NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. J. ALEXANDER SECURITIES, INC. (BD #7809), Los Angeles, CA RICHARD NEWBERG (CRD #346857), Aventura, FL JAMES ALEXANDER (CRD# 2762), Los Angeles, CA Respondents.	Disciplinary Proceeding No. CAF010011 Hearing Officer – JN **AMENDED** **HEARING PANEL DECISION**[1] September 3, 2003

Respondent J. Alexander Securities Inc. engaged in the distribution of unregistered securities, a violation of Section 5 of the Securities Act of 1933 and thus of NASD Rule 2110, and in manipulation, a violation of NASD Rules 2110 and 2120; Section 10(b) of the Securities Exchange Act of 1934; and SEC Rule 10b-5. In addition, the firm provided false information on certain forms filed with the NASD, a violation of Section 15(c) of the 1934 Act; SEC Rule 15c2-11; and NASD Rules 2110 and 6740. Finally, the firm failed to exercise supervisory responsibilities, violations of NASD Rules 2110, 3010(a), and 3010(b). The firm was fined $10,000 each for the distribution and the manipulation; $2,000 for the false forms; and $90,000 for the supervisory violations. Additionally, the firm was required to retain an independent consultant to develop appropriate supervisory procedures.

Respondent James Alexander, the firm's President and owner, failed to exercise his supervisory responsibilities, thereby violating NASD Rules 2110, 3010(a), and 3010(b). For these failures, he was fined $90,000, jointly and severally with the firm, and was suspended for 90 calendar days.

[1] The Decision issued on August 27, 2003 did not include the effective dates of the suspension. Those dates are now added (see p. 42), and are calculated based on the date of this Amended Decision.

Respondent Richard Newberg engaged in the distribution of unregistered securities, a violation of Section 5 of the 1933 Act and thus of NASD Rule 2110, and in manipulation, a violation of NASD Rules 2110 and 2120; Section 10(b) of the Securities Exchange Act of 1934; and SEC Rule 10b-5. Newberg also failed to report outside securities accounts and outside business activities, in violation of Rules 2110, 3030, and 3050. Finally, Newberg testified falsely during a staff investigation, in violation of NASD Rules 2110 and 8210. He was barred for the distribution, manipulation, and false testimony.

Respondents are jointly and severally assessed a total of $13,510.28 in costs.

Appearances

For the Complainant: Jonathan Golomb, Esq. and Paul Taberner, Esq.

For the Respondents: Richard N. Friedman, Esq.

Decision

I. Procedural Background

On April 10, 2002, the Department of Enforcement filed a multi-cause Amended Complaint against Respondents J. Alexander Securities, Inc. (sometimes referred to as "ALEX," its trading name), Richard Newberg, James Alexander, and Dennis Sturm. This Complaint alleged various violations of NASD and SEC Rules, the Securities Act of 1933, and the Securities Exchange Act of 1934. The case as to Respondent Sturm was severed, and he ultimately settled with Enforcement. The proceeding went to hearing against the firm, Newberg, and Alexander.

An extended Hearing Panel, composed of an NASD Hearing Officer, a former member of NASD's Market Regulation Committee, and a former member of NASD's District Committees 9 and 10, conducted eight days of hearings in October and November of 2002. The hearing record consists of numerous exhibits, cited with the prefixes "CX" (Enforcement's exhibits) and "RX" (Respondents' exhibits). The prefix "Tr." refers to pages of the hearing transcript. In February of 2003, the parties filed post-hearing briefs (referred to with the prefix "Enf. Br." for

Enforcement, or "Resp. Br." for Respondents); and in March of 2003, they conducted oral argument before the Hearing Panel.[2] "Enf. ASF" refers to Complainant's Annotated Statement of Facts.

II. Factual Background

Respondent J. Alexander Securities, Inc., a small firm owned by Respondent James Alexander, has its principal office in Los Angeles and operates a branch office in Aventura, Florida. Respondent Newberg, a registered principal and general securities representative, is the manager and principal in charge of that branch office (Tr. 2078). In the Florida office, Newberg worked "side by side" with former Respondent Sturm, a registered principal, who is also his cousin (CX-155, p. 173; Tr. 2129, 2412).

This case involves transactions in the securities of twenty-nine Florida corporations with no ongoing operations, referred to as "shells." A Florida attorney, EL (a long-time friend of Newberg), created these companies by filing articles of incorporation with the State of Florida, preparing minutes of Board meetings, and issuing shares to a small group of stockholders. Controlling interests in the shells were held by EL or by persons connected to him, Newberg, or Sturm. EL distributed minority interests to stockholders (about twenty to thirty per shell) who also were connected to him, Newberg, or Sturm (Tr. 115-116; CX-147, pp. 30-32; CX-300).

For each such shell, the Respondent firm, acting through Newberg and Sturm, filed a Form 211 with NASD, seeking clearance for the listing of the securities on the OTC Bulletin Board (CX-147, pp. 21-22, 60; Tr. 115-116). After the NASD cleared the shells for listing, they became valuable to companies who saw them as candidates for merger and thus a way to get themselves listed efficiently and economically (CX-147, p. 21; Tr. 2110-2113). As Newberg

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[2] The transcript of the oral argument continues the page numbering used during the hearing. Citations to that oral argument will also bear the prefix "Tr."

explained, the shell was a "door" through which another corporation could become a publicly traded company (Tr. 2113).

Once clearance was obtained, many of the minority stockholders began selling their shares at low prices, often after receiving telephone calls from the Respondent firm (CX-326). They used two brokerage firms, Litwin/Shochet and First Security Investment Corp. or First Security Investments ("First Security"), that had connections to Newberg and Sturm.[3] Those firms then dealt with the Respondent firm, which had become a market maker in the shells' securities (Tr. 116-117, 119-120).

After purchasing the stockholders' shares in the shells, the Respondent firm then re-sold the shares—often the same amounts of the stock sold at similar prices—to certain Cayman Islands nominee accounts, which also used Litwin/Shochet as a broker. Trading authority for these accounts was held by Mr. RO, a Cayman Islands broker who had various connections to J. Alexander Securities, Inc., Newberg, and Sturm (see CX-299 and record citations in Enf. ASF, pp. 23-28). After these sales to the Cayman entities, other market makers entered the field, and the prices for the shells' securities began to increase (CX-302; CX-307; Tr. 714).

Eventually, each of the twenty-nine shells underwent a change in control and name, and the Cayman entities then sold their shares at substantial profits (Tr. 141; CX-304). In December of 1998, while many of the shells were being sold, EL sent $300,000 to "Sturm & Newberg, L.C.", an entity that was interested in receiving finder's fees for services performed in connection with acquisitions (CX-255, CX-285). Sturm himself acknowledged receiving finder's fees when locating buyers for shells (CX-156, pp. 70-72, 92). After various companies acquired the shells, generally through mergers, Mr. Sturm and a corporation ostensibly

[3] Most of the stockholders had accounts at Litwin Securities, Inc., a firm later purchased by Shochet Securities ("Shochet") (Tr. 1935-1936). These firms are referred to in the briefs as "Litwin/Shochet."

controlled by Newberg's wife received shares in five of the companies. Sales of these shares produced profits of over one million dollars each for Sturm and Newberg's wife's corporation (CX-305).

III. The Complaint

The Complaint, in Causes One and Two, charged the firm and Newberg jointly with the sale of unregistered securities, in violation of Section 5 of the Securities Act of 1933 and NASD Rule 2110, and with manipulation (engaging in "matched trades" involving purchases from the stockholders and sales to the Cayman entities), in violation of Section 10b of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and NASD Rules 2120 and 2110. As an alternative to manipulation, the Third Cause alleged the aiding and abetting of manipulative trading. The Fourth Cause charged the firm with making certain false statements in the Form 211s, in violation of Section 15(c) of the 1934 Act, Rule 15c2-11 thereunder, and NASD Rules 2110 and 6740.

The Fifth Cause charged that Newberg failed to disclose outside securities accounts at Litwin/Shochet and First Security, in violation of NASD Rules 2110 and 3050(c). The Sixth Cause alleged that Newberg failed to disclose outside business activities to the Respondent firm, in violation of NASD Rules 2110 and 3030. The Seventh Cause charged Newberg with providing false investigative testimony, in violation of NASD Rules 2110 and 8210. The Eighth and Ninth Causes alleged supervisory violations by the firm and James Alexander.

IV. Discussion

A. Selling unregistered securities

Section 5 of the Securities Act of 1933 makes it unlawful for any person to sell securities in interstate commerce, unless a registration statement has been filed. The shells' shares were

listed on the OTC Bulletin Board (through which they were sold to the public at large), and there is no dispute about the fact that they were unregistered.

Section 4(1) of the Act exempts inter alia "transactions by any person other than an . . . underwriter . . ." from the registration requirement. Respondents contend that they are covered by this exemption because they were not underwriters. Enforcement argues that Newberg and the firm were underwriters and that the registration requirement thereby applied to their transactions.

Section 2(11) of the Act defines "underwriter" in broad terms, well beyond conventional notions of underwriting:

> The term "underwriter" means any person who has purchased from an issuer with a view to or offers or sells for an issuer in connection with the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; . . . As used in the paragraph the term "issuer" shall include . . . any person directly or indirectly controlling . . . the issuer . . .[4]

Tracking that definition, the Complaint alleges that Respondents participated in "undertakings involving the purchase of securities from issuers with a view to the distribution of such securities" (par. 22). Respondents' liability for selling unregistered securities thus turns on whether there was a purchase of securities "from an issuer with a view to . . . distribution" and, if so, whether Respondents participated in the distribution of such securities.

Respondents urge that the minority stockholders did not purchase from an issuer with a view to distribution; that neither the firm nor Newberg participated in the distribution; and that,

[4] "[T]o fall in the category of statutory underwriter, the intermediary need not be a securities firm or even a major investor. A person who purchases securities in a private placement and then resells in a public trading market is an 'underwriter,' if she purchased 'with a view' to resell to public investors." Alan R. Palmiter, Securities Regulation (1998), p. 200. "No distinction is made between professional investment bankers and amateurs. Any person who performs one of the specified functions in relation to the offering is a statutory underwriter even though he or she is not a broker or dealer. Louis Loss and Joel Seligman, II Securities Regulation (3rd Ed. 1999), p. 1138.45.

in any event, their activities were protected under the safe harbor provisions of SEC Rule 144. As shown below, these contentions lack merit.

1.) Purchase from an issuer

The statutory definition of "underwriter" begins with "any person who has purchased from an issuer . . ." Under Section 2(11), the "issuer" includes not just the corporation issuing the stocks, but any person who controls it. In this case, the stockholders obtained their shares from EL, who created the shell companies and distributed the shares as he chose. Thereafter, he or persons closely connected to him retained the majority of shares in nineteen of the twenty-nine companies (CX-147, CX-299, CX-328). EL controlled all of the issuers at the outset and ultimately retained control of many. Stockholders who acquired their shares from him acquired them "from an issuer."

2.) Purchase with a view to distribution

A purchase made in contemplation of re-sale to the public is a purchase "with a view to distribution"; a purchase made for investment, on the other hand, does not involve such a "view."[5] The record shows that the stockholders took the shells' stock with a view to re-sale. The shell corporations had no assets or functioning business (Tr. 2109). EL said that they "became valuable" when cleared for trading on the bulletin board (CX-147, p. 21). As Newberg explained, a shell's status as a public company made it potentially attractive to a buyer who saw the shell as a "door" to enter the field of publicly traded companies (Tr. 2112-2113). The value of the shell's stock was thus inextricably linked to its tradability. A person holding shares in

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[5] See, e.g., Gilligan, Will & Co. v. S.E.C., 267 F.2d 461, 466 (2d Cir. 1959), cert. denied, 361 U.S. 896 (1960); G. Eugene England Foundation v. First Federal Corp., 663 F.2d 988, 989 (10th Cir. 1973) ("an intent to resell to the public"); Ackerberg v. Johnson, 892 F.2d. 1328, 1336 (8th Cir. 1989) ("so long as Johnson initially acquired his shares from the issuer with an investment purpose and not for the purpose of reselling them, the acquisition was not made 'with a view to' distribution"); S.E.C. v. U.S. Environmental, Inc., 2003 U.S. Dist. LEXIS 12580, at *55 (S.D.N.Y. July 21, 2003). See also Loss and Seligman, supra, at p. 1138.46, fn. 580.

such companies has no "investment" belief in any eventual corporate products or profits and is necessarily looking to the emergence of a public re-sale market.

Moreover, testimony from some of the stockholders so demonstrated. One expressly agreed that "[his] only concern was whether [he] could make a profit from the sale of the stock and not what the company did" (Tr. 2000). Another stated that he made his own decision to sell the shares, based on value (Tr. 2035). A third explained that he acquired the stock knowing that the company "may or may not go somewhere" and decided to sell (relying on his broker's advice) when the price was right (Tr. 1896, 1912-1913, 1920, 1922). Another of the original stockholders, a securities professional called by Enforcement, stated that he decided to sell his shares "if [he] had the symbols on the stock and look at it and it had some kind of trading value" (Tr. 451).

3.) Gifts/alleged holding period

Respondents argue that the minority stockholders were donees, not purchasers (Resp. Br. p. 10). Though most of the stockholders received the securities as gifts from EL, he explained that "[s]ometimes the shares were paid for" (CX-147, p. 25). Indeed, two of the stockholder-witnesses in this case had purchased some of their shares from him (Tr. 1895; CX-144, p. 19). In another instance, the stockholder suggested that the "gift" of shares was in exchange for services rendered by him (Tr. 2029-2030). In any event, "as a general rule, registration may be required when a gift of securities is made by a control person under circumstances in which a redistribution to the public by the donee may reasonably be anticipated."[6] Such a redistribution

[6] Letter of Chief Counsel, SEC Div. Of Corp. Fin., August 8, 1962, 1 Fed. Sec. L. Rep. (CCH) ¶1551.60, quoted in Loss and Seligman, supra, at p. 1138.56. See also Capital General Corp., Exchange Act Rel. No. 32669, 1993 SEC LEXIS 1880 at *28-29 (July 23, 1993):

> Yeaman and Capital General attempted to evade the registration requirements of the Securities Act by purporting to rely on the theory that since the shares were distributed as "gifts," no sales occurred. However, the fact that recipients may not have provided direct monetary consideration

was inevitable here, where, as noted, the shells' only value came with listing and resulting tradability. Respondents also argue that the stockholders held the stock for periods of at least two years after the issuance, a factor suggesting "investment," not re-sale (Resp. Br. p. 10). Enforcement showed, however, that the shares were distributed well after the purported issue date (see Enf. ASF, pp. 8-13 and portions of the record there cited).

Where, as here, Enforcement shows that unregistered securities were sold, Respondents bear the burden of proving entitlement to an exemption,[7] i.e., that the stockholders did not take with a view to distribution. Such exemptions "are strictly construed against" Respondents, whose evidence "must be explicit, exact, and not built on mere conclusory statements."[8] Applying those standards to this record, the Panel concludes that Respondents failed to establish their entitlement to an exemption.

4.) Respondents' participation

If Respondents participated directly or indirectly in undertakings involving purchases with a view to distribution, they were underwriters, and reliance on Section 4(1)'s exemption for transactions by persons other than underwriters fails.

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for the shares does not mean that there was not a sale or offer for sale for the purposes of Section 5. Section 2(3) of the Securities Act defines "sale"and "offer for sale" as:

> [E]very contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or an interest in a security, for value.

Capital General's distributions of securities constituted a "sale" within the meaning of the Securities Act since the distributions were dispositions for a value. Here, value accrued to Capital General and Yeaman by virtue of the creation of a public market for the issuer's securities, and the fact that, as a public company, the issuer could be sold for greater consideration. (Footnote omitted.)

[7] Busch v. Carpenter, 827 F.2d 653 (10th Cir. 1987) (citations omitted); SEC v. Lybrand, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002) (citations omitted).

[8] Charles F. Kirby, Exchange Act Rel. No. 47149, 2003 SEC LEXIS 46 at *14 (January 9, 2003) (citations omitted).

A "distribution" involves "the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hands of the public." Kirby, supra, 2003 SEC LEXIS 46 at *16 (citations omitted), and underwriters include "all persons who might operate as conduits for the transfer of securities to the public" (Ackerberg, supra, 892 F.2d at 1335).[9] For purposes of Section 2(11), an underwriter "performs some act that facilitates an issuer's distribution; he participates in the transmission process between the issuer and the public." Seattle-First National Bank v. Carlstedt, 101 F.R.D. 715 at 727 (W.D. Okla. 1984); Ingenito v. Bermec Corp., 441 F. Supp. 525 at 536 (S.D.N.Y. 1977).[10]

A person who, like Respondents, had, inter alia, "helped obtain the listing of the security on an exchange . . . and had otherwise aided in the distribution" was found to have "participated" in the undertaking was thus an underwriter. Loss, supra, at p. 1138.67, fn. 626 (citation omitted). "A dealer may be an 'underwriter' under the 'participation' language if he has a close association with the people in the control group and consciously engages in steps necessary to the consummation of the public distribution, even if he purchases all his shares from other dealers" (Id., at 1138.68, fn. 627 (citation omitted)).

Newberg and the Respondent firm easily met these tests of "participation." Virtually all of the shells were controlled by EL (a long-time friend of Newberg), or by persons connected to EL, Newberg, and/or Sturm. As part of the overall scheme, the firm's Aventura office, under Newberg's management, submitted the Form 211s, which led to clearance of the shares for

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[9] Hazen, The Law of Securities Regulation Section 4.24, at 141 (1985) (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess. 13-14 (1933)). See also Wheaton v. Matthews Holmquist & Assocs., 858 F. Supp. 753, 757 (N.D. Ill. 1994); Hedden v. Marinelli, 796 F. Supp. 432, 437 (N.D. Cal. 1992).

[10] See United States v. Yeaman, 194 F.3d 442, 455 (3d Cir. 1999); SEC v. Management Dynamics, Inc., 515 F.2d 801, 810 (2d Cir. 1975); SEC v. North American Research and Development Corporation, 424 F.2d 63, 72-81 (2d Cir. 1970); United States v. Wolfson, 405 F.2d 779, 782 (2d Cir. 1968); SEC v. Culpepper, 270 F.2d 241, 246 (2d Cir. 1959); SEC v. Chinese Consol. Benev., 120 F.2d 738, 739-41 (2d Cir. 1941). See also SEC v. Lybrand, 200 F. Supp. 2d 384, 392-93 (S.D.N.Y. 2002); United States v. Rennert, 1997 U.S. Dist. LEXIS 14437, at *57 (E.D. Pa. Sept. 17, 1997).

Bulletin Board trading—without which they would have had no value (Tr. 2352; CX-147, p. 21). Though Sturm did much of the work on the forms, Newberg handled the filings when Sturm was not available (Tr. 2127). He personally reviewed a number of them, looking at the opinion letters of counsel, the articles of incorporation, and the stockholder lists (Tr. 2129). In at least two instances, he notarized signatures on the papers accompanying the filings (Tr. 2415, 2418). He signed off on certain amended Form 211s, which purportedly reflected trade prices (Tr. 2127).

After NASD cleared the shares for trading, the Respondent firm (through Newberg's Aventura office) became a market maker and handled much of the initial trading (Tr. 116; CX-307). The Respondent firm generally bought the shares through two brokerage firms (Litwin/Shochet and First Securities Investment Corp.), where many of the original stockholders had accounts and with which Newberg and Sturm had various personal and business connections (CX-156, pp. 26, 127-128; CX-192; CX-194; CX-195; CX-199; CX-299; Tr. 119-120, 943, 1444-1445, 1937-1941, 2058-2059, 2413). On several occasions, these transactions came after telephone calls from the Respondent firm to the selling shareholders (CX-326).

After these initial purchases, made at prices set by Newberg, the firm re-sold the shares to various entities in the Cayman Islands, which also maintained accounts with Litwin/Shochet and had various connections to Respondents (CX-303).[11] In many instances, these re-sales occurred fairly quickly after the preceding purchases and involved substantially the same number of shares and substantially the same prices (CX-299). (These are the "matched trades" which constitute the alleged manipulation, discussed in the next section of this Decision).

[11] For example, Mr. RO, the person who had trading authority for these Cayman accounts was instrumental in arranging loans totaling more than $1.9 million for Newberg, and during the time in question the Respondent firm's Aventura office made over 300 telephone calls to that person (CX-254; CX-303; Tr. 2060-2062, 2169). In several instances, those calls occurred on the same day that the Cayman entities engaged in transactions in the involved securities (CX-303).

These activities led to price increases, which, in turn, drew other market makers into the picture. After the Respondent firm's initial activity and subsequent price increases, other market makers entered and took the larger share of the trading in the shell securities (CX-299; CX-307; Tr. 284, 638). Ultimately, all of the twenty-nine shell companies were involved in a change of control and their names changed (Tr. 141; CX-302; CX-328).

On these facts, the Panel concludes that the Respondent firm and Newberg facilitated the "distribution" or "public offering" of the shells' securities for ultimate purchase and sale by the general public. They were "persons who . . . operate[ed] as conduits for the transfer of securities to the public" (Ackerberg, supra, 892 F.2d at 1335) and thus were underwriters. As such they were bound by Section 5's registration requirement.

5.) Rule 144

SEC Rule 144 creates safe harbors for certain distributions of unregistered securities. Respondents' reliance on that Rule is misplaced. As stated in its preamble to the Rule,[12]

> [I]n view of the objectives and policies underlying the Act, the rule shall not be available to any individual or entity with respect to any transaction which, although in technical compliance with the provisions of the rule, is part of a plan by such individual or entity to distribute or redistribute securities to the public. In such case, registration is required.

Respondents' actions were obviously part of a plan to distribute securities to the public. As shown, Respondents were closely involved in obtaining NASD clearance for the securities to trade. Following such clearance, the Respondent firm made calls to the stockholders (mainly friends and relatives) who then sold their shares through Litwin/Shochet and First Security, two brokerage firms connected to Respondents. The Respondent firm purchased the shares and re-sold them to Cayman Islands entities, which also had connections to Respondents and

[12] 37 Fed. Reg. 591 (January 11, 1972); 1972 SEC LEXIS 49 at *29 (January 11, 1972).

maintained accounts at the above two brokerage firms. Many of these Cayman re-sales were at substantially the same time, volume and prices as the Respondent firm's purchases from the stockholders and created the illusion of market activity. Following price increases, other market makers entered the field and involved the general public in the trading. The above activities were not coincidences, but were "part of a plan to distribute securities." The Panel agrees with Enforcement that Rule 144 is, therefore, unavailable.

B. Manipulation

The Supreme Court "has defined manipulation as affecting the price of securities by artificial means, that is, means unrelated to the natural forces of supply and demand."[13] "Matched transactions" (i.e., "orders for the purchase/sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered . . . for the sale/purchase of such security") constitute artificial devices and are manipulative per se. Ernst & Ernst, supra, 425 U.S. at 205, fn. 25 (1976); Santa Fe Industries v. Green, 430 U.S. 462, 476 (1977); Edward J. Mawod & Co. v. S.E.C., 591 F.2d 588, 595 (10th Cir. 1979); United States v. Charnay, 537 F.2d 341, 350-351 (9th Cir. 1976); S.E.C. v. Resch-Cassin & Co., 362 F. Supp. 964, 978 (S.D.N.Y. 1973).

The record supports the Complaint's allegations (par. 24) that Respondents participated in matched trades and thus engaged in manipulative activity. In numerous instances, the Respondent firm's purchases from the shells' stockholders were matched within a fairly short time by sales of substantially the same number of shares at substantially the same price to the

[13] Dep't of Market Regulation v. Amr "Tony" Elgindy, 2003 NASD Discip. LEXIS 14 at 15-16 (NAC, May 7, 2003) (citing Ernst & Ernst v. Hochfelder, 415 U.S. 185, 199 (1976)) appeal pending, No. 3-11145, SEC.

Cayman Islands entities. The most obvious such transactions, set out in tabular form as an Appendix to this Decision, are now discussed.[14]

On July 17, 1998, Sturm's aunt sold 1,000 shares of Arngre, Inc. to the Respondent firm. During the afternoon of the next business day (July 20, 1998), Sturm's friend and others sold a total of 4,000 shares to the firm. Each of the above sales was at $.50 per share. On that same afternoon (and within minutes of its last purchase), the Respondent firm sold 5,000 shares to one of the Cayman accounts at $.52 per share.

On May 21, 1997, Sturm's friends and former secretary sold 40,000 shares of Create-a-Basket, Inc. to the Respondent firm for $.05 per share. Two hours later, the firm sold the 40,000 shares to one of the Cayman accounts for $.06 per share.

On June 12, 1998, Sturm's friends and a friend of EL (the attorney who created the shells) sold a total of 6,000 shares of Coffeeworks, Inc. to the Respondent firm for $.25 per share. One hour later, the firm sold these shares to a Cayman account for $.28125 per share.

On June 17, 1998, the Respondent firm bought 4,000 shares in that same company from another firm that had earlier purchased it from a friend of EL. The Respondent firm paid $.35 per share within a minute and re-sold the shares to one of the Cayman accounts for $.375 per share.

On the afternoon of August 5, 1998, a friend of Newberg's and a former secretary for Sturm sold a total of 4,000 shares of Computer Vending Inc. to the Respondent firm for $.25 per share. The next morning the firm sold those shares to one of the Cayman accounts for $.26 per share.

[14] CX-299 contains a chronology of the trades. The transactions here listed are drawn from Complainant's Annotated Statement of Facts, pp. 28-51.

On June 4, 1998 various friends and relatives of Sturm sold a total of 8,000 shares of First Geneva Investments, Inc. to the Respondent firm for $.25 per share. That afternoon the firm sold those shares (together with 4,000 purchased two days before from Sturm's friends) to one of the Cayman accounts for $.28125 per share.

On the afternoon of November 25, 1996, relatives of Sturm sold 15,000 shares of First New York Investment, Inc. to the Respondent firm at a price of $.1563 per share. Later that day, the Respondent firm sold 15,000 shares in that company to one of the Cayman accounts for $.16 per share.

On October 22, 1996, the Respondent firm bought 5,000 shares of First Zurich Investments, Inc. from friends of Sturm for $.1563 per share. The firm sold those shares the next day to one of the Cayman accounts for $.1719 per share.

On April 22 and 23, 1997, the Respondent firm purchased a total of 7,000 shares of Littman Ventures, Corp. for a price of $.25 per share. On the afternoon of April 23, the firm sold 7,000 shares of that company to one of the Cayman entities at a price of $.27 per share.

On July 28, 1998 the Respondent firm purchased 1,000 shares of Southern Cargo, Inc. from Sturm's relatives for a price of $.50 per share. Within two hours it sold those shares, along with another 1,000 purchased a few days before from Newberg's sister, to one of the Cayman entities. The price for the 2,000 shares was $.55 per share.

On November 11, 1997, a stockholder sold 1,000 shares of Snak-N-Pop Vending, Inc. to the Respondent firm for $.50 per share. The next day, one of the Cayman accounts bought those shares for $.52 per share.

Because the Complaint alleges that the manipulation violated Section 10(b) of the Securities Act of 1934, Rule l0b-5, and NASD Rule 2120, proof of scienter would ordinarily be

required. But, as noted, matched transactions are per se manipulative, and for this reason such evidence is not necessary. See Mawod, supra, 591 F.2d 588, 595 ("We recognize that under the doctrine of Ernst & Ernst, scienter is an essential element. However, it must be noted in this connection that the wash sale and matched order are per se manipulative and are so regarded in the Ernst & Ernst scheme of things"). Cf. Sharon M. Graham, Initial Decision No. 82, 1995 SEC LEXIS 3457, at *27 (Dec. 28, 1995); Carol L. Haynes, Initial Decision No. 78, 1995 SEC LEXIS 3134, at *26 (Nov. 24, 1995); Richard M. Kulak, Initial Decision No. 75, 1995 SEC LEXIS 2481, at *26 (Sept. 26, 1995) ("transactions such as wash sales and matched orders, as are present in this case, which constitute violations of Section 9(a)(1), have been held to be per se manipulative."); Jeffrey R. Leach, Exchange Act Rel. No. 31,007, 1992 SEC LEXIS 1835, at **7-8 (Aug. 6, 1992).[15]

In any event, the record contains ample evidence that Respondents intentionally or recklessly engaged in the manipulative conduct, i.e., that they acted with scienter.[16] Newberg and Sturm, experienced securities professionals, knew that the shells' shares had no potential value until listed for trading. To obtain trading clearance from NASD, they participated in filing Form 211s, which concealed their indirect affiliation with the issuers and sometimes falsely represented the occurrence of certain trades as a basis for asserted prices. The Aventura office, headed by Newberg, made over twenty telephone calls to the stockholders prior to their decisions to sell the stock. Newberg and the firm used Cayman Islands nominees, with many connections

[15] But for Mawod, the above cases involve violations of Section 9(a)(1) of the Exchange Act, which precludes manipulation when the stock is listed on a national exchange. The Hearing Panel sees no reason not to apply the same concept where, as here, the stock is traded in the over-the-counter market; "purchasers in over-the-counter as well as the Exchange market are entitled to believe that the Exchange market price which governed the price charged them represents a price established in an independent market free of artificial devices." Thornton & Co., Exchange Act Rel. No. 4115, 1948 SEC LEXIS 432, at **37-38 (July 14, 1948).

[16] See Aaron v. SEC, 446 U.S. 680, 686-687, fn. 5 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976); Market Regulation Comm. v. Michael B. Jawitz, 1999 NASD Discip. LEXIS 24 at *19-20 (NAC, July 9, 1999), citing Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991).

to Newberg and the Respondent firm, to purchase the shares.[17] This "trading" (the purchases and re-sales), which produced admittedly insignificant profits,[18] must have had some other economic purpose. Viewing the totality of the circumstances, the Panel concludes that Respondents knowingly or recklessly engaged in matched transactions designed to create the appearance of market activity.

Because the Panel finds manipulation, as alleged in the Complaint's Second Cause, there is no occasion for analysis of the alternative aiding and abetting allegations in the Third Cause.

C. False Form 211 filings

Section 15(c) of the 1934 Act makes it unlawful for any broker or dealer to sell securities, or to induce or attempt to induce the sale of securities in interstate commerce by engaging in any fraudulent, deceptive, or manipulative act or practice, or by making any fictitious quotation. Rule 15c2-11, promulgated thereunder, makes it unlawful for any broker or dealer to publish a price quotation for Bulletin Board securities unless such person possesses certain specified information. To demonstrate compliance with these informational mandates, NASD Rule 6740(a) requires the execution and filing of a Form 211 prior to initiating Bulletin Board quotes.

1.) Affiliation with issuers

Among the information required by Rule 15c2-11 is "whether the broker or dealer or any associated person is affiliated, directly or indirectly with the issuer." Form 211, Part 2(a)(5)(e), specifically asks: "Is the member firm submitting this form [J. Alexander Securities, Inc., referred to as ALEX] or any person associated with it (i.e., Newberg, Sturm, etc.) affiliated

[17] The use of nominee accounts is a way of falsely persuading potential investors "that the activity … was reflective of genuine demand." S.E.C. v. Kimmes, 700 F. Supp. 852, 859 (N. D. Ill. 1992).

[18] When asked if the firm's total profit from all of the transactions in all of the twenty-nine shells was $100,000, Newberg answered, "from your lips," and explained that the profits were sometimes $50 per trade and sometimes $125 per trade (Tr. 2258-2259).

directly or indirectly with the issuer?" The Complaint's Fourth Cause alleges that the Respondent firm falsely stated in multiple Form 211 applications that none of its associated persons was affiliated directly or indirectly with an issuer. In each Form 211 filed by ALEX, the firm certified that neither it nor any of its associated persons was directly or indirectly affiliated with the issuer.

Enforcement alleges that such statements were false as to eight of the filings because the persons who controlled the relevant companies were related to associated persons of ALEX.[19] Newberg's sister was sole Officer and Director of Computer Vending, Inc. (CX-034, p. 3), First Geneva Investments, Inc. (CX-054, p. 3), First New York Investments, Inc. (CX-060, p. 3), and First Zurich Investments, Inc. (CX-064, p. 3). Newberg's nephew was the only Officer, Director and controlling shareholder of IFB Corp. (CX-072, p. 3). Newberg's brother-in-law was the sole Officer and Director of Cayman Purchasing & Supply, Inc. (CX-044, p. 3). Sturm's sister was the only Officer and Director of Ronnie Systems, Inc. (CX-112, p. 3). The brother of Keith Brodsky, another ALEX trader, was the sole Officer, Director and controlling shareholder of Snak-N-Pop Vending (CX-123, p. 3).

It is true, as Respondents argue, that neither ALEX nor its associated persons were officers, directors, employees, or shareholders of the companies involved (Resp. Br. pp. 27-28). But that fact is not decisive of the question of direct or indirect affiliation with the issuer. As Respondents acknowledge, "if the majority shareholder is deemed to be the issuer, . . . disclosure of an indirect relationship [would] perhaps be appropriate, if it were required" (Id., at p. 28).

The majority shareholder may, indeed, be deemed to be the issuer. Under Section 2(a)(11) of the 1933 Act, an issuer includes: "any person directly or indirectly controlling or

[19] The specific relationships are described in CX-300.

controlled by the issuer." Control persons, including officers, directors and majority shareholders, have the power to exercise controlling influence over the management or policies of an issuer and are, therefore, deemed to be statutory issuers. See Suppes Securities, Inc., Exchange Act Rel. No. 38,172, 1997 SEC LEXIS 112 at *12 (Jan. 15, 1997) (controlling shareholder was a statutory issuer); Frederick Entman, Initial Decision Rel. No. 96, 1996 SEC LEXIS 2273 at **21-22 (Aug. 20, 1996) (control person deemed to be a statutory issuer); James B. Talman, Exchange Act Rel. No. 27,725, 1990 SEC LEXIS 288 at *7 (Feb. 22, 1990) (person who controlled the company was statutory issuer).

Each of the various relatives of Newberg, Sturm and Brodsky was the *only* control person of his or her respective corporation and, as such, each qualified as a statutory issuer. Newberg, Sturm and Brodsky had close relatives who controlled the issuers, and ALEX should have identified the three associated persons as indirectly affiliated with these particular issuers. As explained by the Assistant Director of NASD's OTC Compliance Department, had those relationships been revealed in the Form 211s, the staff would have seen them as presenting potential conflicts to be brought to the firm's attention (Tr. 1285-1289).

Respondent ALEX asserts that the requirements of Form 211 contemplate a *business*, rather than a *family* affiliation. This distinction has no merit. First, it has no basis in the language of the Form or Rule 15c2-11. Each asks whether any associated person is "affiliated directly or indirectly with the issuer." There is no mention of business, family, or any other kind of affiliation. Moreover, the phrase "directly or indirectly" is broad in scope and suggests inclusion, not exclusion. Narrowing the concept in this case would be especially inappropriate because Rule 15c2-11 was "designed primarily to prevent certain manipulative and fraudulent trading schemes that had arisen initially in connection with the distribution and trading of

securities issued by 'shell' companies . . ."[20] Limiting the Rule's language here would clash with that remedial purpose.

The firm should have disclosed that Newberg, Sturm, and Brodsky (associated persons) were closely related to persons who controlled the issuers. Its negative answers to the "direct or indirect affiliation" question were, therefore, false.

2.) Improper basis for price claims

On several occasions, ALEX filed amended Form 211s to add price quotes for the securities, indicating as a basis unsolicited trades from third party contra brokers or similar language.[21] The Complaint alleges that these representations were false because "Sturm knew or should have known that the trades upon which J. Alexander Securities based its quotes were not the product of arms'-length trading . . ." (par. 33). The Panel agrees with this allegation.

First, as Enforcement points out, many of the trades involved relatives, friends, or associates of Sturm, Newberg, or EL, a factor that the Forms failed to disclose.[22] Second, several of the quotes involved certain of the matched trades, described above in the "Manipulation" section of this Decision.[23] Third, in other instances, the amended Form 211s rested on price claims for trades that had not yet happened. ALEX's filing of July 16, 1998 reported a sale of one company's stock that actually occurred the following day.[24] Likewise, ALEX submitted an amended Form 211, citing a sale that purportedly took place on

[20] "Initiation or Resumption of Quotations without Specific Information," Exchange Act Rel. No. 29095, 1991 SEC LEXIS 718 at *5 (April 17, 1991).

[21] See, e.g., CX-299, pp. 3, 10, 17, 30, 36, 41, 47, 53, 55, 60, 64, 69, 75.

[22] See Complainant's Annotated Statement of Facts, pp. 51-52 and exhibits there cited.

[23] See the amended Form 211s pertaining to Coffeeworks, Inc., Littman Ventures Corp., Southern Cargo Company, Inc., and Snak-N-Pop Vending Inc., set out on Attachment C to the Complaint.

[24] CX-229, p. 8; CX-014, p. 1.

April 21, 1997, though it did not occur until the following day.[25] The Panel concludes that the Forms impliedly represented that the cited prices were rooted in arms'-length transactions; that such trading did not occur; and that the Forms were, therefore, false in this respect.

In filing false Form 211 applications, ALEX violated Section 15(c) of the 1934 Act, Rule 15c2-11 thereunder, and NASD Rule 6740. Respondent ALEX also engaged in conduct that did not comply with high standards of commercial honor and just and equitable principles of trade, in violation of NASD Conduct Rule 2110. See, e.g., D.O.E. v. Gilmore, No. C9B020037, 2003 NASD Discip. LEXIS 5 at *7 (Jan. 8, 2003) (submitting falsified documents to NASD violates Rule 2110).

D. Outside securities accounts

The Complaint's Fifth Cause alleges violations of NASD Rules 2110 and 3050(c), in that Newberg failed to notify the Respondent firm prior to opening securities accounts at other firms. Under Rule 3050(e), this requirement applies "to an account . . . in which an associated person has a financial interest or with respect to which such person has discretionary authority."

An entity known as DF Consulting Services, Inc. ("the corporation") maintained securities accounts for itself and its pension plan at Litwin/Shochet and First Security (CX-194, CX-195, CX-196; Tr. 1445, 1451). The corporation's stockholder, officer, and director was DN, who is Respondent Newberg's wife; she declined to appear at the hearing (Tr. 2098-2099, 2525). It is undisputed that Newberg did not give advance written notice of these accounts to his employer, the Respondent firm.

The evidence shows that Respondent Newberg had a financial interest in the corporation and thus in its securities accounts. First, the Newbergs paid taxes on the corporation's income

[25] CX-086, last three pages; CX-299, p. 49.

(CX-248, CX-249) and, for this reason, certainly had a financial stake in its operations. Moreover, the corporation operated out of the Newbergs' house and used their telephone (Tr. 2439). There was no evidence that it paid rent or otherwise reimbursed them, and to this extent Mr. Newberg necessarily had some financial interest in the corporation.

His status as trustee and beneficiary of the corporation's pension plan (Tr. 1739; CX-248, CX-249, CX-195) certainly gave him a financial interest in the company and its well being. Moreover, the corporation's pension payments to Newberg as an "employee" enabled the company to reduce its taxes (Tr. 1757), with resulting benefit to each of the Newbergs, who, as noted, paid the corporation's tax bills.

In addition, on several occasions, Mr. Newberg drew checks payable to the corporation (totaling well over $100,000), explaining that he did so because his wife needed the money or asked for the transfer (Tr. 2476, 2485-2486). Respondent's pension expectations would naturally make him sensitive to the company's needs and cause him to respond to its financial requests. In addition to funding the corporation as needed, he also frequently drew checks on its behalf (totaling well over $300,000) and made them payable to the Newbergs' joint account (Tr. 2477-2487).

In these circumstances, the Panel believes it fairly inferable that Newberg had a "financial interest" in the company, and thus should have complied with Rule 3050's reporting requirement.[26]

Newberg argues that he asked Litwin/Shochet and First Securities to send duplicate copies of monthly statements to the Respondent firm, but that "foul ups" prevented them from

[26] The Complaint further alleges that Newberg also had a financial interest in the Cayman entities' securities accounts. As discussed in more detail infra, the evidence, while raising suspicions as to Newberg's relationship to the Cayman nominees, is not sufficiently persuasive to establish liability for failure to report their accounts.

doing so (Resp. Br. pp. 33-34). This contention presents no defense. Rule 3050's requirement was personal to Newberg and cannot be delegated. The Rule says: "[a] person associated with a member, prior to opening an account . . . with another member, shall notify . . . the employer member . . ." Even if Newberg's argument were supported by the record, he cannot escape Rule 3050(c)'s mandate by arguing that a third party failed to honor his request to give the notice. See Jay Michael Fertman, Exchange Act Rel. No. 33479, 1994 SEC LEXIS 943 at *18 (January 14, 1994): "[w]hether or not Fertman delegated the notification responsibility to Sharpe, it was Fertman's obligation, as an associated person of an NASD member, to ensure that his affiliation was disclosed . . ."

E. Outside business activity

NASD Rule 3030 requires that an associated person give "prompt written notice" to his or her firm of the acceptance of compensation from "any other person as a result of any business activity . . . outside the scope of his relationship with his employer . . ." The Sixth Cause alleged that Newberg violated Rules 2110 and 3030 by failing to disclose to the Respondent firm that he was receiving "finder's fees and profits from [the] Cayman Account trading" (par. 42).

1.) Finder's fees

An entity known as "Sturm & Newberg L.C.", located at the Aventura office and controlled by Sturm and Respondent Newberg (CX-255; Tr. 2429), was designed to function in some capacity "if we assisted in a merger" (CX-155, p. 145). That office's files contained a draft "finder's fee agreement" between Sturm & Newberg and a company (which later took over one of the shells), which envisioned Sturm & Newberg's receiving fees for successful merger and acquisition services (CX-285; Tr. 309). On December 28, 1998, in the midst of several acquisitions of the shells, Sturm & Newberg received $300,000 from EL (CX-255; Tr. 360-361,

2429-2430). During the hearing, Newberg acknowledged his entitlement to half of this money, while saying that he knew little about it (Tr. 2431-2432).

These circumstances support the inference that Newberg received compensation from EL in the form of finder's fees, as alleged. That Sturm & Newberg contemplated earning finder's fees for successful shell acquisitions was apparent from the draft agreement. Respondent Newberg himself wrote a note, in another context, referring to compensation "[I]f and when I find a buyer for a public vehicle" (RX-1). A former employee of the Aventura office (albeit unhappy with the firm) testified that Newberg mentioned finder's fees, if the employee helped to sell a shell to someone (Tr. 984-985). Significantly, the $300,000 came from the very person who created and promoted the shells, and it arrived contemporaneously with several successful acquisitions of them.

Newberg's vague assertion that the $300,000 was linked to Sturm's contribution to a pension plan was not persuasive. The Panel rejects the notion that Newberg, a sophisticated and experienced professional, would have no details as to a $300,000 payment that came from an old friend, which he (Newberg) personally deposited, and which was the only deposit in the Sturm & Newberg bank account for that entire month.[27] If there were innocent explanations of EL's payment to Sturm & Newberg, they do not appear on this record. The Panel agrees with Enforcement that this payment more likely than not reflected compensation in the form of finder's fees.

The argument that a 1996 memorandum to Mr. Alexander, stating that if Newberg found a buyer for a shell any compensation would be split between him and the firm (RX-1), does not constitute compliance with the Rule. A memorandum written in 1996, two years before Sturm &

[27] See CX-255, p. 4, containing Newberg's name on the deposit slip.

Newberg received EL's $300,000, cannot constitute "prompt written notice" of such receipt. Mr. Alexander testified in this context that he remembered "hearing from him or getting something" and having "conversations" with Newberg at some unknown time, but could not remember receiving this 1996 document (Tr. 1617-1618). This vague testimony also falls short of establishing "prompt written notice" of the receipt of compensation.

A note from Newberg, referring to a conversation with Respondent Alexander concerning entitlement to finder's fees for "vehicles" (CX-266), was a general discussion which made no reference to any particular transaction, let alone any specific receipt of compensation. Neither this undated note nor Newberg's transmittal of it to the compliance officer in March of 1999 qualifies as "prompt" written notice of EL's 1998 payment.

Respondents' counsel acknowledged that the Respondent firm "has no records of any outside business activities engaged in by either Richard Newberg or Dennis Sturm while employed" there (CX-265). Mr. Alexander knew nothing of the receipt of finder's fees by Newberg and Sturm until he heard about the subject at the hearing ("I didn't know that they were seeing this kind of money or had that many activities"), and said that such activity "probably" should have occurred "in house," in which event he would have shared in the proceeds (Tr. 1719-1720). The Panel concludes that Newberg earned finder's fees and thus failed to give the notice of outside business activities required by Rule 3030.

2.) The Cayman accounts

The Complaint also alleged that Newberg failed to give the notice required by Rule 3030, insofar as he received "profits from [the] Cayman Account trading" (par. 42). Enforcement's theory is that such profits must be attributed to Newberg because he was the real owner of the accounts. As to this issue, the Panel concludes that Enforcement failed to prove by a preponderance of the evidence that the accounts should be treated as Newberg's.

As noted in the "Factual Background" section of this Decision, Mr. RO, the Cayman Islands banker who had trading authority for the accounts, was also instrumental in obtaining a substantial mortgage loan for Newberg. But these circumstances do not make Newberg the owner of the accounts. That the Respondent firm made many phone calls to RO prior to trades in the Cayman accounts also does not tend to prove that Newberg owned the accounts. Nor does a Federal Express receipt showing that Newberg once sent some item to RO shed any light on the identity of the accounts' owner. Sturm's inquiry into the cash balance in one of the Cayman accounts (CX-288) might have been suspicious (because he was Newberg's close confidante), but, at the same time, does not establish Newberg's alleged interest in the accounts.

That Sturm once did retail brokerage work for two of the Cayman nominees (of which RO was a director) (CX-156, pp. 139-140) also tells nothing significant for purposes of Newberg's claimed ownership. Indeed, these activities occurred before Sturm joined the Respondent firm, and may thus show that the Cayman entities had a legitimacy which preceded and was wholly unrelated to the trading in issue here. Finally, the argument that the names of two of the five accounts (Redco and Derco) contain letters which might relate to Newberg and his family (Enf. ASF, pp. 27-28) says nothing about the other entities and, in any event, is pure speculation.

The Panel is not convinced that the Cayman accounts were Newberg's. He was, therefore, not obligated under Rule 3030 to treat their profits as outside business activity to be reported to his firm.

F. False testimony

The Seventh Cause alleges that during investigative testimony conducted under Rule 8210, Respondent Newberg testified falsely by denying: (1) "being employed by DF Consulting

Services, Inc. or performing any services for that entity" and (2) "knowing anyone who had any business relationship with RO [sic] . . ." The allegations are discussed in that order.

1.) DF

a.) employment

The following questions and answers occurred during Newberg's on-the-record interview (CX-150, p. 24-25):

> Q. Have you ever been employed by DF Consulting?
>
> A. I don't believe so.
>
> * * *
>
> Q. Have you ever provided any consulting or any type of service to DF Consulting?
>
> A. No.

The Panel is not persuaded by a preponderance of the evidence that Newberg lied when testifying that he did not believe that he had been employed by the corporation. Although its W-2 Forms show him as an "employee" who received $125,000 and $50,000 in 1997 and 1998, respectively (CX-248; CX-249), other evidence suggests that he could have believed that the forms existed for tax purposes and that he had not been "employed." The accountant who created the company's pension plan testified that the "employee" payments reflected tax deductions for the corporation and created sheltered pre-tax payments for Newberg's retirement; because Newberg was older than his wife, "putting him on the books of DF" created a larger deduction for the corporation (Tr. 1739). Newberg understood that the above sums were "the amount that could be taken out of DF to set up the pension plan" for the corporation (Tr. 2164). He said that he did not personally receive the funds; that his name was involved because the accountant "told us that's the way it had to be done;" and that "I don't really understand that

business [the pension] that well at all and I rely upon people such as [the accountant]" (Tr. 2164-2166). Finally, Newberg was also a "trustee" of the pension plan, a status often given to the spouse of a company's owner (CX-195; Tr. 1735).

That Newberg had a financial interest in the corporation (see discussion supra) does not mean that he had been "employed" by it. Whether or not the W-2s were accurate, a matter not relevant here, his testimony that he did not believe that he had been "employed" by DF may well have accurately reflected his understanding of the situation, and was in the Panel's view no less persuasive than Enforcement's case. The Panel thus concludes that Enforcement failed to prove this aspect by a preponderance of the evidence.

b.) performance of any services

Newberg's denial that he had ever provided "any type of service" for DF was false. He admitted having filled out new account forms for the corporation (Tr. 2433-2435, 2438). He also drew three checks totaling $110,000 from the Newbergs' joint account, payable to the corporation; he further drew six checks totaling over $300,000 on the corporation's account, payable to himself (Tr. 2476-2480, 2484-2487). Newberg explained that the checks from him to the corporation were attributable to his wife's requests that funds be transferred; the checks from the corporation to him were rooted in his wife's request to transfer funds from the corporation to their joint account (Id.). The transfers occurred because Mrs. Newberg wanted them to. Transferring substantial sums into and out of the corporation's account, at the request of the person controlling it, constituted performance of a "service" to DF. Mr. Newberg's denial that he had provided "any type of service" for the corporation was false.

Newberg's counsel argued that the "any service" question should be read "in pari materia" with the "employment" question, and thus must have been directed to Newberg's service "as an employee" (Tr. 2825-2828, 2831). That is not what the question asked. The

Department had already obtained Mr. Newberg's "no" answer to the employment question. Asking whether he performed services "as an employee" would have been repetitive and unnecessary. Moreover, the language was general, not limited. The questioner asked about "<u>any type</u> of service" (emphasis added). The inquiry was part of a series of questions about DF's location, business, creation, officers, employees, securities accounts, and investments, and it came in the context of inquiries about Mr. Newberg's connections, if any, to the company and its assets (CX-150). There is no reason to read the question as embodying some unexpressed limitation. Newberg's denial that he had "ever provided . . . any type of service to DF Consulting" was false.

2.) RO

At another point in his on-the-record interview, Respondent Newberg was asked, "do you know of anybody who has any business relationship with Mr. RO [sic]?" He answered, "[n]o" (CX-150, p. 102). As explained earlier, RO, a Cayman Islands banker, had trading authority for the nominee accounts that handled many transactions in the shells' securities and was instrumental in arranging almost $2 million in mortgage loans to Mr. and Mrs. Newberg (CX-254; Tr. 2169).

Enforcement argues that Newberg's denial was false because he knew that he and his wife had borrowed through RO and thus had a business relationship with him (Enf. Br. p. 63). Respondent now says the loans were "personal" and did not involve a "business relationship." Newberg admittedly knew that RO "was in the investment business" and that he "handled mortgages and other types of financial deals" (Tr. 2171). In addition, Newberg told investigators that he had no friends in the Cayman Islands and had met RO only twice (CX-150, pp. 96-100). The notion that a banker in the business of making mortgage loans would arrange a $1.9 million loan as a "personal" matter for the benefit of someone who was not a friend and whom he had

met only twice makes no sense. The loan reflected a "business relationship" with the banker who arranged it, and Newberg's denial was false.

G. Supervisory violations

The Eighth Cause charged Respondents Alexander and the firm with supervisory failures, including, inter alia, giving "minimal oversight" to the Aventura office and failing to review the Form 211s (par. 50). The Ninth Cause alleged a failure to maintain the requisite written supervisory procedures concerning these and other matters involving the shells.

Rule 3010 requires that NASD members "establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with [NASD Rules]." Whether supervision was reasonable "is determined based on the particular circumstances of each case." Dist. Bus. Conduct Comm. v. Lobb, 2000 NASD Discip. LEXIS 11 at *16 (NAC, April 6, 2000). The Panel concludes that in the circumstances of this case, Respondents failed to exercise reasonable supervision.

The Form 211s, seeking NASD clearance for the listing and trading of the securities on the Bulletin Board, were filed by the firm's Aventura office, under Newberg. Mr. Alexander regarded Newberg as running that office "at all times" and chose to visit it only once or twice a year (Tr. 1678, 1697, 2352-2353). Mr. Alexander acknowledged that Newberg generally filed the Form 211s "without any comment by me" (Tr. 1709). Newberg "was in charge of his filings unless he would ask [Alexander] about it beforehand" (Id.). Respondent did not know that various of the Form 211s involved shell corporations, and in reviewing the Aventura branch's trading, he did not know which transactions involved shells (Tr. 1710-1711). Many of the NASD letters raising questions about the Form 211s went to the firm's Los Angeles headquarters (while some went to Aventura), but Mr. Alexander did not see every such letter (Tr. 1520-1521,

1698, 1710-1711). Nor did Alexander know how many other shells, in addition to the twenty-nine involved here, went through the Aventura office (Tr. 1714). He did not comment to Newberg about trading in the shells (Tr. 1704). He did not monitor the shells' profits to the firm and did not even know of the Aventura office's profitability (Tr. 1648, 1706). Regarding the Form 211s, Mr. Alexander admitted having "just rather a cursory involvement with whatever was in our files in Aventura" (Tr. 1690).

Mr. Alexander knew that the Aventura office was his firm's only wholesale trading office and that Newberg or another trader there was the firm's top producing trader (Tr. 1685; 1675-1677, 2086). He also knew that the Florida office filed Form 211s for hundreds of companies (Tr. 1710). He knew that shells had value only as "an inexpensive way for many companies to go public" (Tr. 1570) and must have known that Form 211 clearance is a crucial step in giving value to otherwise worthless stock. Mr. Alexander further knew or should have known that Newberg had some prior disciplinary history (CX-159). In addition, he knew that some of his own firm's disciplinary history, including certain supervisory violations, arose out of the Florida office (Tr. 1818, 1849-1850, 2055).

"It is not sufficient for the person with overarching supervisory responsibilities to delegate supervisory responsibility to a subordinate, even a capable one, and then simply wash his hands of the matter until a problem is brought to his attention . . . Implicit is the additional duty to follow-up and review that delegated authority to ensure that it is being properly exercised." Castle Securities Corp., Exchange Act Rel. No. 39523, 1998 SEC LEXIS 24 at *13 - *14 (January 7, 1998). That duty is especially significant where, as here, substantial distance separates the home office from the branch. La Jolla Capital Corp., Exchange Act Rel. No. 41755, 1999 SEC LEXIS 1542 at *16 (August 18, 1999) and cases there cited.

The Panel concludes that Mr. Alexander failed in that responsibility. The firm's Florida branch, its sole trading arm, was busily filing hundreds of applications for bulletin board listings. For the head of a small firm to maintain only a "cursory involvement" with such matters was unreasonable.

Nor were there adequate written procedures. Rule 3010(b) requires that member firms maintain "written procedures to supervise the types of business in which it engages." As noted, the Florida branch office was heavily engaged in the filing of Form 211s, seeking clearance to list and trade various securities; indeed, it filed approximately 200 such applications per year, many of which involved shells (Tr. 2513, 2515). Yet its manuals (CX-245, CX-246) were silent as to this activity (Tr. 803). Respondents' argument that there was "no need" for such specificity in the manuals (Resp. Br. p. 45) would render meaningless Rule 3030(b)'s requirement for procedures "to supervise the types of business in which [the firm] engages" (emphasis added).

That Alexander left matters in the hands of two Series 24 principals (Resp. Br. p. 44) was not dispositive. See Castle, supra; James L. Owsley, Exchange Act Rel. No. 32491, 1993 SEC LEXIS 1525 at *25 (June 18, 1993) (in addition to placing supervisory registered principals on branch premises, the firm should have "established written supervisory procedures to assist the home office in monitoring the compliance of branch office personnel with applicable requirements"). That the firm's written procedures had been reviewed by NASD staff and promptly amended after such reviews (Tr. 1528, 1529, 1531-1532) creates no defense. As said in Owsley, supra: "Applicants assert that [the] compliance manual routinely 'passed muster' in NASD and Commission inspections. However, responsibility for compliance with applicable requirements cannot be shifted to regulatory authorities."

V. Sanctions

A. Respondent Newberg

1.) Bars

a.) unregistered securities

For egregious cases of selling unregistered securities, the NASD Sanction Guidelines (2001) authorize a bar (at p. 30). The Panel believes that this is such a case. Newberg's activity involved "numerous acts and/or a pattern of misconduct" (Id., at 9), covering twenty-nine such distributions and occurring over a period of several years. As Enforcement counsel correctly stated: Respondent engaged in "an ongoing course of conduct to bring private companies into the public markets without registration and without the disclosure that registration brings, the benefit of registration" (Tr. 37). Such disclosure was especially significant where, as here, the securities reflected worthless shell companies, and some of the applications filed to clear them for trading, submitted by Newberg's Florida office, contained false statements.

Newberg's purported reliance on Rule 144 (creating safe harbors for certain unregistered securities) presents nothing mitigating. That Rule requires the availability of the information concerning the issuer which is specified in provisions of Rule 15c2-11. Yet some of the Form 211s, supposedly containing such information, were inaccurate.[28] Resting on Rule 144 in these circumstances creates an aggravating circumstance. Moreover, even if Newberg had been "in technical compliance" with Rule 144, the preamble makes clear that the Rule would be

[28] For example, Rule 15c2-11(a)(5)(xiv) requires information as to "whether the broker or dealer or associated person is affiliated, directly or indirectly with the issuer." As the Panel concluded above, several of the Form 211s were false in this respect, insofar as they failed to disclose the family relationship between Newberg and the stockholder controlling the issuer.

unavailable "to any individual . . . with respect to any transaction which . . . is part of a plan . . . to distribute or redistribute securities to the public."[29]

Finally, Newberg profited from the distributions. Wholly apart from his earnings as a trader at the Respondent firm, an entity called "Sturm & Newberg" received $300,000 from EL, who created and promoted the shells, under circumstances suggesting that such money constituted finder's fees. In addition, Mrs. Newberg's corporation received shares in some of the companies after their successful acquisitions. The subsequent sale of those shares produced a profit of just over $1 million for the corporation. Even if the corporation, which from time to time received money from and paid money to Mr. Newberg, were entirely the wife's asset, her receipt of significant profits, stemming from the distribution in issue, nevertheless contributed to the Newbergs' overall financial well being.

The Panel agrees with Enforcement that a bar is appropriate.

b.) manipulation

As the National Adjudicatory Council recently explained, in the context of imposing a bar, "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." Dep't of Market Regulation v. Amr "Tony" Elgindy, No. CMS000015, 2003 NASD Discip. LEXIS 14 at *35 (NAC, May 7, 2003). Such misconduct is especially serious for market makers who, like Newberg, "play a crucial role in the securities market" (Id.). The misconduct here involved twenty-nine securities, occurred at various points over several years, and resulted in substantial rewards for Newberg. As in Elgindy, the circumstances are extremely serious, and a bar is appropriate.

[29] 1972 SEC LEXIS 49 at *29 (January 11, 1972).

c.) false testimony

The Sanction Guidelines recommend a bar as the "standard" sanction for a failure to respond (at p. 39). As Enforcement argues, furnishing false testimony is even more serious and a fortiori warrants a bar (Enf. Br. p. 83 and cases there cited). That result is especially appropriate here.

The question involved important investigative inquiries. The Department saw DF Consulting as the recipient of some of the proceeds of illegality and was seeking to link Mr. Newberg to the corporation. In this context, Newberg's denial that he had performed "any type of service" for DF Consulting – despite having filled out that corporation's account forms, executed Mrs. Newberg's request that he deposit funds with the corporation, and drawn checks on its behalf – was egregious. The question was broadly worded and could not have been misunderstood. His false answer could only have stalled or impeded the investigation.

Seeking to link Newberg to the Cayman accounts, which were also likely receptacles for the profits, Enforcement asked whether he knew anyone who had "any business relationship" with Mr. RO, a Cayman Islands banker who had trading authority for those accounts. Newberg's denial, despite the fact that RO was instrumental in a $1.9 million mortgage loan to Respondent and his wife, was designed to throw the investigators off the Cayman track. In the Panel's view, his claim that the mortgage was "personal" and not "business" was a fanciful afterthought, which reflected further lack of candor and itself aggravated the violation.

Newberg's false denials involved significant aspects of the investigation. A bar is eminently appropriate.

2.) Fines and suspensions

In view of the above multiple bars, imposition of the otherwise appropriate fines and suspensions is unnecessary. See Dep't of Enforcement v. Jeffrey B. Hodde, No. C10010005,

2002 NASD Discip. LEXIS 4 at *17 (NAC, March 27, 2002) ("In light of our imposition of a bar under cause two, however, we consider the suspension [under another cause] redundant and do not impose it").[30] If the Panel were to impose additional sanctions, they would be serious in magnitude. For selling unregistered securities, the Panel would impose the maximum fine recommended under the Guidelines ($50,000). For manipulation, where the guidelines make no recommendation, the Panel would accept Enforcement's formula – a fine of $725,000 ($25,000 for each of the twenty-nine securities involved). For Newberg's failure to report outside securities accounts and business activities, the Panel would treat the misconduct as a single course of egregious action and suspend him for one year. In addition, the Panel would impose a fine of $75,000, the combined total of the maximum fines recommended under the Guidelines for violations of Rules 3030 and 3050. But for the multiple bars, Newberg thus would have been fined $850,000 and suspended for one year.[31]

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[30] See also Dep't of Enforcement v. Thomas Christensen, No. C07020071 (OHO, January 13, 2003) (bar for failure to respond; no separate sanction for baseless price predictions); Dep't of Enforcement v. Dawn S. Harper, No. C05020023 (OHO, December 9, 2002) (bar for failure to respond; no separate sanction for U-4 violation); Dep't of Enforcement v. Stephen Prout, No. C07020061 (OHO, December 9, 2002) (bar for failure to respond; no separate sanction for selling away); Dep't of Enforcement v. Stephen Robert Walling, No. C9B020039 (OHO, September 30, 2002) (bar for failure to respond; no separate sanction for unauthorized trading); Dep't of Enforcement v. Cathy L. Cerullo, No. C07020010 (OHO, August 6, 2003) (bars for forgery and failure to respond; no separate sanction for unauthorized disbursement of customer funds).

[31] Enforcement urged that the Panel treat the Cayman entities and DF as though they belonged to Newberg and require that he disgorge some $1.8 million in combined profits from those sources (Enf. Br. p. 80). As previously explained, the evidence was not sufficient to persuade the Panel that the Cayman Islands entities should be regarded as Newberg's. As to DF, although Mr. Newberg certainly was involved in his wife's corporation, the evidence falls short of establishing that all of its money somehow should be attributed to him. Mr. Newberg testified (without contradiction) that his wife had operated a gallery in Bal Harbour, an important shopping mall, where she sold fine and expensive art and jewelry and met many people; in addition, EL (whom she had known for over twelve years) told her that she would receive finder's fees for sending people to him in connection with shell promotions (Tr. 2461-2464). On this record, the Panel cannot conclude that all of the wife's corporation's money was really Mr. Newberg's and that none of it was attributable to her efforts.

B. The firm and Respondent Alexander

1.) Unregistered securities and manipulation

For selling unregistered securities, the Guidelines recommend fines of $2,500 to $50,000 (p. 30). Manipulation, though not listed in the Guidelines, is one of the most serious forms of misconduct (see Elgindy, supra). However, Mr. Alexander, the firm's President, Chairman and sole stockholder, played no role in the sales or the manipulation. Moreover, neither he nor his firm saw any significant profit from this misconduct. The activity occurred solely in the Florida branch office, where Newberg and Sturm were the principals. As to Respondent Alexander and his firm, therefore, the Panel believes that the more significant violations involve supervisory failures, for which, as discussed infra, the Panel imposes a heavy fine, a suspension, and rigorous conditions. On balance, therefore, the Panel concludes that fines of $10,000 each for the unregistered securities violation and the manipulation are appropriate.

2.) False Form 211s

The Panel views the false Form 211s as by-products of the failures to supervise, for which the Panel is imposing several significant sanctions (see discussion infra). As to the false forms themselves, the maximum recommended fine for a "first action" is $2,000 (Guidelines, p. 72) and the Panel hereby imposes that fine on the firm.[32]

3.) Supervisory failures

The firm and Mr. Alexander have been found liable for failures to supervise and for failures to maintain adequate written supervisory procedures. Although there are two charges, the same misconduct underlies both. In these circumstances, the Panel may assess a unitary

[32] The Department multiplies the $2,000 by the number of false forms and seeks a $50,000 fine (Enf. Br. p. 84). The Panel disagrees. The Guidelines' definition of "action" seemingly contemplates proceedings, not incidents (p. 12). In any event, the Panel believes that the misconduct flowed from supervisory failures and that the brunt of the sanctions should be anchored in those violations.

sanction. See Dep't of Enforcement v. Respondent Firm 1, No. C8A990071, 2001 NASD Discip. LEXIS 6 at *31 (NAC, April 19, 2001); see also Dep't of Enforcement v. Emanuel L. Sarris, No. C9A020017, 2003 NASD Discip. 12 at *19 (OHO, March 17, 2003).

The maximum recommended fines for supervisory failure and "written procedures" violations are $50,000 and $25,000, respectively (Guidelines, at pp. 108-109). In egregious cases, the Guidelines recommend suspending the firm for 30 days, suspending the responsible individual for up to two years, or barring the individual.

The Department urges that Mr. Alexander and the firm be fined $100,000 each; that he be barred as a supervisor; that he be suspended for 60 days; and that he be subject to a re-qualification requirement (Enf. Br. pp. 87-88). As to the firm, Enforcement seeks the retention of a consultant who would prepare, implement and oversee various supervisory procedures; the preclusion of further Form 211s for 6 months; the closing of the Aventura office; and the preclusion of opening any new office for 2 years (Id., at pp. 88-89).

The firm and Alexander have lengthy disciplinary histories. Their various acts of misconduct cover events which occurred as far back as 1984 (CX-161) and as recently as April of 2001 (CX-178).[33] Several of their violations reflect supervisory failures, and some involved the Aventura office. In addition, there is no question that the supervisory lapses here allowed Newberg and Sturm to commit serious misconduct, some of which affected the integrity of the marketplace.

However, Mr. Alexander himself got virtually nothing out of Newberg's and Sturm's misconduct. The Department went to great lengths in attempting to prove profits attributable to Newberg and Sturm, but made no such presentation as to the firm and Mr. Alexander.

[33] Their disciplinary history is spelled out in CX-157; CX-158; CX-161 through CX-169; CX-174, CX-177.

Moreover, he and the firm were actually the victims of the violations involving failures to report outside securities accounts and outside business activities. In addition, as the Department recognizes (while emphasizing the disciplinary history), "the failure to supervise may be mitigated somewhat by the fact that Newberg and Sturm actively hid their activities from the firm and James Alexander" (Enf. Br. p. 85). Even the most rigorous supervision would not likely have detected the connections between the shells' stockholders and the firm's associated persons or the connections to the Cayman accounts. In the Panel's view, however, closer scrutiny of the trading records should have revealed at least some of the matched transactions and produced further inquiry.

On balance, the Panel concludes that serious sanctions are necessary.

Mr. Alexander and his firm have been fined many times. The largest fine in their extensive disciplinary history appears to be $62,500 (CX-177). The Panel recognizes that "[a]n important objective of the disciplinary process is to deter future misconduct by imposing progressively escalating sanctions on recidivists" (Guidelines, p. 3). Accordingly, it imposes a fine of $90,000 for the supervisory violations. This sum, more than the combined maximum recommendations for supervisory and written procedure failures, adequately reflects the seriousness of the failures and sends a signal that should deter future violations.

Mr. Alexander is President, Chairman of the Board, and sole shareholder of this small firm (Tr. 1484). Though Enforcement is not seeking to expel it, barring him from supervising would likely produce that result. The Panel believes that such an outcome goes beyond what is needed here and declines to impose the bar. Closing the Aventura office would unnecessarily penalize innocent persons employed there. Moreover, such a sanction, together with precluding the firm from filing Form 211s for some months, would serve no remedial purpose. NASD now

requires opinions from independent counsel (as opposed to the issuer's counsel) in the Form 211s (Notice to Members 00-49). As a result, the NASD almost never sees EL's name any more; very few Form 211s are now filed; and hardly any such issues are cleared for trading (Tr. 1302-1303, 1399, 1423).

The Panel believes that Mr. Alexander must also serve a period of suspension in all capacities. This will be the first such penalty for him,[34] and it should impress him with the seriousness of supervisory responsibility. Though Enforcement seeks a 60-day suspension, the Panel believes that because the crux of the firm's and his misconduct lies in the supervisory violations, the period should be somewhat longer. The Panel concludes that a 90-day suspension would be appropriate.

Enforcement asks that the Panel require Mr. Alexander to re-qualify (Enf. Br. p. 88). He is now 69 years old (CX-158, p. 1). In that circumstance, a re-qualification requirement, with its inherent time commitment, would likely cause him to leave the securities industry. Again, the Panel chooses not to do indirectly what the Department says that it does not want.

The Panel agrees with Enforcement that J. Alexander Securities, Inc. must be ordered to retain an independent consultant at its own expense (and who is acceptable to NASD) to perform various specified tasks (Enf. Br. pp. 88-89). Enforcement suggests a three-year period for the consultant; defense counsel said the firm could "live with" a one-year obligation (Tr. 2871). In deciding upon the appropriate duration, the Panel considered the significant costs inherent in retaining a qualified consultant, together with the industry members' own supervisory experience, and concludes that an eighteen-month obligation should be sufficient to bring about

[34] He was once suspended as a supervisor for thirty days (CX-158).

the necessary reforms. The Panel imposes the following conditions, drawn from pages 88-89 of Enforcement's post-hearing brief:

> a. The independent consultant should review ALEX's compliance and written supervisory policies, practices, and procedures, including those necessary to implement the sanctions in this matter, and finalize a report outlining his or her suggested changes within ninety days of the decision in this case. These recommendations should be submitted to NASD's Department of Enforcement and ALEX. Within thirty days after the report is delivered, ALEX should either adopt all recommendations made by the consultant or, as to any recommendation that it determines to be unduly burdensome or impractical, propose an alternative procedure designed to achieve the same objective, and submit it in writing to the consultant and to the staff of NASD Department of Enforcement. The consultant should: (i) evaluate any proposed alternative procedure and determine whether it will achieve the same objective as the consultant's original recommendation; and (ii) provide ALEX and NASD's Department of Enforcement with a written decision reflecting his or her determination, which shall be implemented by ALEX.
>
> b. The independent consultant should follow-up reviews and prepare follow-up reports addressing ALEX's written supervisory procedures every 120 days thereafter for eighteen months. Each report shall be filed with NASD's Department of Enforcement for review, after which ALEX shall implement any proposed changes.
>
> c. ALEX and its employees should be required to cooperate with the independent consultant and will place no restrictions on the consultant's communications with NASD. ALEX should provide adequate funding so as to allow the consultant to perform his or her functions adequately.
>
> d. For a period of two years following the conclusion of his or her services, ALEX should not be permitted to employ or hire the consultant.

VI. Conclusion

For engaging in sales of unregistered securities, manipulation, and providing false testimony to NASD staff, Respondent Newberg is barred from association with any NASD member firm in all capacities. The bars shall become effective immediately upon this Decision becoming the final disciplinary action of NASD. In view of the multiple bars, no separate sanction was imposed on Respondent Newberg for his failures to disclose outside securities accounts and outside business activities.

For the sales of unregistered securities, Respondent J. Alexander Securities, Inc. is fined $10,000; for the manipulation, the Respondent firm is fined $10,000. For filing false Form 211s, the Respondent firm is fined $2,000. For supervisory failures, Respondent Alexander and the firm are fined $90,000 jointly and severally. The firm is required to retain, at its expense, an independent consultant for an eighteen-month period, during which the consultant and the firm shall have the various responsibilities concerning supervisory matters, as described above in this Decision. Respondent Alexander is suspended in all capacities for 90 days.[35] If this Decision becomes NASD's final disciplinary action, the suspension shall become effective with the opening of business on November 3, 2003, and end on January 31, 2004.

Finally, Respondents are jointly and severally responsible for a total of $13,510.28 in costs, reflecting $12,760.28 for the hearing transcript and the standard $750 administrative fee.[36]

HEARING PANEL

____

By: Jerome Nelson
Hearing Officer

Dated: Washington, DC
September 3, 2003

Copies to: James Alexander (via overnight and first class mail)
Richard Newberg (via overnight and first class mail)
J. Alexander Securities, Inc. (via overnight and first class mail)
Richard N. Friedman, Esq. (via facsimile and first class mail)
Jonathan I. Golomb, Esq. (via electronic and first class mail)
Paul D. Taberner, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

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[35] The Panel understands that this suspension will be measured in calendar days. (See Guidelines at p. 12.)

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

APPENDIX

Matched Transactions

Date of Transaction	Company	Seller(s)	Number of Shares Bought by Respondent Firm	Price Per Share	Date Shares Re-sold to Cayman Accounts by Respondent Firm	Number of Shares Sold	Re-sale Price Per Share
07/17/1998	Arngre, Inc.	Sturm's aunt	1,000	$.50			
07/20/1998	Arngre, Inc.	Sturm's friend and others	4,000	$.50	07/20/1998 (minutes later)	5,000	$.52
06/12/1998	Coffeeworks, Inc.	Sturm's friends and a friend of EL	6,000	$.25	06/12/1998 (one hour later)	6,000	$.28125
06/17/1998	Coffeeworks, Inc.	another firm that had earlier purchased it from a friend of EL	4,000	$.35	06/17/1998 (one minute later)	4,000	$.375
08/05/1998	Computer Vending Inc.	a friend of Newberg's and a former secretary for Sturm	4,000	$.25	08/06/1998 (the next morning, following an afternoon purchase)	4,000	$.26
05/21/1997	Create-a-Basket, Inc.	Sturm's friends and former secretary	40,000	$.05	05/21/1997 (two hours later)	40,000	$.06
06/02/1998	First Geneva Investments, Inc.	Sturm's friends	4,000	$.25			
06/04/1998	First Geneva Investments, Inc.	various friends and relatives of Sturm	8,000	$.25	06/04/1998	12,000	$.28125
11/25/1996	First New York Investment, Inc.	relatives of Sturm	15,000	$.1563	11/25/1996	15,000	$.16

Date of Transaction	Company	Seller(s)	Number of Shares Bought by Respondent Firm	Price Per Share	Date Shares Re-sold to Cayman Accounts by Respondent Firm	Number of Shares Sold	Re-sale Price Per Share
10/22/1996	First Zurich Investments, Inc.	friends of Sturm	5,000	$.1563	10/23/1996	5,000	$.1719
04/22/1997 04/23/1997	Littman Ventures, Corp.	unidentified	7,000	$.25	04/23/1997	7,000	$.27
11/11/1997	Snak-N-Pop Vending, Inc.	stockholder with unidentified relationship	1,000	$.50	11/12/1997	1,000	$.52
07/23/1998	Southern Cargo, Inc.	Newberg's sister	1,000	$.50			
07/28/1998	Southern Cargo, Inc.	Sturm's relatives	1,000	$.50	07/28/1998 (minutes later)	2,000	$.55