NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. U.S. RICA FINANCIAL, INC. (BD #38742) San Jose, CA VINH HUU NGUYEN (CRD #2374393) San Jose, CA, Respondents.	Disciplinary Proceeding No. C01000003 **HEARING PANEL DECISION** Hearing Officer - DMF January 3, 2001

Digest

The Department of Enforcement's Complaint alleges that U.S. Rica Financial, Inc. (Firm), an NASD member firm, and Vinh Huu Nguyen (Nguyen), the Firm's chief executive officer and sole general securities principal, represented to customers, on the Firm's website and on trade confirmations, that they would be, or had been, charged commissions in accordance with the Firm's published commission schedule, or that trades would be, or had been, effected for "free." In fact, the Complaint alleged, Respondents effected 316 customer trades on a riskless principal basis through the Firm's proprietary account and charged the customers undisclosed markups and markdowns, and thereby earned and retained "secret profits" of $58,579.83, as well as commissions, on these trades. Based on the foregoing, the Complaint charged Respondents with violating Section 10(b) of the Securities Exchange Act of 1934, SEC Rules 10b-5 and 10b-10(a)(2)(ii)(A), and NASD

Conduct Rules 2110, 2120, 2210(d)(1)(A) and (B), and 2230. The Complaint also alleges that the Respondents failed to make appropriate memoranda of brokerage orders in violation of Section 17(a) of the Exchange Act, SEC Rule 17a-3, and NASD Conduct Rules 3110 and 2110.

Enforcement moved for summary disposition as to liability. In response, Respondents admitted that they engaged in the conduct alleged in the Complaint and that their conduct violated the various provisions with which they were charged. On that basis, the Hearing Panel granted Enforcement's motion, and held a hearing limited to the issue of sanctions. Following the hearing, the Hearing Panel: (1) expelled the Firm from membership in the NASD; (2) barred Nguyen from associating with any member firm in all principal capacities; (3) suspended Nguyen from associating with any member firm in any other capacity for two years; (4) ordered Respondents, jointly and severally, to pay disgorgement in the amount of $58,579.83 (which represented the total amount of undisclosed markups and markdowns charged on the subject transactions) plus pre-judgment interest thereon to their defrauded customers; and (5) fined Respondents, jointly and severally, $240,000. Finally, the Hearing Panel ordered Respondents to pay, jointly and severally, hearing costs in the amount of $1,779.25.

Appearances

David A. Watson, Esq., Regional Attorney, San Francisco, California, and Rory C. Flynn, Esq., Chief Litigation Counsel (Of Counsel), Washington, DC, for the Department of Enforcement.

Jahan P. Raissi, Esq., Shartsis, Friese & Ginsburg, LLP, San Francisco, California and Deborah R. Gatzek, Esq., Stradley, Ronan, Stevens & Young, LLP, San Mateo, California for Respondents U.S. Rica Financial, Inc. and Vinh Huu Nguyen.

DECISION

I. Procedural History

On February 2, 2000, the Department of Enforcement filed a twelve-cause Amended Complaint against the Firm and Nguyen, the Firm's chief executive officer and sole general securities principal.[1] The First, Fourth, and Seventh Causes allege that, during the period from December 29, 1998 through January 21, 1999, and on February 17 and December 22, 1999, the Respondents falsely advertised on the Firm's website that the Firm would effect transactions for "free" or in accordance with the Firm's published commission schedule, and failed to disclose that the Firm might effect transactions on a riskless principal basis and charge markups and markdowns on such transactions. Based on this misconduct, Respondents are charged with violating NASD Conduct Rules 2110 and 2210(d)(1)(A) and (B).

The Second, Fifth, Eighth, and Tenth Causes allege that, during the same periods and on January 5, 2000, the Respondents engaged in securities fraud, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Conduct Rules 2110 and 2120, by failing to disclose, in connection with a total of 316 customer transactions, the markups and markdowns charged, and by retaining "secret profits" in connection with these transactions. The Third, Sixth, Ninth, and Eleventh Causes allege that, with respect to these trades, Respondents sent confirmations that represented that the Firm had acted as an agent and had charged no commissions, or had charged commissions in accordance with its published commission schedule, thereby violating Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2)(ii)(A), and NASD Conduct Rules 2110 and 2230. Finally, the Twelfth Cause alleges that Respondents failed to make appropriate memoranda of brokerage orders in

[1] All references to the Complaint are to the Amended Complaint.

violation of Section 17(a) of the Exchange Act, SEC Rule 17a-3, and NASD Conduct Rules 3110 and 2110.

Respondents filed an Answer to the Amended Complaint and requested a hearing. On May 5, 2000, prior to the hearing, however, Enforcement filed a motion for summary disposition, pursuant to Rule 9264, as to liability only. On May 24, 2000, respondents, through counsel, filed a response to Enforcement's motion, stating:

> Respondents admit the factual allegations of the Staff and admit that these facts constituted violations of NASD and SEC Rules. Respondents did advertise a commission schedule without disclosing that some transactions would be effected on a riskless principal basis. When these trades were effected on a riskless principal basis, the confirmations improperly represented that the transactions were agency trades. The agency trade confirmations of riskless principal trades also did not disclose the markups received by the firm. Finally, some inventory account transactions were not supported by orders with timestamps as is required by NASD Rules.

At a subsequent pre-hearing conference, respondents' counsel confirmed, "we are admitting the conduct, and, therefore, the violations, and the issue is sanctions." (Tr. 6/8/2000 p. 5.) On the basis of these admissions, the Hearing Panel granted Enforcement's motion on July 12, 2000, stating that the "hearing will proceed as scheduled for the sole purpose of receiving evidence and hearing argument bearing on the issue of sanctions, including any mitigating or aggravating factors that the Parties wish to bring to the Hearing Panel's attention."

On August 10, 2000, the Hearing Panel, composed of two current members of the District Committee for District 1 and a Hearing Officer, conducted a hearing for the purpose of receiving evidence and hearing argument on the issue of sanctions.[2] Enforcement offered the testimony of

[2] Following the hearing, the Hearing Officer left NASD Regulation and a new Hearing Officer was appointed. Because he did not take part in the hearing or Panel deliberations, and did not have an opportunity to observe the witnesses, the new Hearing Officer did not take part in this Decision, which reflects the determinations of the remaining two members of the Hearing Panel.

one witness, Bradley Kaiser, a former NASD Supervisor of Examinations, who was responsible for the examination that gave rise to this disciplinary proceeding, and seven exhibits (CX 1-7), all of which were admitted in evidence. Respondent testified on his own behalf and offered 16 exhibits (RX 1-16), two of which (RX 5 and 15) were admitted in evidence.[3] In addition, on July 6, 2000, prior to the hearing, the Parties filed a Stipulation (Stip), in which Respondents admitted once again that they committed the violations alleged in the Complaint.[4]

II. Discussion

As explained above, Respondents admitted the allegations in the Complaint, and the only issue for hearing was sanctions for the violations.

A. Respondents

Nguyen has been employed in the securities industry and has been registered as a general securities principal and general securities representative since 1993. (Tr. 70, 142.) Nguyen

[3] Respondents withdrew one of their proposed exhibits (RX 1); two of their proposed exhibits (RX 10 and RX 11) were identical to two of Enforcement's exhibits (CX 5 and CX 6) that already had been admitted in evidence; another of their proposed exhibits was a blank sheet of paper (RX 12); and the Hearing Officer sustained Enforcement's objections to RX 2-RX 4, RX 6-RX 9, and RX 13-RX 14. See Tr. 96-104. The Hearing Panel also rejected Respondents' proposed exhibit RX 16, which purported to reflect the price and time of transactions in one of the securities that Respondents placed as riskless principal trades, because it had questions as to authenticity of its contents. (Tr. 168-70.) However, since Enforcement did not object to that exhibit, the Hearing Panel decided to accept Exhibit 1 to Respondents' post-hearing submission, which Respondents' counsel obtained directly from the NASD, as a substitute for RX 16.

[4] Immediately before the hearing was scheduled to begin, Respondents presented a written Offer of Settlement to Enforcement, which Enforcement orally rejected. The Hearing Panel declined to adjourn the hearing, for the purpose of requiring either Enforcement to prepare a written opposition or the Parties to attend a settlement conference (as contemplated by Rule 9270(f)), but advised Respondents that they could, of course, argue that the Hearing Panel should impose sanctions consistent with the terms of their contested Offer of Settlement. At the conclusion of the hearing, upon the request of Respondents, the Hearing Panel afforded the Parties the opportunity to submit post-hearing submissions, which they filed on August 25, 2000. In their post-hearing submission, Respondents again sought to present a contested Offer of Settlement to the Hearing Panel. The Hearing Panel concluded, for the reasons set forth in this Decision, that the sanctions Respondents suggested were too lenient to redress their misconduct and to serve the specific and general deterrent purposes of sanctions, and thus declined to approve Respondents' contested Offer of Settlement. Since this Decision sets

established the Firm in 1996. (Tr. 70.) The Firm has been a member of the NASD since May 29, 1996 (Stip. ¶ 1) and, throughout its existence, Nguyen has served as the Firm's sole General Securities Principal. (Stip. ¶ 2.) The Firm is a discount broker and presently has approximately 15 employees and approximately 2,500 customers. (Tr. 71-73.)

B. Respondents' Misconduct (Based on the Parties' Stipulations)

(1) Causes One through Three

During the period from December 29, 1998 through January 21, 1999, the Firm, acting through Nguyen, advertised on the Firm's website that the Firm would effect customer trades of 500 or more shares for the following specific commissions: (a) $4.95 for Internet trades; (b) $10 for touch-tone telephone trades; and (c) $35 for broker assisted trades. With respect to trades of less than 500 shares, the Firm represented that it would charge its customers: (a) $10 for Internet trades; (b) $15 for touch-tone telephone trades; and (c) $35 for broker assisted trades. In fact, Respondents effected transactions for customers on a riskless principal basis through the Firm's own proprietary account charging undisclosed markups/markdowns on those trades in addition to the advertised commissions. Respondents thereby violated NASD Rules 2110 and 2210(d)(1)(a). (Stip. ¶¶ 3-4 (Cause One.)

During the same period, in connection with 263 customer purchases or sales of securities, Respondents misrepresented to customers that a commission was being charged in accordance with the Firm's published commission schedule, when in fact the transactions were being effected as riskless principal transactions through the Firm's proprietary inventory account, and both commissions and undisclosed markups/markdowns were being charged, resulting in secret profits to

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forth the Hearing Panel's rationale for the sanctions it determined to impose, the Hearing Panel did not issue a separate Order setting forth its reasons for declining to approve Respondents' contested Offer of Settlement.

the Firm of $37,132.95 on the 263 transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110. (Stip[. ¶¶ 5-6 (Cause Two).)

During the same period, and in connection with the same 263 transactions, the Firm, acting through Nguyen, effected purchases and sales of securities for and with the accounts of customers as a principal for its own account, and not as a market maker. In the confirmations to the customers, however, Respondents falsely indicated that the Firm had acted as an agent and was charging a commission in accordance with its published commission schedule, and failed to disclose that the transactions had been effected on a riskless principal basis through the Firm's proprietary account, and that the Firm was charging both commissions and undisclosed markups/markdowns on the transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2)(ii)(A), and NASD Rules 2230 and 2110. (Stip. ¶¶ 7-8 (Cause Three).)

(2) Causes Four through Six

On February 17, 1999, the Firm, acting through Nguyen, advertised on the Firm's website that February 17 was a "commission free day." In fact, on that day Respondents effected customer transactions on a riskless principal basis through the Firm's proprietary inventory account, charging undisclosed markups/markdowns. Respondents thereby violated NASD Rules 2110 and 2210(d)(1)(A) and (B). (Stip. ¶¶ 9-10 (Cause Four).)

On the same date, in connection with 26 customer purchases and sales of securities, the Firm, acting through Nguyen, misrepresented to customers that their transactions were being effected by the Firm as commission free trades when, in fact, the transactions were effected as riskless principal transactions through the Firm's proprietary inventory account, and the customers were charged undisclosed markups/markdowns, through which the Firm received secret profits of

$2,156.25 on the 26 transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110. (Stip. ¶¶ 11-12 (Cause Five).)

Also on the same date, and in connection with the same 26 transactions, the Firm, acting through Nguyen, effected purchases and sales of securities for and with the accounts of customers as a principal for its own account, and not as a market maker. In the confirmations to the customers, however, Respondents falsely indicated that the Firm had acted as an agent for free, when in fact the transactions had been effected on a riskless principal basis through the Firm's proprietary account, and the Firm was charging undisclosed markups/markdowns on the transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2)(ii)(A), and NASD Rules 2230 and 2110. (Stip. ¶¶ 13-14.)

(3) Causes Seven through Nine

On December 22, 1999, the Firm, acting through Nguyen, advertised on its website: "To celebrate the new Millennium and to show our appreciation, U.S. RICA has GREAT news for YOU. Until the End of 1999 All Internet Orders are COMMISSION FREE." In fact, Respondents effected such customer Internet trades on a riskless principal basis through the Firm's proprietary inventory account, charging undisclosed markups/markdowns. Respondents thereby violated NASD Rules 2110 and 2210(d)(1)(A) and (B). (Stip. ¶¶ 15-16 (Cause Seven).)

On the following day, December 23, 1999, in connection with 21 customer purchases and sales of securities, the Firm, acting through Nguyen, misrepresented to the customers that their Internet transactions were being effected by the Firm for free, when in fact the transactions were being effected as riskless principal transactions through the Firm's proprietary inventory account with undisclosed markups/markdowns, through which the Firm received secret profits of $18,925 on the

21 transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110. (Stip. ¶¶ 17-18 (Cause Eight).)

Also on December 23, and in connection with the same 21 transactions, the Firm, acting through Nguyen, effected purchases and sales of securities for and with the accounts of customers as a principal for its own account, and not as a market maker. In the confirmations to the customers, however, Respondents falsely indicated that the Firm had acted as an agent for free, when in fact the transactions had been effected on a riskless principal basis through the Firm's proprietary account, and the Firm was charging undisclosed markups/markdowns on the transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2)(ii)(A), and NASD Rules 2230 and 2110. (Stip. ¶¶ 19-20 (Cause Nine).)

(4) Causes Ten and Eleven

On January 5, 2000, in connection with six customer purchases and sales of securities, the Firm, acting through Nguyen, misrepresented to customers that the Firm was charging a commission on the transaction in accordance with the Firm's published commission schedule, when in fact the transactions were effected as riskless principal transactions through the Firm's proprietary account, and both commissions and undisclosed markups/markdowns were being charged, through which the Firm obtained secret profits of $475 on the six transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110. (Stip. ¶¶ 21-22 (Cause Ten).)

On the same date, and in connection with the same six transactions, the Firm, acting through Nguyen, effected purchases and sales of securities for and with the accounts of customers as a principal for its own account, and not as a market maker. In the confirmations to the customers, however, Respondents falsely indicated that the Firm had acted as an agent for free, when in fact

the transactions had been effected on a riskless principal basis through the Firm's proprietary account, and the Firm was charging undisclosed markups/markdowns on the transactions. Respondents thereby violated Section 10(b) of the Exchange Act, SEC Rule 10b-10(a)(2)(ii)(A), and NASD Rules 2230 and 2110. (Stip. ¶¶ 23-24 (Cause 11).)

(5) Cause Twelve

During the periods: (a) from December 29, 1998 through January 21, 1999; (b) February 17, 1999; (c) December 23, 1999; and (d) January 5, 2000, in connection with the transactions described above, the Firm failed to make a memorandum of each brokerage order reflecting the time of entry and the time of execution of purchases of securities from other broker-dealers into the Firm's inventory account and sales of securities from the Firm to other broker-dealers from the Firm's inventory account. Nguyen caused the Firm to fail to make the appropriate memoranda of the brokerage orders. Respondents thereby violated Section 17(a) of the Exchange Act, SEC Rule 17a-3, and NASD Rules 3110 and 2110. (Stip. ¶¶ 25-26.)

C. Sanctions

(1) The Parties Sanction Proposals

For sanctions, Enforcement has requested that: (1) the Firm be expelled from membership in the NASD; (2) Nguyen be barred from associating with any member firm in all capacities; (3) the Firm and Nguyen be ordered to disgorge their illicit gains to each of the customers identified (by account number) on Schedules A-D to the Complaint, in an amount equal to the undisclosed markup or markdown the Firm charged;[5] and (4) the Firm and Nguyen be fined $245,000, jointly and

[5] In its pre-hearing submission, Enforcement used the term "restitution" (Department of Enforcement's Pre-Hearing Submission, p. 7) but, at hearing, clarified that it is asking that Respondents be required to, in essence, disgorge their illicit, undisclosed profits for the benefit of the customers identified in Schedules A-D to the Complaint. (Tr. 21.)

severally, as follows: (i) $25,000 for each of the false advertising causes in the Complaint (i.e., the First, Fourth, and Seventh Causes); (ii) $25,000 for each of the four fraud causes in the Complaint (i.e., the Second, Fifth, Eighth, and Tenth Causes); (iii) $15,000 for each of the four false confirmation disclosure causes in the Complaint (i.e., the Third, Sixth, and Eleventh Causes); and (iv) $10,000 for the recordkeeping violations (i.e., the Twelfth Cause).[6]

Respondents, in their post-hearing submission, propose that the Hearing Panel impose sanctions as follows: (1) censure the Firm and Nguyen; (2) suspend Nguyen as a principal for two years and until he requalifies by examination and demonstrates to the satisfaction of the Director of District 1 that he is familiar with the rules applicable to the Firm's business; (3) with respect to the trades identified on Schedules A-D to the Complaint, require the Firm to reimburse to any customer the amount of any markup or markdown that was more than 5% over the Firm's cost; (4) fine Respondents, jointly and severally, $120,000 (i.e., $10,000 for each cause in the Complaint); (5) require the Firm, for a period of two years, to submit to NASDR's advertising department and to the Director, and to obtain their pre-use approval of, all advertisements and sales literature; (6) retain a "qualified independent consultant," who is acceptable to the Director or his or her designee, "to design and audit a compliance program" for the Firm's business and certify compliance with the program to the Director on a semi-annual basis; and (7) require the Firm to pay $25,000 to NASDR ($5,000 for each year for a period of five years) to cover the costs of annual examinations of the Firm.[7]

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[6] See Department of Enforcement's Pre-Hearing Submission, pp. 3-7; Department of Enforcement's Post Hearing Submission, p. 8; Tr. 20-21.

[7] See Respondents' Post Hearing Brief, pp. 11-12, and Exhibit 2 thereto; see also Tr. 138-40.

(2) Relevant Facts

On or about March 11, 1999, after NASD Regulation, Inc. (NASDR) staff reviewed the Firm's December 29, 1998-January 21, 1999 and February 17, 1999 website advertisements, the staff conducted an on-site examination of the Firm. (Tr. 34-35.) As a result of the examination, by letter, dated April 14, 1999, NASDR advised Respondents that "it appears that [the Firm] is engaged in 'riskless' principal transactions with customers and failed to disclose the markups or markdowns as required by SEC Rule 10b-10." In its April 14 letter, NASDR further noted that the Firm had advertised, through the Internet, "commission charges of $4.95 on securities transactions without indicating the transactions may be executed on a 'riskless' basis [and that] the Firm charged a markup or markdown in addition to the commission" on such transactions. (CX 5.)

By letter, dated April 22, 1999, Nguyen purported to respond to the issues raised by NASDR. In that letter, Nguyen acknowledged that the Firm's website advertisement improperly failed to disclose that trades may be effected on "'riskless basis' with a markup or markdown" and stated: "[w]e are adding this disclosure to our Web site. We are submitting the change to the NASD advertising department for review." (CX 6) (emphasis added.)

However, because Nguyen's letter did not alleviate the staff's concerns about the Firm's possible violation of SEC Rule 10b-10, on or about July 28, 1999, NASDR staff conducted an on-the-record interview of Nguyen. (Tr. 38-39.) The Firm's FINOP also was present at the interview. During that interview, Nguyen admitted that the Firm effected transactions on a riskless principal basis, and the staff devoted some time during the interview to discussing the confirmation disclosure relating to such transactions. (Tr. 43-44.)

In spite of this, Respondents have stipulated that on December 22, 1999 – eight months after Nguyen represented to NASDR that the Firm would correct its website advertisements to disclose

that the Firm might effect trades on a riskless basis and charge markups or markdowns on such trades, and approximately five months after Nguyen testified before NASDR staff – the Firm published another false and misleading advertisement on its world-wide website. (Stip. ¶ 15.) Nguyen acknowledged that he was responsible for the erroneous advertisement. (Stip. ¶ 15; Tr. 131-32.)

The December 22 advertisement stated: "To celebrate the new Millennium and to show our appreciation, U.S. RICA has GREAT news for YOU. Until the End of 1999 All Internet Orders are COMMISSION FREE." Respondents stipulated that, like the prior advertisements, this advertisement failed to disclose that customer transactions might be effected on a riskless principal basis through the Firm's proprietary inventory account and that, with respect to such trades, customers would be charged undisclosed markups or markdowns. (Stip. ¶ 15.) Indeed, Respondents stipulated that on December 23, 1999, they effected, on a riskless principal basis, 21 purchases or sales of securities for which they charged customers undisclosed markups and markdowns, and realized profits of $18,925. (Stip. ¶ 17; see Complaint, Schedule C.) And, like the confirmations issued for the riskless principal trades effected during the period from December 29, 1998 to January 21, 1999 and on February 17, 1999, Respondents stipulated that the confirmations the Firm issued to its customers for these 21 trades falsely represented that the Firm was acting in the capacity of an agent and failed to disclose the markups or markdowns charged. The confirmations reflected only that the trades had been effected for "free." (Stip. ¶ 19.)

Furthermore, Respondents stipulated that their violations continued even after that date. They acknowledged that on January 5, 2000 – just weeks before this proceeding was instituted – in connection with six customer purchases or sales, they falsely represented that the Firm was charging commissions in accordance with its published commission schedule when, in fact, the transactions

were effected on a riskless principal basis, and the customers were charged undisclosed markups or markdowns, through which the Firm earned undisclosed profits of $475. (Stip. ¶ 21; see Complaint, Schedule D.) And again, the Firm issued confirmations to its customers for these six trades that falsely represented that the Firm was acting in the capacity of an agent and failed to disclose the markups and markdowns charged. (Stip. ¶ 23.)

In or about February 2000 – after this proceeding was instituted and about 10 months after Nguyen represented to NASDR that the Firm would correct its false website advertisements – Respondents finally began disclosing on the Firm's website that the Firm might effect transactions on a riskless basis,[8] and began issuing confirmations to the Firm's customers that correctly noted the capacity in which the Firm effected trades and any markups or markdowns charged. (Tr. 130.)[9]

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[8] The Firm's website advertisement (RX 5) now states:

> If we are able to obtain a price better than the displayed national best bid or offer, we may execute your transaction as a riskless principal trade through our own proprietary inventory account and not as an agency trade. In such a case, you will not be charged a commission and we will retain a markup equal to the difference between the price we obtained and the displayed national best bid or offer, which will not exceed 5%. Your confirmation will reflect a principal transaction and the amount of the markup will be disclosed. Your execution will not exceed the displayed national best bid or offer.

The advertisement further explains:

> National best bid or offer means the best price available from brokers making a market on the stock as reflected on the Nasdaq system. Electronic Communications Networks ("ECN") may from time to time offer better prices than available from NASDAQ[.] ECNs involve additional cost and effort to us. If we can locate a price from an ECN which is better than the NASDAQ price, we may purchase the stock from the ECN for our own account and then resell the stock to you at the best NASDAQ price. Your confirmation will identify the trade as a principal trade and will disclose any mark up. The mark up cannot exceed 5%.

[9] According to Nguyen, he in fact retained counsel as early as the Fall of 1999 to prepare adequate disclosure to correct the Firm's website advertisements and to determine what confirmation disclosure was required (Tr. 127-28) and, in January 2000, the Firm began testing software that would enable it to issue redesigned trade confirmations. (Tr. 129-30.) This does not meaningfully lessen Respondents' delay. Assuming Nguyen retained counsel when he said he did, he waited more than five months after representing to NASDR staff that the Firm would correct the misleading advertisements. Moreover, the Hearing Panel does not believe Nguyen was genuinely concerned about correcting the advertisements before this proceeding was brought: even after

Just days before the August 10 hearing, Respondents, acting on the advice of counsel, for the first time informed the customers identified in Schedules A-D to the Complaint that the confirmations they previously received inaccurately confirmed their trades as agency trades and disclosed the amount of the Firm's markups or markdowns. (Tr. 135-36, 158.) Nguyen also testified that he has hired a new principal to be responsible for the compliance function at the Firm (Tr. 136), and that he was considering retaining an outside firm, National Regulatory Services, to conduct compliance audits of the Firm. (Tr. 132-33.)

(3) Aggravating Circumstances

Respondents conduct was egregious; manifested a total disregard of their obligation to deal fairly with customers; and warrants serious sanctions. First, Respondents stipulated that they engaged in a pattern of intentional or, at a minimum, reckless misconduct over an extended period of time. This misconduct persisted even after NASDR brought to their attention the nature of their wrongdoing.

Further, even after Nguyen assured NASDR that Respondents would take remedial action to correct the false and misleading disclosure on the Firm's website, they failed to do so – or to implement any remedial measures – until after this proceeding was brought, and even then they took certain corrective actions only in anticipation of the hearing. Under these circumstances, the Hearing Panel will not credit Nguyen's assurances that he is willing to take steps necessary to ensure against future violations. (Tr. 132.)

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he retained counsel, he published the December 22, 1999 advertisement announcing that all trades until the end of the millennium would be "free."

(4) Respondents' Mitigation Arguments

The Hearing Panel does not find persuasive Respondents' arguments in mitigation. Respondents argue in favor of leniency, first, because, in their view, there was no customer harm. The Hearing Panel will not adopt Respondents' highly restricted view of customer harm. The Hearing Panel is skeptical that the Firm's customers always received the best bid or offer displayed on Nasdaq as respondents contend. In any event, Customers are entitled to full and fair disclosure about the nature of securities transactions, including the prices they will be, and have been, charged for trades. That disclosure is fundamental to promoting investor confidence in the integrity of the securities industry.

Respondents also argue that, in imposing sanctions, the Hearing Panel should consider Nguyen's testimony that he did not understand how markups and markdowns applied to the Firm's principal transactions. (Tr. 109-10.) Even assuming Nguyen – who had been registered as General Securities Principal for at least five years as of the first review period – did not at the outset understand that the Firm's principal trades involved markups or markdowns, he was on clear notice of the problems after he was required to testify before the staff in July 1999.[10] Nonetheless, Respondents continued their course of misconduct for months thereafter.

The Hearing Panel also rejects Respondents' argument that their lack of a prior disciplinary record (Tr. 70, 97-98) mitigates the seriousness of their misconduct or the severity of the sanctions that should be imposed. The National Adjudicatory Council squarely rejected that argument in

[10] Nguyen claimed he thought the July 1999 on-the-record interview was no more than a "wrap-up" of NASDR's examination of the Firm. (Tr. 124.) This is not credible in light of his admission that, during the years he had been employed in the securities industry, he had never previously been asked to testify under oath, before NASDR staff. (Tr. 145.)

Department of Enforcement v. Balbirer, 1999 NASD Discip. LEXIS 29, at *10-11 (NAC Oct. 18, 1999).

(5) Monetary Sanctions

The Hearing Panel recognizes that, pursuant to Notice to Members 99-86 (Imposition and Collection of Monetary Sanctions, where an individual is barred, NASDR typically will not impose the collection of a fine unless there has been "widespread, significant, and identifiable customer harm." This is such a case. As more fully discussed below, Respondents' false advertisements on the Internet may have been viewed by countless individuals and, in fact, their fraudulent misconduct implicated 316 separate securities transactions. The customers who placed orders for these transactions were led to believe, based on the Firm's false advertisements and false confirmation disclosure, that they would be charged no commissions or commissions in accordance with the Firm's published commission schedule – which was not the case.

The Hearing Panel also has considered and rejects Respondents' claimed inability to pay the fines requested by Enforcement. They offered neither a financial disclosure form nor any other documentation to prove the bona fides of this claim,[11] and Nguyen's testimony about his and the Firm's financial condition was vague and inconclusive.[12]

[11] A respondent claiming inability to pay bears the burden of proving, through credible evidence, the bona fides of such a defense. See, e.g., In re Toney L. Reed, Exchange Act Release No. 37572, n.12, 1996 SEC LEXIS 2208, at * 7 (Aug. 14, 1996)

[12] Nguyen testified only that he did not think Respondents could afford to pay the fines requested by Enforcement, and was uncertain about his personal assets or their value. (Tr. 130-31.)

(6) Specific Sanctions Imposed

a) False and Misleading Advertising (Causes One, Four, and Seven)

The applicable NASD Sanction Guidelines recommend that, in cases involving intentional or reckless use of misleading communications to the public, adjudicators should consider suspending the firm and the responsible individual, in any or all activities, functions, or capacities, for up to two years. NASD Sanction Guidelines, at 77. The Guidelines further advise that "in cases involving numerous acts of intentional or reckless misconduct over an extended period of time" adjudicators should consider expelling the firm and barring the responsible individual.

Respondents' conduct was egregious. In an effort to solicit business, they intentionally or recklessly led potential and actual customers to believe that the Firm would effect their securities transactions for "free" or in accordance with the Firm's published commission schedule when, in fact, some transactions would be effected on a principal basis and customers would be charged undisclosed markups or markdowns. Respondents' misleading statements and nondisclosure were plainly material. Moreover, Respondents published these advertisements on the Internet – where they were available world-wide to an enormous number of individuals.

Accordingly, for this misconduct, the Hearing Panel will expel the Firm from membership in the NASD and bar Nguyen from associating with any NASD member in any principal capacity. The Panel also concludes that Nguyen should be suspended in all other capacities for a period of two years, because of the seriousness of the violations, but that a permanent bar in non-principal capacities is not needed to accomplish the NASD's remedial goals or to protect the investing public.

In addition, the Hearing Panel determines that the Firm and Nguyen should be jointly and severally liable to pay fines in the total amount of $100,000, assessing $50,000 for the false and misleading advertisements Respondents published prior to NASDR detection and warning (i.e.,

$25,000 for First Cause and $25,000 for the Fourth Cause) and $50,000 for the December 22, 1999 advertisement (i.e., the Seventh Cause).

b) Misrepresentations and Omissions (Causes Two, Five, Eight, and Ten)

The applicable Sanction Guidelines recommend that, for intentional or reckless misrepresentations or omissions, adjudicators should consider imposing a suspension in all capacities for 10 business days to two years and that, in egregious cases, adjudicators should consider barring the individual and expelling the firm. As for monetary sanctions, the Guidelines suggest the imposition of fines ranging from $10,000 to $100,000. Guidelines at 80.

The Guidelines also generally recognize that in cases where a respondent, as a result of the misconduct, derived a financial benefit, including profits, compensation, income, fees, or other remuneration, "[a]djudicators may require the disgorgement of such ill-gotten gain by fining away the amount of any financial benefit derived, directly or indirectly." The Guidelines also note that the amount of a respondent's ill-gotten gain may be paid as "restitution" to defrauded customers. Guidelines at 6-7.

For the reasons articulated above, the Hearing Panel concludes that Respondents' affirmative false and misleading statements and non-disclosures, which they caused to be made in connection with 316 separate securities transactions, were egregious. Respondents charged undisclosed markups and markdowns and thereby reaped illicit, undisclosed profits totaling $58,579.83.

Accordingly, for this misconduct, the Hearing Panel concludes that the Firm should be expelled from membership in the NASD and that Nguyen should be permanently barred from associating with any NASD member in any principal capacity and should be suspended in all other capacities for two years. The Hearing Panel also concludes that Respondents should be ordered to

disgorge their ill-gotten gains. Disgorgement is a remedy designed to deprive violators of their illegal profits, thereby effectuating the deterrence objectives of the securities laws.[13] In cases such as this, where a broker-dealer has retained undisclosed profits, it is appropriate to order disgorgement and to order that the amount disgorged be paid as restitution to the defrauded customers.[14]

In addition, the Hearing Panel determines that the Firm and Nguyen should be jointly and severally liable to pay fines in the amount of $90,000 for this misconduct, assessing $20,000 for their misconduct prior to NASDR's detection and warning (i.e., $10,000 for the Second Cause and $10,000 for the Fifth Cause) and $70,000 for their subsequent misconduct (i.e., $35,000 for the Eighth Cause and $35,000 for the Tenth Cause).

c) False Confirmation Disclosures (Causes Three, Six, Nine, and Eleven)

There are no NASD Sanction Guidelines that specifically address false disclosures on trade confirmations. In such circumstances, the Sanction Guidelines encourage adjudicators "to look to the guidelines for analogous violations." Guidelines at 2. Enforcement has suggested that the Hearing Panel look for guidance to the Guidelines for "Forgery And/Or Falsification of Records," and on that basis has proposed a fine of $15,000 for each of the false confirmation disclosure causes of action.[15]

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[13] See, e.g., SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991). See also, e.g., SEC v. World Gambling Corp., 555 F. Supp. 930, 934 (S.D.N.Y. 1983)(disgorgement is an equitable remedy "uniquely suited to redress or cancel unfairness and promote investor confidence in securities transactions").

[14] See, e.g., In re Portfolio Management Consultants, Inc., 52 S.E.C. 846, 1996 SEC LEXIS 1735, at *13-14 (Order Instituting Public Administrative Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 15(b), 19(h) and 21C of the Securities Exchange Act of 1934 and Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, Imposing Remedial Sanctions and Penalties and Cease-And-Desist Order) (ordering respondent to disgorge undisclosed profits it obtained by effecting customer transactions on a principal basis, at prices superior to the prices it obtained for its customers, and requiring distribution of the amounts disgorged to the defrauded customers).

[15] Respondents did not suggest what Guideline the Hearing Panel should look to in imposing sanctions for their false confirmation disclosure.

The Hearing Panel, however, concludes that, in essence, the false confirmation disclosures at issue in this case amounted to a misrepresentation to the customers who received the confirmations. Therefore, the Hearing Panel will look to the Guidelines for "Misrepresentations or Material Omissions of Fact." As noted above, those Guidelines recommend that adjudicators impose a fine of $10,000 to $100,000 for intentional or reckless misrepresentations or omissions, and consider imposing a suspension in any and all capacities for up to 30 business days, or, in egregious cases, a lengthier suspension of up to two years or a bar.

In imposing sanctions for these violations, the Hearing Panel looked at them as distinct from the misrepresentations and omissions for which sanctions have been imposed above. On that basis, the Hearing Panel determined that, for the false confirmations, it would be appropriate to suspend Nguyen from acting as a principal for 30 days and, given his lack of appreciation for the importance of accurate confirmation disclosure, to require him to requalify as a principal by examination. The Hearing Panel will not impose these sanctions, however, because the Panel has already barred Nguyen from acting in a principal capacity as a sanction for the false and misleading advertising violations and the misrepresentation and omission violations.

The Hearing Panel will, however, order that, for this misconduct, the Firm and Nguyen, jointly and severally, pay fines in the amount of $40,000, assessing $10,000 for their misconduct prior to NASDR's detection and warning (i.e., $5,000 for the Third Cause and $5,000 for the Sixth Cause) and $30,000 for their subsequent misconduct (i.e., $15,000 for the Ninth Cause and $15,000 for the Eleventh Cause).

d) Recordkeeping Violations (Cause 12)

The Guideline for recordkeeping violations recommends a fine of $1,000 to $10,000 and a suspension of the responsible individual for up to 30 business days. In egregious cases, the Guideline

suggests that adjudicators consider a lengthier suspension or a bar. Sanction Guidelines at 28. For this violation, Enforcement has requested the imposition of the maximum fine recommended in the Guideline.

Although the Firm's failure to "make and keep" memoranda of brokerage orders reflecting the time of entry and execution of the inter-dealer transactions it effected may have impeded NASDR's examination of the Firm,[16] there is no evidence that Respondents deliberately failed to prepare these records. On the other hand, Respondents' failure to do so was pervasive during the periods relevant to this Complaint. Accordingly, the Hearing Panel concludes that no suspension is required for this violation, but will order the Firm and Nguyen to pay, jointly and severally, a fine in the amount of $10,000.

III. Order

Therefore, having considered all the evidence, U.S. Rica is expelled from membership in the NASD, and Respondent Vinh Huu Nguyen is barred from associating with any member firm in any principal capacity, and he is suspended from associating with any member firm in any other capacity for two years. Respondents U.S. Rica are Nguyen are, jointly and severally, ordered to pay:

(1) disgorgement in the total amount of $58,579.83 plus pre-judgment interest thereon, calculated pursuant to 26 U.S.C. § 6621(a)(2), from January 6, 2000 until paid. The funds disgorged shall be paid as restitution to the customers identified (by account number) on Schedules A-D to the Complaint, in an amount equal to the undisclosed markup or markdown the Firm charged on each of the transactions identified on those Schedules (listed under the heading "Secret Profits") plus the pre-judgment interest due on that amount;

[16] See Department of Enforcement's Pre-Hearing Submission, p. 6

(2) fines in the total amount of $240,000; and

(3) costs in the amount of $1,779.25, which include an administrative fee of $750 and hearing transcript costs of $1,029.25.

These sanctions shall become effective on a date set by the NASD, but not sooner than 30 days from the date this Decision becomes the final disciplinary action of the NASD, except that if this Decision becomes the final disciplinary action of the Association, the expulsion and bar shall become effective immediately, and Nguyen's suspension shall begin on Monday, March 5, 2001 and end at the close of business on Wednesday, March 5, 2003.[17]

HEARING PANEL

By: _____
David M. FitzGerald
Deputy Chief Hearing Officer

Copies to:

U.S. Rica Financial, Inc. (via overnight courier and first class mail)
Vinh Huu Nguyen c/o U.S. Rica Financial, Inc. (via overnight courier and first class mail)
David A. Watson, Esq. (via first class mail and electronically)
Rory C. Flynn, Esq. (via first class mail and electronically)
Jahan P. Raissi, Esq. (via facsimile and first class mail)
Deborah R. Gatzek, Esq. (via facsimile and first class mail)

[17] 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.