BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of Market Surveillance Committee (n/k/a Market Regulation Committee), Complainant, vs. John Roger Faherty Spring Lake, NJ and Ninanne A. Norris Spring Lake, NJ, Respondents.	DECISION Complaint No. CMS920005 Market Surveillance Committee n/k/a Market Regulation Committee Dated: October 14, 1998

I. Summary

John Roger Faherty ("Faherty") and Ninanne A. Norris ("Norris") appealed this matter pursuant to NASD Procedural Rule 9311. Following an independent review of the entire record in this matter, we affirm in part and reverse in part the findings of the Market Surveillance Committee ("MSC")(now known as the "Market Regulation Committee").

Faherty was the head of corporate finance of former member firm Hibbard Brown & Co., Inc. ("Hibbard" or "the Firm").[1] The complaint alleged that Hibbard and certain of its associated persons, including Faherty, engaged in misconduct in connection with sales of First National Realty Associates ("FNRA") and Linkon Corporation ("LKON") securities. We affirm the MSC's findings as follows:

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[1] Hibbard settled the allegations against it. In October of 1994, Hibbard filed a voluntary petition for relief pursuant to Chapter 11 of the United States Bankruptcy Code and a Form BDW to withdraw from NASD membership. In February of 1996, Hibbard was expelled from NASD membership.

under cause one that Faherty aided and abetted Hibbard's manipulation of the FNRA market in violation of Section 15(c) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 15c1-2;[2] and

under cause twelve that Norris "parked" her registration, i.e., maintained it at Hibbard when she was not in fact engaged in the investment banking or securities business of the Firm, in violation of Conduct Rule 2110 and Part II, Section 1(b) of Schedule C to the NASD's By-Laws (now known as and hereinafter referred to as "Membership and Registration Rule 1031").

We affirm in part and dismiss in part the MSC's findings under cause fourteen that Norris failed timely to sign and failed to notarize an affidavit which contained the substance of her telephonic interview with NASD staff and that she failed to appear for investigative testimony, in violation of Conduct Rule 2110 and Article IV, Section 5 of the NASD's Rules of Fair Practice (now known as and hereinafter referred to as "Procedural Rule 8210"). We dismiss the MSC's findings under causes two and three that Faherty, through Hibbard, charged retail customers undisclosed, excessive mark-ups in more than 9,000 sales of FNRA and LKON securities, in violation of Article III, Section 4 of the NASD's Rules of Fair Practice (now known as and hereinafter referred to as "NASD Conduct Rule 2440"), Conduct Rules 2110 and 2120, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5.[3]

We affirm the MSC's dismissal of the allegations in cause thirteen that Faherty held a limited power of attorney over Norris' account at another member firm without informing that member firm that he was associated with Hibbard, in violation of Conduct Rule 2110 and Article III, Section 28 of the NASD's Rules of Fair Practice (now known as and hereinafter referred to as "Conduct Rule 3050"). In addition, we affirm the MSC's dismissal of the allegations in cause fifteen that Faherty failed to respond to NASD staff investigative questions, in violation of Conduct Rule 2110 and Procedural Rule 8210.[4]

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[2] The MSC also found that Faherty engaged in the manipulative scheme, in violation of Article III, Sections 1 and 18 of the NASD's Rules of Fair Practice (now known and hereinafter referred to as "NASD Conduct Rules 2110 and 2120"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Exchange Act Rule 10b-5. In light of our finding that Faherty aided and abetted Hibbard's violations of Section 15(c) and Rule 15c1-2, we do not reach the issue of his involvement as a primary violator in the manipulation. We believe that our finding that he aided and abetted Hibbard's manipulation of the FNRA market amply supports the sanctions that we have determined to impose on him.

[3] We conclude that the record is not sufficient to hold Faherty responsible as a primary violator with respect to Hibbard's pricing of FNRA and LKON common stock, and thus Faherty cannot be and has not been sanctioned with respect to those causes. In addition, we have considered some of Faherty's activities in connection with the FNRA and LKON distributions as evidence of Faherty's scienter with respect to cause one.

[4] Cause thirteen alleged that when Faherty was granted power of attorney over an account that Norris maintained with Fahnestock & Co., Inc. ("Fahnestock"), he failed to advise Fahnestock of his association with Hibbard. Faherty claimed that the relevant Fahnestock representative had been aware of Faherty's association

We censure Faherty, bar him from associating with any member firm in any capacity, and fine him $150,000. We censure Norris and fine her $5,000.

II. Background

Faherty entered the securities industry in 1969. From July of 1988 until December of 1991, he was registered as a general securities principal of Hibbard. From August 1990 through July 1991, he served as the Firm's Executive Vice President of Corporate Finance. Faherty stopped working in the securities industry in December 1991, and he currently is not active in the industry.

Norris entered the securities industry in 1975. She was registered as a general securities representative with Hibbard from November 1988 through August 1990. Before that, she was registered as a general securities representative with member firms Rooney, Pace Inc. ("Rooney, Pace") and Faherty & Faherty, Inc. At all times relevant to the complaint, she and Faherty were married. She is not currently registered.

In addition to Faherty and Norris, the complaint in this matter named as respondents Hibbard, Hibbard's president and chief executive officer, Richard P. Brown ("Brown"), Hibbard's director of compliance, Berry DeJuan Stroud ("Stroud"), Hibbard's head trader, Anthony Nadino ("Nadino"), and Allen R. Sacharow ("Sacharow"). The proceedings are final as to all respondents other than Faherty and Norris.

III. Discussion

A. Faherty

Faherty has not disputed the MSC's findings under causes one through three that Hibbard and other respondents manipulated the market in FNRA common stock and charged fraudulently excessive mark-ups in retail sales of FNRA and LKON common stock, and we fully agree with and adopt the MSC's findings in this regard. As discussed below, although Faherty denies any responsibility for the manipulation and mark-ups, we find that he aided and abetted Hibbard's manipulation of the FNRA market.

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with Hibbard. The MSC dismissed cause thirteen because the record did not include testimony from the Fahnestock representative. We concur with the MSC that the record is insufficient to find that Faherty violated Conduct Rules 2110 and 3050 as alleged in cause thirteen.

We also affirm the MSC's dismissal of cause fifteen, which alleged that Faherty failed and refused to respond to staff investigative questions. Faherty appeared as requested on December 4, 1991 to respond to staff investigative questions. During the deposition, Faherty's attorney became concerned that he might have had a conflict of interest as a result of his representation of Hibbard, so Faherty requested an adjournment until he could retain an attorney who was not also representing Hibbard. Staff agreed to the adjournment and reconvened with Faherty and his new attorney on December 18, 1991. After Faherty answered many questions, Market Regulation staff did not object to his request to adjourn. Faherty reappeared as requested on April 29, 1992, and he responded to all questions. We concur with the MSC that Faherty did not fail and refuse to respond to staff requests for information in violation of Conduct Rule 2110 or Procedural Rule 8210.

1. The FNRA Manipulation and Mark-Ups. Before addressing Faherty's involvement in the FNRA misconduct, we will describe the misconduct itself. Although we have not affirmed the MSC's finding that Faherty was a primary violator with respect to Hibbard's FNRA mark-ups, we discuss the FNRA mark-up violation in detail in this decision, since the excessive mark-ups are part of Hibbard's overall manipulative scheme, which Faherty aided and abetted.

FNRA was founded in 1988 by former employees of Merrill Lynch Realty ("Merrill Lynch") who intended to acquire Merrill Lynch's real estate business. Meanwhile, Emphatic Mergers, Inc. ("EMI"), a shell company promoted by Yves Hentic ("Hentic"), went public in December 1989 by offering 25,000 units. Each unit consisted of two shares of common stock, 30 Class A warrants, and 30 Class B warrants. In April 1990, FNRA went public through a reverse merger with EMI. FNRA then operated as a residential real estate brokerage company. On April 2, 1992, however, it filed a voluntary petition for relief pursuant to Chapter 11 of the United States Bankruptcy Code, and it ceased operations thereafter.

In August 1990, Faherty met with representatives of FNRA and discussed with them its need to acquire additional capital. At Faherty's suggestion, FNRA created C and D warrants issuable upon the exercise of the A and B warrants (one C warrant for each A warrant exercised and one D warrant for each B warrant exercised). Each warrant could be converted into one share of common stock, and the exercise prices were $2 (Class A), $2.50 (Class B), $3 (Class C), and $5 (Class D). On September 14, 1990, Hibbard purchased all of the 1.5 million outstanding A and B warrants at a price of $.75 per warrant. This gave Hibbard control over the public float in FNRA: Only 50,000 shares of common stock had been issued as a result of the original public offering of EMI, while Hibbard's Class A and B warrants gave it the right to purchase 1.5 million shares of common stock, and Hibbard had the right to obtain 1.5 million Class C and D warrants -- convertible to 1.5 million more shares of common stock -- by exercising the Class A and B warrants.

Hibbard was never an underwriter or market maker for FNRA. From September 14 through October 31, 1990 ("the FNRA Review Period"), however, Hibbard sold short more than two million shares of FNRA common stock to retail customers at prices ranging from $6.50 to $7 per share. Between October 5 and 31, 1990, Hibbard exercised all 1.5 million A and B warrants, obtaining 1.5 million shares of common stock at prices of $2 to $2.50 per share.[5]

Although Hibbard did not hold itself out as a market maker in FNRA, during the Review Period, in terms of number of shares sold, Hibbard's retail activity alone accounted for 92.05% of the total market volume. In terms of number of trades, Hibbard's retail activity accounted for 99.36% of all market transactions during the Review Period. Hibbard accounted for less than 10% of the purchase volume of FNRA common stock during the

5 None of the Class C and D warrants were exercised during the Review Period.

Review Period, yet it controlled 97% of the public float by virtue of its ownership of 1.5 million A and B warrants.[6]

The MSC found that, as alleged in causes one and two, Hibbard manipulated the market in FNRA common stock during the FNRA Review Period by acquiring at a low price all FNRA A and B warrants (thereby making Hibbard the beneficial owner of 97% of the public float) and engaging in a massive effort to sell the stock to retail customers without disclosing: Hibbard's beneficial ownership of the majority of the public float; Hibbard's control of FNRA; the fact that no market for FNRA stock existed away from Hibbard; and the fact that Hibbard was charging retail customers prices not related to the prevailing market price for the stock. The MSC found that Hibbard dominated and controlled the market for FNRA during the Review Period. The MSC also found that Hibbard charged retail customers undisclosed, excessive mark-ups in 6,305 retail sales of 2,074,051 shares of FNRA common stock, with the mark-ups in excess of 5% totaling $7,484,509 and the mark-ups in excess of 10% totaling $7,166,182.

We agree with the MSC's findings that Hibbard engaged in a fraudulent manipulation of the market in FNRA common stock. The record in this case possesses many of the classic "earmarks of a manipulation." In re Patten Securities Corporation, Exchange Act Rel. No. 32619 (July 12, 1993). Manipulation is the deceptive movement of a security's price accomplished by an intentional interference with the forces of supply and demand. In re Pagel, Inc., 48 S.E.C. 223 (1985), aff'd, 803 F.2d 942 (5th Cir. 1986). During the FNRA Review Period, Hibbard: dominated and controlled the market in FNRA common stock; sold the vast majority of all FNRA securities sold; had access to an abundant supply of FNRA stock by virtue of its ownership of all warrants (which it had purchased at favorable prices); controlled the public float; and sold short in a rising market with no market risk (because of its large position in warrants). There was no explanation for the price increases (which Hibbard controlled) other than manipulation since, prior to the Review Period, there was scant investor interest in FNRA common stock, there were no known favorable developments for FNRA that should have increased investor interest, and there was little interest in FNRA common stock away from Hibbard. Like the MSC, we believe that Hibbard's two purchases from Datek are evidence of an attempt to establish an illusory price and to create the impression of interest in FNRA away from Hibbard.

We further agree with the MSC's findings that Hibbard charged its retail customers undisclosed and fraudulently excessive mark-ups. We find that Market Regulation staff properly computed Hibbard's mark-ups based on Hibbard's cost in acquiring and exercising the FNRA warrants. In cases in which a firm dominates and controls a market, the appropriate method for calculating the prevailing market price for the security is the cost that the firm paid in the inter-dealer market (or retail market in the absence of inter-dealer trades)

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[6] Only 14 other firms effected transactions in FNRA during the Review Period. The firm with the next highest trading volume was responsible for only .125% of the transactions. That firm, Datek Securities Corporation ("Datek"), purchased a total of 22,180 shares of FNRA common stock from Hibbard, and then (in two transactions) sold back 20,000 shares at a small profit.

to acquire the stock, In re Frank L. Palumbo, Exchange Act Rel. No. 36427 (Oct. 26, 1995), and where a firm has adduced no evidence of any additional costs, the firm's cost in acquiring stock through the contemporaneous exercise of warrants is properly the sum of its costs in purchasing and exercising the warrants, In re Hibbard, Brown & Company, Inc., Exchange Act Rel. No. 35476 (Mar. 13, 1995). We hold that Hibbard's mark-ups in its sales of FNRA, all of which exceeded 10%, were fraudulently excessive.[7]

2. Faherty's Involvement With FNRA. Faherty was a director of Hibbard and the Executive Vice President of its corporate finance department. His office was adjacent to Brown's, and he shared a secretary with Brown. His job was to locate attractive corporate financing candidates for Hibbard to underwrite and attractive issues for Hibbard to sell in the retail market. Hibbard compensated Faherty as an independent contractor rather than as an employee. Faherty testified that he earned a consulting fee of $15,000 per month and, in theory, an annual bonus of one percent of the Firm's overall gross profits. He stated, however, that he received the bonus only during his first year of employment.

Hentic introduced Faherty to FNRA during a series of meetings with FNRA principals in the Summer of 1990. At that time, FNRA was eager for its A and B warrant holders to exercise the warrants to generate capital for the company. During these meetings, Faherty suggested to FNRA that the company should consider issuing C and D warrants without cost to holders of the A and B warrants who exercised the A and B warrants in order to generate more capital for the company. FNRA ultimately followed Faherty's advice.

Faherty acknowledged that the ability to control FNRA's float was part of what made FNRA attractive to him. He testified that after reviewing financial and other information regarding FNRA and meeting with FNRA officials on several occasions, he concluded that FNRA was an attractive opportunity for Hibbard. He admitted that he knew that the majority of the public float in FNRA common stock was held in the warrants, because subsequent to FNRA's reverse merger with EMI, only 50,000 shares of common stock were freely tradeable.

In August 1990, Faherty recommended to Brown that Hibbard purchase the FNRA Class A and B warrants, which were then held by the original EMI unit holders. Faherty provided Brown with background information on FNRA and prepared a memorandum about the company and its financial prospects.[8] Faherty told Brown and Nadino where Hibbard

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[7] Like the MSC, we find that Hibbard did not disclose to its customers the excessive nature of its prices or its dominant position in the FNRA market. Brown confirmed that Hibbard's sales force was not told of Hibbard's acquisition of the entire supply of FNRA Class A and B warrants and would not have been informed of Hibbard's costs in acquiring and exercising the warrants. Therefore, the sales force could not have informed the retail customers of these facts. In addition, the customer confirmations did not disclose these facts.

[8] The memorandum that Faherty prepared for Brown, which indicated that FNRA common stock was trading in the over-the-counter market at $6.50, provided estimated financial figures for the year ended August 31, 1990. It estimated total sales of $21,000,000, gross profits of $7,500,000, and a net loss of $(2,600,000). These estimates were wrong. FNRA's Form 10-K for the year ended August 31, 1990, which was filed in

could purchase the warrants, and he gave Brown a price range within which he believed the warrants could be purchased. Nadino recalled that when he contacted the firms from which he purchased the warrants, he learned that Faherty had already advised the firms that he would be contacting them. Faherty asserted that he did not, however, set the final purchase price. He also claimed to have had no involvement in the exercise of the warrants or any aspect of the Firm's retail sales.

On August 22, 1990, per Brown's instructions, Faherty negotiated Hibbard's purchase of FNRA warrants from Grady Hatch & Company, Inc. ("Grady Hatch"), the firm that had underwritten the 1989 offering of EMI (the shell company with which FNRA had combined in the reverse merger). On September 14, 1990, Hibbard acquired all 1.5 million outstanding FNRA A and B warrants at $.75 per warrant. When Hibbard bought the FNRA A and B warrants, FNRA's common stock was trading at approximately $6 per share. From September 19 through October 31, 1990, Hibbard sold short more than two million shares of FNRA common stock to its retail customers at prices ranging from $6.50 to $7 per share.

Having identified the opportunity represented by FNRA and having been privy to Hibbard's intentions, Faherty was also alert to the opportunity for personal gain. On August 9, 1990, Faherty's wife, Norris, opened an account at Fahnestock over which Faherty exercised a limited power of attorney. On August 31, 1990, Norris purchased 75,000 FNRA A warrants and 75,000 FNRA B warrants in her account at $.07 per warrant. On September 14, 1990, Fahnestock sold the warrants on Norris' behalf to Hibbard at a price of $.75 per warrant. Norris related that Faherty referred her to Fahnestock even though she already had an account at another brokerage firm, recommended the trade, and placed the buy order. Norris stated that she did not know who made the actual call to sell the securities, but knew when she sold that the price had increased based on conversations with Faherty. Based on Faherty's advice, Norris made a profit of $102,000 in the space of two weeks. Faherty's trading in Norris' account at widely different and apparently arbitrary warrant prices, just in advance of Hibbard's manipulative sales efforts, strongly suggests that Faherty had advance knowledge of the manipulative scheme. In addition, the wild fluctuation in these warrant prices, of which Faherty was aware, tends to demonstrate the illusory nature of the $6.50

December 1990, reported total sales of $17,175,074, net commission revenue of $6,082,753, and a net loss of $(5,129,438).

In early August, Hentic had provided Faherty with a post-effective amendment to FNRA's Form S-18 Registration Statement that discussed the reasons for FNRA's $1,284,927 loss in 1989. It indicated that the loss resulted partly from its failed attempt to acquire Merrill Lynch's residential real estate business, partly from costs associated with other acquisitions, and partly from insufficient size to cover corporate overhead.

Faherty's memorandum to Brown did not discuss in adequate detail the reasons for FNRA's prior losses. Moreover, Faherty's memorandum projected earnings per share of $.48 and net income of more than $2 million for 1991. We concur with the MSC that these figures were misleading, given the number of shares that would enter the market upon exercise of the warrants and given the company's prior losses. We note that similar information was included in the sales material that was provided to the sales staff.

price for FNRA common stock that Faherty put forth in the internal memorandum that he prepared for Hibbard.[9]

After Hibbard bought the A and B warrants, Brown advised Faherty that he was willing to exercise them if FNRA reduced the exercise price of the D warrants.[10] Brown asked Faherty to negotiate such a reduction. Faherty negotiated with FNRA officials, and in October 1990, FNRA agreed to reduce the Class D warrant exercise price to $3. Between October 5 and 31, 1990, Hibbard exercised all 1.5 million A and B warrants (thereby obtaining FNRA common stock at prices of $2 to $2.50 per share to cover short sales which had been executed at $6.50 to $7 per share).

Faherty was Hibbard's exclusive contact with FNRA. In a letter dated October 2, 1990, from FNRA Chairman Jay Torok ("Torok") to Faherty, FNRA confirmed its agreement to reduce the exercise price of the Class D warrants from $5 per share to $3 per share. The letter further stated that Hibbard's help as FNRA's investment advisor and investment banker was appreciated and that FNRA expected "the full A and B warrant exercise funds [to be] available as [they had] agreed." Additionally, in a November 26, 1990 letter to Faherty, Torok requested that he and Faherty "get together" to discuss FNRA's C and D warrant conversion and sale.

Faherty took part in Hibbard's marketing effort as an extension of his investment banking responsibilities. Hibbard's research department prepared and disseminated to its sales force promotional material on FNRA based on a memorandum that Faherty prepared, and Faherty's memorandum had identified a market price of $6.50. Faherty reviewed the research material before it was disseminated to the sales force.

Faherty's participation in Hibbard's marketing efforts was further evidenced by his participation in a nationwide conference call/sales meeting with Hibbard branch offices in which FNRA was discussed. Faherty provided the sales force with an investment banking overview of FNRA. Although this was a sales meeting intended to encourage the sales force to sell FNRA, Faherty claimed that the meeting participants did not discuss the retail pricing of the stock.

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9 We have not affirmed the MSC's findings that Faherty should be held responsible as a primary violator for Hibbard's fraudulently excessive mark-ups in sales of FNRA and LKON common stock to public customers. This notwithstanding, we find that Faherty's conduct with respect to these two issuers was remarkably similar and that certain aspects of his conduct with respect to LKON are noteworthy in connection with our discussion of Hibbard's manipulation of the FNRA market. To this end, we note that Faherty also profited handsomely in connection with his investment banking activities in LKON. On January 10, 1991, Norris purchased through her Fahnestock account 3,300 units of LKON at $8 per unit, for a total of $26,693.55. Each unit consisted of two shares of common stock, 30 Class A warrants and 30 Class B warrants. One day later, on January 11, Fahnestock sold the 99,000 LKON A warrants and 99,000 LKON B warrants to Hibbard at $.735 per warrant, for a total of $145,000. Based on the foregoing transactions, Norris made a profit of $118,306.45 in two days.

10 Hibbard stood to benefit from the change in exercise price because it had arranged, through Faherty, to receive C and D warrants from FNRA without cost when it exercised the A and B warrants.

3. Conclusions as to Faherty's Responsibility for the FNRA Manipulation. We find that Faherty aided and abetted Hibbard's violation of Section 15(c) of the Exchange Act and Rule 15c1-2 thereunder in connection with Hibbard's manipulation of the FNRA market.

Courts have imposed liability for aiding and abetting when the following three elements have been established: (1) another party has committed a violation; (2) the accused aider and abettor knowingly and substantially assisted the principal violation; and (3) the accused aider and abettor had a general awareness that his role was part of an overall activity that was improper. In re Kirk L, Knapp, 50 S.E.C. 858, 860 (1992); In re RFG Options Company, 49 S.E.C. 878, 883 (1988); see also In re George Salloum, Exchange Act Rel. No. 35563 (Apr. 5, 1995) (trader who set excessive prices aided and abetted his firm's violation of anti-fraud provisions, including Section 15(c)(1) of the Exchange Act).

As discussed above, we determine that Hibbard manipulated the market for FNRA common stock, and therefore violated Section 15(c) of the Exchange Act and Rule 15c1-2 thereunder. The first prong of the test for aider and abettor liability is therefore satisfied.

We also find that Faherty knowingly and substantially assisted in Hibbard's manipulation of the FNRA market and that, based on his experience in the industry, he understood the violative nature of such a manipulation. Faherty knowingly and substantially assisted Hibbard's manipulation by: introducing Hibbard to FNRA; acting as Hibbard's sole contact with FNRA; assisting Hibbard with its acquisition of all outstanding FNRA warrants and with its obtaining control of the public float for FNRA common stock; touting FNRA's alleged merits to Brown and to Hibbard sales representatives and participating in Hibbard's marketing efforts; negotiating the issuance of and reduction in exercise price of FNRA C and D warrants (thereby further enabling Hibbard to control the supply of FNRA securities); and encouraging Hibbard's exercise of the A and B warrants. We find that Faherty intended, from the outset, for Hibbard to acquire the FNRA warrants so that it could dominate, control and manipulate the FNRA market. The facts are compelling.[11] Faherty:

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[11] Faherty's role in assisting Hibbard's domination and control of particular stocks apparently was not limited to this issuer. He played a similar role with respect to Hibbard's domination and control of the LKON market. Faherty identified both FNRA and LKON as issuers with which Hibbard should become involved, performed due diligence investigations of both companies, gave Brown background information on the companies, suggested purchase prices for warrants to Brown, and advised Brown as to where the warrants could be purchased. Faherty was the only person at Hibbard who had contact with either company. Faherty negotiated a reduction in the exercise price of LKON warrants, just as he had persuaded FNRA to reduce the exercise price of its Class D warrants. Moreover, as he had with respect to FNRA warrants, Faherty purchased LKON units in his wife's account ahead of Hibbard's purchases. As with FNRA, Faherty participated in a sales conference call in which LKON was discussed, and he briefed the Hibbard sales force as to the attributes of LKON.

Furthermore, Faherty admitted that he chose both companies in part because he knew that Hibbard could acquire warrants at favorable prices and that, upon exercise of the warrants, Hibbard would "control the float." We find that Faherty's goal was always to ensure that Hibbard controlled the float in both stocks in order to obtain enhanced opportunities for profit.

was a principal, director, and head of corporate finance who worked very closely with Brown, Hibbard's president;

admittedly identified FNRA as an opportunity that was appealing because Hibbard could control the public float for the common stock;

was responsible for bringing FNRA to Hibbard and was the only person at the firm who had contact with FNRA[12];

orchestrated his wife's purchase (and sale at a profit) of FNRA warrants;

conducted a due diligence investigation of FNRA;

assisted Hibbard in acquiring all outstanding warrants and controlling the public float for the common stock, including recommending a purchase price for the warrants, identifying selling firms, and advising selling firms that Nadino would be calling to buy;

encouraged Brown to exercise the Class A and B warrants;

participated in Hibbard's sales meetings about FNRA, and provided Brown and the Hibbard sales staff with marketing information on FNRA, including a reference to a suggested market price of $6.50 per share and certain unduly optimistic projections[13]; and

profited through his wife's transactions and stood to profit through his bonus from Hibbard's misconduct.

We do not find credible Faherty's contention that he was not familiar with the sales price of FNRA common stock. Based on our collective experience in the securities industry, we find his contention that prices were not discussed during the conference call/sales meeting to be implausible, given the purpose of the meeting and the subsequent marketing efforts of the sales force. In addition, we find that the reference on the informational memorandum that Faherty prepared for Brown to a market price of $6.50 for FNRA common stock suggests that

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12 Indeed, Faherty's relationship with FNRA suggested that he had some control over the company. In March 1991, at Faherty's request, Hibbard lent $100,000 to FNRA, and in June 1991, Faherty "leaned on" FNRA to encourage it to lend $300,000 to Graystone Corporation ("Graystone"), another company that Hentic promoted, for which Hibbard helped to obtain financing. Graystone used approximately $200,000 of the money that FNRA lent it to repay Hibbard on a line of credit that Hibbard had extended to it.

13 Faherty was personally instrumental in the national marketing of the issuer's common stock, providing oral and written promotional information to Hibbard's sales force, including misleading information. We do note, however, that FNRA's chief financial officer, who was a certified public accountant, had supplied financial information to Faherty upon which Faherty had relied.

Faherty intended for Hibbard to sell FNRA common stock at or around that price. Furthermore, Faherty's admitted intention in recommending FNRA to Hibbard was for Hibbard to convert the warrants and profit from sales of the underlying common stock. He would have had to know the sales price in order to determine whether his goal was being achieved.

The pervasiveness of Hibbard's manipulative scheme also supports our findings regarding Faherty's knowledge of and assistance in Hibbard's manipulative scheme. Faherty has not disputed that the Firm was engaged in a massive manipulative scheme. Hibbard's sales force was consumed with selling FNRA common stock, selling more than two million shares -- in 6,305 retail transactions -- in less than two months. This was so notwithstanding that the company had no favorable business developments during the Review Period and, prior to the Review Period, had enjoyed little investor interest. Faherty knew how many FNRA warrants Hibbard had acquired (and therefore knew how many shares of common stock Hibbard stood to acquire upon exercise of the warrants). Given the scale of Hibbard's manipulation of the FNRA market, we find it inconceivable that Faherty did not know of the manipulation. Although Faherty asserts that his involvement was peripheral, the foregoing facts portray him as a central participant in the success of Hibbard's fraudulent scheme.

The pricing of the warrants also supports our findings regarding Faherty's knowledge of Hibbard's manipulative scheme. Faherty knew that Hibbard had purchased all of the 1.5 million outstanding A and B warrants for the same price ($.75 per warrant) and that the exercise prices ranged from $2 to $2.50 per share of common stock.[14] He also knew that the price for the warrants had increased dramatically and inexplicably from $.07 per warrant in August 1990 (when he purchased FNRA warrants in his wife's account) to $.75 per warrant in September 1990 (when he assisted Hibbard with its acquisition of FNRA warrants). Taken together, these facts indicate that the $6.50 price that Faherty listed in his internal memorandum regarding FNRA was indeed illusory and that Hibbard was involved in a manipulation of the FNRA market.

We further find that Faherty was fully aware that the Firm's activities, in which he played a key role, were improper and that he was involved in Hibbard's manipulation of the market for FNRA, thereby satisfying the third prong of the test for aiding and abetting liability. Faherty was not new to the securities industry. He entered the industry in 1969 and was first registered as a general securities principal in 1982. The Securities and Exchange Commission and the courts have long acknowledged that the manipulation of a market for a security by dominating and controlling the supply of that security constitutes fraudulent misconduct. In re Pagel, Inc., 48 S.E.C. 223, 228 (1985) ("Where individuals occupying a dominate market position engage in a scheme to distort the price of a security for their own benefit, they violate the securities laws by perpetrating a fraud on all public investors."), aff'd,

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[14] Since the exercise prices for the A and B warrants differed, we find it troubling, and not in keeping with economic reality, that the purchase prices for the A and B warrants were the same. This fact, along with the others mentioned above, should have caused Faherty to question the $6.50 price for FNRA common stock that he listed in the internal memorandum that he prepared for Hibbard.

803 F.2d 942, 946 (8th Cir. 1986); see also In re Norris & Hirshberg, Inc., 21 S.E.C. 865, 881 (1946) ("[T]he vice inherent in respondent's . . . sales without full disclosure of the fact that the market was dominated by respondent is the same as that inherent in a classic manipulation: The substitution of a private system of pricing for the collective judgment of buyers and sellers in an open market."), aff'd, 177 F.2d 228 (D.C. Cir. 1949). As a securities professional, Faherty was on notice that Hibbard's activities in the FNRA market were improper.

Based on the foregoing, we affirm the MSC's findings that Faherty aided and abetted Hibbard's manipulation of the FNRA market as alleged in cause one.[15]

B. Norris

1. Parking Registration. We affirm the MSC's finding under cause twelve that Norris maintained her registration at Hibbard when she was not in fact engaged in the investment banking or securities business of the Firm. The Central Registration Depository ("CRD") indicates that Norris was registered with Hibbard as a general securities representative from November 1, 1988 through August 15, 1990.

Membership and Registration Rule 1031 states, in pertinent part, that a member shall not make application for the registration of any person as a representative where there is no intent to employ such person in the member's investment banking or securities business.[16] NASD Notice to Members 89-49 reminded members and associated persons that the NASD's Rules specifically prohibit members from maintaining registrations for persons: who no

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[15] On appeal, Faherty contended that he had been denied due process in that he was denied the opportunity to call other respondents in this matter as witnesses on his behalf. Because we do not believe that Faherty was treated unfairly, we reject his procedural argument.

All of the respondents (except Sacharow, who had settled), participated with counsel in the first 22 days of the MSC hearing. On the twenty-third day, respondents Brown, Stroud, and Nadino advised the hearing panel that their attorneys had withdrawn, and they requested a continuance to retain new counsel. The hearing panel denied the request, and Brown, Stroud, and Nadino declined to participate in the remainder of the hearing without counsel. Faherty's counsel did not request that the MSC hearing panel invoke its authority under Procedural Rule 8210 to force other respondents to testify, nor did he indicate that he believed that his defense could not be presented adequately without testimony from those individuals.

We believe that Faherty was treated fairly. The Securities and Exchange Commission has rejected similar claims of prejudice in cases in which the respondent did not specifically request that the NASD invoke its authority to require testimony. See In re Jay Frederick Keeton, Exchange Act Rel. No. 31082 (Aug. 24, 1992) (procedural argument rejected where respondent neither attempted to call other witnesses nor requested NASD to compel testimony); In re Eugene T. Ichinose, 47 S.E.C. 393 (1980) (same). It is the respondent's obligation to marshal all evidence in his defense, In re Ronald Earl Smits, 50 S.E.C. 1020 (1992), and the record does not show that Faherty made any effort to obtain the other respondents' testimony or to request that the NASD compel the testimony. Furthermore, the record contains extensive investigative testimony from these three individuals, and each testified briefly during an earlier portion of the hearing.

[16] NASD General Provision 115(a) states that persons associated with a member have the same duties and obligations as a member under the NASD's Rules. Thus, Rule 1031's proscription applies to individuals associated with members as well as to firms.

longer function as principals or representatives of the firm; who no longer are active in the member's investment banking business; or who wish to avoid the re-examination requirement applicable to persons who are not registered for more than two years.

We find, based on Norris' own admissions, that Norris registered with Hibbard in order to avoid the re-examination requirement that she would have faced had she not registered with Hibbard. She acknowledged in her testimony that she never was employed by Hibbard and that she never had received a salary from it. Although she argued that she was entitled to be registered because she had assisted her spouse, Faherty, with his corporate finance functions at home, both Faherty and Brown confirmed that she never was employed by Hibbard and that Hibbard never compensated her.

Moreover, in a signed statement dated January 31, 1992 (six months prior to the filing of the complaint in this matter), Norris confirmed her previous statements to Market Regulation staff that she did not work at Hibbard and that she had not worked in the securities industry since her affiliation with Rooney, Pace, which ended on February 3, 1987. Norris admitted in the statement that she had registered with Hibbard because she did not want her securities license to expire and that she had been unemployed since leaving Rooney, Pace. Furthermore, in a letter to Market Regulation staff dated April 3, 1991, Norris' former counsel referred to Norris' registration with Hibbard as a "nominal transfer of registration."

We find, based on this evidence, that Norris registered with Hibbard for the purpose of avoiding the requirement to requalify by examination and not because she was engaged in the investment banking or securities business of the Firm. Her last registration prior to her registration with Hibbard ended on February 3, 1987. She would have had to requalify by examination before re-activating her registration if she had sought to re-enter the industry when two or more years had passed after February 3, 1987.[17] Thus, in February 1989 (three months subsequent to the commencement of Norris' registration with Hibbard), Norris would have become subject to the requirement to requalify by examination to re-enter the industry. Based on Norris' own statements and those of her former attorney, we find that she "parked" her registration with Hibbard in order to avoid the re-examination requirement, in violation of Conduct Rule 2110 and Membership and Registration Rule 1031.

2. Failure to Respond. We affirm the MSC's findings under cause fourteen that Norris failed timely to sign and failed to notarize an affidavit which contained the substance of her telephonic interview with Market Regulation staff. We dismiss the MSC's finding that she failed to appear for investigative testimony on November 15, 1991.

Norris responded to Market Regulation staff questions during a telephonic interview on June 5, 1991. On June 11, 1991, Market Regulation staff sent Norris a memorandum in which were reduced to writing the contents of Norris' telephonic interview. The memorandum contained a place for Norris' signature, the date, and notarization. By letter

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[17] Membership and Registration Rule 1031(c) states that a person whose most recent registration has been terminated for a period of two or more years immediately preceding the date of receipt by the NASD of a new application for registration shall be required to pass a qualification examination before becoming registered.

dated September 5, 1991 from Norris' attorney to Market Regulation staff, Norris' attorney advised staff that he would forward the signed affidavit once he was able to review a transcription of the telephonic interview. By letter dated November 26, 1991 from Market Regulation staff to Norris' attorney, Market Regulation staff indicated that Norris still had not returned the affidavit. Norris ultimately returned the statement signed, but not notarized or dated. Based on the record evidence, we find that Norris failed timely to provide Market Regulation staff with a signed statement, as requested by the staff, and that she failed to have the statement notarized, in violation of Conduct Rule 2110 and Procedural Rule 8210.

Although the MSC found that Norris failed to appear for investigative testimony on November 15, 1991, we reverse this finding because the record contains no evidence that Market Regulation staff requested such an appearance. Although the record contains a letter from Market Regulation staff to Norris' attorney dated November 26, 1991 that stated that Norris had failed to appear on November 15, the record contains no evidence that staff had requested her appearance or that she or her attorney were aware of the request. Norris denied knowledge of such a request. In light of the dearth of evidence contradicting her testimony, we must find that Norris was not notified of staff's desire for her to appear on November 15. We therefore dismiss the MSC's findings in this regard.

IV. Sanctions

Like the MSC, we find that Faherty played a key role in Hibbard's misconduct and that his involvement was necessary and instrumental in Hibbard's manipulation of the FNRA market. At a minimum, Faherty knowingly orchestrated the crucial initial stages of Hibbard's manipulation of the FNRA market. Faherty's misconduct is a matter of the highest gravity, and it requires effective remediation in the public interest.

As to Faherty, we affirm the censure and bar imposed by the MSC. In lieu of the $500,000 fine imposed by the MSC, we impose a fine of $150,000.[18] We note that the MSC's decision does not indicate how the MSC arrived at a figure of $500,000 for the fine imposed as to Faherty. In arriving at the $150,000 fine, we have considered the role that Faherty played in Hibbard's manipulation of the FNRA market. We note that, although he was an integral part of Hibbard's overall manipulative scheme, he was not the only party responsible for the violations. Although we believe that Faherty cannot shield himself from responsibility for his actions by claiming to have played only a corporate finance role, we do believe that a reduction in sanctions is in order to account for the nature of his misconduct as

[18] We note that the MSC determined not to order Faherty to pay restitution because it concluded that, in view of Hibbard's bankruptcy proceeding, the customers would receive any restitution that the bankruptcy court deemed appropriate. We do not concur with this reasoning, and we believe that all parties who are responsible for mark-ups and manipulation can and should be ordered to pay restitution to identifiable customers, regardless of pending bankruptcy proceedings filed by other parties. This notwithstanding, we find that it would not be prudent for us to order restitution in this matter, since the transactions at issue occurred in late 1990 and early 1991 and Hibbard has long since gone out of business. In our view, these factors would make it difficult, if not impossible, to locate the thousands of customers at issue to pay restitution. We therefore do not order restitution.

compared to that of Nadino, Stroud and Brown, all of whom were more directly involved in sales, pricing, and establishing retail policies.

Given the gravity of the manipulation of the FNRA market, we find that a bar in all capacities as to Faherty is warranted. In reaching this determination, we also have considered the deliberate nature of Faherty's misconduct. Based, among other things, on Faherty's insistence that his position in corporate finance (and his purported lack of involvement in Hibbard's retail sales efforts) should relieve him of responsibility for Hibbard's misconduct, we believe that Faherty would pose a threat to the public interest if allowed to continue in this industry. We therefore find that a bar in all capacities is appropriate. See Steadman v. SEC, 603 F.2d 1126 (5th Cir. 1979).[19]

As to Norris, we affirm the censure and reduce the fine to $5,000, which we assess as $2,500 each for causes twelve and fourteen. Again, we note that the MSC did not explain in its decision how it arrived at a fine of $22,500 as to Norris. Although we believe that Norris failed timely to provide NASD staff with a signed and notarized statement, we find that she timely responded to all of the staff's investigative questions during a telephonic interview and that her attorney appears to have been partly to blame for her delay in sending staff the signed statement. We acknowledge that reliance on counsel does not excuse a party's failure to respond, but we believe that under these limited circumstances, it is mitigative of the severity of the misconduct. We also have considered that Norris has no disciplinary history and that she timely provided Market Regulation staff with the information that it had requested, albeit not in the form that it had requested (i.e., she answered all questions during a telephonic interview, but failed to follow up with the written statement in a timely manner). Our reduction in sanctions also takes into account our dismissal of a portion of cause 14.[20]

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[19] There is no NASD Sanction Guideline ("Guideline") for market manipulation.

[20] There is no Guideline for "parking" of a registration. The sanctions are consistent with the applicable Guideline for failing timely to respond to a request for information. See Guidelines (1993 ed.) at 20 (Failure to Respond or Respond in a Timely Manner to the NASD).

Accordingly, Faherty is censured, barred from associating with any member firm in any capacity, and fined $150,000. Norris is censured and fined $5,000. The bar imposed herein shall become effective immediately upon issuance of this decision.[21]

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

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[21] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who 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.

Joan C. Conley
Corporate Secretary
(202) 728-8381-Direct
(202) 728-8894-Fax

October 14, 1998

VIA FIRST CLASS/CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Martin J. Auerbach, Esq.
Dornbush, Mensch, Mandelstam & Schaeffer
747 Third Avenue
11th Floor
New York, New York 10017

RE: Complaint No. CMS920005**:** John Roger Faherty and Ninanne A. Norris

Dear Mr. Auerbach:

Enclosed herewith is the Decision of the National Adjudicatory Council in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:	The address of NASD Regulation is:
Office of the Secretary	Office of General Counsel
U.S. Securities and Exchange Commission	NASD Regulation, Inc.
450 Fifth Street, N.W., Stop 6-9	1735 K Street, N.W.
Washington, D.C. 20549	Washington, D.C. 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley
Corporate Secretary

Enclosure

cc: John Roger Fahery
Ninanne A. Norris
Michael D. Wolk, Esq.