NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. D.L. CROMWELL INVESTMENTS, INC. (BD# 37730), Boca Raton, FL DAVID DAVIDSON (CRD# 1212799), Boca Raton, FL LLOYD BEIRNE (CRD# 1982417), Boca Raton, FL ERIC THOMES (CRD# 2233456) Boca Raton, FL Respondents.	:	Disciplinary Proceeding No. CAF020007 Hearing Officer – DMF **HEARING PANEL DECISION** November 19, 2003

Respondents (1) engaged in fraudulent manipulative practices in connection with the purchase and sale of securities, in violation of Section 10(b) of the Securities Exchange Act of 1934, SEC Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110; and (2) unlawfully bid for or purchased securities in the secondary market while distributions of those securities were still in progress, in violation of SEC Regulation M and NASD Rule 2110. Respondents Davidson and Beirne also failed to testify and provide documents as requested during NASD's investigation, in violation of NASD Rules 8210 and 2110. Finally, respondent Cromwell failed to establish and maintain adequate written supervisory procedures and systems, in violation of NASD Rules 3010 and 2110. Respondent Cromwell is expelled from NASD membership, respondents Davidson and Beirne are barred from associating with any NASD member in any capacity, and

respondents Cromwell, Davidson and Beirne are fined a total of $3.8 million, jointly and severally. Respondent Thomes is suspended in all capacities for one year, fined $10,000 and ordered to re-qualify before again becoming associated with any NASD member in any capacity requiring registration.

Appearances

Samuel L. Israel, Esq. and Rory C. Flynn, Esq., Washington, DC, for Complainant.

Martin P. Russo, Esq., New York, NY, for respondents D.L. Cromwell Investments, Inc. and David Davidson. Charles P. Sampson, Esq., Salt Lake City, UT, for respondent Lloyd Beirne. R. Scott Adams, Esq., Oklahoma City, OK, for respondent Eric Thomes.[1]

DECISION

I. Procedural History

The Department of Enforcement filed a Complaint on February 26, 2002, charging that respondents D.L. Cromwell Investments, Inc., David Davidson, Lloyd Beirne and Eric Thomes engaged in fraudulent manipulative practices in connection with the purchase and sale of publicly traded Pallet Management Systems, Inc. securities, in violation of Section 10(b) of the Securities Exchange Act, SEC Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110. Alternatively as to Thomes, the Complaint charged that he aided and abetted the other respondents' manipulation, in violation of NASD Rules 2120 and 2110.

The Complaint also alleged that Cromwell, Davidson and Beirne bid for and purchased Pallet Management Systems units while a distribution of the units was still in

[1] As explained below, counsel for respondents Cromwell, Davidson and Beirne withdrew after the hearing at, or shortly before, the time when respondents' post-hearing submissions were due. No substitute counsel have filed appearances for those respondents.

progress, in violation of SEC Regulation M and NASD Rule 2110. And the Complaint charged that all respondents also violated Regulation M and Rule 2110 by bidding for and purchasing Pallet Management Systems common stock while a distribution was in progress. As to this charge, the Complaint alleged in the alternative as to Thomes that he aided and abetted the other respondents' violation of Regulation M, thereby violating NASD Rules 2120 and 2110.

In addition, Enforcement charged that, during NASD's investigation Davidson and Beirne failed to provide testimony and documents requested by NASD staff, in violation of NASD Rules 8210 and 2110. Finally, the Complaint charged that Cromwell failed to establish and maintain adequate written supervisory procedures in certain respects, in violation of NASD Rules 3010 and 2110.

The respondents filed Answers contesting the charges and requested a hearing, which was held November 11-15, 2002, in Boca Raton, FL, and February 3-6, 2003, in New York, NY, before an Extended Hearing Panel that included an NASD Hearing Officer, and two former members of the NASD Board of Governors. Following the hearing, the Department of Enforcement filed a post-hearing submission. Less than a week before respondents' post-hearing submissions were due, counsel for respondents Cromwell and Davidson filed a notice of withdrawal, and those respondents did not file any post hearing submissions. Counsel for Beirne filed a one-page post-hearing submission, together with a notice of withdrawal as counsel for Beirne. Finally, instead of submitting a post-hearing submission, Thomes submitted an offer of settlement, which was acceptable to Enforcement. The Panel, however, rejected the proposed settlement,

giving Thomes an additional opportunity to file a post-hearing submission. Thomes, however, failed to file any post-hearing submission.

II. Facts

A. Respondents

Cromwell became a member of NASD in 1995. Its principal place of business was in Boca Raton, FL, but at various times it also had offices in New York, NY, Minneola, NY, and Washington, DC. In March 2003, following the hearing in this matter, Cromwell filed a Form BDW with NASD to withdraw from membership. Davidson and Beirne were officers, direct and indirect owners, and registered representatives and principals of Cromwell. Davidson first became associated with an NASD member in 1988; Beirne has also been in the securities industry since 1988. Thomes, who first became associated with an NASD member in 1992, was employed as Cromwell's Head Trader, and at the relevant time was registered with Cromwell as a representative and principal. (CX 1- 4.)

B. The Pallet Transactions

In Fall 1997, Cromwell placed an offering for Pallet Management Systems, Inc., pursuant to SEC Regulation D, Rule 504, of 1 million units (PALTU) at $1 per unit. Each unit consisted of two registered and freely tradable shares of Pallet common stock (PALT) and two unregistered warrants, an "A" warrant, which was exercisable at $1.50, and a "B" warrant, which was exercisable at $1.75. (CX 17.)

According to the placement memorandum, Pallet, headquartered in Boca Raton, Florida, was "engaged in the manufacture, sale, repair and retrieval of wooden pallets, as well as other product packaging required for the shipment of goods." The memorandum

disclosed that Pallet had had substantial net losses for its prior two fiscal years; that as of June 30, 1997, Pallet had an accumulated deficit of more than $2.5 million; and that, because Pallet was in default of certain debt covenants, its auditors had expressed "substantial doubt about [Pallet's] ability to continue as a going concern" in the firm's June 30, 1997 financial statements. According to the memorandum, however, Pallet "believe[d] that, upon the successful completion of this Offering, it will have the cash resources to meet its current obligations." (CX 17.)

Cromwell placed the entire PALTU offering with just 18 purchasers, 17 of them Cromwell customers. The eighteenth purchaser, not a Cromwell customer, was Rotheschild Capital Holdings, Inc. (or, in some of the documents, "Rotheschilds"), which purchased 185,000 PALTU, making it the largest single purchaser in the offering. (CX 18-19, 22; RX 91.)

From December 2 through December 4, 1997, Cromwell purchased a total of 540,000 shares of PALT from several of Cromwell customers who had purchased units in the offering. (The customers broke down the units into PALT and warrants, and sold some or all of the PALT to Cromwell, retaining the warrants.) Cromwell purchased the PALT at prices ranging from $0.5625 to $0.625 per share; its purchases accounted for more than 90% of all the market activity in PALT during the December 2-4 period. The sellers were all customers of Davidson or Beirne, and Cromwell purchased the stock in its "886 Trading Account," which was controlled by Beirne and Davidson. In several instances, the transactions occurred within minutes of each other, yet Cromwell marked each of the trades as "unsolicited."[2] (CX 19, 35, 37, 39, 41, 42, 56, 147.)

[2] On December 2, customer RL, who had purchased 20,000 units, broke down the units and sold the resulting 40,000 PALT to Cromwell, retaining the warrants. Twelve minutes later, customer MG, who had

Prior to the purchases, Cromwell had a flat position in PALT. Cromwell sold no PALT during the December 2-4 period, so by the close of business on December 4, it had amassed a 540,000 share long position. Between December 4 and December 16, Cromwell neither bought nor sold any PALT or PALTU. (CX 56, 78.)

On December 16, 1997, Cromwell became a market maker in both PALT and PALTU, trading on the OTC Bulletin Board, and it remained a market maker in those securities throughout the period at issue in this case. At the beginning of that day, Cromwell still held a 540,000 share long position in PALT, and it was flat in PALTU. On December 16, one customer who had purchased 45,000 PALTU in the offering broke down the units and sold 50,000 PALT to Cromwell. In addition, in less than one hour Cromwell purchased a total of 240,000 PALTU from five customers who had purchased units in the offering, all in trades marked "unsolicited." All of the sellers were customers of Davidson or Beirne, and Cromwell made the purchases in its 886 Trading Account, which Davidson and Beirne controlled. On December 16, Cromwell sold PALT to a few retail customers, and also sold 15,000 PALTU in an inter-dealer trade; by the end of the day, it had a 466,000 share long position in PALT and a 225,000 unit long position in PALTU. (CX 19, 44, 50-54, 56, 78, 140; Tr. 236-37.)

On December 17, Cromwell sold 983,810 shares of PALT to 63 of its retail customers in 74 transactions, 72 of which were marked as "solicited." During that day, Cromwell's representatives sold only a total of 1,500 shares of other securities in just

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purchased 100,000 PALTU, broke down the units and sold half of the resulting PALT (100,000 shares) to Cromwell. On December 3, customer AT, which had purchased 80,000 units, broke down the units and sold the resulting 160,000 PALT to Cromwell. One minute later, MG sold his remaining 100,000 PALT to Cromwell. On December 4, customer BC, which had purchased 70,000 units, broke down the units and sold the resulting 140,000 PALT to Cromwell. (CX 19, 35, 37, 39, 41, 56.)

eight transactions. Cromwell did not purchase any PALT on December 17, so by the end of the day, Cromwell's position was short 544,310 shares. (CX 56, 58-59.)

On December 18, Cromwell continued to sell PALT to its retail customers, leading to a maximum short position of 641,310 PALT shares at 12:04 p.m. Cromwell then began purchasing some PALT from other dealers and also converted the PALTU it held into 444,000 PALT, in order to fill a portion of its short position.[3] At the same time, however, Cromwell continued to sell PALT to its customers. By the end of the day on December 18, Cromwell had a 151,178 share short position in PALT, with a flat position in PALTU. During the rest of December, Cromwell continued to sell PALT to retail customers. Cromwell also bought some PALT in inter-dealer trades, but maintained a substantial short position. At the close of business on December 31, 1997, Cromwell was short 101,822 shares of PALT. (CX 56.)

Beginning on December 22, 1997 and continuing through January 1998, Cromwell purchased PALTU from Rotheschild, which it used to fill its short positions in PALT. According to documents in the record, Rotheschild was incorporated in Delaware in May 1997. In August 1997, Rotheschild opened a securities account at Gruntal & Company, with Beirne's wife as Gruntal's registered representative for the account. Davidson's wife signed the account opening documents as president and secretary of Rotheschild, which listed its address as Cromwell's offices in Boca Raton, Florida, although it had no office space there; no other officers or directors were identified. In September 1997, Rotheschild filed an application for permission to transact business in Florida in which it indicated that its business purpose was "investments." Once again,

[3] Cromwell had sold 3,000 PALTU inter-dealer on December 17, leaving it with 222,000 PALTU, which converted to 444,000 PALT plus warrants.

Davidson's wife was the only officer and director of Rotheschild identified in the application. (CX 24-28; Tr. 213-14, 1303, 1331.)

The first transaction in Rotheschild's Gruntal account was the receipt of 185,000 PALTU on December 22, 1997.[4] PALTU was the only holding in Rotheschild's Gruntal account, and the only activity in that account from December 22, 1997 through January 1998 was sales of PALTU to Cromwell. On December 22, Cromwell purchased 7,000 PALTU from the Rotheschild account, through Gruntal. Cromwell made additional purchases of PALTU from the Rotheschild account, through Gruntal, on December 23, 24, 30 and 31, 1997, and on January 2, 5, 6, 8, 9, 12, 13, 15, 20, 21, 22, 23, 26, 27, 28, 29 and 30, 1998. In all, Cromwell purchased 160,800 PALTU from Rotheschild in 22 transactions during the period December 22, 1997 through January 30, 1998, periodically breaking down the PALTU into PALT, which it used to fill its short positions, and warrants. These transactions accounted for virtually all of the market activity in PALTU during December 1997 and January 1998. (CX 25-26, 56, 78, 84.)

From the time Cromwell became a market maker in PALTU on December 16, 1997, through January 30, 1998, it repeatedly increased its bid for PALTU. Cromwell's initial bid for PALTU on December 16 was $1.00. Cromwell upticked its bid six times on December 16 and another six times on December 17, resulting in a bid of $4.50 as of the end of that day. During this period, there was only one other market maker for PALTU, and Cromwell held the exclusive inside bid at all times, except for a period of approximately 30 minutes on December 16, when the other firm held the exclusive inside bid, and approximately one hour on December 17, when Cromwell and the other firm

[4] Rotheschild's purchase of the PALTU closed on November 17, 1997. (CX 22.) There is no evidence as to where Rotheschild held the PALTU until it was transferred to the Gruntal account.

shared the inside bid. Cromwell continued to hold the inside bid at $4.50 from December 17, 1997 until January 23, 1998, even though one additional firm had become a market maker. From January 23 through January 28, Cromwell upticked its bid four times, to $5.75. As noted above, Cromwell's purchases from Rotheschild accounted for virtually all of the market activity in PALTU during this period. (CX 78, 79, 84.)

During December 1997 and January 1998, the price of PALT also increased. On December 16, the inside bid for PALT increased from $0.75 at the opening to $1.03125 by the close. By the close on December 17 – the day Cromwell sold nearly 1 million PALT to its customers – the inside bid increased to $1.875. Through the rest of December, the inside bid for PALT fluctuated somewhat; on December 31, the closing inside bid was $1.8125. In January 1998, however, the price of PALT increased once more. At the close on January 5, the inside bid was $2.375; by the close on January 23, the inside bid had risen to $2.7188; thereafter, the price reached as high as $3.00, before closing at $2.8438 on January 30. Although Cromwell was a market maker in PALT during this period, there were other market makers and Cromwell did not dominate the inside bid or trading in PALT, as it did in PALTU.[5] (CX 60; RX 14, 15.)

C. Requests for Testimony and Documents

After opening an investigation of Cromwell's trading in Pallet securities, NASD staff attempted to obtain on-the-record interviews (OTRs) and documents from Davidson and Beirne, pursuant to NASD Rule 8210.[6] Initially, both Davidson and Beirne were

[5] In February 1998, the warrants that had been included in the units were registered, after which both the stock and the warrants were traded, and trading in PALTU ended.

[6] The facts set forth in this section are based upon the statement of material facts not in dispute submitted by Enforcement in support of its motion for partial summary disposition, pursuant to Rule 9264, prior to the hearing. By order dated October 15, 2002, the Hearing Panel denied the motion, but, pursuant to Rule 9264(c), the Panel determined that many of the relevant facts set forth in Enforcement's statement were

scheduled for OTRs in February 2001. Prior to the scheduled dates, however, Cromwell, Davidson, Beirne and two other individuals associated with Cromwell filed suit in federal district court seeking to enjoin NASD from compelling the individual plaintiffs to testify in the investigation. The district court stayed the OTRs pending a hearing, but on February 26, 2001, the court issued a decision granting judgment in favor of NASD dismissing the proceeding.

On March 1, 2001, NASD staff, pursuant to Rule 8210, notified Beirne that he was required to appear for an OTR on April 26-27. On March 23, the plaintiffs in the federal court action appealed the district court's dismissal of the case, and on March 26 they asked the appeals court to enjoin NASD from compelling the individual plaintiffs, including Beirne, to appear for OTRs until the appeal was concluded. The appeals court denied that motion on April 25. Nevertheless, Beirne did not appear for his scheduled OTR on April 26 and 27.

On May 1, pursuant to Rule 8210, NASD staff notified Beirne that he was required to appear for an OTR on May 21 and 22. On May 18, the last business day before Beirne's scheduled OTR, his attorney sent NASD staff a letter stating that Beirne "appears to be on the verge of a nervous breakdown and is at this moment seeking medical treatment. Consequently, Mr. Beirne is unable to appear at the [OTR]." Beirne did not appear for his OTR on May 21 and 22.

On May 21, pursuant to Rule 8210, NASD staff requested from Beirne "all of your medical records … and all other documents relating to your medical condition and treatment that you contend prevented you from appearing for your [OTR]." The staff

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undisputed, and the Panel held that those facts would be deemed established for purposes of this proceeding.

requested that Beirne provide those materials by May 31. He did not provide any materials by that date, but on June 4, his attorney sent NASD staff a letter from a licensed clinical social worker stating that "Beirne came to my office for a session with me on May 17, 2001. Throughout the session he was in a state of extreme anxiety, depression, and agitation. There were clear indications that he required a medication consultation with a psychiatrist, for which I gave him referrals."

On July 3, the staff notified Beirne, pursuant to Rule 8210, that he was required to appear for an OTR on July 23 and 24. On July 17, Beirne's attorney responded with a letter stating, "I understand his doctor is of the opinion that it medically is unadvisable for him to appear on the dates you suggest. … Needless to say, Mr. Beirne will no[t] appear until his psychiatrist believes he is emotionally prepared to testify." On July 18, NASD staff sent the attorney a letter advising him that the stated reasons for Beirne's non-appearance were not sufficient, and that if Beirne "would like the Staff to consider any alleged medical excuse … the Staff must be provided with a letter and/or medical records from a treating physician that provides a detailed summary of his medical condition, the treatment that is being rendered and an explanation of why this medical condition prevents him from testifying at the [OTR]." Instead, on July 20, Beirne's attorney forwarded a letter from a physician which simply stated: "Due to my absence over the next three weeks, I have advised my patient, Lloyd Beirne not to appear for any interviews in that they would be stress inducing. Any travel for such interviews would negate the work we have accomplished over the past two months." Beirne did not appear for his OTR on July 23-24.

On August 23, pursuant to Rule 8210, NASD staff requested Beirne to provide by August 31, three dates in September when he would be available for an OTR. Beirne did not provide any such dates. Instead, on August 31, his attorney sent the staff a letter stating that Beirne's physician believed "that it is not medically advisable for Mr. Beirne to appear at an [OTR] at this time. … Accordingly, it would be premature to agree to dates in mid-to-late September at this time. I suggest we revisit the issue towards the end of September 2001." On September 7, Beirne's attorney forwarded to the staff a letter from Beirne's physician stating merely that Beirne "is not capable of submitting to any legal depositions or questioning," and that in his opinion Beirne "could be ready for such questioning after the 1st of next year and not before."

On October 23, NASD staff, pursuant to Rule 8210, requested that Beirne provide, by November 6, 2001, either a completed authorization and consent for the release of his medical records, or "all of your medical records … relating to your medical condition and treatment that you contend has prevented you from appearing for your [OTR]." Beirne did not provide either an authorization or copies of any of his medical records. Instead, his attorney sent the staff a letter dated November 6 stating that Beirne had requested another letter from his physician "respecting his medical opinion of Mr. Beirne's condition and the effect your proposed interrogation might have upon his mental health. … [W]e are confident that his diagnosis of Mr. Beirne's condition is far more competent than any 'evaluation' that might be made by the staff. Consequently, we will obtain the aforementioned letter to aid the staff in achieving its stated goals." However, neither Beirne nor his attorney ever provided such a letter to the staff.

The staff's efforts to obtain an OTR from Davidson followed a virtually identical path. In March 2001, after the district court dismissed the lawsuit, the staff notified Davidson, pursuant to Rule 8210, that he was required to appear at an OTR on April 5 and 6. At the request of Davidson's attorney – the same attorney who represented Beirne – the staff agreed to reschedule the OTR for May 10 and 11. On May 9, the attorney notified the staff that Davidson would not appear because he "medically is in no condition to travel to Washington, D.C., and give a deposition. Mr. Davidson has a history of anxiety related illness and presently is heavily medicated … it will be approximately one month before the medications prescribed for Mr. Davidson take full effect, permitting him to function lucidly." Davidson did not appear on May 10 and 11.

On May 10, the staff sent the attorney a letter advising him that they had not agreed to an adjournment of the OTR, that Davidson' failure to appear might result in disciplinary action, and that if Davidson "wishes for the Staff to consider his failure to appear as an excused absence, then [the Staff] must receive a letter and full medical report from Mr. Davidson's treating physician before 5:00 p.m. on May 11, 2001." The staff received no response to this letter. Therefore, on May 14, pursuant to Rule 8210, the staff requested Davidson to provide, by May 25, "all of your medical records … and all other documents relating to your medical condition and treatment that you contend prevented you from appearing for your [OTR]." Davidson did not provide the requested documents. Instead, on May 25, his attorney provided a letter from the same physician who wrote regarding Beirne stating, "It is my medical opinion that Mr. Davidson is suffering from anxiety and depression. I am currently seeing him in therapy one or two times per week for psychotherapy and medication management." On May 30, the staff

sent Davidson's attorney a letter indicating that the letter from the physician did not satisfy the staff's demand for information regarding Davidson's alleged condition that precluded him from appearing for his OTR, and stated that the letter should be considered "a second request to David Davidson, pursuant to Rule 8210, to provide the Staff with the documentation that was specifically requested in the Rule 8210 request dated May 14, 2001."

Davidson again failed to provide the requested documents. Instead, his lawyer forwarded another letter from his physician stating, "Davidson has been seeing me once to twice a week since May 7, 2001. He has not been in a condition to participate in an interview that you have requested. His anxiety and depression are so severe that he cannot sit for more than 10 minutes at a time and cannot concentrate for more than a minute or two. It is my considered medical opinion that he could not participate in that past interview nor can he participate in such an interview in the near future."

On July 3, the staff again notified Davidson, pursuant to Rule 8210, that he was required to appear for an OTR, this time on July 25 and 26. This time, his attorney advised the staff that Davidson was unavailable because he was hospitalized in an Arizona treatment facility through the end of July. On July 18, the staff again notified the attorney that his explanation was insufficient, and that if Davidson "would like the staff to consider any alleged medical excuse for his failure to appear, the Staff must be provided with a letter and/or medical records from a treating physician that provides a detailed summary of his medical condition, the treatment that is being rendered and an explanation of why this medical condition prevents him from testifying at the [OTR]." In response, Davidson's attorney provided the staff with a letter from the treatment facility

confirming that Davidson was a patient, had been admitted on July 1, and had an anticipated discharge date of July 27.

On August 23, NASD staff, pursuant to Rule 8210, requested that Davidson provide three dates in September when he would be available for his OTR. Instead, on August 31, his attorney sent the staff a letter stating, "As for your request that we provide dates for Mr. Davidson's [OTR], we cannot respond with firm dates until they are approved by Mr. Davidson's primary psychiatrist." The attorney indicated that the psychiatrist was away from his office until September 6, 2001. However, at no time after that date did Davidson or his attorney provide any dates when Davidson would be available for his OTR. On October 24, the staff requested, pursuant to Rule 8210, that Davidson provide "all of your medical records … and all other documents relating to your medical condition and treatment that you contend prevented and continues to prevent you from appearing for your [OTR]." In response, Davidson's attorney provided a letter from a psychiatrist stating, "In my opinion, Mr. Davidson is under significant stress and any interrogative interviews at this time would have an adverse effect on his emotional equilibrium and would be psychiatrically contra-indicated at present." Davidson did not provide any other details or medical records, even though the staff notified his attorney on November 16 that the psychiatrist's letter was not an adequate response to the staff's October 24 Rule 8210 request.

On October 12, 2001, the staff requested, pursuant to Rule 8210, that Davidson provide copies of his federal and state tax returns for the years 1997 and 1998, as well as copies of all documentation reflecting sources of income reported on those tax returns. His attorney requested a two week extension, to November 2, which the staff granted.

Instead of providing the requested documents, however, on November 2 Davidson's attorney sent the staff a letter stating that Davidson "has been unable to obtain copies of the documents you seek. He apparently has contacted his accountant and is in the process of attempting to procure the same. We promptly will forward them to you if and when they are provided." Nevertheless, Davidson never provided the requested documents.

III. Discussion

A. Manipulation and Regulation M Charges

The Panel finds that Cromwell's transactions in PALT and PALTU during December 1997 and January 1998 were part of a carefully conceived and well-orchestrated scheme.[7] Cromwell managed a private placement by Pallet, a company in poor financial condition. Cromwell placed a substantial portion of the offering with customer accounts that Cromwell, or Davidson and Beirne, effectively controlled, rather than with the investing public.

After the offering nominally closed, Cromwell retrieved the common stock component of the units, or in some cases the complete units, from several of those controlled accounts, building a very substantial long position in the stock. Cromwell accomplished this through transactions that it falsely described as unsolicited arms-length purchases from unaffiliated customers. Next, Cromwell became a market maker for both the stock and the units. Cromwell then sold the stock it had retrieved from the controlled accounts, as well as additional stock that it did not yet own, to retail customers at prices

[7] The Panel's findings are based on the evidence and reasonable inferences from that evidence. In addition, the Panel concludes that Davidson's and Beirne's refusal to provide testimony allows the Panel to draw adverse inferences against them. See DBCC v. Mangan, No. C10960162, 1998 NASD Discip. LEXIS 33, at *11-12 (NBCC July 29, 1998) (upholding adverse inferences based on a respondent's refusal to testify); Raymond L Dirks, 48 S.E.C. 200, 205 (1985), aff'd, 802 F.2d 1468 (D.C. Cir. 1986) ("The failure of a party to testify in a non-criminal case in explanation of suspicious circumstances peculiarly within his knowledge warrants the inference that his testimony, if produced, would have been adverse.").

substantially higher than the distribution price of the units had been, building very substantial short positions in the stock.

Finally, Cromwell filled its short positions by retrieving units from Rotheschild, another controlled account, once again in transactions that were falsely reported to the investing public as bona fide arms length transactions. Through this scheme, respondents obtained large profits. In carrying it out, however, respondents violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110, as well as SEC Regulation M and NASD Rule 2110.

1. Manipulation

Section 10(b) of the Exchange Act makes it unlawful "to use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance." Rule 10b-5 implements this provision by prohibiting "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," and NASD Rule 2120 similarly prohibits any NASD member or associated person from "effect[ing] any transaction in … any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

"Manipulation is the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand." Swartwood, Hesse, Inc., 50 S.E.C. 1301, 1307 (1992). The SEC has explained that "investors and prospective investors … are … entitled to assume that the prices they pay and receive are determined by the unimpeded interaction of real supply and real demand so that those prices are the collective marketplace judgments that they purport to be."

Edward J. Mawod & Co., 46 S.E.C. 865, 871-72 (1977), aff'd, 591 F.2d 588 (10th Cir. 1979).

Enforcement charged that Cromwell's purchases of PALTU from Rotheschild, through Gruntal, were manipulative. Enforcement focused, in particular, on Cromwell's increases in its bid price for PALTU during the period December 16, 1997 through January 30, 1998. Enforcement argued that there was no favorable news about Pallet's business, or any market activity or competition from other market makers in PALTU that could have warranted those increases. Therefore, Enforcement contended, the Panel should infer that the increases were manipulative, designed to increase the price of PALTU artificially, in order to allow respondents, by purchasing PALTU from Rotheschild at the artificial prices, to transfer funds from Cromwell to Rotheschild.

During the hearing, however, respondents urged that Enforcement's analysis of Cromwell's PALTU bids was faulty. Respondents argued that, because each unit of PALTU included two shares of PALT, as well as two warrants, PALT and PALTU should have traded "in parity" – that is, increases in the bid price for PALT would naturally lead to increases in the bid for PALTU, as well.[8] Respondents pointed out that Enforcement presented no evidence or analysis of the movement of the inside bid for PALT during the relevant period to show that Cromwell's increases in its bid for PALTU were not driven by increases in the price of PALT.

In its post-hearing brief, Enforcement attempted to fill this gap in its analysis. Relying on market maker price movement reports for PALT introduced by respondents, Enforcement argued that Cromwell's increases in its bids for PALTU did not precisely

[8] Logically, at any given time, Cromwell's bid for PALTU should have been approximately two times the inside bid for PALT, plus some amount for the value of the warrants.

track increases in the price of PALT, and therefore could not have been attributable to those increases.

The Panel, however, finds that Enforcement's post-hearing analysis is insufficient. The evidence shows that during the period in question, both the inside bid for PALT and Cromwell's bid for PALTU increased substantially. On December 16, Cromwell placed its first bid for PALTU as a market maker at $1.00 and subsequently increased its bid for PALTU to $2.375 by the close, while the inside bid for PALT opened at $0.75 and closed at $0.875. On December 17, while it was in the process of selling all of its PALT inventory and building a substantial short position, Cromwell upticked its PALTU bid several times, reaching $4.50. During the same day, the inside bid for PALT increased to $1.875 by the close. Through the rest of December 1997 and January 1998, although Cromwell's bid for PALTU did not move in lock-step with increases in the inside bid for PALT, in general Cromwell maintained its bid at an amount that was somewhat more than twice the inside bid for PALT. (CX 78; RX 14, 15.)

The burden of proof was on Enforcement, not respondents. In the absence of a complete and convincing analysis of the relative price movements of PALT and PALTU, showing that Cromwell's increases in its bid for PALTU could not be explained by increases in the price of PALT, the Panel is not persuaded that, by themselves, those increases are sufficient to establish manipulation.

That is not, however, the end of the inquiry. "Manipulation" encompasses a broad range of misleading activity. "A manipulation occurs when inaccurate information is disseminated into the marketplace." In particular, "[t]he manipulation of a market

results from activities … that '[create] the false impression that certain market activity is occurring when in fact such activity is unrelated to the actual supply and demand.'" Department of Enforcement v. Fiero, No. CAF980002, 2002 NASD Discip. LEXIS 16 at *36-37 (NAC Oct. 28, 2002) (quoting Hundahl v. United Benefit Life Ins. Co., 465 F. Supp 1349, 1360 (N.D. Tex. 1979)).

Here, Cromwell did not simply increase its bid for PALTU; it effected, and reported, purchases from Rotheschild, through Gruntal, at those prices. To market participants, those purchases would have appeared to be arms-length transactions reflecting the actual value placed on Pallet securities under the market laws of supply and demand. In fact, however, the transactions were a sham. Rotheschild was not an independent entity, but was instead controlled by or affiliated with Davidson and Beirne, who also controlled Cromwell. Davidson's wife was the company's only identified officer or director; Beirne's wife was the company's representative at Gruntal. Rotheschild's address was Cromwell's office, even though it did no business from that location. It was the largest purchaser of the PALTU offering and the only purchaser that was not a customer of Cromwell. Rotheschild's only holding in its Gruntal account was the PALTU it purchased in the offering, and its only transactions were sales to Cromwell. These facts amply support an inference that the PALTU was "parked" in the Rotheschild account, then the account was tapped, as needed, to fill Cromwell's short position in PALT. Further, the Panel finds that, in light of Davidson's and Beirne's refusals to testify, it is appropriate for the Panel to draw the adverse inference that they controlled both sides of those trades.[9]

[9] The Panel notes that Beirne's wife, the Gruntal representative for the Rotheschild account, was barred for refusing to testify during NASD's investigation. See Department of Enforcement v. Valentino, No.

Therefore, Cromwell's trades with Gruntal, on behalf of Rotheschild, had the effect of manipulating the market for PALTU. "When investors and prospective investors see activity, they are entitled to assume that it is real activity. … Manipulations frustrate these expectations. They substitute fiction for fact. … The vice is that the market has been distorted and made into a 'stagemanaged performance.'" Edward J. Mawod &Co., 46 S.E.C. at 871-72 (quoting Halsey, Stuart & Co., Inc., 30 S.E.C. 106, 112 (1949)). See Roney, Pace Inc., 48 S.E.C. 891, 896 (1987) (SEC found manipulation and Rule 10b-6 (the predecessor of Regulation M) violations where the respondents sold large volumes of stock in the aftermarket, building a substantial short position, but knowing "that the … shares placed in certain of Rooney's customer accounts [during the distribution] could be used to cover the firm's short position").[10]

Under these circumstances, the fact that Cromwell's increases in its bid for PALTU may have generally paralleled increases in the bid for PALT is not inconsistent with the conclusion that those bids, and the transactions effected at those bids, were manipulative. Instead, it suggests that the manipulation may well have affected the market for PALT, as well as the market for PALTU. As respondents themselves emphasized, because each unit of PALTU included two shares of PALT, market activity relating to PALTU would also affect the market for PALT. Therefore, Cromwell's increases in its bid prices for PALTU, together with its frequent manipulative purchases

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FPI010004, 2003 NASD Discip. LEXIS 15 (NAC May 21, 2003), appeal docketed, No. 3-11191 (SEC June 23, 2003). And although Davidson's wife, nominally the president of Rotheschild, was not subject to NASD jurisdiction, NASD staff requested that she provide testimony voluntarily during the investigation, but she refused. (Tr. 217-18.)

[10] Rotheschild's sales of PALTU to Cromwell were effectively "wash sales." A wash sale is "a securities transaction which involves no change in the beneficial ownership of the security," and is, therefore, manipulative. Swartwood, Hesse, Inc., 50 S.E.C. at 1306 n. 12.

from Rotheschild at those prices, may well have induced or at least contributed to the increases in the bid price for PALT during December 1997 and January 1998.

The Hearing Panel, therefore, finds that Cromwell engaged in manipulative practices in violation of Section 10(b) of the Exchange Act, SEC Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110. Davidson and Beirne are responsible for those violations. The record shows that they controlled Cromwell, and in particular controlled Cromwell's 886 Trading Account, which was used to effect all of the manipulative trades. The Hearing Panel also draws adverse inferences against Davidson and Beirne because of their refusal to provide information during NASD's investigation.[11]

The Panel also finds that Thomes participated in the manipulation. Thomes was Cromwell's Head Trader, and in that capacity he effected most, if not all, of the manipulative transactions. Although Davidson and Beirne directed and controlled trading in the 886 Trading Account, Thomes, as Cromwell's Head Trader, was primarily responsible for entering the quotations and executing the orders through which the manipulation was accomplished. Along with Davidson and Beirne, he had access at all times to Cromwell's inventory positions. As a result, he knew that Cromwell built a large short position in PALTU, which it filled though the trades with Rotheschild. Given the manner in which Cromwell set its bid, the number and frequency of its trades with Gruntal on behalf of Rotheschild, the time period during which they occurred, and the fact that the trades accounted for virtually all of the market activity in PALTU, Thomes had adequate notice that the trades were manipulative, sham transactions. The Panel

[11] Cromwell's, Davidson's and Beirne's actions were intentional, and therefore clearly satisfied the scienter requirement under Section 10(b), SEC Rule 10b-5 and NASD Rule 2120. Scienter is not required to establish a violation of NASD Rule 2110.

therefore finds that Thomes also violated Section 10(b) of the Exchange Act, SEC Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110 by engaging in manipulative trading on behalf of Cromwell.[12]

2. Regulation M

Enforcement next argues that Cromwell, Davidson and Beirne violated SEC Regulation M and NASD Rule 2110 by bidding for and purchasing PALTU before the distribution of the units was completed, and that all the respondents, including Thomes, violated Regulation M and Rule 2110 by bidding for PALT on December 17 while Cromwell was engaged in a distribution. The Panel agrees.

Regulation M "proscribes certain activities that offering participants could use to manipulate the price of an offered security." Anti-manipulation Rules Concerning Securities Offerings, Exch. Act. Rel. No. 38067, 1996 SEC LEXIS 3482, at *6 (Dec. 20, 1996) (adopting Regulation M). As relevant to this case, Regulation M makes it unlawful for any person participating in a distribution to bid for or purchase the security being distributed until the person's participation in the distribution has ended.

In this case, the placement of the Pallet units was unquestionably a distribution, for purposes of Regulation M. Although the distribution purportedly closed in November 1997, "a distribution continues in situations where an underwriter withholds part of an offering in proprietary or nominee accounts, and later sells those securities to the public after trading has begun." Swartwood, Hesse, Inc., 50 S.E.C. at 1303. Cromwell placed a substantial portion of the PALTU offering in accounts that Cromwell, or Davidson and Beirne, controlled. Based on the evidence cited above, as well as adverse inferences

[12] Thomes actions were at least reckless, and therefore satisfy the scienter requirement. As explained, the Panel finds that Thomes is liable for taking part in the manipulative conduct; in the alternative, however, the Panel finds that he aided and abetted the other respondents' manipulation.

from Davidson's and Beirne's refusals to testify, the Panel concludes that they controlled both the accounts from which Cromwell purchased 540,000 shares of PALT during the December 2 to 4, 1997 period, in supposedly unsolicited transactions, and the Rotheschild account. "[T]he use of undisclosed nominees … extends the period of the distribution until the [securities come] to rest in the hands of the investing public." SEC v. Kimmes, 799 F. Supp. 852, 859 (N.D. Ill. 1992). In this case, that did not occur until after Cromwell concluded its purchases of PALTU from the Rotheschild account in December 1997 and January 1998. Therefore, by bidding for and purchasing PALTU during this extended distribution period, Cromwell, Davidson and Beirne violated Regulation M, as charged, and by violating Regulation M, they also violated NASD Rule 2110.

The respondents also violated Regulation M and Rule 2110 in connection with Cromwell's sale of nearly 1 million PALT on December 17, 1997. Enforcement contends that this amounted to a distribution of PALT, for purposes of Regulation M, which provides that a distribution "is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling methods." Anti-manipulation Rules, 1996 SEC LEXIS 3482, at *13. The Panel agrees. The PALT sold by Cromwell on December 17 amounted to approximately 23% of the public float, satisfying the "magnitude" requirement. (CX 61.) See, e.g., John Montalbano, Exch. Act Rel. No. 47227, 2003 SEC LEXIS 153, at *31 (Jan. 22, 2003) (sales amounting to 22.5% of a company's publicly tradable float satisfied the magnitude requirement). In addition,

the Panel finds that the fact that Cromwell sold the PALT to the virtual exclusion of any other activity that day evidences the presence of "special selling methods."[13]

Furthermore, Cromwell's PALT sales on December 17 were a continuation of the PALTU distribution. As explained above, Cromwell obtained the PALT it sold either by purchasing PALT from controlled accounts that had broken down the units they purchased in the PALTU offering, or by purchasing PALTU from controlled accounts and breaking the units down itself. In either case, the PALT that Cromwell sold to its customers was derived from the units. In SEC v. Graystone Nash, Inc., 820 F. Supp. 863, 866, 873 (D.N.J. 1993), the defendant broker-dealer underwrote the distribution of an offering of units. "Almost immediately after these units were sold to customers, the branch offices solicited their return at a fixed price set by Graystone. … Upon receipt of the units Graystone would strip the common stock of the warrants and retail the common stock …." On these facts, the court held that "the distribution … encompassed the sale of both the initial units and the shares of the common stock." The Panel concludes that the same analysis applies here, providing another ground for holding that Cromwell's sales of PALT on December 17, 1997 constituted a distribution. Because Cromwell bid for and purchased PALT while the distribution was continuing, it violated Regulation M, and therefore Rule 2110, as charged.

[13] As additional support for a finding of special selling methods, Enforcement relies on evidence that Beirne and Davidson took part in a "road show" with the president of Pallet given at Cromwell's New York offices, encouraging Cromwell's representatives to sell PALT; that Cromwell promised additional compensation to Cromwell's representatives who sold PALT; and that the representatives used high-pressure tactics to solicit orders for PALT from Cromwell's customers. Although these circumstances do support the conclusion that Cromwell employed special selling methods, the supporting evidence on which Enforcement relies is quite limited, and the Panel finds it unnecessary to rest its conclusion on them, finding that the undisputed evidence that Cromwell's representatives sold nearly one million shares of PALT on a single day to the virtual exclusion of any other sales activity, by itself, adequately supports an inference that Cromwell employed special selling methods to achieve that result.

The Panel also concludes that Davidson and Beirne bear responsibility for these violations. They controlled Cromwell's activities, including the original distribution of the PALTU offering to controlled accounts, Cromwell's purchases of PALT and PALTU from those accounts, Cromwell's distribution of PALT on December 17 and Cromwell's bids for and purchases of PALT and PALTU in Cromwell's 886 Trading Account while the distributions were ongoing. As Cromwell's Head Trader, Thomes is also liable for Cromwell's violations of Regulation M in the sale of PALT on December 17. Thomes monitored Cromwell's inventory positions; he effected most if not all of the trades as Cromwell distributed nearly one million PALT; and he entered Cromwell's bids for and purchases of PALT while the distribution was continuing that day. The Panel found, therefore, that respondents violated Regulation M, as charged, and that, by violating Regulation M, they also violated NASD Rule 2110.[14]

B. Failure to Testify and Provide Documents

Rule 8210 provides that NASD staff "shall have the right to … require a … person subject to [NASD's] jurisdiction to provide information orally … with respect to any matter involved in [an] investigation …." The Rule further provides, "No member or person shall fail to provide information or testimony … pursuant to this Rule."

"It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate." Department of Enforcement v. Valentino, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003). "It is also well

[14] It has been held that proof of scienter is not required to establish a violation of Regulation M. See Jaffee & Co. v. SEC, 446 F.2d 387, 391 (2d Cir. 1971). In any event, the evidence amply supports the conclusion that Davidson and Beirne intentionally caused Cromwell to bid for and purchase PALTU and PALT while distributions were continuing, and that Thomes was at least reckless in effecting bids for and purchases of PALT on December 17 when he knew or should have known that Cromwell was engaged in a distribution.

settled that respondents cannot impose conditions on their responses to NASD's inquiries." Id.

When NASD staff began to investigate respondents' scheme, Davidson and Beirne adamantly resisted the staff's efforts to obtain their testimony. They began by filing a suit in federal court that was dismissed as being without merit. They then repeatedly refused to appear for scheduled testimony. When asked to provide some dates on which they would be available to testify, they failed to do so. They claimed that they were suffering from psychological conditions that precluded them from testifying, but provided inadequate support for their claims, and when requested to provide more detailed support either refused or promised to provide additional information, but failed to do so. Even as of the hearing, they had never offered to provide the testimony requested by NASD staff.

As a general matter, an NASD member firm or associated person who is requested to provide testimony, documents or other information pursuant to Rule 8210 has an unqualified obligation to respond fully and promptly to the request. Of course, a person who has been requested to provide information may ask the staff to adjust the time, place or manner in which the information will be provided to accommodate the person's legitimate physical or mental health needs, but the person making the request must demonstrate to the staff that there is a good faith basis for the request, and must offer an alternative means for the staff to obtain the required information that will satisfy the staff's investigative needs.

Davidson and Beirne made no such showing in this case. On the contrary, initially they simply announced that they would not appear. Then, when the staff asked

for support, they provided letters that were plainly inadequate to support their claims that they were unable to provide the requested testimony. They failed to propose any alternative dates or means by which the staff could obtain their testimony, and refused to provide any detailed medical records, when asked. The unmistakable conclusion is that their excuses for failing to testify and to provide documents were offered in bad faith. Cf. Louis F. Albanese, 53 S.E.C. 294 (1997) (holding that respondent failed to demonstrate that, for health reasons, he had been unable to comply with a New York Stock Exchange request for testimony).

The Panel therefore concluded that Davidson and Beirne violated NASD Rules 8210 and 2110.

C. Supervision Charge

The Panel found that Cromwell's supervisory procedures were inadequate, in violation of NASD Rules 3010 and 2110, as charged. Rule 3010 requires that each NASD member "establish and maintain a system to supervise the activities of each registered representative … that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with the Rules of [NASD]." The firm's supervisory procedures must address "the types of business in which it engages."

Cromwell's written supervisory procedures did not address Regulation M, SEC Rule 10b-5 or manipulation of securities. Further, they did not establish any systems or procedures to ensure that the firm's Head Trader or any other supervisor would be alerted to possible Regulation M violations based on a continuing distribution of securities, as occurred in this case. The Panel therefore finds that they were inadequate.

IV. Sanctions

Turning first to respondents Cromwell, Davidson and Beirne, their violations of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110, on the one hand, and violations of Regulation M and Rule 2110, on the other, arose out of a single manipulative scheme. Therefore, a single set of sanctions is appropriate for those violations.

The violations were highly egregious. As the National Adjudicatory Council has recently emphasized, although there is no NASD Sanction Guideline addressing manipulation, "market manipulation is one of the most serious violations that a respondent can commit. Manipulation is a direct assault on NASD's mission to bring integrity to the markets. Moreover, market makers play a crucial role in the securities market." Department of Enforcement v. Elgindy, No. CMS000015, 2003 NASD Discip. LEXIS 14, at *35 (May 7, 2003).

Here the violations arose out of a deliberate scheme by Davidson and Beirne, effected through Cromwell. Davidson and Beirne arranged to place the PALTU offering in controlled accounts, including the Rotheschild account, which was established away from Cromwell. They arranged for Cromwell to purchase PALT and PALTU from some of the controlled accounts; distributed nearly one million shares of PALT to Cromwell customers at prices well above the offering price, building large short positions in PALT; and then filled the short positions through sham purchases from Rotheschild. These activities had the effect of manipulating the market for both PALTU and PALT. Further, Cromwell, Davidson and Beirne all have substantial prior disciplinary histories. (CX 1-12.)

Under these circumstances, the Panel finds that Cromwell should be expelled from NASD membership, and that Davidson and Beirne should be barred from associating with any NASD member in any capacity. In addition, a fine is warranted, which, to accomplish NASD's remedial goals, must substantially exceed the monetary gains that Cromwell, Davidson and Beirne received as a result of their activities. Enforcement requests that they be fined $1.5 million, jointly and severally, plus the amount of gains realized by Cromwell and Rotheschild (in total, approximately $1.5 million), plus interest (in total, approximately $800,000). The Panel agrees that these amounts are appropriate; therefore, Cromwell, Davidson and Beirne will be fined a total of $3.8 million, jointly and severally. Taken together, the Panel believes these sanctions will be adequate "to deter potential manipulators and to protect the public adequately from recurrence of similar misconduct." Elgindy, 2003 NASD Discip. LEXIS 14, at *35.

The Panel also concludes that Davidson and Beirne should be barred for failing to appear and failing to provide requested documents. Under the Sanction Guidelines, a bar is "standard" for a failure to appear or to provide requested information. NASD Sanction Guidelines at 39 (2001 ed.). Davidson's and Beirne's adamant refusals were highly egregious, and there are no mitigating facts that would justify reduced sanctions in this case. In light of the bars, no additional fines will be imposed for these violations. Further, in light of the expulsion of Cromwell for the manipulation and Regulation M violations, no additional sanctions will be imposed for its failure to have adequate supervisory procedures.

Turning to Thomes, his role in the manipulation and Regulation M violation was primarily to carry out instructions from Davidson and Beirne. Although he was

Cromwell's Head Trader, he exercised no discretion in bidding for and trading PALT and PALTU. Nevertheless, he is responsible for his actions. He knew or should have known that the PALTU bids and purchases he was effecting for Cromwell were manipulative, and he knew or should have known that the PALT sales effort on December 17, 1997, amounted to a distribution, and that Cromwell was therefore prohibited from bidding for or purchasing PALT. The Hearing Panel therefore finds that Thomes' violations were serious, but not so highly egregious as the violations by the other respondents. The Panel concludes, therefore, that a one year suspension, a $10,000 fine and a requirement that he re-qualify are appropriate sanctions.

V. Conclusion

Respondents D.L. Cromwell Investments, Inc., David Davidson, Lloyd Beirne and Eric Thomes (1) engaged in manipulative practices, in violation of Section 10(b) of the Securities Exchange Act, SEC Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110; and (2) unlawfully bid for or purchased securities in the secondary market while distributions of those securities were still in progress, in violation of SEC Regulation M and NASD Rule 2110. Further, Davidson and Beirne failed to testify and provide documents as requested, in violation of NASD Rules 8210 and 2110. Finally, Cromwell failed to establish and maintain adequate written supervisory procedures and systems, in violation of NASD Rules 3010 and 2110.

Cromwell is expelled from NASD membership, Davidson and Beirne are barred from associating with any NASD member in any capacity, and Cromwell, Davidson and Beirne are fined a total of $3.8 million, jointly and severally. Thomes is suspended from associating with any NASD member in any capacity for one year, fined $10,000 and

ordered to re-qualify before again becoming associating with any NASD member in any capacity requiring registration. Respondents are also jointly and severally ordered to pay costs in the amount of $11,423.91, which includes an administrative fee of $750 and hearing transcript costs of $10,673.91.

These sanctions shall become effective on a date established by NASD, but not sooner that 30 days after this decision becomes the final disciplinary action of NASD, except that if this decision becomes NASD's final disciplinary action, the expulsion and bars shall become effective immediately and Thomes suspension shall become effective at the opening of business on January 20, 2004 and end at the close of business on January 19, 2005.[15]

HEARING PANEL

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By: David M. FitzGerald
Hearing Officer

Copies to:

D.L. Cromwell Investments, Inc. (via overnight and first class mail)
David Davidson (via overnight and first class mail)
Lloyd Beirne (via overnight and first class mail)
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Samuel L. Israel, Esq. (electronically and via first class mail)
Rory C. Flynn, Esq. (electronically and via first class mail)

[15] The Hearing Panel has considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.