NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. FRANK ANTHONY CARDIA, JR. (CRD #2808582) Bogota, New Jersey, and ROBERT DANIEL LOUIS (CRD #2707569) Hackensack, New Jersey, Respondents.	Disciplinary Proceeding No. C9B000007 Hearing Officer—Andrew H. Perkins **Hearing Panel Decision** December 27, 2000

Digest

The Complaint principally charges Respondents Frank Anthony Cardia, Jr. ("Cardia") and Robert Daniel Louis ("Louis") with falsifying customer account records while they were General Securities Representatives at Barron Chase Securities, Inc. ("Barron Chase") in violation of NASD Conduct Rules 2110 and 3110. In particular, the Complaint charges that Cardia and Louis falsely represented that Louis was the account executive on customer RA's account. According to the Complaint, RA was Cardia's customer, but Louis signed the New Account Form and permitted Cardia to use his account executive number when executing transactions in the account. The Respondents

allegedly falsified RA's account records because Cardia was not licensed to service this account at the time it was opened. The Complaint further charges that Cardia and Louis testified falsely in their on-the-record interviews before NASD Regulation, Inc. ("NASD Regulation") when they denied that RA was Cardia's customer, and they thereby violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

The Complaint also charges Cardia with several other securities violations. First, the Complaint charges Cardia with violating Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and SEC Rule 10b-5 thereunder, and NASD Rules 2110 and 2120 by pre-selling the aftermarket in connection with sales of an initial public offering. Second, the Complaint charges Cardia with violating NASD Conduct Rule 2110 by failing to execute a sell limit order. Third, the Complaint charges Cardia with violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by falsely stating in a written response to a request for information under Rule 8210 that, other than RA, no customer had complained that Cardia failed to place a sell limit order. According to the Complaint, at least one other customer had made such a complaint, and Cardia was aware of that complaint at the time he supplied his written response to NASD Regulation.

This Hearing Panel Decision concludes that the Respondents violated NASD Conduct Rules 2110 and 3110 and NASD Procedural Rule 8210 in that they intentionally falsified account documents and later lied about their wrongdoing at on-the-record interviews conducted pursuant to Procedural Rule 8210. This Decision further concludes that Cardia violated Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120 by pre-selling the aftermarket of an initial public offering through a tie-in arrangement. And this Decision concludes that Cardia

violated NASD Conduct Rule 2110 by failing to execute a sell limit order. Accordingly, this Decision imposes the following remedial sanctions: Cardia is barred, fined a total of $80,000, and ordered to pay restitution in the principal sum of $8,637.95; and Louis is barred and fined $50,000. In addition, the Respondents are jointly and severally ordered to pay costs in the sum of $2,574.

Appearances

Michael J. Newman, Regional Counsel, and David B. Klafter, Regional Attorney, Woodbridge, New Jersey; and Rory C. Flynn, Chief Litigation Counsel, Washington, DC, counsel for the Department of Enforcement.

Jeffrey Plotkin, counsel for Frank Anthony Cardia, Jr. and Robert Daniel Louis.

DECISION

I. Introduction

On March 20, 2000, the Department of Enforcement ("Enforcement") filed an eight-cause Complaint against Cardia and Louis. The First and Second Causes allege that, between May 28 and July 23, 1998, the Respondents falsified the account documentation for customer RA's account. Specifically, the Complaint alleges that the Respondents falsely indicated that Louis opened and effected transactions in RA's account when, in fact, it was Cardia's account. According to the Complaint, Cardia solicited RA, a resident of New Mexico, to open an account at Barron Chase, but because Cardia was not licensed in New Mexico, Louis signed the new account form and thereafter permitted Cardia to use his account executive number when placing orders in the account. (Compl. ¶¶ 5, 6, 8, 11.) Based on this misconduct, the Respondents are charged with violating NASD Conduct Rules 2110 and 3110. The Third Cause alleges that, on or before July 22, 1998, in connection with Cardia's

recommendation to RA that he purchase shares of Host America Corp. ("Host America") in its initial public offering, Cardia told RA that he could only do so if he also committed to purchasing shares in the aftermarket. (Compl. ¶ 14.) The Complaint further alleges that such activity amounts to pre-selling the aftermarket and violates Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2110 and 2120. The Fourth Cause alleges that, on or about July 27, 1998, RA instructed Cardia to place a limit order to sell 5300 shares of Host America stock at $5 11/16 per share and that, although the stock price fell below the limit order price, Cardia failed or refused to execute RA's order. (Compl. ¶¶ 19-21.) The Fifth and Sixth Causes allege that Cardia violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by twice failing truthfully to disclose that customer RM had complained that Cardia had failed to execute a stop-loss order. (Compl. ¶ 25.) According to the Complaint, the first false statement was in Cardia's written response dated April 28, 1999, to NASD Regulation Staff's request for information, and the second false response came in Cardia's on-the-record interview on May 13, 1999. (Compl. ¶¶ 25, 28.) The Seventh and Eighth Causes allege that, on May 13, 1999, Cardia and Louis violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by denying in their on-the-record interviews that RA was Cardia's customer. (Compl. ¶¶ 33, 36, 37.)

On August 9, 2000, the Hearing Panel, composed of two current members of the District Committee for District 9 and the Hearing Officer, conducted a hearing in Woodbridge, New Jersey.[1] Enforcement offered the testimony of RA and Jack Litsky, the field supervisor in NASD Regulation's New Jersey office who investigated RA's complaint, and 23 exhibits, all of which were admitted into

[1] Reference to the hearing transcript are cited as "Tr. ___."

evidence.[2] Both of the Respondents testified on their own behalf and offered three exhibits, which were admitted into evidence.[3] In addition, prior to the hearing, the Parties filed a Joint Stipulation of Facts.[4]

II. Findings of Fact

A. Respondents

1. Frank Anthony Cardia, Jr.

Cardia has worked in the securities industry and has been registered as a General Securities Representative since 1996. (Tr. 247; C 10.) He worked at Investors Associates, Inc. ("Investors") and Worthington Capital Group, Inc. ("Worthington") before joining Barron Chase in December 1997, where he is currently employed as a General Securities Representative. (Tr. 247; Stip. ¶ 1.) Cardia worked with Respondent Louis at each of these firms, and they joined Barron Chase at the same time where they shared an office. (Tr. 247-48.)

2. Robert Daniel Louis

Louis first entered the securities business in 1995 with Oppenheimer & Co., Inc. (C 11.) Thereafter, he worked as a General Securities Representative at Investors and Worthington before joining Barron Chase in December 1997. (Id.) He was registered as a General Securities Representative and a General Securities Principal at Barron Chase until May 22, 2000, when Barron Chase filed a Uniform Termination Notice For Securities Industry Registration (Form U-5) on his behalf

[2] Reference to Enforcement's exhibits are cited as "C ___." Enforcement withdrew exhibits C 5 and C 26, which had been filed with its Pre-Hearing Submissions. On August 16, 2000, Enforcement filed a certification that the submitted exhibits are the best copies available.

[3] Reference to Respondents' exhibits are cited as "Ex. R ___."

[4] References to the Joint Stipulation of Facts dated July 24, 2000, are cited as "Stip. ¶ ___."

terminating his registrations. (Stip. at ¶ 2.) Louis is not currently registered or employed in the securities industry. (Tr. 214.)

B. The Respondents' Dealings with Customer RA

Several of the charges in the Complaint concerning the Respondents' dealings with RA hinge upon the factual determination of who solicited RA and effected trades in his account before Cardia registered in New Mexico. On these issues RA's testimony and the Respondents' testimony conflict directly. RA testified unequivocally that he never dealt with Louis in any capacity. The Respondents assert RA is lying to recover his $8,600 loss on his investment in Host America.

For the reasons discussed below in the conclusions of law, the Hearing Panel credits RA's testimony. Thus, the following findings of fact are based on his testimony where it contradicts the Respondents'.

1. Customer RA

RA is an attorney and a sophisticated investor. He testified at the hearing that he had been an active investor since 1963. (Tr. 30.) An example of his sophistication is the trading strategy that he and his wife employed for several years. According to RA, starting in 1978, they engaged in a trading strategy that consisted of buying convertible securities (bonds and convertible preferred stock) and selling options against them. (Tr. 30-31.) In RA's words, their strategy was designed to work as a mini-hedge fund. (Tr. 31.) They were forced out of that strategy, however, as more sophisticated investors entered the field who could execute trades faster and cheaper. Thus, they reverted to dealing in stocks and bonds, including municipals and convertibles. (Tr. 31.) Over the years, RA testified that he maintained multiple accounts at a minimum of nine different broker-dealers. (Tr. 85.) One of those firms

was GKN Securities Corp. ("GKN"). (Tr. 85.) In 1998, RA's annual income was approximately $250,000, and his estimated net worth was $2 million. (Tr. 87.)

2. RA's Account at Barron Chase

Cardia first cold called RA sometime in March or April 1998 and solicited him to transfer his GKN account to Barron Chase. (Tr. 33.) RA testified that although he would not normally have considered opening an account with someone under these circumstances, Cardia seemed to have much information about RA's GKN account, and Cardia told RA that GKN was not such a great firm. (Tr. 33.) After some consideration and several more telephone conversations with Cardia, RA decided to open an account with Cardia at Barron Chase. (Tr. 37.)

On May 6, 1998, Cardia faxed RA a New Account Form. (Tr. 34; C 2.) The hand-written note on the fax cover sheet accompanying the New Account Form requested that RA sign the form and return it to Cardia with a copy of his GKN account statement. (C 2, at 1.) Cardia also invited RA to call him if RA had any questions. (C 2, at 1.) On May 28, 1998, RA faxed the form back as requested. (Stip. ¶ 3; Tr. 38; C 2, at 7-9.) RA maintained the account at Barron Chase from May 28, 1998, until June 8, 1999. (Stip. at ¶ 7.)

To open the account, Cardia had RA's GKN account, which consisted of 2500 shares of Telecom Wireless Corp. stock, transferred to Barron Chase and then liquidated to purchase 3600 shares of NEORX Corp. (Tr. 41; C 7, at 2.) The Telecom Wireless stock was sold on June 22, 1998, and the NEORX stock was purchased the next day. (C 7, at 2.)

Next, Cardia recommended RA participate in the purchase of shares of Host America stock in its initial public offering. To do so, however, RA claims that Cardia told him he also would have to

commit to purchasing some additional shares in the secondary market. (Tr. 50.) RA agreed, and on July 22, 1998, he purchased 3500 shares of Host America stock at the initial public offering price of $5.00 per share. (Stip. ¶¶ 10, 11; Tr. 51; C 14.) The next day, RA purchased an additional 1800 shares of Host America in the secondary market at $6.00 per share. (Stip. ¶ 12; C 15.) The purchases of Host America stock were funded by the liquidation of his NEORX stock. (C 7, at 5.)

3. RA's Complaints Regarding the Host America Transactions

RA's first complaint regarding the manner in which Cardia handled his account arose from the letter Cardia sent RA requesting payment for the 1800 shares of Host America purchased on July 23. (C 9, at 1.) The letter contained numerous discrepancies. First, it was dated July 1 although the purchase of Host America in the secondary market did not occur until July 23. Second, the letter showed that the settlement date was July 22, a day before the purchase date. Indeed, RA did not receive the letter until July 24.[5] (Tr. 54.) These discrepancies led RA to call and write Cardia on July 24, 1998. (C 9, at 2.) In this first complaint letter, which was sent to Cardia by overnight delivery on July 25, RA also complained that Cardia had not called with the "numbers" for the Host America transaction before the initial public offering and that he had not returned his telephone call of July 24. (C 9, at 2.) Cardia eventually returned RA's telephone call and explained that the July 1 letter was improperly dated and that it contained an incorrect settlement date. At the hearing Cardia could not explain his letter of July 1. He could offer no explanation for why it was sent, who drafted it, why the

[5] The letter, which was signed by Cardia, also falsely indicated that he held the office of Sr. Vice President at Barron Chase. (C 9, at 1; Tr. 293.)

settlement date was in error, or why it incorrectly referred to him directly below his signature as a "Sr. Vice President." (Tr. 259-61.) In Cardia's words, the July 1 letter made "no sense" to him. (Tr. 261.)

According to RA, on July 27, 1998, he called Cardia to see how the Host America stock was doing and placed a limit order to sell the Host America stock if its price hit $5 11/16. (Tr. 56-57, 109-110; C 9, at 3.) RA testified that Cardia accepted the limit sell order. (Tr. 57.)

About one week later, RA called Cardia several times to see if the Host America stock had sold, and Cardia said it had not. (Tr. 59.) RA then checked the prices of Host America on the Internet for the week of July 27, 1998, and discovered that it had traded at or below $5 11/16 during the week.[6] (Tr. 59, 113-14; C 19, at 1.) RA testified that he then called Cardia to get an explanation of why he had not sold the Host America stock. (Tr. 59, 115.) RA further testified that Cardia gave him a convoluted, technical explanation. (Tr. 59-60, 115; C 9, at 3.) Unsatisfied with Cardia's explanation, between July 27 and August 19, 1998, RA made repeated attempts to speak to Cardia to get further clarification, but Cardia was never available. (Tr. 60.)

RA sent a second complaint letter to Cardia dated August 19, 1998, in which RA detailed the problems he encountered surrounding the purchase and attempted sale of Host America stock. (C 19.) RA reiterated many of the same points raised in his earlier complaint letter, and he also complained that Cardia failed to honor the limit order. Since the stock had fallen in value, RA demanded payment of the amount he would have made on the sale if it had been executed in accord with his limit order. Cardia

[6] RA testified that he checked the price of Host America on YAHOO, which showed that it had traded as low as $5 ½ during the week of July 27, 1998, and that the stock closed for the week at $5 ¾. (Tr. 59; C 22, at 10.)

did not respond to the letter.[7] (Tr. 64, 294.) RA then called Barron Chase and spoke to Dan Mackle, the branch manager. (Tr. 64-65.)

RA testified that he was only able to reach Mr. Mackle once by telephone before sending his third complaint letter dated September 18, 1998. (C 20.) According to RA, Mr. Mackle stated that he was aware of RA's complaint and that he was discussing it with his compliance officer. Although Mr. Mackle promised to get back to RA, he did not. (Tr. 65.) Instead Anthony Mondel from Barron Chase telephoned RA and told him that the firm did not accept good-till-canceled orders[8] on NASDAQ securities such as Host America.[9] (Tr. 60, 65-67, 77.) Mr. Mondel explained to RA that this is why his limit order was not executed although the price of Host America may have hit RA's designated sale price after July 27.

Because neither Cardia nor Mr. Mackle was responsive to his complaints, in October 1998, RA finally sent complaint letters to the SEC and the National Association of Securities Dealers, Inc. ("NASD"). (C 22, at 1-2.) Thereafter, Mr. Mackle called RA and proposed to make him whole by permitting him to participate in another initial public offering. (Tr. 66-68.) According to RA, Mr. Mackle offered to guarantee RA against any loss on the purchase and sale of the new initial public offering. (Tr. 69.) In fact, Barron Chase did, on March 17, 1999, deposit 10,000 shares of Eagle Supply Group, Inc. ("Eagle") common stock and 10,000 Eagle warrants into RA's account at no cost to him. (Tr. 69-70.)

[7] The certified return receipt reflects that the August 19 letter was delivered at Barron Chase on August 24, 1998. (C 19, at 2.)

[8] A good-till-canceled order is a customer's order to buy or sell a security, usually at a particular price, that remains in effect until canceled or executed. On the other hand, a day order expires unless canceled or executed the day it is placed.

[9] During the investigation that led to the filing of the Complaint in this proceeding, Barron Chase confirmed that this was not the case. Barron Chase did accept good-till-canceled orders. (C 25.)

RA later sold these securities for a profit of $9,490 and closed his account. (C 27.) RA testified that, taking into account his profit on the sale of the Eagle securities, his net loss on Host America was $8,637.95. (Tr. 81.)

With the exception of the period after Mr. Mackle became involved with RA's account, all of the other account documentation—including the New Account Form, order tickets, confirmations, and monthly account statements—show Respondent Louis as the account executive,[10] and Louis received all of the commissions generated from activity in the account. (Stip. at ¶¶ 3, 7-9.)

C. The Respondents' Rule 8210 Testimony Regarding RA's Account

On May 13, 1999, Cardia and Louis each testified in on-the-record interviews conducted pursuant to NASD Procedural Rule 8210. (Stip. ¶¶ 16–17.) During those interviews, both Respondents testified that Louis initially solicited RA and that Louis, not Cardia, serviced his account until Cardia registered in New Mexico. (C 12, at 3, 11-12, 16; C 13, at 5-7, 9-11, 20-22, 24-26, 29, 35-37.) Their testimony was false. As found above, Cardia made the initial calls to RA and, except for the purchase and sale of the Eagle securities, he effected all of the transactions in RA's account.

D. Cardia's Rule 8210 Responses Regarding Other Complaints Alleging a Failure to Honor a Limit Order

On or about April 7, 1999, as a result of RA's complaint, NASD Regulation staff sent Barron Chase a written request for information pursuant to NASD Procedural Rule 8210. (Stip. ¶ 14.) Among other things, the request required Cardia to submit a response to RA's complaint letter. On April 28, 1999, NASD Regulation staff received Cardia's response, in which Cardia volunteered that he had

[10] Cardia and Louis admit that Cardia used Louis's account executive number when making trades in RA's account. Louis's account number at Barron Chase was 6591, and Cardia's was 6677. (Stip. ¶ 6.)

never before had an allegation like RA's made against him. (Stip. ¶ 15; C 30.) Cardia made the statement to bolster his denial that RA had not placed a limit order. In fact, however, a similar complaint had been lodged with the NASD by customer RM eight months earlier in August 1998. (C 34.) In that complaint letter, RM claimed that Cardia failed to honor a limit order to sell 100 shares of Circus Circus if its per share price fell by three points. (C 34, at 1.) The record shows that Cardia knew about RM's complaint at least as early as October 13, 1998. (C 36, at 2.)

Cardia is also charged with providing false testimony during his on-the-record interview regarding the existence of RM's complaint. (Compl. ¶ 29.) Upon questioning at the interview,[11] Cardia denied that anyone other than RA had ever complained that he failed to place a requested trade.

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[11] The exchange among the NASD Regulation staff examiner, the Respondent, and his attorney Mr. Gelber went as follows:

> Q Mr. Cardia, did you ever receive any customer complaints, whether written or verbal - - not just at Barron Chase - - but at any of the broker dealers that you've worked for - -
>
> A Yes.
>
> Q - - regarding failure to execute?
>
> A (No response.)
>
> Q If you don't know what that term means, it it's someone gives you instructions to sell - - and/or purchase for that matter - - a particular security and you don't act upon it.
>
> A You don't act upon it - - no.
>
> Q So you've never had anybody complain, whether written or verbal, that you failed to execute any securities for their account?
>
> Mr. Gelber: Execute transactions in securities?
>
> Did you ever - - did anybody complain that you failed to place a trade?
>
> The Witness: That I failed to place the trade?
>
> Mr. Gelber: Yes.
>
> The Witness: No.
>
> Q By the way you answered that, it leads me to believe that somebody had complained about something similar?
>
> A Yes.

Accordingly, the Hearing Panel finds that Cardia's statements denying the existence of a customer complaint similar to RA's were false when made. But the Hearing Panel also finds, in accordance with Enforcement's stipulation during the hearing, that Cardia's false statements did not impede the investigation of RA's complaint, and Cardia's failure to answer truthfully had no regulatory significance. (Tr. 177-78.) In other words, verification of the existence of the complaint RM filed—a fact known to NASD Regulation staff at the time of the questioning—was not material to the staff's investigation. Furthermore, the Hearing Panel finds no evidence that Cardia intended to mislead NASD Regulation staff. In each instance, the existence of RM's complaint was not the focus of the staff's inquiry. In the Hearing Panel's view, it is possible, as Cardia claims, that he simply forgot about RM's complaint at the time he made the statements.[12] (See Tr. 270-75.)

III. Conclusions of Law

A. Jurisdiction

The NASD has jurisdiction of this proceeding. Cardia was registered with the NASD at the time of the alleged violations and at the time Enforcement filed the Complaint. Louis, on the other hand, was registered with the NASD at the time of the alleged violations, and, in accordance with Article V, Section 4 of the NASD's By-Laws, Enforcement filed the Complaint within two years of the date his registration terminated.

(C 32, at 1-2.) Cardia then went on to describe a complaint lodged by a customer whose purchase of securities for a trust account had to be reversed due to the late receipt of the trust account paperwork. (C 32, at 2.)

[12] This possibility is heightened by the fact that from all the evidence it appears that RM's complaint letter generated little attention. The resulting preliminary investigation was closed quickly without action.

B. The Hearing Panel's Assessment of the Evidence and Credibility Findings

For the reasons discussed in more detail below, the Hearing Panel found RA's testimony to be candid, credible and consistent with the documentary evidence. To the contrary, the Hearing Panel found the Respondents' testimony to be contrived and inconsistent with the documentary evidence. Moreover, the Respondents were evasive when questioned about their alleged arrangement whereby Cardia volunteered to develop the RA account for Louis's benefit. Accordingly, the Hearing Panel credits RA's testimony and discredits the Respondents' contradictory testimony.

RA testified that in March or April 1998 Cardia—not Louis—solicited him on a cold call to open an account at Barron Chase and that he thereafter spoke to Cardia several times before deciding to open an account. (Tr. 33.) In support of his version of these events, RA provided logical, consistent details regarding the circumstances surrounding his opening an account at Barron Chase. For example, RA testified that he decided to do business with Cardia because he seemed to know about RA's GKN account. The fact that Cardia's fax of May 6, 1998, requested RA to submit a copy of his GKN account statement with his New Account Form is consistent with this testimony. The fax cover sheet is significant in another way as well. Cardia addressed the fax to RA using only his first name. Such a familiar greeting tends to support RA's contention that he had spoken to Cardia several times before he sent the fax. (Tr. 37.) Furthermore, the handwritten note did not introduce Cardia or explain his role with the account. Here again, this fact is more consistent with RA's version of events than with the Respondents'. The Hearing Panel further notes that each of RA's complaint letters only references Cardia. Given the detailed nature of some of these letters, the Hearing Panel concludes that it is unlikely

that RA would have omitted any reference to Louis if he had made the initial contacts and effected the early transactions in RA's Barron Chase account as the Respondents claim.

Moreover, the Respondents' explanation of the central element of their story—the arrangement between them for Cardia to develop the RA account for Louis—is unbelievable. According to the Respondents, Cardia volunteered to develop the RA account and allow Louis to keep any resulting commissions. The Respondents claim that Cardia was to receive nothing in return.[13] Each of the Respondents was questioned about the purpose for this alleged arrangement, and neither could explain it. Cardia testified that he first learned of RA from Louis after Louis had solicited RA to open an account at Barron Chase. (Tr. 249.) Cardia claimed that Louis told him that he doubted RA would transfer his account and generally expressed a view that something just did not click between RA and Louis. (Tr. 249.) Cardia further testified that in response he offered to develop the account for Louis if it came in.[14] (Tr. 250.) Cardia did not, however, offer an explanation for his willingness to develop the account while he received nothing in return. When asked why he agreed to help Louis develop the account, Cardia answered: "I somewhere - - no idea. He's just a friend of mine. I know him for years and it was the right thing to do." (Tr. 251.)

Louis's testimony was no more convincing. He could not recall anything specific about his alleged conversations with RA other than when he got off the telephone from the initial conversation he turned to Cardia and said that he did not think that RA would follow through and transfer the account.

[13] Cardia did testify that if it turned out to be a "big account," they definitely would have done something different regarding the commissions. (Tr. 252.) Louis did not confirm this understanding, and Cardia was not more specific about what they would have done differently in such a case.

[14] Cardia testified: "If the account comes in, I'll talk to the guy. I'll try to develop the account for what it's worth." (Tr. 250.)

According to Louis, he sensed that "something was wrong," but he could not be more specific. (Tr. 198-99.) Louis further testified that he concluded that having RA as a client may not be a "pleasurable client relationship" and that he immediately told Cardia about his reservations. (Tr. 199–201.) When asked how it came about that Cardia sent RA the fax on May 6, 1998, enclosing the New Account Form, Louis responded as follows:

> Honestly I have no idea what happened there, but basically all I can gather is what happened, I hung up the phone, said to Mr. Cardia, as I just stated, "I think this customer is not going to send the [form]." [Cardia] said, "If you still feel that way, if the account does come in, I'll do this favor for you. I owe you one." And I said, "Here's the blank account form. Send it to him. See if it comes over." (Tr. 200-01.)

The Hearing Panel also notes that neither Cardia nor Louis could explain satisfactorily why they recorded all the transactions in RA's account under Louis's account executive number. Louis offered that it was his account, and he was not aware of any requirement that the account documentation accurately reflect the identity of the registered representative effecting the transactions in a customer's account. The Hearing Panel finds this explanation hollow, particularly in light of the fact that the Respondents admit that they could have transferred the account, something they had done in the past with other accounts, or they could have obtained a joint account executive number for RA's account. (Tr. 266.) As for Cardia, his only explanation was that he had not given it a thought. (Id.)

In conclusion, based upon the foregoing facts and the Hearing Panel's observation of the Respondents' overall demeanor and their difficulty in constructing cogent and responsive answers to questions posed to them, and taking into consideration the inconsistency between their testimony and the uncontroverted documentary evidence, the Hearing Panel finds that the Respondents repeatedly lied

in their testimony at the hearing concerning the RA account. Thus the Hearing Panel does not credit their testimony regarding the RA account.

C. Falsification of Records—Causes One and Two

Cardia and Louis intentionally falsified RA's account records by failing to have them accurately reflect that Cardia opened the account and that, with the exception of the Eagle securities transactions, he placed all of the trades in the account. Since Louis had nothing to do with the account, he should not have signed the New Account Form, and he should not have allowed Cardia to use his account executive number, which created the false impression that Louis was involved in the account.

Falsifying firm books and records constitutes a violation of NASD Rules 3110 and 2110.[15] NASD Rule 3110 requires, in pertinent part, that member firms shall "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of the Association." Rule 3110(c)(1)(C) specifically requires that member firms include in new customer account documents the signature of the partner, officer, or manager who accepts the account. The SEC also has held that falsely representing the identity of a salesman on an investment document is a violation of NASD Conduct Rules 3110 and 2110. In In re Charles E. Kautz[16] the SEC stated:

> [I]t is a violation of NASD Rules to enter false information on official Firm records. The entry of accurate information on official Firm records is a predicate to the NASD's regulatory oversight of its members. It is critical that associated persons, as well as firms, comply with this basic requirement. Sales representatives cannot be allowed to

[15] See District Bus. Conduct Comm. No. 10 v. Mangan, No. C10960612, 1998 NASD Discip. LEXIS 33 (NAC July 29, 1998) (sustaining Rule 3110 violation for creating false customer records); District Bus. Conduct Comm. No. 9 v. Jerry L. Sickels , No. C9A950036, 1997 NASD Discip. LEXIS 23, *10 *(*Jan. 22, 1997) (an associated person acts in contravention of just and equitable principles of trade by falsifying records submitted to a member firm).

[16] Exchange Act Release No. 37072, 1996 SEC LEXIS 994, at *11-12 (Apr. 5, 1996) (citations omitted).

report themselves as the representative of record for sales that they did not actually make.

Accordingly, the Hearing Panel finds that Cardia and Louis violated Rules 3110 and 2110 by providing false customer account information to Barron Chase.

D. Tie-In Arrangement and Pre-Selling the Aftermarket of Host America Stock—Cause Three

In Cause Three of the Complaint, Enforcement alleged that Cardia violated the antifraud provisions of the securities laws and NASD Rules 2110 and 2120 by utilizing a tie-in arrangement pursuant to which RA had to agree to purchase aftermarket shares of Host America stock in order to purchase shares in the initial public offering. In support of its position, Enforcement relies on the SEC's opinion in In re C. James Padgett, Exchange Act Release No. 38423, 52 S.E.C. 1257, 1997 SEC LEXIS 634 (1997), aff'd sub. nom, Sullivan v. SEC, 159 F.3d 637 (D.C. Cir. 1998), cert. denied 525 U.S. 1070 (1999), which was decided in part on closely analogous grounds.

In Padgett, the SEC alleged that the firm and several of its "branch office managers established a policy or practice whereby sales agents were encouraged or required to allow a customer to purchase securities in an initial public offering underwritten by [the firm] only if the customer agreed either to purchase additional securities when aftermarket trading started, or sell securities bought in the underwriting at the opening of trading."[17] The opinion, however, directly deals only with one prong of the allegation: that customers were required to sell back to the firm when aftermarket trading commenced. The portion of the theory more closely analogous to the present case appears not to have been litigated. However, in applying the antifraud rules to the first prong, the SEC upheld the general principle that an

[17] Padgett, 1997 SEC LEXIS 634, at *50.

arrangement that creates the false impression of the extent of market activity operates as a fraud upon the market and defrauds aftermarket purchasers.[18] The same reasoning applies to the instant case.

Section 10(b) of the Exchange Act outlaws the direct or indirect employment of manipulative and deceptive devices in connection with the purchase or sale of securities. Rule 10b-5 makes it unlawful for any person, directly or indirectly, in connection with the purchase or sale of a security, to make an untrue statement of material fact; omit to state a material fact; use any device, scheme or artifice to defraud; or engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person. Similarly, Rule 2120 provides that no member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive, or fraudulent device. NASD Conduct Rule 2120 is the equivalent of SEC Rule 10b-5.[19]

The SEC and the NASD have defined manipulation as the "intentional interference with the free forces of supply and demand."[20] "Manipulation is the deceptive movement of a security's price,

[18] Id. at *48. Without analysis, the SEC reached a similar result in In re Richard D. DeMaio, Initial Decision No. 37, 1993 SEC LEXIS 1999, at *32-33 (Aug. 4, 1993), Exchange Act Release No. 33062, 1993 SEC LEXIS 2846 (Oct. 15, 1993) (final decision). In DeMaio, the respondent conceded, among other violations, that he violated the antifraud provisions of the securities laws: (1) by simultaneously soliciting orders to purchase both the securities in the initial public offerings and the common stocks in the aftermarket; and (2) by receiving and allocating units for sale in the offerings on the basis of tie-in arrangements, including the requirement that purchasers of securities in the initial public offerings also buy common stock in the immediate aftermarket.

[19] Market Regulation Committee v. Kevin Eric Shaughnessy, No. CMS950087, 1997 NASD Discip. LEXIS 46, *24-25 (NBCC June 5, 1997).

[20] Market Surveillance Comm. v. Markowski, No. CMS920091, 1998 NASD Discip. LEXIS 35, at *19 (NAC July 13, 1998) (quoting In re Pagel, Inc., 48 S.E.C. 223, 226 (1985), aff'd sub nom. Pagel, Inc. v. SEC, 803 F.2d 942 (5th Cir. 1986)). Accord, e.g., In re Brooklyn Capital & Securities Trading, Inc., Exchange Act Release No. 38454, 1997 SEC LEXIS 701, at * 13 (same); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976) (market manipulation is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.").

accomplished by an intentional interference with the forces of supply and demand."[21] The SEC has explained that "investors and prospective investors … are … entitled to assume that the prices they pay and receive are determined by the unimpeded interaction of real supply and real demand so that those prices are the collective marketplace judgments that they purport to be."[22]

When liability for manipulation is predicated on Section 10(b) of the Exchange Act and Rule 10b-5, or on NASD Conduct Rule 2120, it is sufficient to establish that the person engaged in a fraud or deceit as to the nature of the market for the security; a showing of manipulative purpose is not required.[23] Further, in making a determination as to whether a manipulation has occurred, it is not necessary to find any particular device usually associated with a manipulative scheme.[24] The prohibition against manipulative activity in Section 10(b) and Rule 10b-5 "is not confined to any particular kind of manipulation, but . . . is necessarily designed to outlaw every device" that interferes with free market forces of supply and demand.[25] The NASD, as well as the SEC, indeed would be hampered in carrying out their regulatory responsibilities if they were limited to finding manipulation only when the activities in question are expressly prohibited by the Exchange Act, e.g., wash trades and matched orders,[26] or otherwise bear the hallmarks of a classic manipulation, e.g., when the manipulator dominates and

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[21] In re Patten Securities Corp., Exchange Act Release No. 32619, 54 S.E.C. Docket 1126, 1993 SEC LEXIS 1762 (July 12, 1993) (footnotes omitted).

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

[23] See, e.g., United States v. Charnay, 537 F.2d 341, 350 (9th Cir.), cert. denied, 429 U.S. 1000 (1976); In re F.N. Wolf & Co., Initial Decision No. 83, 60 S.E.C. Docket, 1996 SEC LEXIS 8, at *43 (Jan. 3, 1996); In re Michael Batterman, 46 S.E.C. 304, 305 (1976).

[24] See In re Swartwood, Hesse, Inc., 50 S.E.C. 1301, 1307 (1992); In re F.N. Wolf & Co., 1996 SEC LEXIS 8, at *44; In re Patten Securities Corp., 51 S.E.C. 568, 574 (1993).

[25] SEC v. Resch-Cassin & Co., 362 F. Supp. 964, 975 (S.D.N.Y. 1973).

[26] See Section 9(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(a)(1).

controls the market in a thinly-traded security, trades through nominee or controlled accounts, or engages in pre-arranged trading.[27]

Likewise, the NASD has held that Conduct Rule 2120 should be interpreted flexibly, with a view towards eliminating fraud and manipulation. The NASD recently articulated the following guiding principles for the application of Conduct Rule 2120:

> The NASD adopted its antifraud rule against the backdrop of the Exchange Act, which requires the SEC to determine that a self-regulatory organization has rules that are "designed to prevent fraudulent and manipulative acts and practices." Exchange Act 15A(b)(6). The NASD's By-Laws identify preventing "fraudulent and manipulative acts and practices" as one of the reasons that the NASD Board of Governors is authorized to adopt Conduct Rules. NASD By-Laws, Art. XI, Sec. 1. Because preventing fraud and manipulation is central to the NASD's purpose, we pay particular attention to the general NASD rule regarding rule interpretation. It states: "The Rules shall be interpreted in such a manner as will aid in effectuating the purposes and business of the Association . . . ." Rule 113.[28]

Scienter is an element of a violation of the antifraud provisions of the securities laws and NASD Rules 2110 and 2120.[29] The Supreme Court has defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud."[30] It is not necessary, however, to prove that the respondent acted intentionally; scienter may be established by showing that the respondent acted with severe recklessness.[31] Scienter is a question of fact, and the determination depends upon the circumstances of

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[27] See generally, e.g., Resch-Cassin & Co., 362 F. Supp. at 976.

[28] Department of Enforcement v. Perles, No. CAF980005, 2000 NASD Discip. LEXIS 9, at *23-24 (NAC Aug. 16, 2000).

[29] See, e.g., Aaron v. SEC, 446 U.S. 680 (1980); In re R. B. Webster Investments, Inc., 51 SEC 1269, 1237 (1994).

[30] Aaron v. SEC, 446 U.S. 680, 686 n.5 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976)).

[31] Hackbart v. Holmes, 675 F.2d 1114, 1117 (10th Cir. 1992).

each particular case.[32] Scienter may be proved through circumstantial evidence and inferences drawn from the surrounding circumstances.[33]

As found earlier, Cardia tied the purchase of Host America aftermarket shares to RA's purchase of shares in the initial public offering. The Hearing Panel finds that such tie-in arrangements violate Section 10(b), SEC Rule 10b-5, and NASD Conduct Rules 2110 and 2120. Such arrangements artificially stimulate demand in the aftermarket, the net effect of which is to create the impression of greater aftermarket activity than actually exists. Purchasers in the aftermarket will not know that the apparent aftermarket demand, which may appear to support the pricing of the offering, has been stimulated by the distribution participants. Thus, the non-disclosure of this information operated as a fraud upon the market, and the tie-in arrangement amounted to a device or scheme that perpetuated a fraud upon aftermarket purchasers.[34] Furthermore, by engaging in such activity Cardia also violated the broad ethical requirements of NASD Conduct Rule 2110.[35]

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[32] SEC v. Hasho, 784 F. Supp. 1059, 1107 (S.D.N.Y. 1992) (citations omitted).

[33] Herman & McLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983); In re Thomas C. Kocherhans, 1995 SEC LEXIS 3332, at *7-8 (Dec. 5, 1995).

[34] Cf. Padgett, 1997 SEC LEXIS 634, at *50-51; DeMaio, 1993 SEC LEXIS 1999, at *32-33.

[35] The Hearing Panel further notes that such tie-in arrangements also violate of Rules 101 and 102 of Regulation M (formerly SEC Rule 10b-6), which prohibit the distribution participants from "directly or indirectly . . . attempt[ing] to induce any person to bid for or purchase" any security that is the subject of a distribution otherwise than in the distribution. See Padgett, 1997 SEC LEXIS 634. Without question, such activity also violates NASD Conduct Rule 2110. Rule 2110 articulates a "broad ethical principle" and empowers the NASD to discipline its members and associated persons for violations of just and equitable principles of trade, irrespective of whether the misconduct rises to the level of fraud. In re Timothy L. Burkes, 51 S.E.C. 356 (1993), aff'd mem., Burkes v. SEC, 29 F.3d 630 (9th Cir. 1994). See also District Business Conduct Committee No. 3 v. Aspen Capital Group, No. C3A940064, 1997 NASD Discip. LEXIS 53, at *7 (NBCC Sept. 19, 1997).

E. Failure to Execute Limit Order—Cause Four

NASD Conduct Rule 2110 requires that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."[36] The Rule "articulates a broad 'elastic' standard [and] . . . appropriately encompasses the myriad types of misconduct that may injure public investors and the marketplace."[37] The failure to follow customer instructions to sell a security, even without fraudulent intent or motive, clearly constitutes a violation of Rule 2110.[38]

Here, the facts clearly demonstrate that Cardia failed to sell Host America stock in accordance with RA's instructions. Therefore, the Hearing Panel finds that Cardia violated Rule 2110.

F. Providing False Testimony and False Responses to Requests for Information Pursuant to NASD Procedural Rule 8210— Causes Five, Six, Seven, and Eight

Cardia and Louis testified falsely in their on-the-record-interviews on May 13, 1999, that Louis originally solicited RA to open an account at Barron Chase and then effected the transactions in his account until Cardia registered in New Mexico. Cardia also falsely denied that a customer other than RA had ever complained that he failed to place a requested trade. And Cardia also submitted a false written statement on April 28, 1999, that no other customer had alleged that he had failed to place a sell limit order. Accordingly, the Hearing Panel finds that Cardia and Louis violated Rules 8210 and 2110.[39]

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[36] Rule 2110 is applicable to associated persons pursuant to Rule 0115(a), which states that "[t]hese Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."

[37] In re Protective Group Securities Corp., Exchange Act Release No. 34547, 57 S.E.C. Docket 1080, 1994 SEC LEXIS 2516, at *21 (Aug. 18, 1994) (footnote omitted).

[38] In re Rita H. Malm, Exchange Act Release No. 35000, 58 S.E.C. Docket 131, 134, 1994 SEC LEXIS 3679, at *9 (1994).

[39] See, e.g., Department of Enforcement v. Marlowe Robert Walker, III, No. 10970141, 2000 NASD Discip. LEXIS 2, at *26-27 (NAC Apr. 20, 2000); In re Brian L. Gibbons, Exchange Act Release No. 37170 (May 8, 1996) (providing

IV. Sanctions

A. Falsification of Records—Causes One and Two

There are two possible guidelines that the Hearing Panel may look to for guidance in imposing sanctions for the Respondents' submitting false account information. The first guideline applies to "recordkeeping violations,"[40] and the second applies to "forgery and/or falsification of records."[41] While there is not a significant difference in the range of potential sanctions under the two guidelines, the Hearing Panel considers the second to be more appropriate under the facts and circumstances of this case because that guideline seems to have been drafted to cover intentional misconduct such as the Respondents'. Accordingly, the Hearing Panel will utilize the NASD Sanction Guideline for "Forgery And/Or Falsification of Records."[42]

The falsification of records guideline, as amended by Notice to Members 99-86 (1999), recommends that a bar be imposed in egregious cases. In cases where there are mitigating factors present, in lieu of a bar the guideline suggests considering a suspension in any or all capacities of up to two years.[43] To determine the appropriate sanction within these suggested ranges the Guideline recommends that adjudicators consider the nature of the falsified documents in addition to the principal considerations[44] generally applicable to all cases.

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misleading and inaccurate information to the NASD in response to an information request with respect to an NASD investigation is a violation of Section 1 (now Rule 2110)).

[40] NASD Sanction Guidelines 28 (1998).

[41] Id. at 35.

[42] Enforcement and the Respondents failed to specify which guideline they considered applicable to this charge.

[43] NASD Sanction Guidelines 35 (1998).

[44] Id. at 8-9. The following principal considerations are relevant in assessing the appropriate remedial sanctions for the Respondents' misconduct in falsifying RA's account records: (1) their relevant disciplinary history, if any; (2)

The intentional falsification of customer account information is an extremely serious offense. The entry of accurate information on official firm records is a predicate to the NASD's oversight of its members. It is therefore critical that associated persons comply with this basic requirement.[45] Indeed, "falsification of records is the antithesis of a registered representative's upholding high standards of commercial honor."[46]

The Hearing Panel believes that the Respondents' conduct was egregious, and they should therefore be barred. The Respondents intentionally falsified the New Account Form for RA's account to hide the fact that Cardia solicited business in New Mexico when he was not licensed to conduct business in that state. Then, to continue the deception, Cardia and Louis agreed to use Louis's account executive number on all the trades Cardia placed. As a result, Barron Chase could not detect from its records that this was actually Cardia's account thereby impeding its ability to properly supervise him. The Hearing Panel further finds that the circumstances surrounding these events are an aggravating factor in assessing sanctions. First, the Respondents' falsification of records continued for many months

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whether they accepted responsibility for and acknowledged their misconduct to their employer prior to detection and intervention by the firm or a regulator; (3) whether they voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy their misconduct; (4) whether they engaged in numerous acts and or a pattern of misconduct; (5) whether they engaged in the misconduct over an extended period of time; (6) whether they attempted to conceal their misconduct; (7) whether they provided substantial assistance to NASD Regulation in its investigation of the underlying misconduct, or whether they attempted to conceal information from NASD Regulation; (8) whether their misconduct was the result of an intentional act, recklessness, or negligence; (9) whether the member firm with which the respondents are or were associated disciplined them for the misconduct at issue prior to regulatory detection; and (10) whether their misconduct resulted in the potential for monetary or other gain.

[45] In re Charles E. Kautz, Exchange Act Release No. 37072, 52 S.E.C. 730, 1996 SEC LEXIS 994, at *11-12 (Apr. 5, 1996) ("Sales representatives cannot be allowed to report themselves as the representative of record for sales that they did not actually make."); see also In re James F. Novak, Exchange Act Release No. 19660, 47 S.E.C. 892, 1983 SEC LEXIS 2023 (Apr. 8, 1983) (describing falsification of order tickets as misconduct "of the utmost seriousness").

[46] District Bus. Conduct Comm. No. 10 v. Douglas John Mangan, 1998 NASD Discip. LEXIS 33, at *16 (NAC July 29, 1998) (sustaining Rule 3110 violation for creating false customer records).

and evidenced a pattern of misconduct. Second, their intent was to conceal Cardia's misconduct of soliciting business in a state where he was not registered. Third, the Respondents continued their deception by testifying falsely at their on-the-record interviews on May 13, 1999, and at the hearing.[47] In contrast, there are no mitigating factors present in this case.

In summary, the Hearing Panel finds that the Respondents' conduct demonstrates a complete disregard of the NASD's rules and a high likelihood that they would continue to commit violations if they were permitted to remain in the industry following a suspension. In the Hearing Panel's view, this is an unacceptable risk. Accordingly, the Hearing Panel concludes that the Respondents each should be barred and fined $50,000 for their violations of Rules 2110 and 3110.

B. Pre-Selling the Aftermarket—Cause Three

In closing argument, Enforcement requested that Cardia be suspended in all capacities for three months, fined $15,000, and ordered to pay restitution to RA for this violation. (Tr. 333.) These sanctions fall well within the recommended sanctions for intentionally misstating or omitting material facts, which is the most applicable Guideline for market manipulation. The Guideline recommends imposing a suspension of up to two years and a fine of $10,000 to $100,000 where the respondent's conduct is found to be intentional or reckless.[48]

Taking into consideration all of the attendant facts and circumstances and the Principal Considerations set forth above, the Hearing Panel concludes that the sanctions requested by

[47] Cf. Department of Enforcement v. Gordon Kerr, No. C02980051, 1999 NASD Discip. LEXIS 35, at *13-14 (NAC Dec. 17, 1999) (untruthful statements at hearing demonstrate a lack of integrity that was considered in assessing the risk of allowing the respondent to remain in the industry).

[48] NASD Sanction Guidelines 80.

Enforcement are appropriate. The Hearing Panel particularly notes that Cardia's conduct was inimical to the fair treatment of RA and interfered with the fair and efficient operation of the market for Host America stock. Had there been evidence of a pattern of such treatment, his misconduct would have been sufficiently egregious to warrant a bar. However, Enforcement did not address the issue of whether pre-selling the aftermarket was a device he regularly employed to induce increased aftermarket activity.[49] Accordingly, the Hearing Panel has taken into consideration that the evidence shows only one such sale and the resulting loss suffered by RA was relatively modest in relation to his total investments. On the other hand, Cardia made no effort to remedy his misconduct, and he testified falsely at the hearing regarding the Host America transaction.

Under these circumstances, the Hearing Panel concludes that a three-month suspension and a $15,000 fine are sufficient to accomplish the NASD's remedial goals and to deter similar misconduct by others.[50]

C. Failure to Execute Limit Order—Cause Four

The NASD Sanction Guidelines do not contain a specific guideline for failing to execute customer orders. However, because this charge is analogous to effecting an unauthorized transaction, that Guideline will be applied. Enforcement has asked that Cardia be suspended for three months, fined $15,000, and ordered to pay restitution to RA for this violation. (Tr. 335.)

[49] Enforcement also did not present evidence quantifying the impact of Cardia's misconduct on the market for Host America stock.

[50] The Hearing Panel has not ordered restitution to RA for this violation because under Enforcement's theory of the case and the Hearing Panel's findings, the manipulation operated as a fraud on other aftermarket purchasers, not RA.

Although there is only one customer order at issue, the Hearing Panel finds that Cardia's failure to execute this order was sufficiently egregious to warrant more than the minimum recommended sanction. RA gave Cardia a clear instruction to sell and then he followed up repeatedly to inquire of his order's status. Cardia accepted the order, but he intentionally refused to execute it. Thus, Cardia has shown that he is unwilling to fulfill his obligation to follow customer instructions—an obligation that "serves as the essential foundation for the customer/registered representative relationship."[51] Further, the circumstances surrounding Cardia's refusal to execute the sell order are aggravating. Cardia not only ignored RA's instruction to sell Host America, but he repeatedly evaded RA's written and telephone inquiries as to the status of the sell order. Accordingly, the Hearing Panel views Cardia's refusal to execute the sell order as part of Cardia's overall pattern of wrongdoing with respect to the Host America transaction that began with Cardia inducing RA to purchase aftermarket shares that he did not want. Under these circumstances, the Hearing Panel agrees with Enforcement's assessment that a substantial suspension and fine are warranted for this offense.

The Hearing Panel also agrees that restitution is appropriate to remediate Cardia's misconduct: restitution is a traditional equitable remedy designed to "restore the status quo where otherwise a . . . victim would unjustly suffer loss."[52] The NASD Sanction Guidelines generally recognize that, in cases where an identified individual has suffered a quantifiable loss as a result of a respondent's misconduct, it is fitting to order the respondent to pay restitution.[53] The Guidelines also suggest that, when ordering

[51] District Bus. Conduct Comm. No. 7 v. Wells , No. C07970045, 1998 NASD Discip. LEXIS 32, at *7 (NAC July 24, 1998).

[52] In re David Joseph Dambro, 51 S.E.C. 513, 518 (1993).

[53] NASD Sanction Guidelines 6.

restitution, adjudicators may consider requiring the respondent to pay pre-judgment interest on the base amount, calculated pursuant to 26 U.S.C. § 6621(a)(2), i.e., the interest rate used by the Internal Revenue Service to determine interest due on underpaid taxes.[54] The Guidelines recommend that pre-judgment interest should be measured from the date of the occurrence of the violative activity that gave rise to the loss.

Accordingly, for this violation, Cardia is suspended for three months, fined $15,000, ordered to pay restitution to RA in the amount of $8,637.95, plus pre-judgment interest thereon. Pre-judgment interest shall be calculated pursuant to 26 U.S.C. § 6621(a)(2) and shall run from July 27, 1998, the date RA instructed Cardia to sell the stock, to the date of this Decision.

D. Providing False Information to the NASD in Response to a Request for Information Under Rule 8210—Causes Five, Six, Seven and Eight

Rule 8210(a)(1) authorizes the NASD to require persons associated with a member of the NASD to "provide information orally, in writing, or electronically and to testify, under oath or affirmation * * * if requested, with respect to any matter involved in any investigation." Rule 8210(c) imposes on associated persons and member firms an unqualified obligation to fully and promptly cooperate with requests made by the NASD under Rule 8210.

This Rule provides a means for the NASD to carry out its regulatory functions in the absence of subpoena power and is a "key element in the NASD's effort to police its members."[55] Failure to cooperate fully and promptly when requests for information are made subverts the NASD's ability to

[54] Id., at 12. The Internal Revenue Service rate, which is adjusted each quarter, reflects market conditions, and thus approximates the time value of money for each quarter in which the customer lost the use of his or her funds.

[55] In re Rouse, Exchange Act Release No. 32658, 51 S.E.C. 581, 54 SEC Docket 1259, 1993 SEC LEXIS 1831, at *7 (July 19, 1993).

carry out its regulatory functions.[56] There is no question that providing incomplete or misleading records in response to a Rule 8210 request constitutes a violation of NASD Rule 2110.[57]

The applicable NASD Sanction Guideline[58] for failing to respond truthfully to a request for information made pursuant to NASD Procedural Rule 8210 suggests that a bar should be standard where no mitigation exists.[59] In this case, the Hearing Panel finds that the Respondents intentionally testified falsely in their on-the-record interviews on May 13, 1999, by denying that Cardia solicited RA to open an account at Barron Chase and by denying the Cardia conducted the transactions in RA's account between May 25 and June 18, 1998. As to these charges, there are no mitigating factors warranting a lesser sanction than a bar. Accordingly, the Hearing Panel will bar the Respondents for violating Rules 8210 and 2110, as alleged in the Seventh and Eighth Causes of the Complaint.

On the other hand, the Hearing Panel believes that no further sanction need be imposed for Cardia's false statements regarding RM's complaint. As to Cardia's misstatement during his on-the-record interview to the effect that he had not been subject to another complaint alleging a failure to execute an order, his full answer demonstrates that Cardia attempted to answer completely. Cardia went on at some length regarding a third complaint in an effort to be complete. RM's complaint had been made to the NASD, and, therefore, it would be illogical to conclude that Cardia thought he could benefit from lying about its existence. Cardia stood to gain nothing by failing to mention RM's complaint.

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[56] In re Borth, Exchange Act Release No. 31602, 51 S.E.C. 178, 53 SEC Docket 37, 1992 SEC LEXIS 3248, at *7 (Dec. 16, 1992).

[57] Id.

[58] NASD Sanction Guideline 31.

[59] See Department of Enforcement v. Marlowe Robert Walker, III, 2000 NASD Discip. LEXIS 2, at *30 ("untruthful responses [are] as harmful as a complete failure to respond and, as such, … a bar is the appropriate sanction.").

Accordingly, the Hearing Panel concludes that Cardia did not intend to mislead the NASD Regulation staff .

The Hearing Panel also notes that the question posed to Cardia lacked a high degree of clarity and concerned an issue that was not the direct subject under investigation. It is not unreasonable to conclude, therefore, that Cardia simply did not remember RM's complaint. From the record, it appears that RM's complaint did not generate much of an investigation. For example, there is no evidence that Cardia or anyone at his firm was interviewed about RM's complaint, and NASD Regulation quickly closed the complaint without action.[60] Thus, there is nothing in the record about the history of the Complaint that would have made it unforgettable.

Finally, from a remediation standpoint, multiple bars for each misstatement made during a single on-the-record interview are unnecessary, particularly where, as here, the Respondent is found to have made materially false statements concerning the matter under investigation. Since the Hearing Panel is imposing a bar for those misstatements concerning the RA account, this sanction is sufficient to protect the investing public and deter others from similar misconduct.

With respect to Cardia's written response, the Hearing Panel similarly concludes that the bar imposed for Cardia's misstatements in his on-the-record interview sufficiently addresses Cardia's carelessness. While his response was false, and it reflected a lack of care in responding to the NASD, the evidence does not suggest that he made the response knowing it was false. Here also, the information was collateral to the NASD's inquiry and unresponsive to the questions he was asked.

[60] The Hearing Panel further notes that Mr. Litsky, the NASD Regulation examiner who questioned Cardia, also forgot about RM's complaint despite the fact that he had worked on the investigation for three to four months before

Under these circumstances, the Hearing Panel finds that no regulatory purpose would be served by imposing a separate bar for this false response.

V. Order

Therefore, having considered all the evidence,[61] the Hearing Panel imposes the following sanctions against Frank Anthony Cardia, Jr. and Robert Daniel Louis:

A. Frank Anthony Cardia, Jr.

(1) Cardia is barred from associating with any member firm in all capacities and fined $50,000 for falsifying records concerning RA's account in violation of NASD Conduct Rules 2110 and 3110, as alleged in the First and Second Causes of the Complaint.

(2) Cardia is suspended in all capacities for three months and fined $15,000, for pre-selling the aftermarket in Host America stock in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120, as alleged in the Third Cause of the Complaint.

(3) Cardia is suspended in all capacities for three months, fined $15,000, and ordered to pay restitution to RA in the sum of $8,637.95, plus pre-judgment interest thereon, calculated pursuant to 26

Cardia's on-the-record interview. (Decl. of David B. Klafter in Supp. of the Department of Enforcement's Resp. to Frank Anthony Cardia, Jr.'s Mot. to Compel Disc. at ¶¶ 8, 10.)

[61] 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.

U.S.C. § 6621(a)(2), from July 27, 1998, until the date of this decision,[62] for failing to execute a limit order in violation of NASD Conduct Rule 2110, as alleged in the Fourth Cause of the Complaint.

(4) Cardia is barred from associating with any member firm in all capacities for providing false information to the NASD in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110, as alleged in the Eighth Cause of the Complaint.

B. Robert Daniel Louis

(1) Louis is barred from associating with any member firm in all capacities and fined $50,000 for falsifying records concerning RA's account in violation of NASD Conduct Rules 2110 and 3110, as alleged in the First and Second Causes of the Complaint.

(2) Louis is barred from associating with any member firm in all capacities for providing false information to the NASD in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110, as alleged in the Seventh Cause of the Complaint.

Pursuant to Notice to Members 99-86, each of the foregoing fines is due and payable when and if the Respondents seek to re-enter the securities industry.

The Respondents also are, jointly and severally, ordered to pay costs in the total amount of $2,574, which include an administrative fee of $750 and hearing transcript costs of $1,824.

[62] Specific identifying information regarding RA is contained in Enforcement's Exhibits, which were served on the Respondents in the course of the proceeding.

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 bars shall become effective immediately.

_____

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

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