BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Kirlin Securities, Inc. Syosset, NY, and Anthony J. Kirincic Dix Hills, NY, and David O. Lindner Bellmore, NY, and Andrew J. Israel Rockaway Park, NY, Respondents.	DECISION Complaint No. EAF0400300001 February 25, 2009

Respondents Kirlin Securities, Inc., Kirincic, and Israel engaged in market manipulation; respondent Kirincic falsified customer signatures; and respondents Kirlin Securities, Lindner, and Israel failed to comply with best execution requirements for a customer order. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Gary A. Carleton, Esq., Leo F. Orenstein, Esq., and Philip J. Berkowitz, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Isaac M. Zucker, Esq.

Decision

Pursuant to NASD Rule 9311(a), Kirlin Securities, Inc. ("Kirlin" or "the Firm"), Anthony J. Kirincic ("Kirincic"), David O. Lindner ("Lindner"), and Andrew J. Israel ("Israel") (together, "respondents") appeal a November 28, 2007 Hearing Panel decision. The Hearing Panel found that: (1) Kirlin, Kirincic, and Israel engaged in market manipulation, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110; (2) Kirincic falsified customer signatures on stock certificates and letters of authorization, in violation of NASD Rule 2110; and (3) Kirlin, Lindner, and Israel failed to comply with best execution requirements for a customer order, in violation of NASD Rules 2320 and 2110. The Hearing Panel expelled Kirlin from FINRA membership and barred in all capacities Kirincic, Israel, and Lindner for their misconduct. The Hearing Panel further ordered that Kirlin, Lindner, and Israel pay, jointly and severally, $26,163 in restitution to a single customer, and that respondents pay, jointly and severally, $21,676.95 in costs.

After a complete review of the record, we affirm the Hearing Panel's findings. With respect to the Hearing Panel's sanctions, we affirm the expulsion imposed upon Kirlin and bars in all capacities imposed upon Kirincic and Israel for their market manipulation, and affirm the bar in all capacities imposed upon Kirincic for his forgeries. For Kirlin's, Lindner's, and Israel's failure to comply with best execution requirements, we reduce the expulsion and bars imposed by the Hearing Panel to one-year suspensions, and order that Lindner requalify in all capacities. We affirm the Hearing Panel's imposition of $26,163 in restitution in connection with the best execution violations, and the Hearing Panel's assessment of costs against respondents.

I. Introduction

Kirlin, through Kirincic (its co-founder and co-chief executive officer) and Israel (its head equity trader), fraudulently manipulated the stock price of Kirlin's publicly traded parent company, Kirlin Holding Corp. ("Kirlin Holding"), during a five-week period in 2002. Kirincic and Israel's manipulation was designed to increase the bid price of Kirlin Holding shares to $1 per share and maintain such price for at least 10 consecutive trading days to avoid delisting from NASDAQ's National Market. Kirlin dominated and controlled the thinly traded market for Kirlin Holding shares, and Kirincic and Israel bid up the price of Kirlin Holding shares by placing numerous purchase orders for Kirlin Holding shares on behalf of Kirincic's sister's account; quickly canceling such orders (despite the fact that they had received partial fills); and replacing them with successively higher-priced purchase orders. Almost all of the purchase orders were placed at prices equal to or exceeding the existing inside bid price, and some were placed at prices equal to or exceeding the existing inside ask price. While Kirincic's sister had previously purchased Kirlin Holding shares, she had never done so on a scale remotely close to the amount purchased during the five-week period in question, and neither Kirincic nor his sister could adequately explain the rationale for the purchases or the trading pattern during the period in question. Kirincic and Israel accomplished their goal of avoiding a Kirlin Holding delisting, as their manipulative trading caused the inside bid price of Kirlin Holding shares to increase by more than 57 percent and move above $1 per share for at least 10 consecutive trading days. In addition, Kirincic and Israel's manipulation allowed Kirincic's relatives to sell 500,000 Kirlin Holding shares at artificially increased prices. For these serious violations of securities laws, we expel Kirlin and bar in all capacities Kirincic and Israel.

In connection with the manipulation of Kirlin Holding's share price, Kirincic falsified the signatures of his parents on several stock certificates and letters of authorization to transfer funds from his parents' account to his sister's account, from which most of the manipulative activity originated. Kirincic signed his parents' names to these documents without any authorization, and at least a portion of the funds transferred to Kirincic's sister's account helped further the manipulation originating from that account. We bar Kirincic in all capacities for this misconduct.

Finally, Kirlin, through Lindner (Kirlin's other co-founder and co-chief executive officer) and Israel, failed on a single trading day to comply with best execution requirements for a customer order to sell Kirlin Holding shares. Lindner directed that Israel offer, on behalf of Kirlin Holding and pursuant to an existing stock repurchase program, customer DL $.80 per share for his 114,000 shares of Kirlin Holding. Lindner arbitrarily selected the purchase price for DL's shares, and Lindner and Israel failed to obtain for DL as favorable a price as possible under prevailing market conditions. Indeed, at the time Kirlin received DL's request to sell, Kirincic's sister had an open order to purchase 24,700 shares at $1.10 per share, and the inside bid price at the time of DL's sale was $1.04. Moreover, two hours prior to execution of DL's sell order, Kirincic's parents and first cousin sold to Kirlin Holding a total of 243,000 shares at $1.05 per share (a premium to the inside bid price at the time). Further, Israel disregarded the terms of DL's sell order and delayed executing the order. However, unlike the Hearing Panel, which expelled Kirlin from FINRA membership and barred Lindner and Israel for failing to comply with their best execution requirements, we have considered the unusual circumstances that surrounded the sale of DL's shares and that this misconduct occurred in connection with a single trade on one afternoon. Accordingly, we reduce the Hearing Panel's expulsion and bars to one-year suspensions, although we affirm the Hearing Panel's order that Kirlin, Lindner, and Israel pay restitution to DL. We further order that Lindner requalify in all capacities.

II. Factual and Procedural History

A. Respondents' and Kirlin Holding's History

Kirincic and Lindner co-founded Kirlin. Kirlin became a FINRA member firm in March 1988. In 2002, Kirlin employed approximately 150 registered representatives and operated from its Syosset, New York headquarters and seven branch offices throughout the country. On November 2, 2006, Kirlin filed a Uniform Request for Withdrawal from Broker-Dealer Registration.[1] Kirlin is wholly owned by Kirlin Holding.

Kirlin Holding became a publicly traded company in 1995 when it began trading on the NASDAQ Small Cap Market. Kirlin Holding transferred its listing to the NASDAQ National

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[1] As of November 2006, Kirlin was engaged in the consulting business and had five employees (including Kirincic, Lindner, and Israel). Kirincic, Lindner, and Israel are not currently registered with FINRA member firms.

Market when it reached the required listing standards in 1999.[2] Kirincic served as a Kirlin Holding director and as its president, and Lindner served as its chairman and chief executive officer. Kirincic and Lindner each owned approximately 20 percent of Kirlin Holding's shares in early 2002. During all relevant time periods, Kirlin was a significant asset of Kirlin Holding.

Kirincic entered the securities industry in 1986 and was registered with Kirlin as a general securities representative, general securities principal, registered options principal, and financial and operations principal from March 1988 until January 2007. During all relevant time periods, Kirincic served as Kirlin's co-chief executive officer and focused primarily on Kirlin's financial matters, the Firm's overall structure and liquidity, and efforts to integrate the business and operations of Kirlin with newly acquired member firms.[3] Kirincic's activities on behalf of customers were limited, and he served as the account executive for only 25 to 50 customers (including his family's accounts).

Lindner entered the securities industry in 1986 and was registered with Kirlin as a general securities representative and general securities principal from March 1988 until January 2007. Lindner, along with Kirincic, served as Kirlin's co-chief executive officer, and Lindner focused almost exclusively on Kirlin's investment banking business in 2002.

Israel entered the securities industry and registered with Kirlin as a general securities representative in October 1989, an equity trader in March 2000, and a general securities principal in January 2002. Israel served in these capacities at Kirlin until January 2007, and served as Kirlin's head of equity trading at all times relevant to the complaint.

B. Factual Background

1. Manipulation of Kirlin Holding's Stock

a. Kirlin Holding's Losses and Illiquidity of Its Stock

Kirlin Holding's stock once traded as high as $50 per share. However, Kirlin Holding's stock began to decline in 2000, and in 2001 its price ranged from $.68 to $2.45 per share. For the year ended December 31, 2000, Kirlin Holding reported a net loss of $11 million. Kirlin Holding reported a $3.7 million net loss for the year ended December 31, 2001, and a $400,000 net loss for the first two months of 2002. These losses were attributed to, among other things, Kirlin's acquisitions of other brokerage firms and Kirlin Holding's expansion beyond the brokerage industry.

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[2] Kirlin Holding transferred its listing back to the NASDAQ Small Cap Market in November 2002, and until August 2008 traded under the symbol KILN. In August 2008, Kirlin Holding changed its name to Zen Holdings Corp. and is currently quoted in the Pink Sheets.

[3] In August or September 2001, Kirlin acquired the assets of M.S. Farrell & Co., Inc., a FINRA member firm, and Kirlin hired almost all of M.S. Farrell's employees.

In early 2002, Kirlin Holding was a thinly traded stock.[4] Most of the trading volume associated with Kirlin Holding's stock originated at Kirlin, and large buy or sell orders would cause large increases or decreases in the stock price. From the beginning of January 2002 through March 15, 2002, Kirlin Holding's average daily trading volume was 15,395 shares.[5] Kirlin Holding had a float of approximately 8.5 million shares.[6] Approximately 80 percent of Kirlin Holding's outstanding shares were held in accounts of Kirlin customers.

b. NASDAQ's Delisting Notice

On February 20, 2002, NASDAQ sent Kirlin Holding (to Lindner's attention) notification of a possible delisting of its stock based upon its failure to meet NASDAQ's $1 per share minimum continued listing bid price requirement.[7] The notice stated that "[i]f at anytime before May 21, 2002, the bid price of the Company's common stock closes at $1 per share or more for a *minimum* of 10 consecutive trading days, Staff will provide written notification that the Company complies with the Rule." NASDAQ staff further informed Kirlin Holding that under certain circumstances it might require that its closing bid price equal $1 per share or greater for more than 10 consecutive trading days before determining that Kirlin Holding satisfied the requirement for continued inclusion on the NASDAQ National Market. Kirincic learned of the delisting notice shortly after its receipt.

On March 19, 2002, Kirlin Holding's board of directors held a special meeting to discuss the NASDAQ delisting notice.[8] The board discussed several options it could take in response to the delisting notice, including a phase-down to NASDAQ's Small Cap Market (where the deficiency grace period to satisfy the $1 per share minimum closing bid price would be longer), conducting a repurchase of Kirlin Holding shares in the open market, or effectuating a reverse stock split. Kirincic informed the board that he hoped the bid price of Kirlin Holding's stock

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4 Six market makers made a market in Kirlin Holding during the relevant time period. Kirlin did not make a market in Kirlin Holding stock.

5 This figure includes cross trades between Kirincic's relatives totaling 280,000 shares on March 5, 2002. Excluding the cross trades, the average daily trading volume in Kirlin Holding was less than 10,000 shares.

6 "A stock's 'float' represents the total number of shares publicly owned and available for trading." *Dep't of Market Reg. v. Proudian*, Complaint No. CMS040165, 2008 FINRA Discip. LEXIS 21, at *12 n.13 (FINRA NAC Aug. 7, 2008).

7 The bid price is "the highest price a prospective buyer is prepared to pay at a particular time for a trading unit of a given security. . . . The highest bid price is typically characterized in the industry as the 'inside bid price.'" *Dep't of Enforcement v. Alexander Sec., Inc.*, Complaint No. CAF010021, 2004 NASD Discip. LEXIS 16, *10 n.5 (NASD NAC Aug. 16, 2004).

8 In addition to Kirincic and Lindner, three other individuals were members of Kirlin Holding's board of directors in March 2002.

would on its own go above the $1 minimum required by NASDAQ. The board decided to reconvene to discuss the matter further.

c. Kirincic's Trading on Behalf of His Parents' Account

Kirincic did not have many customers who were not family members, and he served as the account executive for a number of accounts held by his parents, in-laws, sister SP, and first cousin JM. In early 2002, Kirincic's parents were purchasing Kirlin Holding shares. Kirincic could not recall the reasons underlying his parents' acquisitions, and testified that he had no knowledge of their investment strategy in connection with Kirlin Holding. On March 5, 2002, Kirincic placed an order to cross four separate sell orders from his parents' retirement accounts and his in-laws' accounts with a buy order for 140,000 shares (at a price of $.85 per share) from his parents' joint, non-retirement account. Kirincic could not recall discussing these orders with his parents or in-laws, or the reasons for the sales and purchases.

Between March 7 and March 15, 2002, Kirincic placed nine purchase orders on behalf of his parents' joint account for a total of 10,981 Kirlin Holding shares. These shares were purchased on the open market and were routed through Kirlin's clearing firm for execution by a Kirlin Holding market maker. The price per share generally decreased during this period, and the price paid by Kirincic's parents ranged from $.76 to $.64 per share. Kirincic could not recall his parents' reason for their purchases of Kirlin Holding. Kirincic's parents did not purchase any additional Kirlin Holding stock (at least through June 30, 2002). However, as described below, they sold a large portion of their Kirlin Holding shares in April 2002.

d. Kirincic Begins Actively Purchasing Kirlin Holding Shares for His Sister SP's Account

Prior to March 18, 2002, SP had not purchased Kirlin Holding shares since November 8, 2001, and for all of 2001 SP purchased a total of 21,925 Kirlin Holding shares in just four transactions. SP was a divorced mother of three, and in 2002 her monthly income consisted primarily of alimony from her ex-husband totaling $3,600 per month.[9] SP borrowed from her parents at least a portion of the funds used to purchase Kirlin Holding shares in her account.[10]

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[9] SP's ex-husband was a former Kirlin principal and Kirincic and Lindner's "third partner." SP's ex-husband left Kirlin prior to the time period at issue in the complaint. In March or April 2002, SP was not employed, and she estimated that her liquid assets totaled approximately $500,000 (including approximately $220,000 worth of Kirlin Holding shares purchased in March and April 2002).

[10] SP testified that she often borrowed money from her parents. SP planned to repay them once her ex-husband repaid her more than $200,000 that he had previously borrowed from SP. SP did not wait to purchase Kirlin Holding shares until her ex-husband repaid her because she wanted to buy the stock in March and April 2002. SP offered no reason for the timing of her purchases, and respondents' expert testified that he was unaware of any urgent need for SP to acquire Kirlin Holding shares during this time period.

SP testified that she wanted to acquire a large block of Kirlin Holding shares as a legacy for her children. Other than SP's generally stated desire to build a legacy for her children, SP could not explain why her purchases increased significantly beginning in March 2002.

SP testified that she never discussed Kirlin Holding's business with Kirincic, and did not consider news concerning Kirlin Holding or the NASDAQ delisting notice when deciding to purchase Kirlin Holding shares. Rather, SP testified that she granted Kirincic price and time discretion to purchase Kirlin Holding shares within a range of prices, without any specific direction on how to execute purchase orders. Kirincic could not recall how he received purchase orders from SP, and neither Kirincic nor SP could recall any specific orders or instructions from SP concerning her purchases of Kirlin Holding shares. Further, SP could not recall the parameters of any range of prices she allegedly gave to Kirincic.

Beginning on March 18, 2002 (the first trading day subsequent to Kirincic's parents' final purchase of Kirlin Holding stock), Kirincic began to place purchase orders on behalf of SP for Kirlin Holding shares. From March 18 through and including April 22, 2002 (the "trading period"), the average daily trading volume in Kirlin Holding increased to 56,579 shares per day, more than triple the daily volume for the first part of 2002. The increased trading in SP's account and other transactions by Kirincic's relatives, as described herein, contributed significantly to the increased volume in Kirlin Holding shares.

Kirincic's purchases on behalf of SP generally were placed in a similar manner. Kirincic would call Kirlin's trading desk and convey the order, often directly to Israel.[11] As a courtesy to Kirincic, the trading desk would write the order ticket on Kirincic's behalf. Kirincic directed that most of these purchase orders be placed using the electronic communication network ("ECN") BRUT, and he would specify the price, display, and reserve of each order.[12] For many of these purchase orders, Kirincic directed that the order be canceled shortly after its placement, but before it was completely filled, and he replaced it with a higher-priced purchase order. Most

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[11] In addition to personally discussing certain of the orders with Kirincic and placing them at Kirincic's direction, Israel, as Kirlin's head equity trader, was responsible for reviewing the order tickets received and processed by Kirlin's trading desk. Israel testified that he did not discuss trading strategy with Kirincic, and that Kirincic "is not the person you really have conversations with . . . He really doesn't want to hear your opinion on it." However, at some point after March 18, 2002, Israel realized that Kirincic was working a large order on behalf of Kirincic's sister's account. Israel was on vacation during the first week of April 2002.

[12] By using an ECN for purchase orders, it is possible to place large purchase or sale orders anonymously, while displaying only a portion of the entire order to the market. Moreover, unexecuted purchase orders displayed on an ECN that satisfy the minimum size requirements and that are at prices greater than the existing inside bid automatically result in a new inside bid price.

of the purchase orders were placed at prices equal to or exceeding the existing inside bid price, and some of the orders were placed at or above the existing inside ask price.[13]

For example, on March 18, 2002, Kirincic (through Kirlin's trading desk) placed three purchase orders for SP using BRUT ECN. Kirincic placed the first purchase order for 7,000 shares at $.68 per share, with 500 shares displayed and 6,500 shares in reserve. This raised the inside bid price from $.64 to $.68 per share, and the order quickly received a fill on approximately 2,500 shares. Rather than waiting for the rest of the order to be filled, and within approximately one hour of placing the order, Kirincic directed that the order be canceled and replaced with a purchase order for 4,400 shares (with 500 shares displayed and 3,900 shares in reserve) at a price of $.74 per share—$.06 higher than the partial fill, $.06 higher than the inside bid price, and $.01 higher than the inside ask price. This order received a fill on 1,500 shares, but similar to the first order, Kirincic directed that the order be canceled less than one hour after it had been placed. Less than two hours later, Kirincic placed another purchase order for 10,000 shares (with 1,000 shares displayed) at a price of $.76 per share. SP's purchase order was placed $.10 higher than the inside bid at the time (and at the inside ask price). This order was completely filled by the close of the trading day. As a result of SP's orders on March 18, 2002, the inside bid price of Kirlin Holding stock increased from $.64 to $.76 per share, and SP purchased a total of 14,053 shares.

Between March 19 and March 27, 2002, Kirincic followed a similar trading strategy and placed for SP's account at least 12 orders to purchase Kirlin Holding on BRUT ECN.[14] For example, on March 19, 2002, Kirincic (through Kirlin's trading desk) placed three purchase orders for SP using BRUT ECN. The first purchase order was for 10,000 shares at $.78 per share ($.10 more than the inside bid and at the inside ask), with 1,000 shares displayed and 9,000 in reserve. Within three minutes, this order received a fill on 5,000 shares. One hour later, Kirincic directed that the order be canceled and be immediately replaced with an order for 5,000 shares (with 1,000 shares displayed and 4,000 shares in reserve) at a price of $.81 ($.03 more than the inside bid). Almost immediately, this order received a fill on 1,000 shares at $.79 per share. Less than two hours later and just prior to the close of the market, the order was canceled and replaced with yet another order to purchase 4,000 shares (with 1,000 shares displayed and 3,000 shares in reserve) at a price of $.84 per share ($.15 more than the inside bid and at the inside ask). This order immediately received a fill on 100 shares at $.84 per share.

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[13] Indeed, during the trading period, SP's 65 purchase orders placed on BRUT ECN were at or exceeded the existing inside bid (and thus lifted the inside bid) on 41 occasions, were at or exceeded the existing inside ask on 20 occasions, and were executed at prices less than the inside bid on just four occasions. Thus, SP's BRUT ECN orders either created a new inside bid or took the inside bid approximately 94 percent of the time.

[14] During this period, there were 11 additional purchase orders placed on BRUT ECN by Kirlin that were canceled prior to receiving fills. These orders were not identified with certainty as trades in SP's account. Kirincic admitted, however, that based upon the display and reserve of the canceled purchase orders they were probably SP's orders.

This trading pattern—placing purchase orders on behalf of SP's account, receiving partial fills on such orders, and then canceling the purchase orders shortly thereafter and replacing them with purchase orders at increased bid prices—repeated itself throughout the next five trading days. By the close of trading on March 28, 2002, the inside bid price for Kirlin Holding shares was $.91 per share—up from $.78 on March 19, 2002.[15]

e. Kirlin Holding's Board of Directors Authorizes Repurchase

On March 27, 2002, Kirlin Holding's board of directors met to resume its discussion regarding Kirlin Holding's potential delisting from the NASDAQ National Market. Although the bid price of Kirlin Holding shares had increased since the board's initial meeting, it remained below the $1 per share minimum. Kirlin Holding's public filings with the SEC stated that "[i]f we are delisted from the NASDAQ National Market the liquidity of our common stock may be adversely affected which may result in a decline in our stock price." Kirincic testified that "the board saw value in [Kirlin Holding's] stock and there's an advantage to being in NASDAQ National Market versus NASDAQ Small Cap from a prestige standpoint." Consequently, the board determined to adopt a stock repurchase plan to address the bid price deficiency, and authorized Kirlin Holding to repurchase up to $1 million of the company's stock in the open market.

Kirlin Holding designated Kirincic and Lindner as the individuals responsible for the repurchase plan and to serve as brokers for Kirlin Holding's account at Kirlin. Kirlin Holding made its first stock repurchase on April 10, 2002, when it purchased 260,000 shares of its stock in an agency cross transaction from Kirincic's parents at a price of $1.02 per share.

f. Continued Purchases by Kirincic on Behalf of SP

On April 1, 2002, Kirincic placed no orders for SP's account. Kirincic testified that he did not place any orders on this day because Kirlin Holding was planning to issue a press release regarding its earnings after the close of trading. During the day, and with SP out of the market, the inside bid price of Kirlin Holding shares decreased from $.91 to $.77 per share, on volume of only 1,770 shares. There was no negative news on April 1, 2002, that caused the inside bid price to decline by $.14 per share. After the close of trading, Kirlin Holding reported a decrease in its yearly net loss from $11 million for 2000 to $3.6 million for 2001. Although Kirincic described the press release as "more positive than negative," on April 2, 2002, the opening bid for Kirlin Holding shares was $.73 per share. The inside bid ranged from $.73-$.77 per share during the morning of April 2, 2002.

At 11:06 a.m. on April 2, 2002, Kirlin Holding issued a news release announcing its stock repurchase program. The announcement of the repurchase program had no immediate

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[15] On March 28, 2002, Kirincic purchased on behalf of SP (through a Kirlin Holding market maker) 4,000 Kirlin Holding shares at prices ranging from $.91 to $.9496 per share.

effect on Kirlin Holding's inside bid price.[16] Approximately 45 minutes after the announcement, Kirincic resumed his purchases of Kirlin Holding on behalf of SP. Kirincic directed the placement of an order to purchase 2,000 shares (which was routed through Kirlin's clearing firm for execution by a Kirlin Holding market maker) at approximately $.95 per share, just $.0021 below the inside ask price. Almost immediately after this order, Kirincic purchased on behalf of SP another 400 shares of Kirlin Holding at $.95 per share, and five seconds later Kirincic purchased another 100 shares of Kirlin Holding at $.96 per share. During the early afternoon of April 2, 2002, Kirincic purchased on behalf of SP's account (through a Kirlin Holding market maker) an additional 10,000 shares of Kirlin Holding, in eight separate transactions, at prices ranging from $.9798 to $.99 per share.

Kirincic was not finished placing purchase orders on behalf of SP. Indeed, just prior to the close of trading on April 2, 2002, Kirincic placed several large purchase orders for SP's account. However, rather than placing SP's orders through a market maker, as he had done earlier in the day, Kirincic again placed orders on BRUT ECN. At 3:29 p.m., Kirincic placed a purchase order for SP—his largest to date—for 50,000 shares at $1.02 per share, with 2,500 shares displayed. At the time the order was placed, the inside bid was $.97 per share. Almost immediately this order received a fill on 24,800 shares at $1 per share. Several minutes later this order received a fill on 200 shares at $1.02. Shortly thereafter, Kirincic canceled this pending order and placed a new order to purchase 25,000 shares at $1.04 ($.03 more than the inside bid and at the inside ask), displaying 2,500 shares. Almost immediately this order received a fill on 400 shares, the last 200 of which were executed at $1.04 per share. As a result of Kirincic's orders on behalf of SP, the inside bid price closed at $1.04. This was the first time since January 2002 that Kirlin Holding's bid price closed above $1 per share.

Kirincic's purchases in SP's account followed a similar pattern over the next several trading days. Kirincic generally directed that purchase orders be placed on BRUT ECN, canceled the orders before they were completely filled, and replaced them with higher-priced purchase orders that exceeded the existing inside bid price.[17] The size of the orders was

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[16] Although it appears that market makers continued to quote inside bid prices similar to those quoted prior to the announcement, four purchase orders (for a total of 1,600 shares) were executed at $.95 per share in the 45 minutes immediately after the press release.

[17] For example, on April 3, 2002, at 1:16 p.m., Kirincic placed a purchase order for 10,000 shares on BRUT ECN, displaying 500 shares, at $.01 per share more than the inside bid price. By 2:40 p.m., the order was completely filled. Over the next five minutes, however, with SP out of the market, the inside bid fell to $.89. At 2:46 p.m., a Kirlin customer (probably SP according to Kirincic) placed a purchase order for 10,000 shares on BRUT ECN, displaying 1,500 shares, at $.95 per share. At 3:00 p.m. this order was canceled, and Kirincic placed a purchase order for 10,000 shares on BRUT ECN, displaying 1,500 shares, at $1.01 per share, $.06 more than the existing inside bid price and $.02 more than the inside ask price. SP's account purchased 4,100 shares at $.99 per share and 1,500 shares at $1.01 per share. Kirincic canceled the order at 3:30 p.m. and placed a purchase order for 50,000 shares, with 5,000 displayed, at $1.02 per share ($.13 more than the inside bid). At 3:31 p.m., Kirincic also placed a "good until canceled order"

[Footnote continued on next page]

generally significantly larger during this time period than SP's earlier purchase orders (most were for 25,000 or more shares), and some of the orders were placed late in the trading day. Kirlin Holding's inside bid price closed above $1 per share each day after April 2, 2002. Consequently, on April 18, 2002, NASDAQ staff verbally informed Kirincic that Kirlin Holding's inside bid price had closed at $1 per share or more for the past 10 consecutive trading days, although staff noted that they would continue to monitor the stock through Friday, April 19, 2002, and would not issue a formal notice of compliance until Monday, April 22, 2002.

g. Activity in SP's Account for the Remainder of 2002

Although SP continued to purchase Kirlin Holding shares after April 22, 2002 (through October 2002), her purchases subsequent to the trading period decreased substantially relative to her purchases during the five-week trading period. During the trading period, SP purchased 224,653 Kirlin Holding shares for a total purchase price of $219,952. For the remainder of 2002, SP purchased a total of 303,285 Kirlin Holding shares for a total purchase price of $228,419. SP could not explain why her purchases declined significantly for the period from April 23, 2002, through the end of October 2002 compared to the trading period. Further, in December 2002, SP sold 600,000 Kirlin Holding shares for $.45 per share. SP explained that she sold these shares because she was "really extended out there" and faced a number of large expenses. Further, SP explained that her ex-husband was concerned about his job security and had not yet repaid her the $200,000 he had borrowed.

2. Failure to Comply with Best Execution Requirements

Customer DL had been a Kirlin customer for several years prior to the events at issue in this case.[18] Patrick Byrne ("Byrne"), a Kirlin registered representative, served as DL's account executive. Throughout April 2002, DL was recovering from surgery and treatment for esophageal cancer, and was not making or receiving business calls. In mid-April 2002, DL's financial advisors advised him to consolidate his securities holdings and to liquidate some of his smaller brokerage accounts, including his account at Kirlin. DL agreed, and instructed his personal assistant to call Kirlin and direct that his account be liquidated. DL's account at Kirlin held 114,000 shares of Kirlin Holding, as well as several other securities. DL did not know the price at which Kirlin Holding's stock was trading, did not know that it had announced a

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[cont'd]

(i.e., an order that is active until the investor cancels the order or the trade is executed) for 2,000 shares at a price of $1.01 per share. Kirincic does not recall why he placed the good until canceled order, which caused the market to reflect at least two purchase orders for Kirlin Holding shares and helped ensure that the inside bid price would not drop below $1.01. As described below, the good until canceled order was not filled until the afternoon of April 22, 2002.

[18] DL was a wealthy businessman who had a number of brokerage accounts. His account at Kirlin represented less than one percent of his net worth.

repurchase program, and did not know that it was a thinly traded stock. DL's assistant called Kirlin sometime during the week of April 15, 2002, and she was instructed to put DL's request to liquidate his account in writing.

On April 22, 2002, the market for Kirlin Holding opened with an inside bid price of $1.04 per share and an inside ask of $1.18 per share. During the morning, Kirincic placed two purchase limit orders on behalf of SP on the open market—the first for 500 shares at a price of $1.1489 per share, and the second for 500 shares at a price of $1.04 per share. At 12:53 p.m., Kirlin Holding (at Kirincic's direction and through Israel) purchased 114,502 shares through its repurchase program from Kirincic's cousin JM in an agency cross transaction. The purchase price for these shares was $1.05 per share, $.01 higher than the inside bid price.[19] At 12:58 p.m., Kirlin Holding (at Kirincic's direction and through Israel) purchased another 125,498 shares through its repurchase program from Kirincic's parents in an agency cross transaction. These shares were also purchased at $1.05 per share and at a $.04 premium to the inside bid price. At 1:01 p.m., Kirincic directed the placement of a purchase order on behalf of SP for 25,000 Kirlin Holding shares on BRUT ECN, displaying 2,000 shares, at a bid price of $1.10 per share. The bid price for this purchase order was $.05 more than the existing inside ask, and the order quickly received a fill on 300 shares.

At 1:24 p.m., Kirlin received a fax with DL's instructions to liquidate his Kirlin account. Sometime thereafter, Byrne's assistant informed Israel that a customer had faxed instructions to liquidate a large number of Kirlin Holding shares. Israel instructed Byrne's assistant to contact Byrne, who was working from home. Byrne testified, and his phone records indicate, that after he spoke with his assistant he called DL's office at 2:43 p.m. to discuss the liquidation request. Byrne did not speak with DL but instead spoke with DL's assistant, who informed him that DL was incapacitated and confirmed DL's request to liquidate his holdings. Byrne did not discuss with DL's assistant a price at which DL's Kirlin Holding shares would be sold. Byrne believed that DL was close to death and that it was urgent that DL's account be liquidated.[20]

At 2:45 p.m., Byrne called his assistant and asked her to write a ticket for a market order to sell DL's Kirlin Holding shares (as well as DL's other securities) and to bring it to Kirlin's trading desk. Byrne testified that his assistant would have written the ticket immediately and brought it to Israel for processing, and he did not instruct her to put a price on the sell ticket. At 2:53 p.m., Byrne and Israel discussed DL's order. Byrne testified that Israel did not mention the prior repurchases by Kirlin Holding,[21] SP's pending order to purchase 24,700 shares at $1.10 per

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19 At 12:58 p.m., after the inside bid price decreased to $1.01, SP's good until canceled order placed on April 2, 2002 was filled.

20 Both Israel and Lindner testified that they also understood that DL was near death and that it was important to liquidate DL's Kirlin account as quickly as possible. This belief was mistaken.

21 The Hearing Panel found that Israel's testimony that he informed Byrne that Kirlin Holding had repurchased shares from Kirincic's relatives was not credible.

share, or the current market for Kirlin Holding shares. Byrne further recalled that Israel informed him that Israel was going to talk to Kirincic to find out if Kirlin Holding would be interested in making an offer for DL's shares, as it was Kirlin's unwritten policy that traders contact Kirincic (or Lindner if Kirincic was not available) if they received an order to sell more than 10,000 shares of Kirlin Holding.

Israel was unable to contact Kirincic, who was out of the office, but was able to reach Lindner.[22] Lindner was also out of the office at a meeting on the afternoon of April 22, 2002. Lindner and Israel discussed the market for Kirlin Holding and the trading that had occurred earlier in the day.[23] However, Lindner and Israel did not discuss SP's pending order to purchase 24,700 shares at $1.10 per share. Lindner determined that Kirlin Holding should pay $.80 per share for DL's 114,000 shares. Lindner testified that he was "working in the dark" that afternoon and arrived at the price of $.80 per share based upon his investment banking experience. Specifically, Lindner testified that he arrived at the $.80 per share price by doing "a calculation that [he] would have done if [he] was pricing, let's say, a secondary offering." Israel informed Byrne that Kirlin Holding would purchase DL's shares at $.80 per share, and Byrne informed Israel that he should execute the order.

At 3:05 p.m., Israel began liquidating DL's account by selling DL's non-Kirlin Holding securities. At 3:08 p.m., Kirincic called Kirlin's trading desk and gave instructions to cancel SP's pending order to purchase 24,700 shares of Kirlin Holding at $1.10 per share. The order was canceled immediately. Neither Kirincic nor Israel could recall any conversation concerning this cancellation.[24] At 3:16 p.m., a ticket to sell DL's Kirlin Holding shares was time stamped by Kirlin's trading desk, Israel wrote the purchase order ticket for Kirlin Holding, and DL's sell order was executed at 3:18 p.m. at $.80 per share.[25] The inside bid at this time was $1.04 per share. Twenty minutes later, Kirincic called Kirlin's trading desk to place another purchase order on behalf of SP. Kirincic directed that the order to purchase 5,000 shares of Kirlin Holding

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22 Lindner thought that he spoke with Byrne, and not Israel, regarding DL's order. However, the Hearing Panel credited Byrne's testimony, corroborated by Israel, that Lindner spoke with Israel and not Byrne.

23 Further, Lindner and Kirincic had a three or four minute telephone conversation at approximately 2:25 p.m. Although neither could remember the exact details of this conversation, both testified that they discussed the repurchases by Kirlin Holding totaling $250,000 earlier in the day.

24 The Hearing Panel found that Kirincic canceled SP's pending purchase order with knowledge of DL's request to sell his Kirlin Holding shares.

25 Israel testified that he erroneously reported to the Automated Confirmation Transaction Service DL's sale order with a ".w" modifier, which indicates that the transaction was effected at a price based upon a weighted-average price or other special pricing formula. Trades reported with a ".w" modifier do not affect the last sale price. *See NASD Notice to Members 00-43* (July 2000).

(displaying 1,000 shares) be placed using BRUT ECN at an inside bid of $1.01. There were no executions on this order, and the trading day ended with the inside bid at $1.01.

3. Kirincic Falsifies His Parents' Signatures

From April 2002 to June 2002, Kirincic signed his parents' names to four Kirlin Holding stock certificates representing more than 465,000 shares, and three letters of authorization to transfer a total of $200,000 from his parents' account to SP's account.[26] The signatures on the stock certificates enabled Kirincic to deposit Kirlin Holding stock into his parents' account, 260,000 shares of which were repurchased by Kirlin Holding on April 10, 2006. One of the three letters to which Kirincic signed his parents' names authorized the transfer of $75,000 to SP's account on April 16, 2002, during the trading period.

At Kirincic's investigative interview in January 2005, he initially and repeatedly testified that he believed that his parents signed these documents. After Enforcement consulted with Kirincic's counsel and Kirincic conferred with his counsel, Kirincic stated that "upon further reflection, I believe that I signed these documents for my parents with their full authorization as an administrative convenience." Kirincic repeated this claim at the hearing. Other than his own testimony, Kirincic presented no evidence to support this claim.

C. Procedural History

In November 2002, DL complained to FINRA regarding the fairness of the price he received on April 22, 2002, for his Kirlin Holding stock. FINRA's Department of Market Regulation referred the case to FINRA's Department of Enforcement ("Enforcement"), and Enforcement commenced an investigation. On December 1, 2005, Enforcement filed an amended four-cause complaint against respondents. The complaint alleged that: (1) Kirlin, Kirincic, and Israel violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110 when they manipulated the price of Kirlin Holding's stock in March and April 2002; (2) Kirincic violated NASD Rule 2110 when he forged his parents' signatures on Kirlin Holding stock certificates and letters of authorization to transfer funds from his parents' account to SP's account; (3) Kirlin, Lindner, and Israel violated NASD Rules 2320 and 2110 when they failed to obtain best execution for customer DL in connection with the sale of Kirlin Holding shares on April 22, 2002; and (4) Kirlin, through Kirincic and Lindner, violated NASD Rules 3010 and 2110 when they failed to establish, maintain, and enforce an adequate supervisory system and written supervisory procedures.

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[26] A total of $325,000 was transferred from Kirincic's parents' account to SP's account from April 2002 to June 2002 ($75,000 on April 16; $50,000 on May 1; $75,000 on June 7; and $125,000 on June 27). The record, however, contains only three letters authorizing transfers totaling $200,000. In addition, on March 27, 2002, and April 10, 2002, SP deposited two checks totaling $150,000 drawn on her personal account into her account at Kirlin. SP could not recall the source of funds for these two checks.

Respondents denied all of the allegations. The Hearing Panel conducted a hearing over 10 days in late 2006 and early 2007. In a decision dated November 28, 2007, the Hearing Panel found that respondents had committed the violations alleged in the first three causes of the complaint (i.e., market manipulation, forging customer signatures, and failure to comply with best execution requirements). The Hearing Panel dismissed the fourth cause alleging that Kirlin, Kirincic, and Lindner failed to establish, maintain, and enforce an adequate supervisory system and written supervisory procedures.[27] The Hearing Panel expelled Kirlin from FINRA membership and barred Kirincic and Israel in all capacities for their manipulation of the price of Kirlin Holding stock. The Hearing Panel also barred Kirincic for forging his parents' signatures on Kirlin Holding stock certificates and letters of authorization. The Hearing Panel further expelled Kirlin, and barred Lindner and Israel, for their failure to comply with best execution requirements in connection with DL's sale of Kirlin Holding shares. Finally, the Hearing Panel ordered that Kirlin, Lindner, and Israel pay, jointly and severally, restitution of $26,163 to DL, and assessed costs against all respondents. Respondents' appeal followed.

III. Discussion

A. Kirlin, Through Kirincic and Israel, Manipulated the Price for Kirlin Holding shares

The Hearing Panel found that Kirlin, through Kirincic and Israel, manipulated the price of Kirlin Holding shares, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110. We affirm the Hearing Panel's findings.

Section 10(b) of the Exchange Act makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe[.]" Exchange Act Rule 10b-5 makes it unlawful, in connection with the purchase or sale of any security, "(a) to employ any device, scheme, or artifice to defraud, . . . or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . ." NASD Rule 2120 is FINRA's antifraud rule and is similar to Exchange Act Rule 10b-5. *See Market Regulation Comm. v. Shaughnessy*, Complaint No. CMS950087, 1997 NASD Discip. LEXIS 46, at *24 (NASD NBCC June 5, 1997), *aff'd*, 53 S.E.C. 692 (1998).[28]

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[27] Enforcement does not appeal dismissal of the fourth cause, and we do not consider this matter.

[28] A violation of another Commission or FINRA rule is also a violation of NASD Rule 2110. *See Dist. Bus. Conduct Comm. v. Euripides*, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45, at *18-19 (NASD NBCC July 28, 1997). NASD Rule 2110 provides that FINRA members shall, in conducting their business, "observe high standards of commercial honor and just and equitable principles of trade." In addition, NASD Rule 0115 makes all FINRA rules applicable to both FINRA members and all persons associated with FINRA members.

Manipulation is "virtually a term of art when used in connection with securities markets." *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977) (*quoting Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)). Manipulation "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ernst & Ernst*, 425 U.S. at 199; *Swartwood Hesse, Inc.*, 50 S.E.C. 1301, 1307 (1992) ("Manipulation is the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand.").

"[A] finding of manipulation does not hinge on the presence or absence of any particular device usually associated with a manipulative scheme. Rather, each case must be judged on its own facts." *Patten Sec. Corp.*, 51 S.E.C. 568, 574 (1993). Courts, however, have identified several "classic elements" of manipulation, including market domination and control, leadership in raising and maintaining the market price, price leadership when the issuer's condition was not favorable, and purchases or increases in bids when the firm already had a substantial inventory. *See Randolph K. Pace*, 51 S.E.C. 361, 363 (1993) (citing sources). Circumstantial evidence is sufficient to demonstrate a manipulation. *See Pagel, Inc.*, 48 S.E.C. 223, 226 (1985) ("Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data."), *aff'd*, 803 F.2d 942 (8th Cir. 1986). "[I]solated instances of seemingly innocent conduct can, when viewed as a whole, constitute circumstantial evidence of manipulative activity." *Terrance Yoshikawa*, Exchange Act Rel. No. 53731, 2006 SEC LEXIS 948, at *22 (Apr. 26, 2006).

In order to demonstrate that respondents engaged in manipulation, Enforcement must show, by a preponderance of the evidence, that respondents acted with scienter.[29] "[S]cienter refers to a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst*, 425 U.S. at 193 n.12 (internal quotation omitted). A showing of recklessness is sufficient to demonstrate that respondents acted with scienter. *See Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2507 n.3 (2007) (reserving the issue but stating that "[e]very Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required."). "Reckless conduct has been defined as . . . an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Dep't of Enforcement v. Abbondante*, Complaint No. C10020090, 2005 NASD Discip. LEXIS 43, at *28 (NASD NAC Apr. 5, 2005) (citations omitted), *aff'd*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23 (Jan. 6, 2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006).

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[29] To prove violations of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, Enforcement must also show that respondents' manipulation occurred in connection with the purchase or sale of securities, and that respondents used "any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange[.]" The record contains ample evidence supporting each element.

After a thorough review of the record in this case, we affirm the Hearing Panel's findings that Kirlin, Kirincic, and Israel manipulated the price of Kirlin Holding shares.[30] Kirlin, through Kirincic and Israel, artificially inflated the inside bid price of Kirlin Holding shares through extensive trading in Kirincic's relatives' accounts in March and April 2002. After receiving NASDAQ's delisting notice, Kirincic began actively trading in Kirlin Holding stock in early March 2002, when Kirincic placed numerous purchase orders for Kirlin Holding on behalf of his parents' account. Further, Kirincic orchestrated a large cross trade of Kirlin Holding shares from his in-laws' account and parents' retirement account to his parents' non-retirement account (i.e., the same account that sold more than 385,000 shares of Kirlin Holding stock at more than $1 per share and from which $75,000 was transferred to SP's account during the trading period). Kirincic could not recall discussing any of these orders with his parents or in-laws or the reasons for the purchases and sales.

Despite these repeated purchases, Kirlin Holding's inside bid price decreased and remained below $1 per share, so in mid-March 2002 Kirincic stopped purchasing shares through Kirincic's parents' account and began placing purchase orders in SP's account. Over the next five weeks, Kirincic (through Israel and Kirlin's trading desk) purchased $219,952 worth of Kirlin Holding shares on behalf of SP, and these purchases coincided with Kirlin Holding's efforts to regain compliance with NASDAQ listing requirements. Neither Kirincic nor SP could explain the sudden and dramatic increase in purchases in SP's account, and the average daily trading volume in Kirlin Holding shares (thinly traded throughout its history) more than tripled during this period. Indeed, the vast majority of trading during this time period originated from Kirlin and Kirincic's relatives' accounts. The active trading in SP's account had the desired result, as Kirlin Holding's inside bid price increased more than 57 percent during the trading period and exceeded $1 per share for 10 consecutive trading days.

The pattern of trading in SP's account during the trading period supports a finding of manipulation. Kirincic, using SP's account and often acting directly through Israel and almost always with Israel's knowledge as head equity trader, initially placed numerous small, successively higher purchase orders for Kirlin Holding shares on BRUT ECN. Almost all of these purchase orders were either placed at a price equal to or exceeding the inside bid, and certain of the orders were placed at prices greater than the existing inside ask price. Indeed, of the 65 orders executed on behalf of SP's account using BRUT ECN, 20 were placed at a price equal to or exceeding the existing inside ask and 41 were placed at a price equal to or exceeding the existing inside bid price for Kirlin Holding. The purchase orders placed on BRUT ECN at prices exceeding the existing inside bid automatically resulted in new, higher inside bid prices.

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[30] The Hearing Panel properly found Kirlin liable for Kirincic's misconduct. *See Dep't of Enforcement v. Perpetual Sec., Inc.*, Complaint No. C9B040059, 2006 NASD Discip. LEXIS 18 (NASD NAC Aug. 16, 2006) (finding firm and its president engaged in misconduct), *aff'd in relevant part*, Exchange Act Rel. No. 56613, 2007 SEC LEXIS 2353 (Oct. 4, 2007); *see also Armstrong, Jones & Co. v. SEC*, 421 F.2d 359, 362 (6th Cir. 1970) (holding that a broker-dealer may be sanctioned for the willful violations of its employees).

A number of these orders were canceled shortly after being placed, despite the fact that they had received partial fills almost immediately after placement, and were replaced with purchase orders at higher bid prices. *See F.N. Wolf & Co.*, Initial Decision Rel. No. 83, 1996 SEC LEXIS 8, at *52 (Jan. 3, 1996) ("Paying increasingly higher prices for a security, and bidding up a stock or causing it to be bid up are well-established manipulative techniques.").

Further, a number of SP's orders were placed near the close of the trading day, which helped ensure that the inside bid price of Kirlin Holding shares satisfied NASDAQ's $1 per share minimum listing requirement. Indeed, once Kirlin Holding's shares began trading at prices greater than $1 per share, Kirincic and Israel greatly increased the size of SP's purchase orders, so that large portions of the orders would remain unfilled at the end of each trading day. This helped ensure that the minimum inside bid price remained above $1 per share. SP's good until canceled order to purchase 2,000 shares at a limit price of $1.01 per share, placed on April 3, 2002, and not executed until April 22, 2002, served as a floor for the bid price of the stock. Although Kirincic claims that he cannot recall why the order was placed, we find that the purpose of SP's good until canceled order was to artificially maintain the bid price for Kirlin Holding above the $1 per share minimum required to avoid delisting from the NASDAQ National Market.

In addition, Kirlin dominated the market for Kirlin Holding shares and accounted for much of the trading activity in the stock during the trading period. Approximately 80 percent of Kirlin Holding's outstanding shares were held in accounts of Kirlin customers (mostly Kirincic's relatives). Moreover, more than 90 percent of the total volume of Kirlin Holding shares traded during the trading period was executed at Kirlin or was executed by other firms in connection with orders from SP, Kirincic's relatives, or other Kirlin customers. Market domination and control of the supply of a stock are classic elements of manipulation. *See Pace*, 51 S.E.C. at 363. Further, the share price of Kirlin Holding steadily decreased after the trading period. *See SEC v. Resch-Cassin & Co.*, 362 F. Supp. 964, 973 (S.D.N.Y. 1973) (holding that price drop subsequent to cessation of trading activity is another indication of manipulation).

We further find that Kirincic and Israel acted with scienter. Kirincic orchestrated the trading activity in SP's account and directed all of the trading in SP's account. Kirincic decided when each trade would be placed, where to route each trade, the bid price for each limit order, and when to cancel purchase orders. Further, Kirincic had intimate knowledge of NASDAQ's delisting notice and Kirlin Holding's repurchase program. The increased activity in SP's account and rise in Kirlin Holding's bid price allowed Kirlin Holding to avoid delisting from NASDAQ's National Market, and permitted Kirincic's parents and cousin to sell 500,000 shares of Kirlin Holding stock, at an increased price, through its repurchase program in April 2002.[31] Further,

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[31] Respondents argue that continued listing on NASDAQ's National Market was unimportant to Kirlin Holding, and that the listing requirements were changing such that Kirlin Holding would likely not satisfy the new standards. The record, however, shows that remaining on the NASDAQ National Market was important to Kirlin Holding. Kirlin Holding's board of directors held two special meetings to address the matter in March 2002, and Kirlin Holding's public filings stressed the importance of remaining on NASDAQ's National Market. Moreover,

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the rise in Kirlin Holding's inside bid increased the value of Kirincic's 20 percent ownership stake in the company. Kirincic could not recall discussing any orders to purchase or sell Kirlin Holdings with his sister, parents, or in-laws, and he could not recall any specific reasons for the sales and purchases. Kirincic's inability to recall these matters supports our finding that Kirincic intentionally manipulated the market for Kirlin Holding shares. *See Jay Michael Fertman*, 51 S.E.C. 943, 949 (1994) (holding that respondent's lack of candor and asserted inability to recall basic information concerning the events at issue lends support to a finding of scienter).

Israel also acted with scienter. Israel often personally handled the orders that Kirincic called in to Kirlin's trading desk, and as Kirlin's head equity trader he reviewed all of the trading desk's orders. Although Israel claimed that he was initially unaware of Kirincic's purchases in SP's account, he admitted that sometime during the trading period he realized that Kirincic was acquiring Kirlin Holding shares for SP. Israel also knew that Kirlin Holding was a thinly traded stock and that most of the volume associated with Kirlin Holding shares originated from Kirlin. Further, Israel knew or was reckless in not knowing that SP's purchase orders (frequently canceled shortly after being placed, despite receiving immediate fills, and replaced with higher-priced purchase orders) dramatically and rapidly raised Kirlin Holding's inside bid and caused Kirlin Holding to regain compliance with NASDAQ's listing standards. At a minimum and under the circumstances, Israel was reckless in furthering Kirincic's manipulative scheme by placing purchase orders for SP's account (which dramatically increased in size once the bid price exceeded $1 per share), canceling many of these orders shortly thereafter (despite the orders receiving partial fills), and replacing the purchase orders with successively higher-priced orders. *See Dep't of Enforcement v. Fiero*, Complaint No. CAF980002, 2002 NASD Discip. LEXIS 16, at *63 (NASD NAC Oct. 28, 2002) (holding that scienter is established if the evidence shows that respondents knew of the manipulation or "the market manipulation was so obvious" that respondents must have been aware of it).[32] We therefore find that Kirlin, acting through Kirincic and Israel, fraudulently bid up the price of Kirlin Holding shares.

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although NASDAQ eliminated its requirement that a company have net tangible assets of $4 million and instead required that a company have shareholder equity of $10 million to be listed on its National Market, such requirement did not become effective until November 2002, well after the manipulative conduct occurred in this case. Finally, respondents argue that if regaining compliance with NASDAQ's listing requirements was truly important, Kirlin Holding simply could have declared a reverse stock split to satisfy the listing standard. Kirlin Holding, however, did not choose this course of action. The mere existence of an apparent alternative method that theoretically could—within the confines of the securities laws—raise the bid price of Kirlin Holding shares so as to satisfy NASDAQ's listing requirements is, on its own, insufficient to demonstrate that respondents' misconduct did not constitute manipulation.

[32] Throughout these proceedings, Israel has portrayed his role as nothing more than executing orders for, and at the direction of, his boss. However, Israel "cannot absolve himself of responsibility for compliance with the NASD Rules or Rule 10b-5 simply by relying on the directives of his superior." *Hibbard, Brown & Co.*, 52 S.E.C. 170, 180 (1995) (rejecting argument that that firm's head trader and manager of the trading department simply followed the

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Respondents argue that the trades in SP's account were "real" trades involving actual payments to acquire Kirlin Holding stock, and that SP actually lost money on Kirlin Holding trades. Israel further argues that he did not profit from SP's trades. However, these facts, even if true, do not preclude a finding that Kirincic and Israel fraudulently manipulated the share price of Kirlin Holding stock. *See Markowski v. SEC*, 274 F.3d 525, 528-29 (D.C. Cir. 2001) (rejecting applicants' argument that the trades were not manipulative because they involved "real customers, real transactions, and real money . . . Just because a manipulator loses money doesn't mean he wasn't trying"); *Hibbard, Brown & Co.*, 52 S.E.C. at 180 (holding that the fact that applicant did not profit from misconduct does not defeat a finding of fraud); *cf. Swartwood Hesse*, 50 S.E.C. 1301 (holding that the fact that respondent did not "dump" stock after raising the stock's price is not necessarily inconsistent with a manipulation). Further, Kirincic's parents and first cousin benefited from the artificially inflated price for Kirlin Holding shares when they sold 500,000 shares in mid-April 2002.

Respondents also argue that the trading in SP's account during the trading period has been taken out of context and that SP continued purchasing Kirlin Holding shares throughout most of 2002. Although from April 23, 2002, through the end of October 2002 SP purchased a total of 303,285 shares for $228,419, the shares purchased during this period were only 78,632 more shares and $10,000 more than she expended during the five-week trading period. Respondents offer no explanation for the sharp decrease in purchases in SP's account after April 22, 2002, relative to her purchases during the trading period. Further, SP sold 600,000 shares in December 2002.

Respondents further argue that their expert, Kirincic, and SP each provided non-fraudulent explanations for the trading in SP's account during the trading period, whereas Enforcement presented no contradictory testimony that Kirincic and Israel fraudulently manipulated the market for Kirlin Holding.[33] Respondents thus argue that the Hearing Panel could only conclude that they did not engage in manipulation. Respondents are mistaken. First, expert testimony is not necessary to demonstrate a pattern of manipulative trading, and the Hearing Panel could on its own conclude that respondents manipulated the price of Kirlin Holding shares. *See Meyer Blinder*, 50 S.E.C. 1215, 1222 (1992) (holding that FINRA hearing panels have sufficient knowledge and expertise to render a businessman's judgment without the

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orders of his supervisor and had no role in the decision making process, and finding that applicant had many years of experience as a trader and was intimately involved in the fraudulent trading at issue); *Rafael Pinchas*, 54 S.E.C. 331, 338 (1999) (rejecting a registered representative's argument that his supervisor's approval of trading ticket orders in account absolved representative of blame). Further, during the trading period Israel was a Kirlin principal and the Firm's head equity trader.

[33] Enforcement's expert witness became ill and was unable to complete his testimony. Consequently, the Hearing Officer struck the testimony he had already provided in the case.

aid of expert testimony); *see also Yoshikawa*, 2006 SEC LEXIS 948 (rejecting respondent's contention that there was nothing inherently manipulative or fraudulent in entering orders and canceling them shortly thereafter).

Second, the Hearing Panel found that Kirincic's attempts to explain the trading in SP's account, his claim that SP directed and initiated the purchases in her account, and SP's explanation that the increased trading in her account was meant to leave a legacy of Kirlin Holding stock for her children were not credible. The Hearing Panel was free to disbelieve these witnesses, even if the witnesses' testimony was uncontradicted. *See, e.g.*, *Willis v. State Farm Fire & Cas. Co.*, 219 F.3d 715, 720 (8th Cir. 2000). Respondents have not demonstrated the existence of substantial evidence sufficient to overturn the Hearing Panel's credibility determinations (made after hearing testimony from Kirincic and SP over the course of several days), and we therefore affirm the Hearing Panel's credibility findings. *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *16 n.11 (NASD NAC Dec. 21, 2004) (holding that the Hearing Panel's credibility determinations are entitled to deference and can only be overturned by "substantial evidence"), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005).

Finally, even if certain trades in SP's account during the trading period may have, by themselves, resembled a legitimate strategy to acquire shares, the totality of the evidence—including the trading in SP's account during the trading period—more than adequately supports a finding of manipulation. *Yoshikawa*, 2006 SEC LEXIS 948, at *22 ("[I]solated instances of seemingly innocent conduct can, when viewed as a whole, constitute circumstantial evidence of manipulative activity."). Kirlin dominated and controlled the thinly traded market for Kirlin Holding shares. Neither Kirincic nor SP could adequately explain SP's sudden and frequent purchases of Kirlin Holding during the trading period (often at prices equal to or exceeding the existing inside ask price), the cancellation of partially filled purchase orders shortly after being placed, or the large increase in size of the purchase orders once Kirlin Holding began trading above $1 per share, and the trading resulted in a dramatic rise in Kirlin Holding's bid price. Kirlin Holding sought to regain compliance with NASDAQ's listing requirements just prior to and during the trading period, and Kirincic's relatives sold 500,000 Kirlin Holding shares at inflated prices near the end of the trading period. All of these facts, taken together, lead us to conclude that Kirlin, Kirincic, and Israel fraudulently manipulated the market for Kirlin Holding, in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110.

B. Kirincic Falsified His Parents' Signatures on Stock Certificates and Letters of Authorization

The Hearing Panel found that Kirincic falsified his parents' signatures on Kirlin Holding stock certificates, as well as on several letters of authorization directing the transfer of funds to SP's account, in violation of NASD Rule 2110. We affirm the Hearing Panel's findings.

It is well established that signing a customer's name to documents, without authority, is forgery and is inconsistent with just and equitable principles of trade and violates the high standards of commercial honor set forth in NASD Rule 2110. *See Dep't of Enforcement v. Claggett*, Complaint No. 2005000631501, 2007 FINRA Discip. LEXIS 2, at *10 (FINRA NAC

Sept. 28, 2007); *Dep't of Enforcement v. Cooper*, Complaint No. C04050014, 2007 NASD Discip. LEXIS 15, at *9 (NASD NAC May 7, 2007). "The SEC has sustained FINRA's finding of forgery when misconduct harmed a customer or benefited the forger." *See Rooney A. Sahai,* Exchange Act Rel. No. 51549, 2005 SEC LEXIS 864, at *20 & n.17 (Apr. 15, 2005) (collecting cases); *accord Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *16 (Aug. 22, 2008) (stating that the Commission has sustained findings of forgery when the misconduct defrauds a customer or benefits the forger).

At Kirincic's investigative interview in January 2005, he initially and repeatedly denied signing the documents at issue on behalf of his parents. However, after consulting with counsel, Kirincic changed his testimony and stated that he signed the documents with his parents' authorization as a convenience to them. At the hearing, Kirincic admitted that he signed his parents' names to their Kirlin Holding stock certificates and the letters of authorization. Kirincic again claimed, however, that he signed such documents with his parents' authority as a convenience to them.[34] The Hearing Panel found that Kirincic's testimony that he had his parents' authority was not credible, and that the record contained nothing to support Kirincic's claim.

We affirm the Hearing Panel's findings. Kirincic admitted signing the documents at issue, and he had the burden to prove he did so with his parents' authorization. *See Cooper*, 2007 NASD Discip. LEXIS 15, at *9; *cf. United States v. George*, 386 F.3d 383, 398 (2d Cir. 2004) (holding that a defendant's claim of authorization is an affirmative defense to forgery charges). Kirincic has failed to satisfy this burden, and he has not demonstrated the existence of substantial evidence sufficient to overturn the Hearing Panel's credibility determination regarding his claim of authorization. *See Mizenko*, 2004 NASD Discip. LEXIS 20, at *16 n.11. The record contains no documentation evidencing a grant of authority to Kirincic to sign documents on behalf of his parents, and he did not place any notation on any of the documents to indicate that he had signed the documents on his parents' behalf. Further, neither of Kirincic's parents testified at the hearing or provided sworn declarations that they granted him authority (whether written or oral) to sign any documents, and respondents' expert testified that he did not see any documentation evidencing Kirincic's claim of authorization. Rather, the only evidence supporting Kirincic's claim is his own testimony (which the Hearing Panel found to be not credible based upon Kirincic's initial denial that he did not sign the documents). Kirincic's self-serving testimony that he had authorization, without anything more, is insufficient. *See District Bus. Conduct Comm. v. Kirschbaum*, Complaint No. C07960069, 1998 NASD Discip. LEXIS 36, at *6 (NASD NAC Aug. 25, 1998) (holding that "[w]ithout any evidence that customers had authorized Kirschbaum to sign their names, Kirschbaum has no valid defense to the complaint's allegation of forgery").

Further, we find that Kirincic's parents suffered harm as a result of Kirincic's falsification of their signatures and that Kirincic benefited from such forgeries. Kirincic's

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[34] Kirlin's written supervisory procedures prohibited the signing of a customer's name, even as an accommodation to that customer.

forgeries enabled the unauthorized transfer of $200,000 from his parents' account to SP's account, $75,000 of which was transferred to SP's account during the trading period and a portion of which was directly used to purchase Kirlin Holding shares in furtherance of the manipulation. Consequently, we find that Kirincic forged his parents' signatures, in violation of NASD Rule 2110.

Kirincic argues that the Hearing Panel's finding that he improperly signed his parents' signatures was not based on any evidence, such as a handwriting expert or customer testimony.[35] However, expert testimony is not required for a finding of forgery in FINRA cases. *See Dep't of Enforcement v. Masceri*, Complaint No. C8A040079, 2006 NASD Discip. LEXIS 29, at *23 (NASD NAC Dec. 18, 2006). Further, Kirincic admitted to signing his parents' names to the documents at issue. Thus, under the circumstances the only issue for the Hearing Panel to consider was whether Kirincic had his parents' prior authorization to sign the documents. The burden of demonstrating such authorization rested with Kirincic, and Kirincic failed to meet his burden. *Cooper*, 2007 NASD Discip. LEXIS 15, at *9. Kirincic cannot admit signing customers' names and then defeat a charge of forgery with nothing more than his own unsupported and uncorroborated testimony that he signed the customers' names with their prior authority.[36] Finally, Kirincic's argument that neither parent complained about the signatures is irrelevant. *See Maximo Justo Guevara*, 54 S.E.C. 655, 664 (2000) (holding that FINRA's "power to enforce its rules is independent of a customer's decision not to complain"), *pet. for review denied*, 47 F. App'x 198 (3d Cir. 2000). Consequently, we find that Kirincic falsified his parents' signatures on Kirlin Holding stock certificates and letters of authorization, in violation of NASD Rule 2110.

C. Kirlin, Lindner, and Israel Failed to Comply with Best Execution Requirements

The Hearing Panel found that Kirlin, through Lindner and Israel, failed to comply with best execution requirements in connection with the sale of DL's Kirlin Holding shares, in violation of NASD Rules 2320 and 2110. We affirm the Hearing Panel's findings that Kirlin,

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[35] Kirincic also argues that New York law governs these proceedings. He is mistaken. *See Dist. Bus. Conduct Comm. v. Bickerstaff*, Complaint No. C01920017, 1994 NASD Discip. LEXIS 60, at *36 (NASD NBCC June 23, 1994) (holding that the elements of forgery under state law are not dispositive as to whether record demonstrates that respondent committed forgery), *aff'd*, 52 S.E.C. 232 (1995).

[36] We reject Kirincic's argument that the Hearing Panel improperly drew an adverse inference against Kirincic for his failure to call his parents to testify at the hearing. The Hearing Panel properly considered that there simply was no evidence (including any testimony from Kirincic's parents) establishing that Kirincic had authorization to sign his parents' signatures, and rejected as not credible Kirincic's testimony that they granted him such authority. Indeed, Kirincic affirmatively chose not to utilize either of his parents (or any other person) as witnesses to substantiate his claim of authorization.

Lindner and Israel failed to comply with best execution requirements, although our rationale for doing so differs from the rationale employed by the Hearing Panel.

NASD Rule 2320 provides that in a transaction for or with a customer, a member firm and persons associated with the member "shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions." *See* NASD Rule 2330(a); *see also Dep't of Enforcement v. Nicolas*, Complaint No. CAF040052, 2008 FINRA Discip. LEXIS 9, at *65 (FINRA NAC Mar. 12, 2008) (internal quotations omitted) ("The duty of best execution requires a broker-dealer to seek to obtain for its customer's order the most favorable terms reasonably available under the circumstances, including executing customers' trades at the best reasonably available price."). The duty of best execution is based upon the mutual understanding that a customer is engaging in the subject transaction and utilizing the services of his broker solely to maximize the customer's own economic benefit, and that the broker receives his compensation for his role in maximizing the customer's economic benefit. *See Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 273 (3d Cir. 1998) (en banc). In determining whether a broker has satisfied his obligations of best execution by using reasonable diligence, we must look at the facts and circumstances surrounding the trade in question. *See NASD Notice to Members 01-22* (Apr. 2001).[37]

The Hearing Panel concluded that at the time Israel and Lindner spoke on the afternoon of April 22, 2002, Lindner would have been aware of SP's pending order to purchase Kirlin Holding shares at $1.10 per share. The Hearing Panel further determined that Lindner's assertion that he and Israel did not discuss the possibility that SP would purchase DL's shares was not credible. In finding a violation of the duty of best execution, the Hearing Panel determined that at a minimum, DL's sell order should have been executed against SP's order to purchase 24,700 Kirlin Holding shares at $1.10 per share. Further, although the Hearing Panel was unwilling to apply the best execution rule to Kirlin Holding's purchase of DL's shares because it did not have a pending purchase order at the time DL's order was placed, it found that Kirlin, Lindner and Israel violated NASD Rule 2110 by executing the sale to Kirlin Holding at $.80 per share, compared to the $1.05 price Kirlin Holding paid for Kirincic's relatives' shares.

We affirm the finding that Kirlin, Lindner, and Israel violated NASD Rules 2320 and 2110. The record is devoid of any evidence demonstrating that either Lindner or Israel was diligent in seeking the most favorable price for DL under the circumstances. Despite knowing that just prior to receipt of DL's instructions to liquidate his account, Kirlin Holding had

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[37] NASD Rule 2320(a) sets forth a number of non-exhaustive factors to be considered in determining whether a member has used "reasonable diligence," including the character of the market for the security (e.g., price, volatility, relative liquidity, and pressure on available communications), the size and type of transaction, the number of markets checked, the accessibility of the quotation, and the terms and conditions of the order, as communicated to the broker, which result in the transaction. *See also* IM-2320. NASD Rule 2320(a) was amended, effective November 8, 2006, to include the last factor.

purchased (pursuant to its repurchase program) from Kirincic's parents and cousin 240,000 Kirlin Holding shares at $1.05 per share, Israel did not inform DL's registered representative (Byrne) of these facts. Nor did Israel inform Byrne of SP's then-pending order to purchase 24,700 shares of Kirlin Holding at $1.10 per share. Israel was the only person during the afternoon of April 22, 2002, with instant access to market information and a complete picture of the trading that had occurred earlier in the day, yet he did not disclose this information to Byrne.

After speaking with Byrne, and while SP's purchase order at $1.10 per share remained open, Israel spoke with Lindner for guidance pursuant to the Firm's unwritten policy of contacting Kirincic or Lindner whenever it received a sell order for Kirlin Holding shares exceeding 10,000 shares. Although Lindner had knowledge of the earlier repurchases from Kirincic's relatives, Israel testified that he and Lindner did not discuss SP's then-pending order, and Lindner testified that he was unaware of SP's then-pending order or any other outstanding orders to purchase Kirlin Holding stock. We do not find it necessary to determine whether Lindner actually knew of the possibility that SP would purchase DL's shares. Under the circumstances, Lindner should have known that at the time he arbitrarily selected a price for DL's shares, an unexecuted purchase order existed for 24,700 shares at a price $.30 per share more than the price selected by Lindner. Further, Lindner should have been aware that the inside bid price was $1.04. Despite these facts, and despite Kirlin Holding's repurchases from Kirincic's relatives at $1.05 per share earlier that afternoon, Lindner arbitrarily selected a price of $.80 per share for DL's sell order. Moreover, Israel ignored the terms of DL's sell order and did not attempt to sell any of DL's shares on the market upon receipt of DL's sell order; rather he consulted with Lindner and at Lindner's direction sold DL's stock to Kirlin Holding at an arbitrary price that was significantly lower than SP's open purchase order, the inside bid at the time, and the prior cross trades between Kirincic's relatives and Kirlin Holding. Under these circumstances, and considering that both Lindner and Israel knew that Kirlin dominated the market for Kirlin Holding shares and accounted for most of the trading activity in the stock during the trading period, neither Lindner nor Israel was reasonably diligent in obtaining the most favorable price for DL's shares.[38]

Lindner argues that he owed no duty of best execution to customer DL but rather owed this duty solely to Kirlin Holding. Lindner is mistaken. Lindner, as co-CEO of Kirlin, owed a duty of best execution to customer DL. Rather than provide DL with best execution, Lindner arbitrarily selected a price at which another Kirlin customer (Kirlin Holding), with whom Lindner was closely affiliated and controlled, would purchase DL's shares pursuant to its repurchase program. Lindner's decision, on behalf of Kirlin Holding, to purchase DL's shares cannot absolve Lindner of his duty of best execution owed to customer DL. *Cf. NASD Notice to Members 01-22* (stating that "broker-dealers must not allow . . . the opportunity to trade with that order as principal, to interfere with its duty of best execution"); *E.F. Hutton & Co.*, 49 S.E.C. 829, 832 (1988) ("A broker-dealer's determination to execute an order as principal or agent

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[38] We note that although Kirlin Holding was generally a thinly traded stock, on April 22, 2002, there was greater liquidity in the market because of Kirlin Holding's repurchase program and SP's active trading.

cannot be a means by which the broker may elect whether or not the law will impose fiduciary standards upon him in the actual circumstances of any given relationship or transaction.").

Further, although Kirlin Holding did not have a pending purchase order at the time Kirlin received DL's request to sell and had no obligation to purchase DL's shares, once Lindner decided that Kirlin Holding would purchase DL's shares he was required to provide DL with the most favorable price possible under the circumstances absent an agreement with the customer to the contrary. Although respondents argue that the transaction between DL and Kirlin Holding was a negotiated, arms-length block trade (and thus they allegedly did not owe the duty of best execution to DL and he "must live with his decision" to accept $.80 per share), nothing in the record supports respondents' argument that the transaction (including the purchase price) was negotiated.[39]

We acknowledge that there was some confusion surrounding DL's order to sell and that Israel and Lindner were operating under the mistaken belief that DL required that his account be liquidated immediately. Nonetheless, under the circumstances Kirlin, Lindner, and Israel failed to comply with their best execution obligations, in violation of NASD Rules 2320 and 2110.

D. Procedural Issues

Respondents argue that they were denied a fair hearing and were prejudiced by the Hearing Officer's sua sponte order denying respondents the ability to issue subpoenas, pursuant to New York law, so that they could (among other things) learn the identity of traders at market making firms in Kirlin Holding stock who traded the stock in March and April 2002. Respondents further argue generally that the Hearing Panel and Enforcement were biased.

We reject these arguments. First, the Hearing Officer has the authority to rule on any and all procedural issues that arise during the course of the hearing. NASD Rule 9235(a) grants the Hearing Officer broad authority to "do all things necessary and appropriate" to discharge her duties, including resolving any procedural and evidentiary matters. At a pretrial conference, the Hearing Officer learned that respondents were considering issuing subpoenas under New York state procedural rules. Although the Hearing Officer initially declined to decide whether the issuance of such subpoenas would be proper, shortly after the pretrial conference she issued an order prohibiting respondents from issuing subpoenas in the case. The Hearing Officer further ruled that respondents could use NASD Rule 9252 to request that Enforcement invoke NASD Rule 8210 to compel the production of documents or testimony.[40] The Hearing Officer cited to

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[39] Respondents assert that had they placed a sell order on the open market on the afternoon of April 22, 2002, for all 114,000 of DL's shares, DL would have received a price less than the $.80 per share that Kirlin Holding paid for his stock. Such speculation about market interest, however, does not satisfy respondents' obligation to use diligence to obtain as favorable a price as possible under prevailing market conditions. Further, respondents incorrectly assumed that it was crucial to sell all of DL's Kirlin Holding shares by the close of trading on April 22, 2002.

[40] Indeed, respondents later filed motions pursuant to NASD Rule 9252, and in light of such motions Enforcement agreed to issue limited NASD Rule 8210 requests for Byrne's testimony at

[Footnote continued on next page]

an order in another FINRA disciplinary proceeding, published on FINRA's website, which set forth a detailed explanation as to why the New York statute permitting the issuance of subpoenas in administrative proceedings (and relied upon by respondents in this case) did not apply in FINRA disciplinary actions.[41] Under the circumstances, the Hearing Officer was within her authority to make such ruling, even without a formal request by either party to do so.

Second, the Hearing Officer properly prohibited respondents from issuing subpoenas pursuant to Article 23 of New York's Civil Practice Law and Rules ("CPLR"), Section 2302(a).[42] FINRA's Code of Procedure does not provide parties to disciplinary proceedings with subpoena authority. *See Dep't of Enforcement v. Gonchar*, Complaint No. CAF040058, 2008 FINRA Discip. LEXIS 31, at *49 (FINRA NAC Aug. 26, 2008) (holding that Section 2302 of New York CPLR does not apply to FINRA disciplinary proceedings), *appeal pending*, No. 3-13243 (filed Sep. 26, 2008); *Dep't of Enforcement v. Faber*, No. CAF010009, 2003 NASD Discip. LEXIS 3, at *36-37 (NASD NAC May 7, 2003) (holding that respondents in FINRA proceedings cannot request subpoenas), *aff'd*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277 (Feb. 10, 2004); *Thomas E. Warren, III*, 51 S.E.C. 1015, 1020 n.22 (1994) (holding that "NASD rules do not provide for the use of a subpoena"), *aff'd*, 69 F.3d 549 (10th Cir. 1995) (table). FINRA's Code of Procedure provides for discovery and testimony solely pursuant to its rules (in this instance NASD Rules 8210 and 9252), and it does not permit parties to look to state statutes to circumvent these rules. We thus reject respondents' argument and find that the Hearing Officer properly refused to permit respondents to use subpoenas.

Third, we reject respondents' argument that they were prejudiced by the Hearing Officer's refusal to permit them to issue subpoenas so that they could learn the identity of market making firms' traders and call them as witnesses. Respondents argue that the reasoning of traders at Kirlin Holding market making firms during the trading period—specifically the reasons each trader had for posting bid and ask quotes for Kirlin Holding in March and April

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the hearing and related documents. We further note that approximately 10 months after the Hearing Officer's order prohibiting the use of subpoenas, respondents filed a motion to partially vacate the order. Respondents' motion did not cite to any authority to support their argument that they could issue subpoenas pursuant to state law in a FINRA disciplinary proceeding, whereas Enforcement's opposition discussed relevant authority prohibiting the use of subpoenas in FINRA disciplinary proceedings. The Hearing Officer denied respondents' motion.

41 *See* OHO Order 05-39 (CAF040058), available at http://www.finra.org/Industry Enforcement/Adjudication/OHODisciplinaryOrders/2005/P015863.

42 N.Y. CPLR § 2302(a) provides: "Subpoenas may be issued without a court order by . . . an attorney of record for a party to . . . an administrative proceeding or an arbitration . . . in relation to which proof may be taken or the attendance of a person as a witness may be required." New York CPLR does not specifically define "administrative proceeding" as the term is used in CPLR 2302.

2002—is material to whether respondents manipulated the market for Kirlin Holding shares. Respondents, however, have not articulated how such information would be relevant in deciding whether Kirincic and Israel engaged in manipulative practices in connection with their trading of Kirlin Holding shares. In addition, we reject respondents' argument that traders at market making firms (as well as market maker price reports) would have enabled them to present the Hearing Panel with a picture of the depth of the market for Kirlin Holding shares. It is undisputed that the market for Kirlin Holding was not deep.[43]

Finally, respondents argue generally that the Hearing Panel and Enforcement were biased. In support of their claims, respondents point generally to the Hearing Panel's ultimate findings of liability, and specifically to its conclusion that Kirincic and Israel manipulated the market for Kirlin Holding shares (which was not the conclusion reached by respondents' expert but was the conclusion reached by Enforcement's expert). Respondents argue that although the Hearing Officer ultimately struck the testimony of Enforcement's expert in its entirety, the Hearing Panel improperly relied on this testimony to reach its conclusion that respondents engaged in manipulation and that such reliance evidenced the Hearing Panel's bias.

We disagree. "[U]nsubstantiated assertions of bias are an insufficient basis to invalidate NASD proceedings." *Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *39 n.16 (NASD NAC Jan. 28, 1999), *aff'd*, 54 S.E.C. 655 (2000), *pet. for review denied*, 47 F. App'x 198 (3d Cir. 2000). Adverse procedural and substantive rulings, without more, do not amount to bias. *See Dep't of Enforcement v. Epstein*, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *86-87 (FINRA NAC Dec. 20, 2007) (holding that adverse rulings against respondent, absent evidence of an extrajudicial source of prejudice, are insufficient to constitute bias), *aff'd*, Exchange Act Rel. No. 59328, 2009 SEC LEXIS 217 (Jan. 30, 2009). Moreover, the fact that the Hearing Panel did not reach the same legal conclusion as respondents' expert does not demonstrate bias. *Cf. United States v. Bilzerian*, 926 F.2d 1285, 1294-95 (2d Cir. 1991) (stating that an expert witness may not usurp the role of an adjudicator as to whether the applicable facts violate the law).[44]

Further, to demonstrate that FINRA has engaged in selective prosecution, respondents must demonstrate that they were singled out for enforcement while others similarly situated were not and that such prosecution was motivated by arbitrary or unjust considerations (e.g., race, religion, or the desire to prevent the exercise of a constitutionally protected right). *See*

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[43] Respondents further argue that Enforcement refused to provide them with certain data that formed the basis of certain of Enforcement's exhibits. The record demonstrates otherwise, and we reject respondents' claim.

[44] Further, in support of their claim of bias, respondents argue that the Hearing Panel improperly relied upon Enforcement's expert to conclude that being delisted from the NASDAQ National Market would have an adverse impact on the liquidity of Kirlin Holding stock. However, Kirlin Holding itself made similar statements in public filings dated April 1, 2002.

Yoshikawa, 2006 SEC LEXIS 948, at *28-29. The record is devoid of evidence to support such a contention. Consequently, we reject respondents' claims of bias.

IV. Sanctions

In connection with the manipulation of Kirlin Holding stock, the Hearing Panel expelled Kirlin and barred in all capacities Kirincic and Israel. The Hearing Panel separately barred Kirincic for his forgeries of customer signatures. Further, the Hearing Panel separately expelled Kirlin, and barred Lindner and Israel, for their failure to comply with best execution requirements, and ordered that Kirlin, Lindner, and Israel pay (jointly and severally) $26,163 in restitution to customer DL. After careful consideration, we affirm the sanctions imposed by the Hearing Panel in connection with the manipulation of Kirlin Holding stock and forgery. In connection with the best execution violations, we reduce the expulsion imposed upon Kirlin and bars imposed upon Lindner and Israel to one-year suspensions, and order that Lindner requalify in all capacities. We affirm the order that Kirlin, Lindner, and Israel pay, jointly and severally, $26,163 in restitution to DL, and affirm the imposition of $21,676.95 in costs upon respondents, jointly and severally.

A. Manipulation (Kirlin, Kirincic, and Israel)

The FINRA Sanction Guidelines ("Guidelines") do not specifically address market manipulation. Thus, in determining the appropriate sanctions, we look to Commission precedent regarding the gravity of the violation and to the general considerations in determining sanctions, as set forth in the Guidelines. As the Commission has made clear, "there are few, if any, more serious offenses than manipulation. Such misconduct is a fraud perpetrated not merely on particular customers but on the entire market." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *49 (Jan. 22, 2003).[45]

Kirlin, Kirincic, and Israel's misconduct was egregious, and expelling Kirlin from FINRA membership and barring in all capacities Kirincic and Israel are the only effective remedial sanctions under the circumstances. Kirincic and Israel's manipulative trading scheme was detrimental to the public interest.[46] Kirincic and Israel's manipulative conduct was

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[45] In addition, the Guidelines for misrepresentations or omissions of material fact provide guidance in this case. *FINRA Sanction Guidelines* 93 (2007), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*]. These Guidelines recommend a fine of $2,500 to $50,000 and a suspension of up to 30 business days in cases involving negligence. For intentional or reckless misconduct, these Guidelines provide for a fine of $10,000 to $100,000 and a suspension for a period of 10 business days to two years. For egregious cases, the Guidelines recommend considering a bar (or, in the case of a firm, expulsion).

[46] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 11); *see also Proudian*, 2008 FINRA Discip. LEXIS 21, at *52 (finding that respondent's manipulation "attack[ed] the integrity of free markets").

intentional, extensive, and involved more than 115 trades spanning a five-week period.[47] The entire scheme was designed to benefit Kirlin Holding, of which Kirincic owned approximately 20 percent, and Kirinic's parents and cousin sold 500,000 shares during the trading period at artificially inflated prices.[48]

Further, Kirincic and Kirlin have relevant disciplinary histories.[49] Since 2001, Kirlin has submitted four Letters of Acceptance, Waiver, and Consent ("AWCs"), pursuant to which Kirlin agreed to pay fines totaling $200,000 and restitution totaling $1,044,732. Included among the AWCs is one submitted in August 2004, pursuant to which Kirlin consented to a fine of $155,800 and restitution to customers totaling $1,044,732, and Kirincic consented to a $25,000 fine and 30-day suspension as a general securities principal, to settle allegations that, among other things, the Firm and Kirincic failed to disclose material facts and made material misrepresentations.[50]

In light of the foregoing aggravating factors and the detrimental impact that Kirlin, Kirincic, and Israel's misconduct had on the integrity of the market, we find that Kirincic and Israel present a danger to the investing public and a bar is necessary to deter them and others similarly situated from engaging in similar misconduct. Likewise, expulsion of Kirlin is necessary to ensure that it does not engage in similar misconduct in the future and to protect the investing public.

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47 *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8, 9, and 13). We recognize that Israel was out of the office for four days in April 2002. However, Israel was in the office during the remainder of the five-week trading period, and he admitted to frequently receiving orders from Kirincic and then placing them pursuant to Kirincic's instructions during the trading period. Moreover, Israel was a principal in the Firm and as head equity trader he was responsible for reviewing the order tickets of the three other traders at Kirlin's trading desk.

48 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 17).

49 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 1). The fact that Israel does not have a disciplinary record is not a mitigating factor in imposing sanctions against him. *See PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *26-27 (Apr. 11, 2008), *petition for review filed*, No. 08-1188 (D.C. Cir. May 13, 2008).

50 The August 2004 AWC also settled allegations that the Firm failed to provide customers with best execution. In addition, in March 2001, Kirlin submitted an AWC pursuant to which Kirlin settled allegations that it failed to provide customers with best execution when the Firm acted as principal. We consider this disciplinary history in connection with the best execution violations.

B. Forgery (Kirincic)

For forging documents, the Guidelines recommend a fine of $5,000 to $100,000, and a suspension in any or all capacities for up to two years in cases where mitigating factors exist.[51] In egregious cases, the Guidelines recommend a bar. The Guidelines instruct adjudicators to consider, in addition to the principal considerations and general principles applicable to all violations, the nature of the document forged and whether respondent had a good faith, but mistaken, belief of express or implied authority.[52]

We affirm the Hearing Panel's bar of Kirincic. In this case there are no mitigating factors. Indeed, several aggravating factors warrant the imposition of a bar. Kirincic signed his parents' names to four stock certificates and three letters of authorization. These documents facilitated the sale of Kirlin Holding shares from Kirincic's parents' account and the transfer of $200,000 in funds from his parents' account to SP's account (of which $75,000 was transferred during the trading period). Kirincic's forgeries helped fund SP's account, from which most of Kirincic's manipulative activity originated. The record contains no evidence that Kirincic had a mistaken but good faith belief that he had his parents' authorization to sign the documents on their behalf. Indeed, at his investigative interview in January 2005, Kirincic initially denied having signed the documents, and only after repeated questioning and consultation with counsel did he admit to having signed his parents' signatures.[53] Kirincic's forgery was not a single, isolated incident, but rather he forged the documents on six separate dates over a three-month period.[54] For all of these reasons, we find that anything short of a bar would be insufficient to remedy Kirincic's misconduct and to deter him from engaging in future misconduct.

C. Failure to Comply with Best Execution Requirements (Kirlin, Lindner, and Israel)

For failing to comply with best execution requirements, the Guidelines recommend fines of $5,000 to $50,000 and a suspension of up to 30 business days in cases involving negligence.[55] For intentional or reckless misconduct, these Guidelines provide for a fine of $20,000 to $200,000 and a suspension for a period of 10 business days to two years. For egregious cases, the Guidelines recommend considering barring an individual respondent and expelling the firm. The Guidelines instruct adjudicators to consider the nature of the best execution violation (i.e., whether the execution was at an inferior price or was untimely), and whether the violation was the result of a system malfunction.

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51 *Guidelines*, at 39.

52 *Id.*

53 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10).

54 *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

55 *Id.* at 52.

DL's sale of 114,000 Kirlin Holding shares was executed at an inferior price—$.24 below the inside bid price, $.25 below the large repurchases from Kirincic's relatives by Kirlin Holding two hours prior to DL's sale, and $.30 below SP's existing order at the time Kirlin received DL's request to sell his shares. Further, the order was not executed for more than 30 minutes after Byrne instructed his assistant to write the order tickets and almost two hours after Kirlin received DL's initial written instructions to sell the stock. The violation was not the result of a system malfunction but rather resulted from a failure to promptly execute DL's order, Lindner's reckless and arbitrary selection of a price for DL's Kirlin Holding shares, and Israel's acquiescence in executing the order. We further note that on two previous occasions Kirlin has settled allegations that it failed to comply with its duty of best execution.[56] The Commission "has stressed the importance of a broker's fiduciary obligation to get the best price for his customers, an obligation that is vital to the broker-customer relationship." *Voss & Co.*, 48 S.E.C. 39, 40-41 (1984).

Kirlin, Lindner, and Israel's failure to comply with their duty of best execution was egregious, and they were, at a minimum, reckless in failing to timely execute DL's order, failing to attempt to sell any of DL's shares on the market, and arbitrarily selecting a price at which DL's shares were sold without exercising reasonable diligence. However, under the unique facts and circumstances of this case, the Hearing Panel's expulsion of Kirlin and bars imposed upon Lindner and Israel were unnecessarily harsh. Byrne attempted but was unable to confirm the sell order with DL directly, and relied upon direction from DL's assistant to follow DL's written request to liquidate his account. This direction was not provided until late in the trading day, and Byrne, Lindner, and Israel all believed, mistakenly, that DL was near death and that it was imperative that his account be liquidated immediately. Both Byrne and Lindner were out of the office that day, and neither had instant access to market information. Moreover, the misconduct in this instance involved a single sale on one afternoon, and Kirlin's prior disciplinary history notwithstanding, Lindner and Israel's failure to comply with best execution requirements in connection with DL's sell order is the only violation we have before us. In light of the foregoing, we reduce the expulsion of Kirlin and bars of Lindner and Israel to one-year suspensions in all capacities, and order that Lindner requalify before acting in any capacity requiring registration.[57]

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[56] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 1). There is no evidence in the record, however, indicating that either Lindner or Israel were responsible for the prior allegations of misconduct.

[57] We also find that requalification in all capacities would be appropriate for Israel's failure to comply with best execution requirements. However, we decline to order requalification in light of the bar imposed upon Israel in connection with his manipulative conduct. Similarly, in light of Israel's bar and Kirlin's expulsion for their manipulation, we consider the one-year suspensions for failure to comply with best execution requirements redundant and do not impose such sanctions.

We further order that Kirlin, Lindner, and Israel pay restitution to DL. Restitution is "used to restore the status quo ante where a victim otherwise would unjustly suffer loss."[58] An order of restitution "seeks to restore a respondent's victim to the position he was in prior to the transaction by returning to the victim the amount by which the victim was deprived." *Dep't of Enforcement v. Kapara*, Complaint No. C10030110, 2005 NASD Discip. LEXIS 41, at *34 (NASD NAC May 25, 2005) (*citing Toney L. Reed*, 51 S.E.C. 1009, 1013-14 (1994)). The Guidelines provide that restitution may be ordered "when an identifiable person, member firm or other party has suffered a quantifiable loss as a result of a respondent's misconduct."[59] We affirm the Hearing Panel's order that Kirlin, Lindner, and Israel pay, jointly and severally, $26,163 (plus interest) in restitution to customer DL.[60]

V. Conclusion

We affirm the Hearing Panel's findings that: (1) Kirlin, Kirincic, and Israel manipulated the price of Kirlin Holding shares; (2) Kirincic forged his parents' signatures on seven documents; and (3) Kirlin, Lindner, and Israel failed to comply with their duty of best execution in connection with DL's sell order on April 22, 2002. Accordingly, we: (a) expel Kirlin from FINRA membership; (b) bar Kirincic and Israel in all capacities; (c) suspend Lindner in all capacities for one year, and order that he requalify before acting in any capacity requiring registration; (d) order that Kirlin, Lindner, and Israel pay, jointly and severally, customer DL $26,163 in restitution, plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), from April

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58 *Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 5); *see also Dep't of Enforcement v. Belden*, Complaint No. 05010012, 2002 NASD Discip. LEXIS 12, at *25 (NASD NAC Aug. 13, 2002) (holding that "restitution is proper when a person has suffered a quantifiable loss as a result of a respondent's misconduct"), *aff'd*, Exchange Act Rel. No. 47859, 2003 SEC LEXIS 1154, at 18 (May 14, 2003).

59 *Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

60 The Hearing Panel correctly calculated this amount as follows: (a) $7,410, representing the total that DL would have received had 24,700 of his shares been sold to SP pursuant to her order to purchase 24,700 shares at $1.10 per share instead of to Kirlin Holding at $.80 per share; plus (b) $18,753, representing the total amount that DL would have received for his remaining 89,300 shares at $1.01 per share (the lowest price that the market would have reached that day given the market manipulation) instead of $.80 per share.

22, 2002, until paid;[61] and (e) order that Kirlin, Kirincic, Lindner, and Israel pay, jointly and severally, $21,676.95 in costs.[62]

On behalf of the National Adjudicatory Council,

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

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[61] Because any proceeding to summarily suspend or expel a member that fails to pay any fine, costs, or other monetary sanction imposed in this decision would commence after December 15, 2008, when the first phase of a new Consolidated Rulebook of FINRA Rules became effective, FINRA Rule 8320 would apply to such proceeding. *See FINRA Regulatory Notice* 08-57 (Oct. 2008). Pursuant to this rule, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

Further, restitution is to be paid in the amount set forth herein. In the event that customer DL cannot be located, unpaid restitution should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of DL's last known address. Satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to effect restitution, shall be provided to staff of FINRA's Department of Enforcement, District 10, no later than 90 days after the date when this decision becomes final.

[62] The expulsions and bars are effective as of the date of this decision. We have also considered and reject without discussion all other arguments advanced by the parties.