sup>&</sup>lt;sup>37</sup> CX-73, at 1-7.

<sup>&</sup>lt;sup>39</sup> Tr. 237-38, 290-91.

<sup>&</sup>lt;sup>40</sup> Tr. 359.

<sup>&</sup>lt;sup>41</sup> CX-57, at 9-10.

<sup>&</sup>lt;sup>44</sup> CX-57, at 13.

<sup>&</sup>lt;sup>45</sup> CX-57, at 14. The SHLP sale on June 23 was \$0.025 less than her purchase on June 20. CX-57, at 14.

## e. Oscher Made Other Purchases At The Ask Price On The Dates Of The 18 Purchases

Market Regulation provided the SHLP bid and ask prices for the dates of the 18 purchases.<sup>46</sup> Each of Oscher's 18 purchases were executed at the SHLP ask price.<sup>47</sup> A review of Osher's trading reveals that some of her other SHLP purchases on the same dates as the 18 purchases were also at the ask price. On May 14, 2007, Oscher made another purchase at 2:00 pm that was at the ask price.<sup>48</sup> On May 29, Oscher made a total of three SHLP purchases (one on the chart of allegedly manipulative trades and two others around 2:00 pm) and all three were at the ask price.<sup>49</sup> On December 11, 2007, Oscher made five purchases of SHLP. Three of the five were at the ask price, one near the close of the market as shown in the chart and two others during the day around 1:00 pm and 2:00 pm.<sup>50</sup> On December 31, 2007, Oscher made a total of seven purchases, the one in the chart and six others.<sup>51</sup> All of the seven SHLP purchases were in amounts ranging from 500 to 2500 shares, and all seven were at the ask price.<sup>52</sup>

## f. Oscher Was Unaware That The Forbes Traders Were Selling SHLP

Market Regulation argues that Oscher supported the price of SHLP to facilitate sales by the Forbes Traders.<sup>53</sup> Oscher testified that she never knew that the Forbes Traders were selling SHLP.<sup>54</sup> She testified that at Smith Jacobs she sat by herself and did not talk to the other traders about her trading.<sup>55</sup> Oscher also emphasized that the electronic trading system she used at Smith Jacobs did not enable her to see if particular traders (or even her firm) were trading.<sup>56</sup> Oscher's testimony is consistent with the manner in which Smith Jacobs' SHLP trades were executed. While Smith Jacobs' order entry system enabled its traders to view the bids, offers, and trading

<sup>54</sup> Tr. 250, 296-98; *see* CX-64, at 13 (Christopher Forbes testifying that he never communicated with Oscher about when he was going to execute trades in SHLP).

<sup>55</sup> Tr. 218-19, 329-31.

<sup>56</sup> Tr. 220-23.

<sup>&</sup>lt;sup>46</sup> See CX-79 (identifying the bid and ask price for the 18 purchase dates). In the over-the-counter market, the term "ask" refers to the lowest price at which a market maker will sell a specified number of shares of a stock at any given time. The term "bid" refers to the highest price a market maker will pay to purchase the stock. The ask price, also known as the "offer" price, will almost always be higher than the bid price. Market makers make money on the difference between the bid price and the ask price. That difference is called the "spread." <u>http://www.sec.gov/answers/ask.htm</u>.

<sup>&</sup>lt;sup>47</sup> CX-79.

<sup>&</sup>lt;sup>48</sup> CX-57, at 9; CX-79, at 1.

<sup>&</sup>lt;sup>49</sup> CX-57, at 10; CX-79, at 1.

<sup>&</sup>lt;sup>50</sup> CX-57, at 11; CX-79, at 2-3.

<sup>&</sup>lt;sup>51</sup> CX-57, at 12; CX-79, at 3-4.

<sup>&</sup>lt;sup>52</sup> CX-57, at 12; CX-79, at 3-4.

<sup>&</sup>lt;sup>53</sup> Tr. 347-49, 355-56.

volume for all stocks, including SHLP,<sup>57</sup> the SHLP orders were executed by Archipelago Trading Services, Inc. ("ARCA"), the electronic communication network and alternative trading system that executed the orders and reported them to the market.<sup>58</sup> The Smith Jacobs traders sent SHLP orders electronically to ARCA for execution.<sup>59</sup> Any SHLP orders that they sent to ARCA were reported to the market as orders executed by ARCA, not orders executed by Smith Jacobs.<sup>60</sup> There was nothing reported to the market that reflected the individual trader or even that the orders had originated at Smith Jacobs.<sup>61</sup>

### g. Oscher Did Not Trade In Response To Any Communications From The Forbes Traders

Market Regulation contends that Oscher traded in concert with the Forbes Traders.<sup>62</sup> In support of its position that Oscher knew that the Forbes Traders were trading SHLP, Market Regulation points to an instant message dated June 30, 2008, at 3:17 pm. In the instant message, Raymond Forbes told Oscher that he was "hearin [sic] a story that they may try to gun shlp into the bell...im ofeering [sic] 10000 every .05 cts up."<sup>63</sup> Oscher replied "ok." Twenty seconds later, Raymond Forbes wrote, "im kidding....," and eight seconds later, added "chirs [Christopher Forbes] is gonna gun it."<sup>64</sup>

Oscher testified that she did not do anything in response to the instant message.<sup>65</sup> Market Regulation did not identify any allegedly violative trading by Oscher on June 30, 2008, and a review of Osher's SHLP trading on June 30 reveals that she did not place any trades in SHLP after receipt of that instant message.<sup>66</sup>

# h. There Was No Financial Incentive For Oscher To Facilitate SHLP Sales By The Forbes Traders

Market Regulation's contention that Oscher traded in concert with the Forbes Traders is also inconsistent with the compensation structure at Smith Jacobs. There was no financial incentive for Oscher to support the SHLP price so that the Forbes Traders could sell their SHLP stock. Oscher was responsible for her SHLP losses. She only got paid if she generated a net profit. As noted above, she provided Smith Jacobs with a \$50,000 capital contribution as a

- <sup>63</sup> CX-71, at 2.
- <sup>64</sup> CX-71, at 2.
- <sup>65</sup> Tr. 243.

<sup>66</sup> CX-57, at 14.

<sup>&</sup>lt;sup>57</sup> Tr. 191, 219.

<sup>&</sup>lt;sup>58</sup> Tr. 59, 222.

<sup>&</sup>lt;sup>59</sup> Tr. 59, 222.

<sup>&</sup>lt;sup>60</sup> CX-76; CX-77; Tr. 59, 220-21, 223.

<sup>&</sup>lt;sup>61</sup> Tr. 199-200, 205-06, 221-23; *see, e.g.*, CX-76 (Oscher's SHLP trades reflecting ARCA as the executing entity); CX-77 (Christopher Forbes' SHLP trades reflecting ARCA as the executing entity).

<sup>&</sup>lt;sup>62</sup> Tr. 347-49, 355-56.

security against any losses she may incur. Because the SHLP stock price continually declined throughout the Relevant Period, any help she would provide to the Forbes Traders would only cause her to incur more losses for which she was personally responsible.

#### 3. Conclusion

After careful consideration of the record evidence, the Panel finds that Market Regulation failed to prove that Oscher engaged in a fraudulent scheme to artificially inflate or support the price of SHLP securities. The Panel also finds that Market Regulation did not demonstrate that Oscher acted with scienter when she placed the 18 trades at issue.

Oscher bought SHLP shares in the open market at the ask price, as she had done on other occasions. The Panel did not find that Oscher's trading exhibited a pattern of trades designed to manipulate the price of SHLP. During the Relevant Period, which was almost two years, Market Regulation identified only 18 allegedly manipulative trades, many of which were separated by large time spans. In addition, three of the allegedly manipulative trades did not move the SHLP stock price at all.

There is no evidence that Oscher benefited from the allegedly manipulative trading. With the exception of one SHLP purchase, there is no evidence that she sold SHLP stock soon after any of the 18 allegedly manipulative trades. In fact, she continued to buy SHLP throughout the Relevant Period and she did not liquidate her SHLP position until more than one year after the last allegedly manipulative trade.

Although Market Regulation argues that Oscher was supporting the price of SHLP to help the Forbes Traders sell their SHLP positions, the Panel finds that Oscher was unaware of their sales.<sup>67</sup> Furthermore, given Oscher's compensation structure at Smith Jacobs, it was against her financial interest to support the SHLP stock price to enable other traders to sell their stock. The Panel finds that Oscher had no motive for manipulating the price of SHLP.

The Panel concludes that Market Regulation failed to prove that Oscher willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010, by engaging in a scheme to manipulate the price of SHLP. Accordingly, the Panel dismisses the First Cause of Action of the Complaint as it relates to Oscher.

### D. Oscher Did Not Place Non Bona Fide SHLP Orders

The Second Cause of Action alleges that Oscher violated NASD Rules 3310 and 2110, IM-3310, and FINRA Rule 2010, by engaging in the publication or circulation of reports of non bona fide purchases of SHLP.

<sup>&</sup>lt;sup>67</sup> The Panel found Oscher to be credible. Oscher testified that, during her investigative testimony, she learned from FINRA that the Forbes Traders were selling their SHLP stock as she was buying (i.e., they were on the other side of her trades). She was very angry when she learned this information and she resigned from Smith Jacobs the next week. Tr. 296-98.

NASD Rule 3310 provides that no member shall cause to be published or circulated any communication that purports to report any transaction as a purchase or sale of any security unless such member believes that such transaction was a bona fide purchase or sale of such security. IM-3310 explains that it is "inconsistent" with the provisions of NASD Rules 2110, 2120, and 3310 to:

[P]ublish or circulate or cause to be published or circulated . . . any quotation for any security without having reasonable cause to believe that such quotation is a bona fide quotation, is not fictitious and is not published or circulated or caused to be published or circulated for any fraudulent, deceptive or manipulative purpose.

Market Regulation alleges that, when Oscher fraudulently marked the close and open on the above 18 transactions, she caused the reporting of non bona fide trades. As stated above, the Panel concluded that Market Regulation failed to prove that Oscher's 18 trades were executed for a manipulative purpose, or as part of a manipulative scheme. Accordingly, the Panel also concludes that Oscher did not violate NASD Rules 3310 and 2110, and IM-3310, and FINRA Rule 2010, as alleged in the Second Cause of Action, and dismisses the Second Cause of Action of the Complaint as it relates to Oscher.

# III. ORDER

The Department of Market Regulation failed to prove that Respondent Oscher violated: (1) Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder, NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010, by engaging in a stock price manipulation as described in the First Cause of Action; and (2) NASD Rules 3310 and 2110, IM-3310, and FINRA Rule 2010, by engaging in the publication or circulation of reports of non bona fide purchases or sales as described in the Second Cause of Action. The charges in the Complaint relating to Respondent Oscher are dismissed.

Maureen A. Delaney Hearing Officer For the Extended Hearing Panel