BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY[1]

In the Matter of Market Regulation, Complainant, vs. Ara Proudian New Rochelle, NY, Respondent.	DECISION Complaint No. CMS040165 Dated: August 7, 2008

Registered representative aided and abetted a market manipulation. Held, Hearing Panel's findings affirmed. Sanctions modified and increased consistent with the findings set forth herein.

Appearances

For the Complainant: Laurie A. Doherty, Esq., Department of Market Regulation, Financial Industry Regulatory Authority

For the Respondent: Martin H. Kaplan, Esq.

Decision

The Review Subcommittee of the National Adjudicatory Council ("NAC") called this matter for discretionary review under NASD Rule 9312 to examine the Hearing Panel's findings and the sanctions imposed. The Hearing Panel, in a decision dated September 7, 2006, found that Ara Proudian ("Proudian") aided and abetted a market manipulation. For this misconduct, the Hearing Panel suspended Proudian in all capacities for 90 days, fined him $5,000, and ordered that he requalify in all capacities.

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[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating as the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA shall include, by reference and where appropriate, references to NASD.

The Hearing Panel also dismissed allegations that Proudian was responsible for the sale of unregistered, restricted securities. As discussed below, we affirm the Hearing Panel's findings and modify and increase the sanctions imposed. We base our findings upon an independent review of the record.

I. Facts

A. Proudian Enters the Securities Industry

Proudian entered the securities industry in 1994. Proudian registered as a general securities representative with Alexander, Wescott & Co., Inc. ("Wescott") in June 1994 and as a general securities principal with that firm in December 1995. From May 1995 until December 1999, Proudian was Wescott's "Head of Trading," overseeing and supervising the firm's trading staff, market making, and retail and institutional sales force. In December 1999, Proudian became President of Wescott, assuming supervision of the daily activities of the firm and of the firm's trading department. Proudian resigned his position at Wescott in December 2000.

In January 2001, Proudian registered as both a general securities representative and principal with Stone Harbor Financial Services, LLC ("Stone Harbor"). Proudian also registered as a limited representative - equity trader with Stone Harbor in March 2001. At Stone Harbor, Proudian's title was "Head of Trading."[2] Proudian resigned from Stone Harbor in July 2002 because the firm was on the verge of going out of business and his position there, which had been unpaid, left him in need of income.

B. Proudian Joins Park Capital Securities, LLC

Park Capital Securities, LLC ("Park Capital") was, during the relevant period of time, a FINRA member broker-dealer controlled by Chief Executive Officer Philip Orlando and Executive Vice President Anthony Orlando. Park Capital employed between 20 and 40 registered representatives at any given time.[3]

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[2] Proudian testified that he never conducted any securities trading on behalf of Stone Harbor because he registered with the firm on the belief that the firm would one day conduct market-making activities, something for which the firm was never approved during his tenure.

[3] Park Capital operated as a "$5,000 broker-dealer." A broker-dealer that does not receive or hold customer funds or securities and does not carry customer accounts is required to maintain net capital of not less than $5,000. Exchange Act Rule 15c3-1(a)(2)(vi). A broker-dealer operating under the $5,000 minimum net capital requirement is not permitted to engage in more than 10 transactions in any one calendar year for its proprietary investment accounts. *Id.*

Proudian, who was an acquaintance of the Orlandos, approached Philip Orlando in June 2002 about potential employment with the firm. Phillip Orlando offered Proudian a salaried position, and Proudian joined Park Capital in July 2002. On August 7, 2002, Proudian registered as a general securities representative, general securities principal, and limited representative – equity trader with Park Capital.[4]

Proudian arrived at Park Capital as a specialist "in trading and market making in illiquid micro-cap and small cap securities." Proudian intended to use these skills to buy and sell thinly-traded stocks for Park Capital's customers on an agency basis. At a meeting during which Proudian was introduced to Park Capital personnel, Anthony Orlando described Proudian as a "trading expert" whose job it was to assist Park Capital's sales force with trading Cordia Corporation ("Cordia") securities on behalf of customers.[5]

C. Park Capital Customers Begin Purchasing Cordia Shares

Cordia, a business services holding company that claimed to provide "internet-enabled outsourcing solutions" to the insurance and telecommunications industries, was controlled by Alexander Minella and Keith Minella.[6] Cordia's insurance business consisted of tracking and recovering overpayments from insurance claim recipients. Cordia's telecommunications business consisted of buying, at a discount, and then reselling telephone services to retail customers. As of December 31, 2001, Cordia's operations had produced an accumulated deficit of more than $3 million.

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[4] Proudian was identified as a "Managing Director" of the firm in a November 20, 2002 private placement memorandum issued by Park Capital Financial Group, LLC, Park Capital's parent company. No evidence, however, was produced to establish that Proudian ever actively participated in the management of Park Capital or assumed any responsibility for the supervision of Park Capital personnel.

[5] The Department of Market Regulation ("Market Regulation") argues that Proudian, on the basis of several regulatory filings and versions of Park Capital's written supervisory procedures, was Park Capital's "Head Trader." Proudian, however, denies ever assuming this role and testified that he was to hold this position only when Park Capital began conducting market-making activities, something for which the firm was never approved during his tenure. We find it unnecessary to resolve this factual dispute for purposes of reaching a decision in this matter.

[6] Alexander Minella and Keith Minella have been barred since 1992 from associating with any FINRA member firm as a result of multiple disciplinary actions in which they were found by FINRA to have engaged, among other things, in fraud and manipulation in violation of the federal securities laws and FINRA rules. There is no evidence that Proudian knew or ever met the Minellas.

Anthony Orlando instructed Park Capital's sales force to begin promoting Cordia's securities to customers in the spring of 2002. The sales personnel were given a script, which instructed them to inform customers that Cordia's earnings and stock price, despite the company's existing financial difficulties, were prepared to increase as a result of Cordia's telecommunications business. The script further instructed the sales force to inform customers that the price for Cordia's stock, which was then trading for less than $2 per share, was targeted to increase to $15 per share.

On April 1, 2002, Park Capital began trading Cordia's securities, which were quoted on the OTC Bulletin Board® ("OTCBB") service, for the accounts of its customers. Early that day, Park Capital placed a series of small orders into the market to purchase 4,000 shares of Cordia stock for three customers, which were filled at prices between $1.50 and $1.75 per share. Later that day, Park Capital customer GS sold 84,000 shares of Cordia stock to other customers and proprietary accounts in a series of cross trades at $1.75 per share.[7]

This trading was indicative of a pattern that repeated itself in the following months. Park Capital placed buy orders into the market to purchase small amounts of Cordia's stock at increasing prices for proprietary or customer accounts and followed those trades with a series of cross transactions in which a large number of shares were purchased and sold in-house at increasing prices. For example, on May 29, 2002, Park Capital placed a series of orders into the market to purchase 18,500 Cordia shares. These orders were filled at prices starting at $0.99 a share and ending at $1.50 a share. Thereafter, near the end of trading on May 29, 2002, Park Capital began entering a series of cross trades in which 188,000 Cordia shares were purchased and sold in-house between customer and proprietary accounts at prices of $1.45 and $1.50 per share.[8]

Similarly, on July 30, 2002, Park Capital entered a series of cross trades in which 42,500 Cordia shares were purchased and sold in-house between customer accounts at $6.00 a share, after having earlier entered 13 small buy orders into the market at prices from $4.00 to $6.50 a share.[9] Later on July 30, 2002, Park Capital entered another series of small buy orders at $6.45 and $6.50 a share. These orders were followed by cross trades in which nearly 20,000 shares were exchanged between Park Capital customer accounts at $6.50 per share.

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[7] Circumstantial evidence shows that GS was associated with Alexander Minella and Cordia.

[8] All but 10,000 of the shares purchased in these cross trades were sold from accounts controlled by GS and Alexander Minella.

[9] On or about June 7, 2002, Cordia engaged in a five for one reverse stock split.

Anthony Orlando urged Park Capital's sales personnel to convince customers to purchase as much Cordia stock as possible.[10] Park Capital's sales personnel were not, however, permitted to sell Cordia shares for their customers into the open market because, as Anthony Orlando explained, it would drive downward the stock's price. Instead, sales of Cordia's securities were to occur through in-house cross trades that would not have a depressive effect on the value of Cordia's stock but would still generate commissions for the firm.[11] Indeed, the overwhelming majority of sales of Cordia stock by Park Capital and its customers occurred as cross trades in which the shares were purchased by other accounts at Park Capital. As a result, few Cordia shares were sold to the "street" during the period of April through September 2002.

Park Capital was active in the market for Cordia's stock on 45 trading days during this period. On the days on which Park Capital bought or sold Cordia shares for customer and proprietary accounts, its volume of purchases and sales of Cordia stock generally led the market by significant amounts. Although Park Capital was not a buyer or seller of Cordia stock on every trading day, it was the leader in terms of total volume, total buy volume, total sell volume, and total customer buy and sell volume for Cordia shares during the months of April through September 2002.

From April 1 to September 31, 2002, Park Capital and its customers were net purchasers of Cordia shares.[12] By September 31, 2002, Park Capital customers held approximately 600,000 shares of Cordia in their accounts. Through their trading, Park Capital and its customers came to control Cordia's public float,[13] with most Park Capital

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[10] Park Capital's sales force was instructed to solicit customer buy orders at the end of the week or month in an effort to push Cordia's stock price upward. One former Park Capital salesman testified that the firm regularly placed small buy orders for shares of Cordia into the market to "take out all the bid prices and move the price up and get it to a good price at the end of the day."

[11] On occasion, Park Capital allocated shares of Cordia's stock to several customer accounts without authorization. Park Capital sales personnel were instructed to call these customers and obtain approval for these trades after-the-fact.

[12] On September 13, 2002, RBC Dain Rauscher, Inc. ("Dain Rauscher") ceased clearing trades for Park Capital. Park Capital entered into a new clearing arrangement with and began trading through Wexford Clearing Services, LLC ("Wexford") on October 8, 2002. During the period between September 13 and October 8, 2002, when Park Capital was without a clearing firm and thus unable to execute any trades, the market for Cordia's shares was virtually nonexistent, with only a de minimis volume of trading.

[13] A stock's "float" represents the total number of shares publicly owned and available for trading. Anthony Orlando claimed that Park Capital and its customers controlled 80 to 90 percent of Cordia's float, and he informed Park Capital's sales force

[Footnote continued on next page]

customers holding at least some Cordia stock and, in many instances, holding Cordia securities exclusively.[14]

D. Proudian Assumes Responsibility for Processing Park Capital's Orders

On October 8, 2002, Proudian assumed responsibility for Park Capital's order processing.[15] Proudian received order tickets from Park Capital's sales personnel and initialed them to indicate that he had reviewed the order tickets for completeness.[16] During the time period that Park Capital maintained a clearing relationship with Wexford, Proudian telephoned the orders to Wexford for execution. Proudian reported the execution of any cross trades to the Automated Confirmation Transaction ("ACT") service and then faxed the completed order tickets to Wexford so that the clearing firm could allocate the executed trades to the appropriate accounts.

While responsible for Park Capital's order entry, Proudian processed orders for a significant amount of Cordia stock. Between October 8, 2002, and November 18, 2002, Proudian processed a series of orders in which over 450,000 shares of Cordia stock were purchased for Park Capital customers and proprietary accounts. Of these shares, 368,750 were purchased in 56 cross trades with selling Park Capital customers.[17] These sales

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that this control would create customer-generated demand that would drive upward the price of Cordia's stock.

[14] Philip Orlando and Anthony Orlando vigilantly tracked the public float for Cordia's securities by reviewing weekly reports issued by the Depository Trust Company ("DTC") and sent to them by Alexander Minella. When discussing Cordia's DTC reports, Anthony Orlando informed Alexander Minella: "I would like to get all [Cordia] stock possible in our house. . . . It makes sense to keep track of it in this manner." Anthony Orlando told Park Capital salesmen that Cordia's management was "on board" with Park Capital "trying to get the stock to move in the right direction."

[15] Prior to assuming order entry responsibilities for the firm, Proudian was assigned the task of preparing Park Capital's regulatory application for market maker approval. There is no evidence that Proudian serviced customer accounts of his own or was engaged in the solicitation of customers and their orders.

[16] Park Capital's sales personnel determined the prices at which Cordia shares would be traded, the commissions to be charged, and whether transactions should be crossed.

[17] Market Regulation asserts that 372,250 shares were traded in 57 cross trades during this period. We find that the difference between the figures calculated by Market Regulation and the figures cited in this decision are immaterial.

represented 100 percent of all sell orders entered by Park Capital on behalf of its customers during this period. An additional 27,000 Cordia shares were allocated to customer accounts from stock purchased by Park Capital through its average price account. From October 8 to November 18, 2002, Park Capital and its customers were net purchasers of Cordia stock, purchasing an additional 56,700 Cordia shares in open market transactions and increasing their control of Cordia's float to more than 75 percent. Of all transactions processed by Proudian to sell Cordia stock during this period, only 4,100 Cordia shares were sold in open market transactions to the street.

The trades that Proudian processed during the period of October 8 to November 12, 2002, included a series of transactions in which eLEC Communications Corp. ("eLEC"), a company in which Alexander Minella controlled an ownership interest, sold Cordia stock from its account at Park Capital to other Park Capital customers. On October 22, October 25, October 31, November 1, and November 8, 2002, when Proudian was processing other orders in which Cordia shares were generally being sold by Park Capital customers at prices above $4 per share, Proudian entered eight cross trades in which eLEC sold a total of 120,000 Cordia shares to certain Park Capital customers at $1.50 per share. Proudian later processed additional orders in which these intermediary customers, within a few days of settlement, resold a majority of the Cordia shares purchased just days before for $1.50 per share at prices between $4.00 and $4.20 per share to additional Park Capital customers in cross trading.

Park Capital was active in the market for Cordia's stock on 20 trading days during October and November 2002. On the days on which Park Capital bought or sold Cordia shares for customers and proprietary accounts, its volume of purchases and sales of Cordia securities generally led the market by significant amounts. Park Capital remained the leader in terms of total volume, total buy volume, total sell volume, and total customer buy and sell volume for Cordia shares in October and November 2002.

E. Proudian Crosses Trades Between Wexford and Carlin Equities

On November 14, 2002, Wexford froze eLEC's Park Capital account. On November 19, 2002, Wexford sent an e-mail, which was forwarded to Proudian on November 20, 2002, informing Park Capital that several of Park Capital's customers had not paid for the Cordia shares sold originally by eLEC. Proudian was subsequently informed by Park Capital's compliance department and Philip Orlando that Wexford would no longer accept from Park Capital orders to trade any OTCBB securities, including Cordia, and that Wexford was requesting that Park Capital "take that business somewhere else." From this point forward, Wexford would permit Park Capital to enter liquidating, sell orders only for OTCBB stock.

Following Wexford's decision, Park Capital negotiated an agreement whereby it introduced accounts to Carlin Equities ("Carlin") to accomplish the OTCBB securities trades that Park Capital wished to conduct on behalf of its customers. Philip Orlando instructed Proudian to begin calling Carlin to effect orders for trades in OTCBB securities under a "secondary" or "piggybacking" arrangement that Park Capital had with

Carlin to clear trades through Carlin's clearing firm.[18] On December 13, 2002, Proudian directed the first orders that he received from Park Capital's salesmen for customer trading in OTCBB securities to Carlin.[19]

On December 16, 2002, Proudian entered the first order involving Cordia shares to be traded through Carlin.[20] Proudian instructed Carlin on this date to cross two customer orders, one to purchase, and the other to sell, 24,500 Cordia shares at $3.35 per share. Proudian also received orders from Park Capital's sales force to sell a total of 10,000 Cordia shares from Park Capital customer accounts at $3.20 per share. Proudian processed these sell orders through Wexford. At or about the time that he placed the sell orders through Wexford, however, Proudian placed a purchase order through Carlin to purchase the same amount of Cordia shares at $3.25 per share for a Park Capital customer account introduced by Carlin.

A similar pattern of selling and purchasing Cordia shares for and on behalf of Park Capital customers occurred on December 31, 2002, January 7, 2003, and January 23, 2003. For example, Proudian entered two orders through Wexford to sell a total of 58,350 Cordia shares from the account of customer GG at $2.15 per share on January 23, 2003. Minutes later, Proudian called Carlin and placed six separate customer buy orders to purchase a total of 58,350 shares of Cordia at $2.20 per share.

In total, Park Capital customers purchased 109,450 shares of Cordia stock through accounts introduced by Carlin during the period of December 16, 2002, to January 23, 2003. More than 95 percent of these shares were purchased in trades that involved cross transactions between Park Capital customer accounts introduced by Carlin or through buy and sell orders effectively matched between Park Capital accounts at Wexford, on one side, and accounts introduced by Carlin, on the other.

While Park Capital engaged in its secondary clearing arrangement with Carlin, Park Capital remained the market leader in terms of Cordia purchase and sale orders on those days it was in the market for Cordia stock. As a result of Park Capital's Cordia trading through Carlin, Carlin replaced Park Capital as the leader in terms of total

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18 In the first week of December 2002, FINRA staff made an unannounced visit to Park Capital to obtain records relating to the firm's Cordia trading. Proudian saw the FINRA staff arrive and the next week learned that they were at the firm to investigate Park Capital's trading in Cordia.

19 Proudian understood that Carlin would report Park Capital's trades through ACT.

20 During the period of late November and early December 2002, the second interstice during which Park Capital was without the ability to freely buy and sell Cordia shares, the market for Cordia's securities was once again effectively nonexistent.

volume, total buy volume, total sell volume, and total customer buy volume for Cordia shares in December 2002 and January 2003. Park Capital and its customers continued to control approximately 80 percent of Cordia's float during this time period.

II. Procedural Background

On October 11, 2004, Market Regulation filed a complaint alleging that Park Capital and 12 individual respondents, including Proudian, violated the federal securities laws and FINRA rules by engaging in misconduct including manipulation, fraud, and the unregistered distribution of Cordia securities.[21] Park Capital and the individual respondents, except Proudian, settled with Market Regulation or defaulted prior to a hearing in this matter. Beginning on March 6, 2006, the Hearing Panel held a three-day disciplinary hearing concerning Proudian's alleged misconduct. Following the issuance of the Hearing Panel's decision, the Review Subcommittee of the NAC called this matter for discretionary review under NASD Rule 9312.

III. Discussion

This case is about trading that took place in Cordia's stock by Park Capital and its customers during a 10-month period in 2002 and 2003, and Proudian's responsibility, if any, for such trading. The Hearing Panel found that Proudian aided and abetted a manipulation of the market for Cordia's stock that violated the federal securities laws and FINRA rules.[22] The Hearing Panel, however, dismissed claims that Proudian unlawfully

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[21] Proudian was terminated by Park Capital on January 2, 2004. Proudian is not currently associated with any FINRA member firm in any capacity.

[22] The first cause of Market Regulation's complaint alleged that Park Capital, Philip Orlando, Anthony Orlando, and Proudian, among others, knowingly or recklessly engaged in a manipulative scheme involving the purchase and sale of Cordia stock, 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, or, alternatively, that they "knowingly or recklessly provided substantial assistance" in furtherance of the manipulative scheme, in violation of NASD Rule 2110. Before the NAC, Proudian avers that the Hearing Panel constructively amended the complaint when it found that he aided and abetted a manipulation because the complaint's charging language did not explicitly use the words "aid" or "abet." NASD Rule 9212(a) requires that a complaint "specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged . . . to have violated." A complaint is alleged in "reasonable detail" when it provides sufficient notice to a respondent to "understand the charges and adequate opportunity to plan a defense." *Dist. Bus. Conduct Comm. v. Euripides*, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45, at *10 (NASD NBCC July 28, 1997). We find that Proudian received the notice required to sustain a claim that he aided and abetted a market manipulation.

participated in the distribution of unregistered, restricted securities.[23] We affirm the Hearing Panel's findings.

A. Proudian Aided and Abetted a Market Manipulation

To find that Proudian is liable as an aider and abettor we must find: (1) a primary securities law violation committed by another party or parties; (2) that Proudian rendered substantial assistance in furtherance of the conduct constituting the violation; and (3) that he provided such assistance knowingly or recklessly (i.e., with scienter). *Sharon M. Graham*, 222 F.3d 994, 1000 (D.C. Cir. 2000). We find that Park Capital's violations of the federal securities laws and FINRA rules are clear, as is the fact that Proudian knowingly and recklessly lent them substantial assistance.

1. Park Capital's Manipulation of Cordia's Securities

The term "manipulation" "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976), or "artificially affecting market activity in order to mislead investors."[24] *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977). Manipulation thus "is the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free

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[23] The fourth cause of the complaint alleged that Park Capital, Philip Orlando, Anthony Orlando, and Proudian, between October 1, 2002 and January 31, 2003, "participated" in the sale of unregistered, restricted Cordia shares by eLEC, in violation of NASD Rule 2110. Market Regulation, in both its pre-hearing and post-hearing filings argued that Proudian was also liable for sales of restricted Cordia shares by GG. The Hearing Panel determined to consider sales by GG for purposes of evaluating the claims made against Proudian in the fourth cause of the complaint because GG purchased his Cordia shares from eLEC. We find no error in this decision. Even assuming that Market Regulation's pleading was defective, we conclude that the record amply demonstrates that Proudian understood the issues that were the subject of complaint and had sufficient opportunity to defend himself. *See James L. Owsley*, 51 S.E.C. 524, 528 (1993).

[24] Section 10(b) of the Exchange Act makes unlawful the use or employment of "any manipulative or deceptive device or contrivance" in contravention of SEC rules. 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5 prohibits, in addition to nondisclosure and misrepresentation, "any device, scheme, or artifice to defraud" or any practice "which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5. NASD Rule 2120 states that "[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." NASD Rule 2110 requires the observance of high standards of commercial honor and just and equitable principles of trade.

forces of supply and demand." *Swartwood, Hesse, Inc.*, 50 S.E.C. 1301, 1307 (1992). Proof of a manipulation generally depends upon inferences drawn from a mass of factual detail, including patterns of behavior, apparent irregularities, and trading data.[25] *Pagel, Inc.*, 48 S.E.C. 223, 226 (1985), *aff'd*, 803 F.2d 942 (8th Cir. 1986).

We agree with the Hearing Panel, and Proudian does not dispute, that Park Capital, acting through Philip and Anthony Orlando and others, orchestrated a manipulative scheme to artificially affect the volume and price of Cordia's stock by creating an illusion of strength and widespread market interest in the company's securities.[26] Multiple elements that are classic indicia of an over-the-counter market manipulation are present in this case. The record shows that Park Capital placed successive, small-volume buy orders into the market at increasing prices to simulate increased demand for Cordia shares.[27] *See SEC v. Resch-Cassin & Co., Inc.*, 362 F. Supp. 964, 976-77 (S.D.N.Y. 1973) ("[T]he use of actual purchases and sales at successively higher prices not only has the effect of giving an appearance of activity, it raises the price of the over-the-counter security."). Park Capital then sought to carefully control the market for Cordia's stock by acquiring substantial supplies of the security for its customers and reducing the floating supply of that security.[28] *Id.* at 977 ("dominion and control of the market . . . is clearly disclosed by the record"); *see also SEC v. Rega*, No. 73 Civ. 2944, 1975 U.S. Dist. LEXIS 11581, at *35 (S.D.N.Y. July 3, 1975)

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[25] A finding of manipulation does not rise or fall on the presence or absence of any particular device usually associated with a manipulative scheme. *Swartwood, Hesse*, 50 S.E.C. at 1307; *see also United States v. Regan*, 937 F.2d 823, 829 (2d Cir. 1991) (holding that no single set of factors identifies manipulation which encompasses "diverse devices that ingenious minds" have conceived to manipulate securities prices).

[26] The fact that an alleged aider and abettor is claimed to have assisted in only a portion of a manipulative scheme does not mean that the entire scheme may not be considered to determine whether an underlying violation of the federal securities laws or NASD rules has occurred. *Sharon M. Graham*, 53 S.E.C. 1072, 1081 n.26 (1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000).

[27] This deceptive device is known as "painting the tape." *SEC v. Competitive Technologies, Inc.*, 2005 U.S. Dist. LEXIS 43349, at *4 (D. Conn. July 21, 2005).

[28] While cross trading among customer accounts, including accounts for entities over which Alexander Minella exercised influence, was the dominant feature of Park Capital's intramural market for Cordia shares, we find that a small portion of its total purchase volume represented acquisitions from outside sources necessary to acquire stock for the firm's customers and protect Park Capital's control of available supply. "Actual buying with the design to create activity . . . for the purpose of inducing others to buy is to distort the character of the market as a reflection of the combined judgments of buyers and sellers." *Halsey, Stuart & Co., Inc.*, 30 S.E.C. 106, 112 (1949).

("[D]omination was greatly facilitated by the fact that a substantial percentage of the . . . issue . . . [was] in the hands of . . . customers."), *rev'd in part on other grounds*, 581 F.2d 1020 (2d Cir. 1978).

With little independent market for Cordia securities apparent outside of Park Capital, we find it evident that the firm instead used cross trades and other transactions that effectively matched orders to fraudulently control Cordia's float and fashion market activity for Cordia shares.[29] *See SEC v. Sayegh*, 906 F. Supp. 939, 947-48 (S.D.N.Y. 1995) ("[Respondent] executed cross trades to avoid liquidations."); *see also Rega*, 1975 U.S. Dist. Lexis 11581, at *18 ("[I]f a customer sold [stock] the salesman was responsible for finding another customer to buy the shares."). To avoid a depressive effect on the price of Cordia's stock, Park Capital did not permit customer sales to the street. *See Sayegh*, 906 F. Supp. at 944 ("To artificially withhold supply . . . from the market . . . [respondent] discouraged . . . brokers from selling [stock]."). Sales of Cordia securities were thus deceptively absorbed through "the continual shuffling of securities back and forth in its customers' accounts." *Norris & Hirshberg, Inc.*, 21 S.E.C. 865, 886 (1946), *aff'd*, 177 F.2d 228 (D.C. Cir. 1949).

We find that Park Capital sought to immunize Cordia's securities from free and competitive forces through control of the volume and price of the Cordia shares purchased and sold by its customers. "When individuals, occupying a dominant market position, undertake a scheme to distort the price of a security for their own gain, they violate the securities laws by perpetrating a fraud on all public investors."[30] *SEC v. Commonwealth Chemical Secs., Inc.*, 410 F. Supp. 1002, 1013 (S.D.N.Y. 1976). Supply and demand for Cordia's shares arose in this case not from the "unimpeded interaction of real supply and real demand" but rather from a "stagemanaged performance"

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[29] "Matched orders" are orders for the purchase or sale of a security that are entered knowing that orders for the sale or purchase of substantially the same amount of stock have been or will be entered by the same or different persons at substantially the same time and price. *Ernst & Ernst*, 425 U.S. at 206 n.25. Although not per se unlawful, matched orders can be a manipulative and deceptive device. *See id.* at 205-06 (noting that matched orders "were considered so inimical to the public interest as to require express prohibition" under Section 9(a)(1) of the Exchange Act); *see also Irfan Mohammed Amanat*, Exchange Act Rel. No. 54708, 2007 SEC LEXIS 2558, at *30 (Nov. 3, 2007) ("[M]atched trades have long been recognized as fraudulent devices proscribed by Section 10(b) and Rule 10b-5."), *aff'd*, 2008 U.S. App. LEXIS 5716 (3d Cir. Mar. 17, 2008).

[30] Whether a person has adequate market power to successfully manipulate a market is not dispositive of the question of whether that person engaged in a manipulative scheme. *Michael J. Markowski*, 54 S.E.C. 830, 835 (2000) (finding that the actions of a manipulator "are not rendered innocent simply because they fail to achieve the desired result").

manufactured by Park Capital through its customers. *Edward J. Mawod*, 46 S.E.C. 865, 871-72 (1977). The corruption of Park Capital's scheme "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." *Norris & Hirshberg*, 21 S.E.C. at 881. We therefore conclude that the practices described above, when viewed in the setting portrayed by the record before us, are manipulative, deceptive, and fraudulent, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110.[31]

2. Proudian Knowingly and Recklessly Provided Substantial Assistance to Park Capital's Manipulative Scheme

We conclude that Proudian knowingly and recklessly lent himself to Park Capital's scheme to manipulate the market for Cordia's stock. First, the record is clear that Park Capital's Cordia manipulation was successful due, in substantial part, to Proudian's assistance. Between October 2002 and January 2003, Proudian, at the direction of Philip Orlando and Park Capital's sales force, entered manipulative buy and sell orders for Cordia's stock, with the vast majority of those orders being crossed or effectively matched to permit Park Capital's continued control of the market for the security. *See Graham*, 222 F.3d at 1004 (finding registered representative who executed wash trades and matched orders for a customer who manipulated the market aided and abetted the customer's manipulation); *cf. SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 112 (2d Cir. 1998) (holding trader who executed manipulative buy and sell orders for customer

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[31] Scienter is a necessary element for finding a violation of these antifraud provisions of the federal securities laws and FINRA rules. *See Ernst & Ernst*, 425 U.S. at 193 & n.12 ("'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud"); *see also Dep't of Enforcement v. Fiero*, Complaint No. CAF980002, 2002 NASD Discip. LEXIS 16, at *28 (NASD NAC Oct. 28, 2002). Both knowing and reckless conduct suffice to establish scienter. *See Tellabs, Inc. v. Makor Issues & Rights., Ltd.*, 127 S. Ct. 2499, 2507 n.3 (2007) (reserving the issue but stating: "Every 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."); *see also Dep't of Enforcement vs. Meyers*, Complaint No. C3A040023, 2007 NASD Discip. LEXIS 4, at *28 (NASD NAC Jan. 23, 2007) ("The courts have defined recklessness 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.'"). Like the other rudiments of a manipulation claim, scienter may be inferred from the facts and circumstances of a given case. *Mawod*, 46 S.E.C. at 870 n.22 ("Manipulators seldom publicize their intentions."). We find present in this case the knowing and reckless actions necessary to support a finding that Park Capital, acting through Philip and Anthony Orlando and others, violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rule 2120.

liable as primary violator under antifraud provisions of the federal securities laws). Proudian was also responsible for reporting the manipulative transactions executed through Wexford and understood that Carlin would report Park Capital's deceptive trades to the market. *See Howard R. Perles*, 55 SEC 686, 690 (2002) (finding registered representative that was responsible for executing and reporting orders liable as an aider and abettor of manipulative scheme involving matched orders); *Richard D. Chema*, 53 S.E.C. 1049, 1055-56 (1998) (holding registered representative who executed and reported customer's manipulative cross and wash trades liable as an aider and abettor). The trades that Proudian executed on behalf of Park Capital had the effect of creating an intramural marketplace for Cordia's securities, falsely created the appearance of market vibrancy, and thus substantially assisted Park Capital's manipulation. *See Robert J. Prager*, Exchange Act Rel. No. 51974, 2005 SEC LEXIS 1558, at *23-24 (July 6, 2005) ("His trading had the effect of distorting the market . . . and creating the false appearance of active trading at ever-increasing prices.").

Second, we find that Proudian knowingly and recklessly permitted himself to be used as an instrument in Park Capital's Cordia scheme. As one former Park Capital salesman and registered representative, Philip Blackwell ("Blackwell"), credibly testified, Proudian knew of Park Capital's manipulation.[32] Blackwell testified under oath that Proudian "was right there in the midst of it with Anthony Orlando and [others] in terms – as far as getting done what it was they were trying to do" with Cordia's stock. Blackwell witnessed and overheard Proudian's discussions with Anthony Orlando concerning how best to time and position customer orders and cross orders in order to "move" Cordia's stock and "paint the tape." Proudian's knowledge of Park Capital's scheme thus leads to a conclusion of aiding and abetting. *See Mawod & Co. v. SEC*, 591 F.2d 588, 595-96 (10th Cir. 1979) ("Knowledge of the illegality of the scheme is, of course, essential, to aiding and abetting."); *Randolph K. Pace*, 51 S.E.C. 361, 371 (1993) ("[Respondent] knowingly and substantially assisted the manipulation.").

We also think it clear that, even if he did not know, Proudian must certainly have realized that his order execution activities on behalf of Park Capital were improper. *See Prager*, 2005 S.E.C. LEXIS 1558, at *24 ("The courts have held that 'extreme recklessness' satisfies the scienter requirement for aiding and abetting liability."); *see also Mawod*, 46 S.E.C. at 875 ("It must have been apparent to [respondent] that the market in [stock] was no real congress of bona fide sellers and bona fide purchasers."). Here Proudian knew that Cordia was a small company whose securities were thinly

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[32] The Hearing Panel discounted Blackwell's testimony as "insufficient" to support an inference that Proudian was a primary violator in this case because Blackwell left Park Capital prior to Proudian assuming order entry duties. We find, however, that Blackwell's testimony is probative of Proudian's state of mind when he assumed those responsibilities. *Cf. Graham*, 53 S.E.C. at 1081 n.26 ("[T]he fact that an aider and abettor assists in only a portion of a violative scheme does not mean that the entire scheme cannot be considered.").

traded. Proudian further recognized that there was not an active market for Cordia shares outside of Park Capital and that Park Capital's trading represented a large volume of the total market for Cordia's securities. *See Adrian C. Havill*, 53 S.E.C. 1060, 1067-68 (1998) (finding respondent reckless in not recognizing that wash sales he effected constituted a large proportion of the reported volume of a thinly traded stock). Proudian further understood that he was entering a large number of cross trades and other orders, receiving order tickets from Park Capital's sales force which frequently and inexplicably suggested that two customers had called Park Capital at the same time and placed the same order for Cordia shares, with one customer a purchaser of Cordia's stock and the other a seller. *See Mawod & Co.*, 591 F.2d at 592 ("The order to buy was contemporaneous with the order to sell.").

Proudian was in this case "confronted with an abundance of warning signs that should have aroused his suspicions and caused him to question [Park Capital's Cordia] trading and his own involvement in it." *Prager*, 2005 S.E.C. 1558, at *33. Proudian was an experienced securities industry professional. *See Mawod & Co.*, 591 F.2d at 590 ("[Respondent] was not a novice as far as the securities business was concerned."); *Graham*, 53 S.E.C. at 1084 ("[Respondent] was, in any event, an experienced securities professional."). Proudian effected a series of cross trades and effectively matched orders that he was certainly reckless in not realizing, if he did not otherwise know, were "highly peculiar and made little, if any, economic sense." *See Perles*, 55 S.E.C. at 704. Proudian recklessly disregarded the heavy volume of Cordia shares traded by Park Capital customers and the impact of this trading on the market. *Id.* at 24-25. Although Proudian knew that Park Capital's customers were losing money trading Cordia shares, he nonetheless executed trades whereby more Cordia stock was purchased for customers than was sold and in which sales of Cordia stock were kept from the market by selling them to other customers in-house. *See Mawod*, 46 S.E.C. at 873 n.41 ("Manipulators who seek to raise the price . . . will normally buy more than they sell."); *see also Graham*, 222 F.3d at 1005 (finding respondent reckless where she effected trades on behalf of a customer who was "repeatedly buying and selling" but was "not making any money"); *Prager*, 2005 S.E.C. LEXIS 1558, at *26 ("As [respondent] acknowledged, the circular trading in . . . stock was a 'red flag' that he should have heeded.").

Proudian claims that he bears no responsibility for Park Capital's manipulation. Proudian thus casts himself as an "order entry clerk" who could pass no judgment upon the trades that he executed because he did not price or otherwise act in a principal or authoritative capacity with respect to the relevant transactions.[33] These assertions are of

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[33] Proudian also asserts that he had no monetary motive to participate in Park Capital's manipulative scheme. While Proudian's compensation during his association with Park Capital consisted solely of a $60,000 annual salary, he will not be absolved of responsibility for his substantial assistance in furtherance of a manipulative scheme because he did not tangibly profit from his misconduct. *See Graham*, 222 F.3d at 1005 ("[Respondent] may have gone along with [manipulator's] scheme (or hidden her head in the sand) to please her bosses or to keep her job."); *see also Perles*, 55 S.E.C. at 707, n.31

[Footnote continued on next page]

no moment. *See Graham*, 222 F.3d at 1004 (rejecting argument that registered representative may not be regarded as having substantially assisted a manipulation since the execution of the manipulator's trades was a "ministerial" act). Liability as an aider and abettor does not depend upon an individual's status or relationship with the primary violator. *In re: Catanella and E.F. Hutton and Co., Inc. Secs. Litig.*, 583 F. Supp. 1388, 1421 (E.D. Pa. 1984); *see also Perles*, 55 S.E.C. at 704 ("While there is no direct evidence that Applicants agreed to play a role in [the] manipulation, direct evidence is not required to establish that [Applicants] were participating in some overall activity that was improper."). Proudian at all times possessed the discretion to refuse to execute the trades that in this case constituted a securities violation. *See Graham*, 222 F.3d at 1004 ("Of course, doing so might have made [respondent's] career . . . more difficult, but fear of such consequences does not excuse a violation of the securities laws."). Even assuming that the details of Park Capital's scheme were concealed from Proudian, it is of little consequence. *Mawod*, 46 S.E.C. at 875. He was cast by Park Capital in a "supporting role" and "he played his part unhesitantly." *Id.*

The record evidence leads to but one conclusion -- Proudian could hardly dismiss the possibility that Park Capital, with his assistance, was engaging in activities meant to deceive the marketplace. As Proudian admitted, upon reflection, Park Capital's Cordia trading was "odd" and "there could be speculation that there[ ] [was] not a real market there."[34] Proudian asserts, however, that it was not his place to question the trades that he executed because he was "strictly a conduit" to getting the trades done. We disagree. In the context of market manipulation, "the importance of a broker-dealer's responsibility to use diligence where there are any unusual factors is highlighted by the fact that violations of the antifraud and other provisions of the securities laws frequently depend for their consummation . . . on the activities of broker-dealers who fail to make diligent inquiry to obtain sufficient information to justify their activity in [a] security." *Alessandrini & Co., Inc.*, 45 S.E.C. 399, 406 (1973). Securities industry professionals occupy an important position in the capital markets. Because few, if any, manipulations can succeed without the assistance of these professionals, it is implicit that they are required to exercise reasonable care when confronted with indicia of manipulative activity. *Mawod*, 46 S.E.C. at 875.

[cont'd]

("[T]he absence of profit from manipulative conduct does not negate that conduct.").

[34] Additional "red flags" that must have alerted Proudian that the normal forces of supply and demand might not be operating with respect to Cordia's stock included the sale of Cordia shares at below-market prices by eLEC, *Pace*, 51 S.E.C. at 371, the failure of Park Capital customers to pay for their Cordia purchases, *Graham*, 53 S.E.C. at 1078, restrictions placed upon Park Capital's OTCBB and Cordia trading by Wexford, *id.*, and FINRA's investigation of Park Capital's trading in Cordia's securities.

We find that Proudian recklessly abdicated his duty to investigate Park Capital's trading. *See Chema*, 53 S.E.C. at 1058-59 ("[H]e ignored clear warning signs and recklessly failed to fulfill his investigatory obligations."). Proudian "closed his eyes to circumstances indicative of a scheme to create the false appearance of an independent market." *Alessandrini & Co.*, 45 S.E.C. at 404; *accord Prager*, 2005 SEC LEXIS 1558, at *33-34 ("[Respondent] closed his eyes to the manipulative trading."). In sum, we find that Proudian aided and abetted a market manipulation, in violation of NASD Rule 2110.[35]

B. Proudian Is Not Liable for the Sale of Unregistered, Restricted Cordia Shares

Market Regulation alleged that Proudian participated in the sale of unregistered, restricted Cordia securities that flouted Section 5 of the Securities Act of 1933 ("Securities Act"). Specifically, Market Regulation asserts that Proudian failed to conduct a reasonable investigation to determine whether Cordia shares sold by both eLEC and GG could be sold into the market without restriction in compliance with the provisions of Securities Act Rule 144.[36] Market Regulation therefore avers that Proudian violated NASD Rule 2110. The Hearing Panel dismissed these charges. We affirm the Hearing Panel's findings.

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[35] Aiding and abetting a market manipulation is clearly misconduct that is inconsistent with the high standards of commercial honor and just and equitable principles of trade required of member firms and their associated persons, and thus is a violation of NASD Rule 2110. *Perles*, 55 S.E.C. at 707-708; *see also* NASD Rule 0115 (NASD Rule 2110 applies to all members and persons associated with a member.). We therefore need not address whether, as the Hearing Panel found, Proudian's aiding and abetting activities also constituted violations of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rule 2120. *See Prager*, 2004 NASD Discip. LEXIS 16, at *46 n.20.

Also, because we find that the abundance of record evidence supports the conclusion that Proudian acted in this case as an aider and abettor, we have further determined that we need not analyze whether the facts of this case also prove that Proudian was a primary violator of the antifraud provisions of the federal securities laws and FINRA rules, including all of their elements. Our finding that Proudian aided and abetted manipulative activity is sufficient alone to support the stringent sanctions that we impose herein.

[36] Under Securities Act Rule 144(a)(3), restricted securities include securities that have been acquired by a purchaser from an issuer or a control person in a transaction or a chain of transactions that did not involve a public offering. 17 C.F.R. § 230.144(a)(3).

Under Section 5 of the Securities Act, "any person" is prohibited from "directly or indirectly" selling unregistered securities that are not exempt from the registration requirements.[37] 15 U.S.C. § 77e(a), (c). It is undisputed that the stock sales at issue here were not registered under the Securities Act.

Securities Act Rule 144 provides a safe harbor from the definition of the term "underwriter" within Section 2(11) of the Securities Act for certain persons who engage in the sale of restricted securities. 17 C.F.R. § 230.144 (Preliminary Note). A person satisfying the conditions of Rule 144 is deemed not to be engaged in a distribution of securities and therefore is not an underwriter for purposes of determining whether a sale is eligible for exemption under Section 4(1) of the Securities Act for "transactions by any person other than an issuer, underwriter, or dealer." *Id.* One condition represents a limitation on the manner of sale under Securities Act Rule 144(f). 17 C.F.R. § 230.144(f). Sales made in compliance with Rule 144, if not made in transactions directly with a market maker or riskless principal transactions, must be made in "brokers' transactions" within the meaning of Section 4(4) of the Securities Act. *Id.* Under Securities Act Rule 144(g), however, the term "brokers' transactions" does not include transactions by a broker in which such broker solicited or arranged for the solicitation of customer orders to buy the restricted securities. 17 C.F.R. § 230.144(g).

It is clear from the record that Proudian entered orders that effected the sale of restricted Cordia securities by eLEC and GG. The record also clearly establishes that most of the orders that Proudian entered for the purchase of eLEC's and GG's Cordia shares had been solicited by Park Capital salesmen.[38] We therefore agree with Market Regulation that sales of restricted Cordia shares by eLEC and GG did not meet the conditions of Securities Act Rule 144.

Not everyone, however, in the chain of intermediaries between a seller of securities and the ultimate buyer is involved sufficiently in the process of distribution to make him responsible for an unlawful transaction. *Owen V. Kane*, 48 S.E.C. 617, 620 (1986), *aff'd*, 842 F.2d 194 (8th Cir. 1988). To show that a person bears accountability for a violation of Securities Act Section 5, it must be proven that the person was a "necessary participant" or "substantial factor" in the violation. *Carley*, 2008 SEC LEXIS 222, at *40. A "necessary participant" is an individual whose participation is a "but for"

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[37] A showing of scienter is not required to establish a violation of Section 5. *John A. Carley*, Exchange Act Rel. No. 57246, 2008 SEC LEXIS 222, at *23 (Jan. 31, 2008).

[38] Park Capital's written supervisory procedures required that order tickets indicate whether an order had been solicited or unsolicited. The order tickets used by Park Capital included a box which, if not checked, indicated that the order had been solicited. Having reviewed and initialed each of the order tickets in question, Proudian should have been aware that all but two of the 14 orders that he processed for purchases of restricted Cordia shares from eLEC and GG were not unsolicited orders.

cause of an unlawful sale of securities. *SEC v. Rogers*, 790 F.2d 1450, 1456 (9th Cir. 1986). Although "substantial" participation is a concept without precise bounds in this context, case law suggests that "one who plans a scheme, or, at the least, is a substantial motivating factor behind it, will be held liable as a seller." *Id.*

We find that Proudian was neither a "necessary participant" nor a "substantial factor" in the sale of unregistered Cordia securities. Where, as is the case here, a person has not had individual contact with the purchasers of unregistered securities, that person may be held liable as having "indirectly" sold the security if the person has "employed or directed others to sell or offer them, or has conceived of and planned the scheme by which the unregistered securities were offered or sold." *SEC v. Friendly Power Comp., LLC*, 49 F. Supp. 2d 1363, 1371 (S.D. Fla. 1999). The record before us does not indicate that Proudian's involvement in the sale of Cordia's securities rose to this level. There is no evidence that Proudian was involved in acquiring Cordia securities from the issuer, affiliates of the issuer, or control persons. There is likewise no evidence suggesting that Proudian was involved in or supervised the solicitation of investors or promoted the purchase of restricted Cordia shares. Proudian thus is not primarily liable for the sale of unregistered securities. *See Rogers*, 790 F.2d at 1456 ("Fringe participants, although possibly liable as aiders and abettors, are not liable as sellers under Section 5.").

Market Regulation, citing *Dist. Bus. Conduct Comm. v. Niebuhr*, 1994 NASD Discip. LEXIS 203 (NASD NBCC 1994), *aff'd*, 52 S.E.C. 546 (1995), nonetheless contends that Proudian violated a well-established duty of a broker-dealer to conduct a searching inquiry of transferability when the broker-dealer is offered a substantial block of a little-known security to sell. This duty of inquiry, however, is not infinitely elastic, but rather has traditionally been extended to salesmen and registered representatives who facilitated customer orders to sell unregistered and restricted securities and whose involvement reached beyond mere order entry. *See, e.g., George Wasson v. SEC*, 558 F.2d 879, 886 (8th Cir. 1977) ("The participation theory is too broad in that it extends liability to persons for remote or incidental connection with the transaction."); *see also Jacob Wonsover*, 54 S.E.C. 1, 14-15 (1999) ("Wonsover unpersuasively cast himself in the role of a mere order taker."); *Robert G. Leigh*, 50 S.E.C. 189, 193 (1990) ("We have made clear that the duty of inquiry extends to salesmen."). The duty of inquiry posited by Market Regulation is thus best imposed upon those persons "who are uniquely positioned to ask relevant questions, acquire material information, or disclose their findings." *Kane*, 842 F.2d at 199.

We find that the record does not support the conclusion that Proudian was in such a position. Proudian possessed no supervisory responsibilities, had no contact with customers, and his duties were limited to the processing of Park Capital's order flow. He was not required under Park Capital's written supervisory procedures and in no position to acquire, process, and disseminate information concerning whether the shares of stock

sold in the orders he entered were free-standing and not subject to sales restrictions.[39] There is no evidence that Proudian knew or should have known the source of these securities at the time that he entered orders to sell restricted shares by eLEC or GG.[40] Market Regulation provided insufficient evidence to support a finding that Proudian bears responsibility for the sale of unregistered, restricted shares by eLEC or GG.[41] We therefore affirm the Hearing Panel's dismissal of the fourth cause of the complaint as to Proudian.

IV. Sanctions

Like the Hearing Panel, we find that Proudian played a role in Park Capital's scheme to manipulate the market for Cordia's securities and that his involvement was a substantial factor in the success of Park Capital's manipulative design. For his aiding and abetting a market manipulation, the Hearing Panel suspended Proudian from associating with any FINRA member firm in any capacity for 90 business days. The Hearing Panel also fined Proudian $5,000. Finally, the Hearing Panel ordered that Proudian requalify by examination in all capacities prior to returning to any activities that require registration with a FINRA member firm. For the reasons discussed below, we conclude that Proudian's misconduct was serious and that stringent sanctions are appropriate. Based upon our assessment of the principal considerations in the FINRA Sanction

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[39] The record before us is clear that Proudian was given no responsibilities or role to approve or supervise transactions or ensure compliance with Securities Act Rule 144.

[40] The duties imposed upon a securities industry professional to recognize indicia of a manipulation and to inquire concerning the tradability of an unregistered security are not necessarily coextensive. *See Perles*, 55 S.E.C. at 706-707 ("Whether or not [respondents] knew the source of the shares [manipulator] was selling, they knew, or were reckless in not seeing, that [manipulator] was engaging in uneconomic trades for the purposes of creating the artificial appearance of market activity in [issuer].").

[41] The only evidence put forth by Market Regulation indicating that Proudian possessed any awareness of the restricted nature of any Cordia securities was an e-mail from Park Capital's compliance officer informing Proudian, on January 9, 2003, that customer GG's account included 60,000 restricted shares and 8350 "free-standing" shares that could be sold to cover a deficiency that existed within the account. There is no evidence that Proudian recalled or should have recalled this e-mail, which dealt with the issue of an account's deficiency, when he placed orders on January 23, 2003, to sell Cordia shares from GG's account. Proudian testified that the orders that he placed for Park Capital's sales force dealing with Cordia securities represented a fraction of the total order flow that he handled.

Guidelines ("Guidelines"), we have determined to modify and increase the sanctions imposed by the Hearing Panel.[42]

First, we have considered the number of acts of misconduct and the period of time over which these acts were perpetrated.[43] Given that Proudian effected a large number of deceptive trades, involving a large volume of Cordia shares, over a period of several months, we find that Proudian systematically failed to uphold high standards of commercial honor. Proudian's conduct was not the result of a momentary lapse of judgment that might establish mitigation.[44]

We have also considered that Proudian's misconduct resulted directly or indirectly in injury to the investing public.[45] Manipulation is a serious offense and is a fraud that attacks the integrity of free markets. *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *49 (Jan. 22, 2003) (finding that such misconduct "is a fraud perpetrated . . . on the entire market"). The manipulative activities that we have found to have existed in this case are detrimental to the public interest and succeeded with Proudian's substantial assistance. *Cf. Alessandrini*, 45 S.E.C. at 410 ("The manipulative activities . . . impair the integrity of the securities markets and investor confidence in them . . . , and as so often is the case could not have succeeded without the active or passive assistance of broker-dealers."). Through his actions, Proudian "jeopardized the integrity of the markets he was obligated, as a securities professional, to protect." *Michael B. Jawitz*, 55 S.E.C. 188, 203 (2001).

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42 The Guidelines do not specifically address aiding and abetting manipulative activity or violations of NASD Rule 2110. Although not a direct analog, the Guidelines for misrepresentations or omissions of material fact provide some guidance in this case. *FINRA Sanction Guidelines* 93 (2008) (Misrepresentations or Material Omissions of Fact), http://www.finra.org/web/groups/enforcement/documents/enforcement/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. *Id.* 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. *Id.* For egregious cases, the Guidelines recommend considering a bar. *Id.*

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

44 The Hearing Panel, for purposes of assessing sanctions, concluded that Proudian's misconduct occurred "over a fairly brief period of time." We disagree with this assessment. A four-month period is a long time period in the life of any security, particularly a thinly traded stock of a financially struggling company such as Cordia.

45 *Id.* (Principal Considerations in Determining Sanctions, No. 11).

Furthermore, we have found that Proudian's misconduct in this case was undertaken with scienter.[46] We also find disquieting Proudian's failure to account for his actions. As Proudian testified, "I don't know if I could have done anything differently." When given an opportunity at the hearing below to consider the possibility that the trades he was effecting were part of a broader manipulative scheme, Proudian stated "[i]t wasn't my concern." Proudian's failure to accept responsibility for his own actions is an aggravating factor that we have considered in reaching our conclusion as to an appropriate level of sanctions in this case.[47]

Aiding and abetting a market manipulation is a matter of great gravity. *Perles*, 2000 NASD Discip. LEXIS 9, at *45-46. It is deserving of a sanction sufficiently severe as to both prevent recurrences by Proudian and to deter others from similar misconduct. *Perles*, 55 S.E.C. at 710. We therefore conclude that "[w]hat the public interest calls for in this situation is a sanction that impresses upon [Proudian] and other professionals in the securities business with the importance of their duty to exercise care when confronted by indicia of manipulative activity." *Mawod*, 46 S.E.C. at 876; *accord Chema*, 53 S.E.C. at 1059. We find that a one-year suspension will serve to impress upon Proudian his duties as a securities industry professional.

The Hearing Panel imposed an admittedly "light" fine of $5,000. The Hearing Panel cited to Proudian's "lengthy unemployment and lack of funds" to justify this lesser fine. At the time of the hearing in this matter, however, Proudian had been continually employed for several years.[48] Moreover, although FINRA adjudicators are required to consider a respondent's claimed inability to pay when imposing a fine, the record does not demonstrate that Proudian raised such a claim before the Hearing Panel and does not contain any credible evidence, which it was Proudian's burden to provide, that his inability to pay a larger fine is bona fide.[49] Because Proudian did not raise and document at the hearing below an inability to pay, we have determined to impose a more

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46 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

47 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

48 After leaving Park Capital, Proudian became the president of Clayton, Dunning & Company, Inc.

49 *Id.* at 5 (General Principles Applicable to All Sanction Determinations, No. 8). A respondent has the burden of introducing evidence sufficient to prove bona fide insolvency. *Toney L. Reed,* 52 S.E.C. 944, 947 n.12 (1996). A respondent's "ability to pay is peculiarly within his knowledge, and it is appropriate that he bear the burden of demonstrating his inability." *B.R. Stickle & Co.,* 51 S.E.C. 1022, 1026 (1994). Evidence of a respondent's negligible net worth and income is insufficient to prove bona fide insolvency. *Dist. Bus. Conduct Comm. v. Schiff,* Complaint No. C10970156, 1999 NASD Discip. LEXIS 15, at *22 (NASD NAC Apr. 9, 1999).

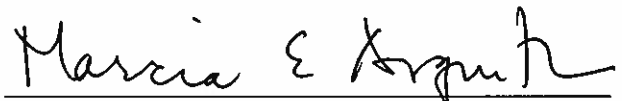
appropriate monetary sanction in this case and order that Proudian be fined $25,000 for his misconduct.

Accordingly, we order that Proudian be suspended for one year from associating in any capacity with any FINRA member firm. We further impose a fine of $25,000 upon Proudian. Finally, we agree with the Hearing Panel that Proudian should be and is hereby ordered to requalify by examination in all capacities prior to associating with any FINRA member firm in the future.[50]

V. Conclusion

We affirm the Hearing Panel's findings that Proudian aided and abetted a market manipulation, in violation of NASD Rule 2110. We further affirm the Hearing Panel's conclusion that Proudian was not responsible for the sale of unregistered securities and agree that the fourth cause of Market Regulation's complaint should be dismissed as to Proudian. As to sanctions, we order that Proudian be suspended for one year from associating in any capacity with any FINRA member firm. We further fine Proudian $25,000.[51] Finally, we order Proudian to requalify in all capacities prior to associating with any FINRA member firm in the future.[52]

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

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[50] *Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 7).

[51] The Hearing Panel did not impose hearing costs against Proudian and no additional costs are imposed as a result of the Review Subcommittee's determination to call this matter for discretionary review.

[52] We also have considered and reject without discussion all other arguments of the parties.

Pursuant to NASD Rule 8320, 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 nonpayment. 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 nonpayment.