

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MONITOR INVESTMENT GROUP, INC.
(BD # 31007), et al.,

MICHAEL GALASSO, JR.
(CRD # 1814376)
Staten Island, New York,

EMMANUEL GENNUSO
(CRD # 867580)
Brooklyn, New York,

Brooklyn, New York,

PATRICK GIGLIO
(CRD # 2512858)
Staten Island, New York,

STEVEN GOLDSTEIN
(CRD # 2021935)
New York, New York,

New York, New York,

Disciplinary Proceeding
No. C10970145

**Amended Hearing Panel
Decision as to Respondents
Michael Galasso, Jr., Emmanuel
Gennuso, Patrick Giglio, Steven
Goldstein, Dwayne Leverett,
Gerard McMahon, John
Montelbano, and Todd Nejaime¹**

Hearing Officer - Ellen A. Efros

December 10, 1999

¹ This Decision is being reissued to correct an error on page 117. See Footnote 464.

DWAYNE LEVERETT
(CRD # 2139170)
Hackensack, New Jersey,

GERARD MCMAHON
(CRD # 810308)
Belford, New Jersey,

JOHN MONTELBANO
(CRD # 1046715)
New York, New York,

TODD NEJAIME
(CRD # 1929989)
Plantation, Florida,

Respondents.

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DIGEST

On January 23, 1998, the Department of Enforcement (“Enforcement” or “Complainant”) filed a Complaint against 18 Respondents.² Prior to or at the time of the Hearing, ten Respondents were held in default by the Hearing Officer.³ The remaining eight Respondents appeared at the Hearing, either through counsel or *pro se*, and actively contested the allegations. Those eight Respondents -- Michael Galasso (“Gallaso”) (trader), Emmanuel Gennuso (“Gennuso”) (Operations and Compliance Officer), Gerard McMahon (“McMahon”) (research analyst), John Montelbano (“Montelbano”) (President), Patrick Giglio (“Giglio”) (registered representative), Steven Goldstein (“Goldstein”) (registered representative), Dwayne Leverett (“Leverett”) (registered representative and general securities principal) and Todd Nejaime (“Nejaime”) (registered representative and manager) -- all were employed by Monitor Investment Group, Inc. (“Monitor” or “the Firm”). Monitor was a member of the NASD from August 1992 until October 21, 1996, when it filed a Broker Dealer Withdrawal Form with the NASD.

The Complaint alleges that Respondents engaged in a fraudulent scheme in which they manipulated the price and supply of Accessible Software Inc. (“ASWI”), an OTC

² With leave of the Hearing Officer, an Amended Complaint was filed on October 15, 1998. The Amended Complaint merely corrected certain typographical errors.

³ These Respondents are Monitor Investment Group, Inc. (“Monitor” or “the Firm”), Michael Cavallo, James Garcia, Scott Herkert, Norman Lescht, William Palla (“Palla”), Salvatore Piazza (“Piazza”), Jeffrey Pokross (“Pokross”), Salvatore Ruggiero, and Edward Telemany. Although Monitor and the named individuals defaulted by their failure to participate in this disciplinary proceeding, three of the defaulting Respondents will be referred to in this decision because of their prominent roles in the management of Monitor and their participation in the manipulation of the price and supply of the security at issue. These individuals are: Palla (one of the Firm’s purported owners, who already is barred by the NASD for failing to respond to the Staff’s inquiries into the Monitor scheme), Pokross (a control person and/or part owner of the Firm), and Piazza (a control person and/or part owner of the Firm). A default decision as to these individuals and the other defaulting Respondents will be issued.

Bulletin Board security. Complainant contends that Respondents' alleged fraudulent scheme had a single purpose – to enrich Monitor, and thus, ultimately each Respondent. Complainant further alleges that each Respondent knowingly or recklessly contributed to this fraudulent scheme. Complainant alleges that Respondents' conduct violates Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), Rules 10b-5 and 10b-6 thereunder and NASD Rules 2110, 2120, 2440, 3010, 3110 and 8210.⁴

Specifically, the Complaint alleges 42 causes of action against Monitor and the 17 individuals formerly associated with Monitor. As applicable here Causes 4 through 7 respectively, charge Respondents Montelbano, McMahon, Gennuso, and Galasso with the manipulation of the price and supply of ASWI; Causes 8, 11, 13, and 14, respectively, charge Respondents Goldstein, Giglio, Leverett, and Nejaime with manipulation and deceptive trading practices with respect to trading in ASWI; Cause 15 charges Respondents Gennuso and Galasso with charging excessive and fraudulent markups; Cause 16 charges Respondents Montelbano, McMahon, Gennuso, and Galasso with bidding for purchasing or inducing others to purchase ASWI while engaged in a distribution in violation of Exchange Act Rule 10b-6; Causes 17 and 18, respectively, charge Respondents Leverett and Galasso with creating false and fictitious records; Cause 19 charges Respondent Gennuso with failure to establish and maintain an adequate supervisory system; Causes 21 and 22, respectively, charge Respondents Montelbano and Gennuso with failure to supervise; Cause 27 charges Respondent Gennuso with failure to register an employee who should be so registered; and Causes 30, 33, 34, 35, 39, 41, and 42, respectively, charge Respondents Gennuso, Montelbano, McMahon, Galasso, Giglio,

⁴ The specific charges against each individual Respondent are discussed more fully herein. All of the

Leverett, and Nejaime with violating NASD Procedural Rule 8210 for failing to respond truthfully and completely.

Based on the evidence presented at the Hearing, the Hearing Panel made the following findings as to liability and sanctions with respect to each allegation of the Complaint as to each Respondent⁵:

- Respondents Montelbano (Fourth Cause), McMahon (Fifth Cause), Gennuso (Sixth Cause), and Galasso (Seventh Cause) manipulated the price and supply of ASWI in violation of Section 10(b), Rule 10b-5, and NASD Conduct Rules 2110 and 2120. The following sanctions are imposed:

Respondent Montelbano: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent McMahon: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Galasso: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Gennuso: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

- Respondents Goldstein (Eighth Cause), Giglio (Eleventh Cause), Leverett (Thirteenth Cause), and Nejaime (Fourteenth Cause) engaged in manipulative and deceptive sales practices in violation of Section 10(b), Rule 10b-5, and NASD Conduct Rules 2110 and 2120. The following sanctions are imposed:

Respondent Goldstein: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be

alleged violations do not apply to all Respondents.

⁵ A summary as to the total liability for each Respondent is set forth in a summary at the conclusion of this Decision. See pp. 126-130.

suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Giglio: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Leverett: a fine of \$20,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, requalification by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 examination within 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum score of 80, and a suspension of 45 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

Respondent Nejaim: a fine of \$10,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, requalification by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 within a 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum score of 80, and a suspension of 45 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

- Respondents Galasso and Genusso (Fifteenth Cause) charged excessive and fraudulent markups in violation of Section 10(b), Rule 10b-5, and NASD Conduct Rules 2110, 2120, and 2440. The following sanctions are imposed:

Respondent Galasso: a permanent bar from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent may seek to re-enter the securities industry.

Respondent Gennuso: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

- **Respondents Montelbano, McMahon, Galasso, and Gennuso** (Sixteenth Cause) solicited purchases of ASWI during a distribution in violation of Section 10(b), Rule 10b-6, and NASD Conduct Rules 2110 and 2120. The Hearing Panel has determined not to impose any separate sanctions for these

violations since they arise from the same conduct and activities which gave rise to other violations for which the Hearing Panel has imposed sanctions.

- **Respondent Galasso** (Eighteenth Cause) violated NASD Procedural Rule 8210 and NASD Conduct Rules 2110 and 3110 by creating false and fictitious records. The following sanctions are imposed: a permanent bar from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.
- Respondent Gennuso (Nineteenth Cause) failed to establish and maintain an adequate supervisory system in violation of NASD Conduct Rules 3010 and 2110. Respondents Montelbano (Twenty-First Cause), Gennuso (Twenty-Second Cause), and Leverett (Twenty-Third Cause) failed to perform their duties as supervisors to prevent, remedy, or detect the violative conduct in violation of NASD Conduct Rules 3010 and 2110. The following sanctions are imposed:

Respondent Montelbano: a permanent bar from associating with any member firm in any capacity and a fine of \$10,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Gennuso: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Leverett: a fine of \$5,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, requalification by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 examination within 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum score of 80, and a suspension of 45 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

- **Respondent Gennuso** (Twenty-Seventh Cause) violated NASD Registration and Membership Rule IM-1000-3 and NASD Conduct Rule 2110 by permitting an unregistered person to conduct business as a general securities representative and by failing to register such person. The following sanctions are imposed: Respondent Gennuso is permanently barred from associating with any member firm in any capacity and is fined \$25,000, such fine to be

suspended until such time as Respondent seeks to re-enter the securities industry.

- Respondents Gennuso (Thirtieth Cause), Montelbano (Thirty-Third Cause), McMahon (Thirty-Fourth Cause), Galasso (Thirty-Fifth Cause), Giglio (Thirty-Ninth Cause), Nejaime (Forty-First Cause) and Leverett (Forty-Second Cause) violated NASD Rules 8210 and 2110 by failing to respond completely and truthfully during their on-the-record interviews concerning ASWI. The following sanctions are imposed:

Respondent Gennuso: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Montelbano: a suspension of two years from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent McMahon: a suspension of two years from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Galasso: a suspension of one year from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Giglio: a suspension of two years from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Nejaime: a suspension for 45 business days from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Leverett: a suspension for 30 business days from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

The Hearing Panel assesses the costs of the Hearing, \$25,349.00 (\$24,599.00 for transcripts and \$750.00 administrative fee) jointly and severally against all Respondents.

APPEARANCES

Mari B. Maloney, Esq., Senior Regional Attorney and William St. Louis, Esq., Regional Attorney, NASD Regulation, Department of Enforcement, District No. 10, New York, New York. Rory C. Flynn, Esq., Chief of Litigation, NASD Regulation, Inc., Department of Enforcement, Washington, D.C.

Martin P. Unger, Esq. and Andrew M. Zeitlin, Esq., Tenzer Greenblatt LLP, New York, New York, for Respondents Todd Nejaime, Dwayne Leverett, and Steven Goldstein.

Elizabeth Rose, Esq., Kogan & Taubman, LLC, New York, New York, for Respondent Patrick Giglio.

John Montelbano, *pro se*.

Gerard McMahon, *pro se*.

Michael Galasso, Jr., *pro se*.

Emmanuel Gennuso, *pro se*.

DECISION

I. Summary of Case

On January 21, 1998, Enforcement served a Complaint asserting various charges against 18 Respondents. The Complaint charges that Monitor and the individual Respondents circumvented the federal securities laws and NASD rules by devising and implementing a scheme whereby, among other things, (1) entities related to or controlled by Monitor acquired an inexpensive supply of ASWI through a 1995 private placement offering; (2) certain Respondents then transferred the ASWI shares to Monitor to enable the Firm to dominate and control the market for ASWI; (3) certain Respondents manipulated the price and supply of ASWI; (4) Monitor's sales force sold shares of ASWI at excessive markups through the use of material misrepresentations and/or

omissions; and (5) certain Respondents frustrated Enforcement's investigation of the ASWI scheme by providing false and fictitious records and by failing to respond truthfully to the Department's inquiries.

Specifically, Complainant alleges that the following steps, taken together, constitute the overall fraudulent scheme:⁶

- In November 1995 Monitor's owners acquired an inexpensive supply of ASWI at \$1 per share through a Rule 504 offering;⁷
- In December 1995 and April 1996, Respondent Galasso, on behalf of Monitor, filed a Form 211 with the NASD to be a market maker in ASWI on the OTC Bulletin Board;
- Monitor's owners or controlling persons placed their ASWI shares in a jointly held account, DMN Capital ("DMN"), at the brokerage firm Baird Patrick;
- Respondents Montelbano and McMahon provided false and misleading information to Monitor's brokers about ASWI;
- Respondents Montelbano and McMahon allocated shares of ASWI to brokers;
- On May 13 and 14, 1996, Respondents Galasso, McMahon, Montelbano and Gennuso engaged in a distribution of 124,500 shares of ASWI, which Monitor purchased from DMN through Baird Patrick;
- Respondents McMahon, Montelbano, and Gennuso encouraged brokers to sell shares of ASWI to their customers during this distribution by offering them incentives of special compensation;
- Respondents Leverett, Goldstein, and Giglio solicited their customers to purchase ASWI and made material misrepresentations and price predictions;

⁶ Complainant's Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law ("Complainant's Br.") at 2-4. These allegations merely provide an overview of Complainant's case. Evidence with respect to each allegation is discussed in detail in this decision.

⁷ A Regulation 504D Offering ("Rule 504 Offering") is a private placement of securities under Rule 504 of Regulation D promulgated under the Securities Act of 1933.

- Respondents Leverett, Nejaime, Goldstein and Giglio sold ASWI to their customers at predetermined prices and without disclosing their compensation;
- On the morning of May 13, 1996, Respondent Galasso up-ticked the price of the ASWI shares from \$1.25 to \$9.375 in less than two hours in order to sell shares of ASWI to Monitor's retail customers at a higher price, thus increasing the Firm's and brokers' profits;
- On the afternoon of May 13, 1996, Respondent Galasso moved the price of the ASWI shares downward in order to sell ASWI to the Firm's retail clients at predetermined prices and to give the brokers their predetermined special compensation;
- On May 13, 1996, after Monitor's inventory had been depleted, instead of creating a short position, Respondents Galasso and Gennuso marked customer orders "not done";
- At the end of the day on May 13, 1996, Respondents Galasso and Gennuso allocated shares in ASWI to certain customers;
- Respondent Galasso, after the close of trading on May 13, reported to the NASD tape ASWI order tickets with predetermined limit, reported, and execution prices, unrelated to free market forces;
- On May 14, 1996, after Monitor's inventory had been replenished by newly purchased shares of ASWI from Baird Patrick, Respondents Galasso and Gennuso allocated and then executed customer orders of ASWI at predetermined prices, unrelated to free market forces, with special compensation to the brokers;
- On May 13 and 14, 1996, Respondent Galasso executed and Respondent Gennuso approved ASWI order tickets with sales credits to the brokers ranging from \$1 to \$2.25 per share;
- Respondent Galasso sent ASWI order tickets to Monitor's clearing firm that resulted in customers' confirmations that failed to disclose that Monitor's brokers received special compensation for their ASWI orders;
- On May 16, 1996, Respondents Galasso and Gennuso canceled the ASWI order tickets that were executed on May 13 1996 with the \$1 to \$2.25 sales credits;

- On or about May 16, Respondents Nejaime, Leverett, Goldstein and Giglio wrote a second set of order tickets for their customers' May 13 ASWI purchases with sales credits of \$.25, which Respondents Leverett and Gennuso initialed and which bore May 13, 1996 time stamps;
- On May 16, Respondent Galasso provided the NASD with some of the tickets written on May 16, 1996, but failed to respond completely to the Staff's request for all ASWI order tickets; and
- Respondents Galasso, McMahon, Montelbano, Gennuso, Nejaime, Leverett and Giglio failed to respond completely and truthfully during their on-the-record interviews concerning the events surrounding ASWI.

In addition to the foregoing, Complainant also alleges that: (1) Respondent Gennuso failed to register a person who conducted a securities business while employed at Monitor, falsified records with respect to this person, and obstructed Enforcement's investigation by failing to respond truthfully concerning the activities of the unregistered person; (2) Respondents Montelbano, McMahon, and Gennuso obstructed Enforcement's investigation by failing to respond truthfully concerning the Firm's employee compensation, the ownership and management structure of Monitor, and their individual roles at the Firm; (3) Respondent Gennuso failed to establish and maintain an adequate supervisory system; and (4) Respondents Gennuso and Montelbano failed to supervise the registered representatives to prevent abusive trading practices.

Respondents, collectively and individually, deny any knowing involvement in the ASWI scheme. Respondents Montelbano, McMahon, Gallaso, Gennuso, Nejaime, and Leverett alternatively argue that they were unaware of any scheme to manipulate the price and supply of ASWI or to charge excessive markups or that they simply were following

the directions of Palla.⁸ Further, these Respondents deny that they held the positions at Monitor attributed to them or had the responsibility and/or authority to prevent the abusive trading practices alleged in the Complaint.

Respondents Giglio, Goldstein, and Leverett deny that they induced customers to purchase ASWI based on false or misleading information and, also argue that, in fact, their customers were not misled. They assert that any information provided to their customers with respect to ASWI was based on information received from Respondents Montelbano, McMahon, or Palla. These Respondents also assert that they were unaware they would receive special compensation for sales of ASWI. They assert that the prices they recommended to their customers to purchase ASWI were not predetermined, but based on the information provided by Respondent McMahon and the price at which ASWI was trading on May 13-14, 1996, when the sales were made.

All of the Respondents deny that they failed to respond truthfully during their respective on-the-record interviews conducted as part of Enforcement's investigation.

The Parties presented evidence to the Hearing Panel in a 14 day period commencing in November 1998 and ending in January 1999. Enforcement presented 33 witnesses in support of its direct case. The witnesses included: (1) Enforcement Staff investigators⁹; (2) other NASD employees who had some direct knowledge as to

⁸ Palla founded Monitor, was one of the Firm's owners, and also President and Chief Executive Officer during at least part of the relevant time period. See, e.g., Transcript ("Tr."), 11/16/98 at 144, 146-47; CX-23. The evidence presented throughout the Hearing demonstrates that he also personally hired most, if not all, of the Respondents.

⁹ The Staff employees who testified are William Shields, Wayne Freeman, Joseph Mazur, and Deborah Davies. Mr. Shields was the principal Staff investigator responsible for the investigation which resulted in the allegations charged in the Complaint. He testified at different times during the course of the Hearing with respect to specific areas of the investigation.

Monitor's activities with respect to ASWI;¹⁰ (3) James Tagliareni ("Tagliareni"), the President, CEO, and Chairman of ASWI; (4) Clifton Miskell ("Miskell") who in April 1996 was a supervisor at RAF Financial Corporation ("RAF"), Monitor's clearing firm; (5) traders at other firms who either sold ASWI to Monitor or purchased ASWI for customer accounts;¹¹ (6) customers who purchased ASWI from Respondents Goldstein, Leverett, and Giglio; (7) former Monitor employees;¹² and (8) the Respondents present at the Hearing.

Each Respondent testified on his own behalf.¹³ In addition, Respondents Montelbano and McMahon presented testimony from three witnesses in support of their defenses.

II. General Findings Of Fact

During the relevant time (1996), Monitor had three offices in New York located at 30 Broad Street, 20 Exchange Place, and 919 Third Avenue.¹⁴ The 30 Broad Street office appears to have served as the main office. The evidence demonstrates, and it was not challenged by Respondents, that Messrs. Palla, Pokross, Piazza, and James Labate

¹⁰ These employees are Peter Canada, the Assistant Director of Trading and Market Services for NASDAQ, who in April 1996 was running the Portal market trading system for NASDAQ; Kristin Blair, who in December 1995 and April 1996 was working in the OTC Compliance Unit of NASD Regulation; and Yvone Huber, who in April 1996 was a team leader in the fraud section of Market Regulation.

¹¹ On May 13-14, 1996, John D'Angelo ("D'Angelo") was the account executive at Baird Patrick who sold all the ASWI shares from the DMN account to Monitor. On May 13, 1996, Ann Magelinsky ("Magelinsky"), a trader at Ernst & Co. ("Ernst"), and Richard Dubronsky ("Dubronsky"), a trader at Dean Witter Reynolds, Inc. ("Dean Witter"), purchased ASWI for client accounts.

¹² These witnesses included former Monitor registered representatives: Christian Sierp ("Sierp"); Michael Hogan ("Hogan"); Greg McGuinn ("McGuinn"); and Michael Kardish ("Kardish"). In addition, the on-the-record testimony of other Monitor employees and registered representatives was admitted in evidence.

¹³ Respondent Goldstein testified only in Complainant's direct case.

¹⁴ Tr., 11/16/98 at 103 (Shields).

(“Labate”) were owners, controlling persons or partners in the ownership and/or control of Monitor.¹⁵ The evidence further demonstrates, and it was not challenged by Respondents, that entities controlled by, or persons related to, Respondents Piazza and/or Pokross and their associate, Labate,¹⁶ purchased ASWI at \$1.00/per share in a Rule 504 Offering.¹⁷

Of the 535,000 ASWI shares offered through the Rule 504 Offering, 485,000 shares were acquired by affiliates or controlling persons of Monitor.¹⁸ Labate and Pokross transferred 125,000 of these shares to the firm of Baird Patrick for the account of DMN. On May 13 and 14, 1996, Baird Patrick sold 124,500 of these shares from the DMN account to Monitor for sale to the public, which was 24% of the public float.¹⁹

¹⁵ Tr., 11/16/98 at 146-47 (Shields). See also id. at 155-216. Peter Canada testified that Respondent Piazza held himself out to be the Vice President of Monitor orally and in an application to list on the Portal Market. Id. at 284.

¹⁶ As demonstrated by CX-33 and the evidence at the Hearing (Tr., 11/16/98 at 147-201), these entities include: (1) DMN Capital Investments (“DMN”). Respondents Piazza and Pokross were officers and/or controlling persons of DMN. In June 1995, Piazza sold his interest in DMN to JLE Construction (“JLE”), a company owned and/or controlled by James Labate; (2) Document Management Network, Inc. owned by the wife of Respondent Piazza; (3) Margaux, S.A. (“Margaux”). Respondents Piazza and Pokross owned and/or controlled Margaux. In June 1995, Respondent Piazza sold his interest in Margaux to JLE; (4) James Labate’s wife; (5) Respondent Pokross’ father; (6) Respondent Piazza’s mother; (7) an employee of Monitor and Respondent Piazza’s sales assistant; (7) Respondent Pokross’ wife; and (8) Respondent Pokross’ nephew.

¹⁷ ASWI is a New Jersey company whose primary business is the development of “multi-platform systems management” software programs. ASWI was incorporated in 1995 and historically operated at a deficit. At the suggestion of Respondent Pokross, it decided to raise capital through a Rule 504 Offering. Monitor was responsible for executing the private placement. Tr., 12/3/98 at 43-50 (James Tagliareni); see CX-32-35.

¹⁸ Persons affiliated with or related to Monitor controlled over 90% of the ASWI shares sold in the Rule 504 Offering. Tr., 11/16/98 at 203-04, 216 (Shields). The evidence demonstrates, and it was not challenged by Respondents, that on May 13, 1996, the day ASWI started trading on the Bulletin Board, Respondent Monitor, acting through its controlling persons, controlled the freely tradeable shares of ASWI. Id.

¹⁹ Tr., 11/16/98 at 213, Tr., 12/3/98 at 94-96 (Shields) and CX-62.

On May 10, 1996, Monitor received authorization from the NASD OTC Bulletin Board Compliance Unit to make a market in ASWI.²⁰ The Form 211 Applications which Monitor filed in order to initiate quotations of the Bulletin Board disclose that the initial bid and ask prices would be 7/8 and 1 ¼, respectively, and that the price was determined by a private placement based on a Rule 504 offering price of \$1.00 per share.²¹

Prior to initiating quotes for ASWI, certain Respondents undertook activities to facilitate the distribution of ASWI shares to Monitor's clients at predetermined prices.²² More specifically, these Respondents (1) encouraged Monitor's sales force to treat ASWI as if it were an initial public offering of securities ("IPO"), (2) promoted ASWI as a new "offering" and compared it favorably with a company called Tivoli,²³ (3) suggested that ASWI should be offered with an opening price in the \$6.00 range,²⁴ (4) told the sales force that ASWI ultimately would trade much higher than its "offering" price²⁵ and that

²⁰ Tr., 11/17/98 at 39-40 (Blair) and CX-31 at 902. Monitor filed two Form 211 Applications to initiate quotations on the OTC Bulletin Board, one dated December 28, 1995 and the other dated April 1, 1996. Tr., 11/17/98 at 30-38 and CX-30 at 893-896 and 889-892, respectively. Respondent Galasso signed both Forms 211 as the employee to contact regarding the information contained therein. CX-30 at 892 and 896.
²¹ CX-30 at 890 and 894. The Forms 211 also state that the factors considered in making the determination of the bid and ask were the information contained in the Rule 504 Offering including, but not limited to, financial statements. Id. at 890.

²² The defending Respondents who participated in this scheme are Montelbano, McMahon, Galasso, and Gennuso. The specific activities attributable to each of these Respondents is discussed more fully herein. Palla, Pokross, and Piazza also participated in this scheme.

²³ See CX-106 at 3241, CX-110 at 3310; CX-130 at 3926-3932; Tr. 12/16/98 at 156-157 (Sierp), 192 (Nejaime); Tr., 12/17/98 at 144-45, 247-48 (Goldstein), 179-80, 220, 242, (Kardish). Tivoli Systems was another software application company that also was started by Tagliareni, had gone public, and was taken over by IBM for approximately \$750 million.

²⁴ Monitor's sales force was told that the offering price of ASWI should be in the range of \$6.00 even though Monitor's opening bid and ask prices were 7/8 and 11/4, respectively. Tr., 12/16/98 at 108 (Sierp), 251 (Hogan); Tr., 12/17/98 at 139, 142 (Goldstein), 184 (Kardish). In fact, certain brokers testified in their on-the-record interviews that they were told the opening tickets should be at \$7.00/share or higher. See CX-110 at 3326-27; CX-129 at 3879; CX-130 at 3919-3924.

²⁵ CX-110 at 3307, 3310, 3319 (Sierp); Tr., 12/16/98 at 257-58 (Hogan); Tr., 12/17/98 at 242, 248 (Goldstein); Tr., 12/18/98 at 32-33 (Goldstein).

there were a limited number of shares available for sale,²⁶ and (5) instructed certain brokers to secure indications of interest from their customers and, then, allocated certain amounts of ASWI to certain of those customers.²⁷ In addition, the brokers were told they would receive compensation in the form of credits for each share of ASWI sold which would not be disclosed to investors.²⁸

On May 13, 1996, at 10:26 a.m., Monitor (as the sole market maker) initiated its first quote (7/8 bid and 1 ¼ ask) in ASWI on the OTC Bulletin Board.²⁹ Between 10:26 a.m. and 12:25 p.m. Monitor, acting through Respondent Galasso, effected 12 inter-dealer trades of ASWI moving the price from \$1.25 to \$9.375 in just under two hours.³⁰ The series of “up-ticks” in the price of shares was not related to sudden market demand nor to any available news relating to ASWI.³¹

²⁶ CX-106 at 3258; CX-110 at 3303, 3308, 3310, 3323; Tr., 12/16/98 at 107-108 (Sierp).

²⁷ CX-129 at 3876, 3878-79; Tr., 12/16/98 at 246, 262 (Hogan); Tr., 12/17/98 at 138, 144 (Goldstein), 182 (Kardish).

²⁸ The brokers were told they would receive sales credits between \$1.00 and \$2.25 per share. CX-110 at 3306; CX-158; Tr., 12/16/98 at 110, 113-114, 116 (Sierp); Tr., 12/4/98 at 532-34; Tr., 2/1/98 at 464, 482 (Galasso). The actual order tickets indicate that the brokers did receive such credits. See, e.g., CX-41. Since Monitor had access to a ready supply of ASWI at prices well below the prices at which such shares would be offered to its retail customers, the brokers were to receive a portion of the spread between Monitor’s cost of acquisition and the prices displayed to the market. Monitor handled the trades in ASWI in this manner as not to disclose any “commission” to its clients on confirmations.

²⁹ CX-59-61; Tr., 11/17/98 at 198-207 (Shields). At 10:29 a.m., Monarch Financial (“Monarch”) entered an order for 2,000 shares. Monarch was acting as an agent for the account of customers who are Respondent Galasso’s grandparents. Tr., 12/4/98 at 538-39 (Galasso). The ASWI shares were sold at \$1.25 which established a \$2,000 short position for Monitor. CX-60; Tr., 11/17/98 at 208-210.

³⁰ The sales were to Monarch, Ernst, and Dean Witter, all of which acted as agents for three public customers. CX 59-61. The three accounts each had ties to Monitor. Tr., 11/17/98 at 209-212, 222-24. Eleven of the 12 trades were bona fide; one was a sham which had the effect of moving the price from \$2.375 to \$5.375. Id. at 219-22; CX-60. The 11 inter-dealer trades for 7,000 shares were the first transactions by Monitor in ASWI and were the only retail purchases of ASWI effected away from Monitor on May 13-14, 1996.

³¹ CX-61; Tr., 11/17/98 at 249-58.

Monitor's ability to access an inexpensive and readily available inventory of ASWI shares was an essential part of the manipulation scheme. In essence, through the Baird Patrick transactions, Monitor transferred shares to itself from entities its officers or associated persons owned or controlled. Although such purchases were made to appear as if a disinterested third-party, DMN, was selling the shares to Monitor in arm's length transactions, this was a fiction since Monitor (through Piazza and Pokross) was on both sides of the Baird Patrick transactions.³²

With up-ticks effected on May 13, 1996, Monitor's sales force, including Respondents Giglio, Goldstein, and Leverett, made numerous misrepresentations and/or baseless price predictions to their customers to solicit purchases of ASWI. As will be discussed more fully herein with respect to the specific charges against individual Respondents, the following types of statements were made to Monitor's customers: (1) ASWI was a Rule 504 Offering being purchased directly from the Company; (2) other major market makers would begin trading ASWI shortly; (3) ASWI was an "IPO" which would open in the next few months in the \$8.00-\$15.00 range; (4) the price of ASWI would rise dramatically within the next few weeks; and (5) ASWI was attempting to raise capital before an offering would be released in 60-90 days.

As demonstrated by the evidence, on May 13-14, 1996, Monitor sold 120,600 shares of ASWI to its customers in over 100 transactions and 7,000 shares in inter-dealer transactions. The ASWI shares sold to Monitor's customers were in prices ranging from \$3.875 to \$7.25 (the vast majority at \$6.75).³³ The evidence further demonstrates that

³² CX-59, 60; Tr., 12/3/98 at 94-96 (Shields), 121-22, 132, 138, 141-42, 149-53 (D'Angelo).

³³ CX-59-62.

Monitor was involved in every transaction on May 13-14, 1996 involving ASWI.³⁴ Thus, Monitor dominated and controlled the market in ASWI, and had an inexpensive and ready supply of stock purchased at \$1.00 per share to support the demand created by its sales force. In selling ASWI to its customers, Monitor, through certain Respondents, charged \$221,931.00 in excessive and fraudulent markups which ranged from 10.48% to over 74% above the Firm's contemporaneous costs.³⁵

III. Findings As To Individual Respondents

A. RESPONDENT GALASSO

1. The Seventh Cause of the Complaint: Violations of Section 10(b), SEC Rule 10b-5, and NASD Rules 2110 and 2120

The Sixteenth Cause of the Complaint: Violations of SEC Rule 10b-6 and NASD Rules 2110 and 2120

The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent Galasso manipulated the supply and price of ASWI. The Hearing Panel also finds that the preponderance of the evidence demonstrates that Respondent Galasso knowingly or recklessly, while Monitor was engaged in a distribution of ASWI, engaged in manipulative trading and other special selling methods.

³⁴ *Id.* Monitor was not in possession of any ASWI shares at the start of trading on May 13, 1996. On the trading dates, Monitor purchased 124,500 shares from the DMN account at Baird Patrick (*i.e.*, 94.67% of all shares purchased in ASWI) and sold 90% of those shares to its retail customers. CX-59-60; Tr., 11/17/98 at 211, 215, 219, 225-28, 232-33; Tr., 12/3/98 at 96 (Shields), 141-49 (“D’Angelo”). It was responsible for 50.61% of all sales in ASWI (the remaining sales volume was from Baird Patrick effecting transactions for DMN). Further Monitor was involved in 65.71% of all ASWI shares purchased or sold on May 13-14, 1996 and as of May 13, 1996, Monitor controlled 65.71% of the total volume of ASWI. (The remaining 32.45%, was controlled by Baird Patrick for the account of DMN). CX-62; Tr., 11/17/98 at 264-266.

³⁵ CX-150 at 04514-17; Tr., 12/3/98 at 91-93. Although no evidence was presented that Monitor was entitled to a maximum 5% markup in connection with the ASWI transactions, if it were, the actual markups that should have been charged for the ASWI transactions were \$23,921.87. CX-150 at 4517.

As noted above, as a first step in furthering the ASWI scheme, Monitor applied to the NASD for approval to be a market maker and list quotes in ASWI on the OTC Bulletin Board. Respondent Galasso, on Monitor's behalf, filed two such applications, one hand-written (December 1995) and one typed (April 1996).³⁶ Respondent Galasso had direct knowledge that the source of supply of ASWI shares was an earlier private placement in which the price of the shares was valued at \$1.³⁷ Further, the testimonial and documentary evidence demonstrates that at the time Respondent Galasso first filed the Form 211 in December 1995, he had access to the Rule 504 Offering memorandum and other related financial data.³⁸ In fact, the Form 211 discloses that Respondent Galasso based his opening "bid and ask" quotes on the information provided in the Rule 504 Offering memorandum.³⁹

Respondent Galasso actively and willingly participated in and contributed to Monitor's scheme to manipulate ASWI -- moving the price of ASWI upward. As Monitor's trader,⁴⁰ Respondent Galasso moved the share price of the ASWI shares from \$1.25 to \$9.375 in just two hours through twelve transactions with two other traders.⁴¹ The two traders -- Magelinsky of Ernst and Dubronsky of Dean Witter -- testified that after each transaction on May 13, 1996, Respondent Galasso up-ticked the price of

³⁶ CX-30 at 893-896, 889-892. Respondent Galasso was listed as "the employee to contact regarding information contained in the Form 211 application." Respondent Galasso admitted that he signed both Forms 211 and had partially completed the handwritten form. Tr., 12/4/98 at 486-91; Tr., 2/1/99 at 457.

³⁷ CX-30 at 890, 894; Tr., 12/4/98 at 488-91, 495-97; Tr., 2/1/99 at 458 (Galasso).

³⁸ CX-30 at 892, 896; Tr., 12/4/98 at 492-97.

³⁹ CX-30; Tr. 2/1/99 at 459-460.

⁴⁰ Tr., 12/4/98 at 480-81, 504-05 (Galasso).

ASWI.⁴² This series of up-ticks in the price of ASWI was not related to a sudden market demand in shares of ASWI nor to any available news relating to ASWI.⁴³ Rather, these up-ticks were manufactured by Respondent Galasso to inflate the price of ASWI shares.⁴⁴ Indeed, given the fact that the customers who purchased ASWI shares during the period that Respondent Galasso was up-ticking the price all had apparent connections to Monitor, the Hearing Panel concludes that Respondent Galasso engaged in certain prearranged transactions in order to create an artificial market demand for ASWI shares.⁴⁵

Respondent Galasso also was instrumental in another step in the manipulation of ASWI -- moving the price of the shares of ASWI downward. On May 13, 1996 between 15:37 and 16:13, Respondent Galasso purchased into his inventory from the DMN account at Baird Patrick 89,500 shares of ASWI at ever-decreasing prices from \$9.375 to \$3.875.⁴⁶ During his on-the-record interview, Respondent Galasso admitted that the reason he moved the price down was so he could execute the customer orders at the

⁴¹ Tr., 11/17/98 at 216-225 (Shields); Tr., 12/4/98 at 519 (Galasso).

⁴² Tr., 12/3/98 at 190-196 (Magelinsky), 218-227 (Dubronsky). The first up-tick of the day was based on a purchase of ASWI shares by Monarch for Respondent Galasso's grandparents. CX-47, 61; Tr., 11/17/98 at 208-210 (Shields); Tr., 12/4/98 at 538-46 (Galasso).

⁴³ CX-61; CX-154 at 371; Tr., 11/17/98 at 219-26; Tr., 12/3/98 at 277-78 (Shields); Tr., 12/4/98 at 511 (Galasso).

⁴⁴ On May 13, 1996, at 12:05 p.m., Respondent Galasso reported to the NASD tape a bogus trade for 1000 shares with Ernst at a share price of \$4.25. CX-60, Tr., 11/17/98 at 219-220. Several days later, he reported this as a canceled trade to NASD. *Id.* Magelinsky, the Ernst trader, testified she never placed such an order with Galasso. Tr., 12/3/98 at 198-99. The net effect of this sham transaction was the movement of ASWI's price from \$2.375 to \$5.375. Tr., 11/17/98 at 219-223.

⁴⁵ In addition to Respondent Galasso's grandparents, the other customers who purchased ASWI shares through Ernst and Dean Witter also had a relationship with Monitor. These customers were Astaire & Partners, whose Monitor account was serviced by Respondents McMahon and Montelbano, and John Serpico, whose account was serviced by Respondent Giglio. CX-41, 48, 49, 52; Tr., 11/17/98 at 209-12, 222-25.

⁴⁶ Tr., 11/17/98 at 225-233.

prices indicated on the tickets.⁴⁷ At the Hearing, Respondent Galasso testified that he followed Palla's instructions and moved the price of the stock to give the brokers the \$2.25 credit that they wanted.⁴⁸ Respondent Galasso knew that he would be able to move the price of ASWI downward because he admitted to having an arrangement with Baird Patrick trader D'Angelo to supply ASWI shares.⁴⁹

In addition, Respondent Galasso treated the freely tradable shares of ASWI as if the offering were an IPO, which it was not. He did this by allocating ASWI shares in his inventory to customer orders at the end of the day on May 13, 1996.⁵⁰ Further, Respondent Galasso admitted that he executed the customer orders after the close of the market on May 13, 1996 with predetermined compensation to the brokers and at predetermined prices by the brokers, having absolutely no relation to market forces.⁵¹

On May 13, when Respondent Galasso ran out of shares to allocate to approximately 30 customer orders, rather than taking a short position, he simply did not execute those orders and marked the tickets "not done."⁵² Respondent Galasso executed

⁴⁷ Tr., 11/17/98 at 232-233, 261-62 (Shields). Respondent Galasso told Shields that he knew what price he needed to execute the customers' orders and he made sure that when he purchased from Baird Patrick that he purchased at a price that would allow execution of the customers' orders. Tr., 11/17/98 at 261-62.

⁴⁸ Tr., 12/3/98 at 258; Tr., 12/4/98 at 520-22, 536-37; Tr., 2/1/99 at 526.

⁴⁹ CX-157; Tr., 12/4/98 at 519-524. Respondent Galasso testified "it was kind of agreed between me and him (D'Angelo) that he was going to sell it (the ASWI shares)." Tr., 12/4/98 at 521-22.

⁵⁰ Tr., 12/4/98 at 566-67; Tr., 2/1/98 at 471-472.

⁵¹ CX-154; Tr., 12/4/98 at 534; Tr., 2/1/99 at 424-25, 453, 462, 464-66. For example, on May 13, 1996, more than 42 customer orders from brokers at the 919 Third Avenue office were executed at the same price of \$6.75. CX-60; Tr., 11/17/98 at 239-241 (Shields).

⁵² Tr., 12/4/98 at 566-67; Tr., 2/1/98 at 471-474 (Galasso); Tr., 11/17/98 at 241-42 (Shields). Many of the actual order tickets from 30 Broad are marked "ND" (not done). *Id.* at 179; *see, e.g.*, CX-41 at 1439, 1443, 1446, 1449.

these orders the next day, after his inventory had been replenished by a fresh supply of shares from Baird Patrick.⁵³ Respondent Galasso executed all of the May 14 orders at predetermined prices (\$6.375) which incorporated predetermined special compensation to the brokers through the form of credits ranging from \$1 to \$1.25.⁵⁴

Respondent Galasso does not deny that any of the above-described activities took place. Rather, he attempts to defend his actions by blaming others. For example, he testified that he only was following the directions of Monitor's counsel when he filled out and filed the Forms 211.⁵⁵ He also testified that he only was following Respondent Palla's orders when he moved the price of ASWI.⁵⁶

Respondent Galasso's position was not substantiated by the evidence of record. Moreover, even if he were following Palla's instructions in manipulating the price and supply of ASWI, his conduct would not be excused. Respondent Galasso executed all customer orders for ASWI as presented without regard for market demand and with full knowledge that the prices were predetermined. Accordingly, his assertion that he was not responsible for the manipulation because he did not "write" the order tickets is without

⁵³ CX-60; Tr., 11/17/98 at 243-246; Tr., 2/1/99 at 474.

⁵⁴ CX-60; Tr., 11/17/98 at 243-244; Tr., 12/4/98 at 532-37; Tr., 2/1/99 at 423-425; see e.g., CX-42 at 1731-89.

⁵⁵ Tr., 1/29/99 at 376-380. Respondent Galasso's testimony that he had no understanding of the meaning of the Form 211 is not credible. Tr., 1/29/99 at 376-380. The record clearly establishes that (1) he asked the Firm's attorneys questions regarding the meaning of the Forms before signing them, including questions concerning a Rule 504 Offering, and received a response (Tr., 12/4/96 at 489-91; Tr., 2/1/99 at 458) and (2) he read the Rule 504 Offering disclosure documents prior to the commencement of ASWI trading on May 13 and was aware that ASWI's price in the Rule 504 Offering was \$1 (Tr., 12/4/98 at 495; Tr., 2/1/99 at 459). Respondent Galasso also signed and filed the Form 211 twice – once in December 1995 and once in April 1996. Even if he were unsure of what he was doing in December 1995, he certainly had sufficient time to acquaint himself with the information contained in the Form 211 in the 4 ½ month interval. Yet, he testified that he did nothing. Tr., 2/1/98 at 458-60.

⁵⁶ Tr., 12/4/98 at 537; Tr., 2/1/99 at 462, 466, 469-70, 484, 488.

merit.⁵⁷ Further, Respondent Galasso presented no evidence to suggest that he had any concerns about the legality of his actions regarding the trading of ASWI, or that he ever questioned Palla about the propriety of the ASWI trading.⁵⁸ Instead, the credible evidence demonstrates that Respondent Galasso was a willing participant in every stage of the ASWI scheme.

Much of the same evidence supports the Panel's findings with respect to the violations alleged in the Sixteenth Cause of Complaint that Respondent Galasso violated Section 10(b) of the Exchange Act, Rule 10b-6, and Conduct Rules 2110 and 2120. In particular, Respondent Galasso used manipulative trading and special selling techniques to assist Monitor in the distribution of ASWI.

The distribution at issue was the sale to the public of the 124,500 shares of ASWI, 24 % of the public float.⁵⁹ The evidence clearly shows that Respondent Galasso knew and participated in the distribution of ASWI shares. Further, by virtue of his position as the sole trader⁶⁰ executing orders on May 13 and May 14, Respondent Galasso had to be aware of the magnitude of the ASWI distribution because he reported each transaction to the NASD tape. Moreover, the evidence demonstrates that Respondent Galasso

⁵⁷ Respondent Galasso's Post-Hearing Submission And Summary Of Mitigating Facts As It Pertains To Sanctions ("Respondent Galasso's Br.") at 2. Similarly, Respondent Galasso's assertion that there is no evidence that he knew anything about the supply of ASWI (Id.) wholly ignores the overwhelming evidence to the contrary.

⁵⁸ Tr., 12/4/98 at 536-37; Tr., 2/1/99 at 485-86, 526-527.

⁵⁹ CX-62.

⁶⁰ On May 13-14, 1996, Respondent Galasso was located at Monitor's 919 Third Avenue office. No trader was located at Monitor's 30 Broad Street office. Tr., 11/17/98 at 246.

facilitated the distribution of ASWI by purchasing all ASWI shares sold on May 13 and 14 from the source, the DMN account at Baird Patrick.

The special selling techniques used by Respondent Galasso included manipulation of the price of ASWI in order for Monitor to obtain greater profits during the distribution and treating the distribution like an IPO.⁶¹ In addition, Respondent Galasso assisted the Monitor brokers in their special selling methods by executing the stack of order tickets that he received after the close on May 13, all at predetermined prices which included special compensation for the brokers.⁶²

2. *The Fifteenth Cause of the Complaint: Violations of Section 10(b), SEC Rule 10b-5, and NASD Rules 2110, 2120 and 2440*

The Hearing Panel finds that the preponderance of the evidence demonstrates that Monitor, acting through Respondent Galasso, charged the Firm's customers undisclosed excessive markups. Enforcement demonstrated that entities controlled by Monitor's owners and officers purchased the ASWI shares at \$1 per share in the Rule 504 private placement.⁶³ These same entities held the ASWI shares (for a short time) and then sold them to Monitor through the DMN account at Baird Patrick.⁶⁴ Monitor, acting through

⁶¹ Yvonne Huber, of NASD Market Regulation, testified that on May 14 Respondent Galasso admitted that he treated the ASWI distribution as if it were an IPO and allocated shares at the end of the day to different customers. Tr., 11/17/98 at 98. Indeed, Respondent Galasso admitted at the hearing that he treated the ASWI distribution in a special manner, "like" an IPO. Tr., 12/4/98 at 567.

⁶² Tr., 12/3/98 at 266; Tr., 12/10/98 at 16. Respondent Galasso's assertions in his Post-Hearing Brief (at 4) that there is "no evidence" that he treated ASWI as an IPO or that he was involved in allocating ASWI shares are unsupported and unsupportable in view of the overwhelming weight of the evidence to the contrary.

⁶³ CX-23-28, 36-40; Tr., 11/16/98 at 147-79, 180-204, 213, 284; Tr., 12/3/98 at 94-97.

⁶⁴ Tr., 12/3/98 at 95-7, 138-153.

Respondent Galasso, as the sole market maker in ASWI, dominated and controlled the ASWI market.⁶⁵

The Hearing Panel finds that the prices Monitor paid to Baird Patrick on May 13 and 14, 1996 for ASWI shares which were the closest in time to Monitor's bid to its retail customers are Monitor's contemporaneous costs and, thus, the proper basis on which to review markup charges.⁶⁶ Based on the evidence presented by Complainant, the Panel further found that Monitor's contemporaneous cost for ASWI was \$3.875 per share on May 13, 1996 and \$5.00 per share on May 14, 1996.⁶⁷

On May 13 and 14, Respondent Galasso executed order tickets for ASWI with excessive markups. Specifically, on May 13, he executed order tickets at a price of $6\frac{3}{4}$, which included a sales credit of \$2.25 for the brokers at the 919 Third Avenue office⁶⁸ and at a price of $6\frac{1}{2}$, which included a sales credit of \$1.25 for the brokers at the 30 Broad Street office.⁶⁹ On May 14, Respondent Galasso executed the 30 "left over" May

⁶⁵ CX-62; Tr., 11/17/98 at 264-267.

⁶⁶ Tr., 12/3/98 at 91 (Shields). Enforcement provided two schedules for calculating markups. Tr., 12/3/98 at 90. The first schedule calculated markups based on \$1, the price paid for ASWI shares in the Rule 504 Offering. *Id.* at 93; CX-150 at 4510-13. Complainant argues that because Monitor's owners controlled the DMN account from which Monitor purchased all the ASWI shares it resold to its customers, \$1 is the proper basis upon which to review markup charges. Tr., 11/17/98 at 271, 279, 282, 290, 307; Tr., 12/3/98 at 96-97. While Complainant's position is understandable, it is not correct for purposes of calculating markups. The Panel concludes that the price paid for ASWI shares in the Rule 504 Offering must be viewed as Monitor's historical costs, not the prevailing market price of ASWI or the Firm's contemporaneous costs of acquiring the shares from Baird Patrick on May 13-14, 1996. The latter is the correct basis for determining the prevailing market price from which the markups are to be calculated. Monitor's contemporaneous costs for acquiring ASWI shares on May 13-14, 1996 are set forth in a separate schedule in CX-150. Tr., 12/3/98 at 90-93; CX-150 at 4514-17.

⁶⁷ Tr., 12/3/98 at 92-93; *see* CX-60; CX-150 at 4514-17.

⁶⁸ CX-42 at 1685-1724; CX-45; Tr., 12/4/98 at 533-534, 536-538 (Galasso).

⁶⁹ CX-42 at 1666-1684; CX-45.

13 customer order tickets for brokers at the 30 Broad Street office with sales credits of \$1.25.⁷⁰

Respondent Galasso admitted that he executed customer orders for ASWI on May 13 and 14 at prices having nothing to do with the prevailing market price, but designed to give the brokers the credits⁷¹ they were promised by the Firm.⁷² As a result of the execution of the customer orders with excess markups, Monitor, acting through Respondent Galasso, charged more than \$221,000 in excessive markups, which ranged from 10.48% to 74.19% above Monitor's contemporaneous costs.⁷³

3. *The Eighteenth Cause of the Complaint: Violations of NASD Rules 8210, 2110 and 3110*

The Hearing Panel finds that the preponderance of the evidence establishes that Respondent Galasso's actions resulted in the generation of false and misleading trade confirmations. The Hearing Panel also finds that he submitted an incomplete set of order tickets in response to NASD requests.⁷⁴

⁷⁰ CX-42 at 1731-1789.

⁷¹ Throughout its Brief, Enforcement refers to "credits" when that terminology was used by a witness or when "CR" was written on the order tickets. The evidence demonstrates that during the ASWI scheme, Monitor brokers were offered special compensation in the form of "credits." Many of the brokers who testified, referred to this special compensation as "credits."

⁷² Tr., 12/4/98 at 533-536; Tr., 12/10/98 at 39. The fact that Respondent Galasso did not have any customers and executed the order tickets as completed by the brokers is not a defense. See Respondent Galasso's Post-Hearing Br. at 3. As the evidence clearly demonstrates, Respondent Galasso knew the prices were predetermined, knew the prices included special compensation to the brokers, and knew the markups were excessive. Indeed, Respondent Galasso admitted that he might have said he thought the markups were excessive. Tr., 12/4/98 at 538.

⁷³ CX-150 at 4514-17; Tr., 12/3/98 at 93. The evidence demonstrates that of the 107 transactions on May 13-14, 1996, all but six (6) resulted in markups which were greater than 10% and, thus, as discussed herein, were fraudulent *per se*.

⁷⁴ Tr., 12/3/98 at 257(Shields); Tr., 12/4/98 at 543 (Galasso).

The customer confirmations for ASWI did not reflect any compensation to the Firm or brokers because Respondent Galasso ensured that the reported price, execution price, and limit price indicated on the tickets were the same, even though this did not accurately reflect the transactions.⁷⁵

In addition, on May 13, 1996, Respondent Galasso sent to Monitor's clearing firm, RAF, order tickets with sales credits of \$2.25.⁷⁶ Then, on May 16, after Yvonne Huber of NASD Market Regulation called and interviewed Respondent Galasso, and after the NASD visited the firm, the May 13 order tickets were canceled and rebilled to lower the sales credits.⁷⁷ Respondent Galasso admitted he sent the "new" order tickets to RAF.⁷⁸

Respondent Galasso did not cooperate with the NASD Staff on May 16, 1999 when it requested all the order tickets for the ASWI trading. Rather, Respondent Galasso knowingly only provided the NASD with some of the ASWI tickets -- significantly, none

⁷⁵ Tr., 12/3/98 at 271, 285-86 (Shields); Tr., 2/1/99 at 424, 462, 492-93. Significantly, Respondent Galasso testified as follows at his February 5, 1997 on-the-record interview (CX-156):

Galasso: They didn't want to show it as markups. They wanted a reported price, an executed price and a limit price all the same, okay? And as no commission.

Q. As no markup?

Galasso: As no markup.

Q. The confirm would show reported price and net the same?

Galasso: Reported price, net the same, price the same, no markup. So it looks like the customer was just buying the stock for free.

⁷⁶ Tr., 12/3/98 at 322 (Shields).

⁷⁷ CX-45; Tr., 12/3/98 at 295-96, 321-22 (Shields); Tr., 12/4/98 at 355-57, 359-63 (Miskell).

⁷⁸ Tr., 12/3/98 at 307.

of which showed the \$2.25 sales credit⁷⁹ -- and he never told the NASD that the ASWI order tickets had been canceled and rebilled.⁸⁰

4. *The Thirty-Fifth Cause of the Complaint: Violations of NASD Rules 8210 and 2110*

The Hearing Panel finds that the preponderance of the evidence establishes that Respondent Galasso failed to respond truthfully to NASD Staff inquiries during on-the-record interviews.

Respondent Galasso testified that on May 13, 1996 he received an order for 10,000 shares of ASWI from Magelinsky of Ernst.⁸¹ At the hearing, Magelinsky stated she never placed such an order.⁸²

In May 1996, Respondent Galasso also told the NASD that he did not know Mr. and Mrs. Defazio, his grandparents.⁸³ He admitted at the Hearing that he did not tell the truth.⁸⁴

⁷⁹ Tr., 12/3/98 at 257-60; Tr., 2/1/99 at 653. The evidence demonstrates that initially the brokers would have earned a 2 ¼ credit per share or 33% of the price as a commission. On the “rebilled” tickets actually provided to the NASD, the brokers were to earn a ¼ credit; Tr., 12/3/98 at 258 (Shields). Even though the commissions were lowered, Monitor’s customers still paid the price initially charged (Tr., 12/3/98 at 291-92). The net effect of changing the commissions was that the amount received by the brokers was reduced and the amount Monitor received was increased (Id.).

⁸⁰ The evidence demonstrates that initially the brokers would have earned a 2 ¼ credit per share or 33% of the price as a commission. On the “rebilled” tickets actually provided to the NASD, the brokers were to earn a ¼ credit; Tr., 12/3/98 at 258 (Shields). Even though the commissions were lowered, Monitor’s customers still paid the price initially charged (Tr., 12/3/98 at 291-92). The net effect of changing the commissions was that the amount received by the brokers was reduced and the amount Monitor received was increased (Id.).

⁸¹ Tr., 12/4/98 at 557-58.

⁸² Tr., 12/3/98 at 196-197.

⁸³ Tr., 11/17/98 at 209 (Shields); Tr., 12/4/98 at 554-56. In a subsequent on-the-record interview in June 1996, Respondent Galasso, again, initially denied knowing Mr. Defazio, his grandfather. Then, after consulting with counsel, he changed his testimony and admitted he knew his grandparents. Tr., 12/10/98 at 48-49.

⁸⁴ Tr., 12/10/99 at 48-49.

B. RESPONDENT MCMAHON

1. *The Fifth Cause of the Complaint: Violations of Section 10(b), SEC Rule 10b-5, and NASD Rules 2110 and 2120*

The Hearing Panel finds that Respondent McMahon played an essential role in the ASWI scheme by providing to Monitor's brokers false and misleading information regarding ASWI, which induced them to sell the shares.

a. *Information provided to brokers at 919 Third Avenue*

Five brokers from Monitor's 919 Third Avenue office (Hogan,⁸⁵ Kardish,⁸⁶ Nejaime,⁸⁷ Leverett⁸⁸ and Goldstein⁸⁹) testified that Respondent McMahon conducted a sales meeting regarding ASWI *prior* to the commencement of Monitor's trading activity.⁹⁰ The brokers testified that during the meeting Respondent McMahon touted the company as a very good opportunity to make money and compared it favorably to a company called Tivoli that had been purchased by IBM for over \$700 million.⁹¹ The brokers also testified that Respondent McMahon: (1) provided price projections for ASWI in the short term of \$15-\$20 and \$100 in long term;⁹² (2) explained to the brokers

⁸⁵ Tr., 12/17/98 at 242-243.

⁸⁶ Tr., 12/17/98 at 179-220.

⁸⁷ Tr., 12/16/98 at 189-190.

⁸⁸ Tr., 12/29/98 at 21-22.

⁸⁹ Tr., 12/17/98 at 136-137.

⁹⁰ Tr., 12/30/98 at 160.

⁹¹ Tr., 12/16/98 at 190 (Nejaime); Tr., 12/17/8 at 145 (Goldstein), 220 (Kardish).

⁹² Tr., 12/16/98 at 257-258 (Hogan); Tr., 12/17/98 at 184, 220-21 (Kardish); Tr., 12/18/98 at 32 (Goldstein).

that there were a limited number of shares available to each of them;⁹³ (3) indicated he liked the stock so much that he was taking ASWI warrants as his investment banking fee;⁹⁴ and (4) told them that the ASWI shares were being sold as part of a Rule 504 offering.⁹⁵

In addition, during the Hearing and at their on-the-record interviews, certain brokers testified that prior to the commencement of trading in ASWI, Respondent McMahon, along with Palla, told them the commission they would earn on ASWI transactions⁹⁶ and the price at which ASWI was going to be sold.⁹⁷

None of this evidence effectively was rebutted by Respondent McMahon. In response he offered only uncorroborated and self-serving denials, repeatedly testifying that he never spoke to any broker at any time about ASWI.

b. Information provided to brokers at 30 Broad Street

The evidence demonstrates that Respondent McMahon also had numerous conversations with the brokers at Monitor's 30 Broad Street office concerning ASWI *prior* to it trading publicly.⁹⁸ Sierp and Telemany testified⁹⁹ that they were told by

⁹³ Tr., 12/16/98 at 244-45 (Hogan).

⁹⁴ Tr., 12/16/98 at 255 (Hogan); Tr., 12/17/98 at 144-45 (Goldstein).

⁹⁵ Tr., 12/17/98 at 137-38, 242; Tr., 12/18/98 at 16 (Goldstein).

⁹⁶ Tr., 12/17/98 at 144 (Goldstein).

⁹⁷ CX-167 (Nejaime) [on-the-record interview].

⁹⁸ Respondents McMahon and Montelbano shared an office at Monitor's 30 Broad Street office. Tr., 12/29/98 at 143, 216. As a result, many of the brokers from the 30 Broad Street office testified that they had joint conversations with Respondents McMahon and Montelbano concerning ASWI. Accordingly, much of the evidence recited here with respect to Respondent McMahon also supports the Hearing Panel's findings as to the Fourth and Sixth Causes of Complaint concerning Respondent Montelbano.

⁹⁹ Sierp testified at the Hearing. Telemany was in default and his on-the-record interview (CX-110) was admitted into evidence.

Respondents McMahon and Montelbano: (1) that only a limited number of shares were available which could be allocated for sale to their customers;¹⁰⁰ (2) that they would receive a special credit between 5/8 and \$1 per share;¹⁰¹ (3) projected prices for ASWI of between \$20-\$40 per share;¹⁰² and (4) the price at which ASWI was scheduled to sell.¹⁰³

During their on-the-record interviews, other brokers from Monitor's 30 Broad Street office testified that, prior to May 13, 1996, Respondents McMahon and Montelbano told them that ASWI was a great trading opportunity because it was a very good company.¹⁰⁴ They also testified that they received materials on ASWI from Respondent McMahon and/or had conversations with Respondents McMahon and Montelbano concerning the relative merits of ASWI and Tivoli.¹⁰⁵

The Hearing Panel found Respondent McMahon's testimony that he never spoke to any broker at any time about ASWI, and that all the brokers who testified were lying, contrary to the great weight of credible evidence. In fact, Respondent McMahon's testimony that the brokers lied about his involvement in ASWI either because they feared for their safety or loss of their NASD licenses¹⁰⁶ was contradicted by the testimony of

¹⁰⁰ Tr., 12/16/98 at 107-08; CX-110 at 3307.

¹⁰¹ Tr., 12/16/98 at 109-110; CX-110 at 3307.

¹⁰² CX-110 at 3301-3303, 3319.

¹⁰³ Id. at 3327; Tr., 12/16/98 at 108.

¹⁰⁴ CX-129 at 3877-78 (Cushing); CX-130 at 3912-13 (Gonzalez).

¹⁰⁵ CX-129 at 3869; CX-130 at 3915-17, 3929; CX-106 at 3240-41 (Herkert).

¹⁰⁶ Tr., 1/28/99 at 189.

Sierp who, when asked at the Hearing directly by Respondent Montelbano whether he feared for his safety, responded “no, not at all.”¹⁰⁷

Based on the foregoing evidence, the Hearing Panel finds that Respondent McMahon, with the requisite scienter, engaged in manipulative and deceptive acts in connection with the purchase and sale of ASWI by disseminating baseless information to Monitor’s brokers to induce them to sell shares of ASWI.

2. *The Sixteenth Cause of the Complaint: Violations of SEC Rule 10b-6 and NASD Rules 2110 and 2120*

As the evidence discussed previously demonstrates, Monitor was engaged in a distribution of ASWI. The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent McMahon knew of and participated in such distribution and that during such distribution, knowingly or recklessly, engaged in special selling efforts.

For example, at the Hearing, Tagliareni, the President of ASWI, testified:

- Q. “Did anybody from Monitor specifically help you with some of the business documents with the 504 placement?”
- R. “Yes. The business documents, our plan was to present a public offering. We call it the big IPO. And the research analyst, Jerry McMahon, added the business plan for that IPO.”¹⁰⁸

Tagliareni further testified that the business plan he was referring to mentioned the Rule 504 offering¹⁰⁹ and that Respondent McMahon was aware that Monitor had been involved with the Rule 504 offering.¹¹⁰

¹⁰⁷ Tr., 12/16/98 at 144.

¹⁰⁸ Tr., 12/3/98 at 49.

Respondent McMahon wholly failed to rebut Tagliareni's testimony demonstrating his knowledge of the Rule 504 offering and his participation in the distribution of ASWI.¹¹¹ Moreover, his testimony that he knew nothing about the ASWI Rule 504 offering until after ASWI began trading in May 1996 also is contrary to other evidence presented at the hearing. By virtue of his position (research analyst) at Monitor, he admittedly played a crucial role in the companies that the Monitor sales force marketed to the public.¹¹² Respondent McMahon admitted that prior to ASWI trading on May 13 he visited Prudential and observed ASWI's software in operation and also had numerous conversations with employees of ASWI and Tagliareni.¹¹³ He testified that he knew details about the company, including for example, that the company had no earnings.¹¹⁴

Notwithstanding the foregoing admissions, Respondent McMahon denied that he had read ASWI's business plan.¹¹⁵ Rather, he testified that Pokross and Palla asked him

¹⁰⁹ Id. at 81-82.

¹¹⁰ Tagliareni testified, "[a]bsolutely, Jerry McMahon knew that there was a 504 offering between our company and Monitor." Tr., 12/3/98 at 82. Further, Respondent Montelbano testified that Respondent McMahon told him that the offering was not going to be an IPO, but, rather, a Rule 504 offering. Tr., 12/29/98 at 154-155.

¹¹¹ Respondent McMahon filed a Post Hearing Submission which fails to set forth facts or citations to the record to support his position and wholly ignores the evidence of record. Indeed, his Post-Hearing Submission best is described as a diatribe against certain individuals and the NASD. Thus, it does nothing to assist Respondent McMahon's position in this proceeding.

¹¹² During his testimony he admitted that as a regular course of his duties at Monitor, he constantly reviewed prospective business deals that were presented to him by Pokross (Tr., 12/29/98 at 212-13) and conferred with Palla regarding Monitor's market making activity. (Id. at 226).

¹¹³ Tr., 12/29/98 at 236-37.

¹¹⁴ Tr., 1/28/99 at 188-89.

¹¹⁵ Respondent Montelbano testified that he and Respondent McMahon met Tagliareni in November 1995 and that Respondent McMahon had the ASWI business plan at that time (Tr., 12/29/98 at 151-54). In fact, on cross-examination, Respondent McMahon admitted he gave a business plan for ASWI to Respondent Montelbano (Tr., 1/28/99 at 201).

to review the business plan as a favor, but that he only edited the executive summary and never looked at the financials.¹¹⁶

The Hearing Panel finds Respondent McMahon's testimony not credible. In light of his duties to evaluate securities deals, his experience in the industry, and his involvement with and knowledge of ASWI, it is inconceivable that he would edit a business plan for grammar and not look at the portions of the plan describing the company's financials. Based upon the foregoing, the Hearing Panel finds that Respondent McMahon knew of the Rule 504 offering before ASWI began trading on May 13 and participated in the distribution.

Respondent McMahon also engaged in special selling efforts to assist Monitor in conditioning the market to make the ASWI distribution more profitable. Such special efforts included mobilizing the firm's brokers to sell ASWI shares to their customers and offering them special compensation for such sales,¹¹⁷ and treating the ASWI distribution like an IPO by allocating a specific numbers of shares to certain brokers.¹¹⁸

The defense witnesses¹¹⁹ Respondent McMahon called to support his contention that he never spoke to the brokers about ASWI and was surprised when it started trading

¹¹⁶ Tr., 12/29/99 at 232-36.

¹¹⁷ Tr., 12/16/98 at 109-10 (Sierp); CX-110 at 3307 (Telemany).

¹¹⁸ Tr., 12/16/98 at 107-108 (Sierp); CX-110 at 3310 (Telemany).

¹¹⁹ Respondent McMahon called four witnesses jointly with Respondent Montelbano: Thomas Hauke, Mark Ferro, Elliot Gayer and Todd Spenla. The testimony of Hauke, a CPA, regarding his audit of Monitor's books (Tr., 1/28/99 at 82-84), and Ferro, a mutual funds wholesaler, about mutual funds presentations to Monitor's brokers (Tr., 1/28/99 at 103-04) is not relevant. Neither witness knew anything about the ASWI offering.

were not persuasive.¹²⁰ Witnesses Gayer and Spenla were offered to establish that on May 13 when McMahon found out that ASWI suddenly was trading, he called a headhunter and immediately, with Respondent Montelbano, had a meeting with Gayer and Spenla to discuss potential new employment opportunities.

The testimony of Gayer and Spenla does not support Respondent McMahon's position. Gayer's testimony, in conjunction with his CRD records, clearly establishes that Gayer only could have interviewed Respondents McMahon and Montelbano after October 1996 when Gayer was employed at H.B. Turck.¹²¹ Similarly, Spenla's testimony was of no value since he testified that he had no independent recollection of the date he met with Respondents McMahon and Montelbano and that he had relied on what Gayer told him concerning the date.¹²² Thus, during his direct case, Respondent McMahon failed to present any credible evidence to rebut the violations alleged in the Sixteenth Cause of Complaint.¹²³

3. The Thirty-Fourth Cause of the Complaint: Violations of NASD Rules 8210 and 2110

The Hearing Panel finds that Respondent McMahon failed to respond completely and truthfully during his on-the-record interview about his knowledge and involvement in the marketing of ASWI.

¹²⁰ Respondent McMahon's testimony that he was outraged on May 13 when he thought someone had lied to him about ASWI (Tr., 1/28/99 at 203) and, consequently, wanted to leave Monitor immediately (*Id.* at 198-201) is highly suspect. The un rebutted evidence establishes that instead of leaving Monitor he remained and accepted a promotion to Vice Chairman, entangling himself further with the same individuals who allegedly lied to him (Tr., 1/28/99 at 202-03). Moreover, despite his purported moral outrage about having been fooled about ASWI, Respondent McMahon continued to maintain a business association with Pokross even after he left Monitor (Tr., 12/29/98 at 246-47, 250).

¹²¹ CX-214 ; Tr., 1/28/99 at 126-29.

¹²² Tr., 1/28/99 at 164-66, 182.

First, Respondent McMahon was not truthful about the timing of when he first heard about ASWI and met Tagliareni. During his on-the-record interview Respondent McMahon stated that he first heard about ASWI in March 1996 at Monitor's 20 Exchange Place office when Pokross introduced him to Tagliareni.¹²⁴ This statement, however, was contradicted by Tagliareni who testified that he first met Respondent McMahon prior to his association with Monitor in September 1995.¹²⁵ Moreover, Tagliareni testified that he first was introduced to Respondent McMahon by Palla as the man who was going to "clean my materials up."¹²⁶

Second, Respondent McMahon was not truthful about discussions with Respondent Montelbano concerning ASWI. During his on-the-record interview McMahon stated that the only conversation that he had with Respondent Montelbano prior to ASWI trading in May 1996 was to tell him that Tagliareni was a nice guy.¹²⁷ This statement was refuted by Respondent Montelbano who testified that in November 1995 Respondent McMahon introduced him to Tagliareni.¹²⁸ Respondent Montelbano further testified that Respondent McMahon was holding a thick business plan which he handed to Respondent Montelbano to review.¹²⁹ Respondent Montelbano also testified

¹²³ See Tr., 1/28/99 at 184-191.

¹²⁴ Tr., 12/29/98 at 229-30. During the Hearing, Respondent McMahon continued to insist that he first met Tagliareni during the first quarter of 1996.

¹²⁵ Tr., 12/3/98 at 71-72.

¹²⁶ Tr., 12/3/98 at 73-4; see also Tr., 12/29/98 at 152-154 (Montelbano).

¹²⁷ Tr., 12/29/98 at 241.

¹²⁸ Id. at 151-52.

¹²⁹ Id.

that after Respondent McMahon visited the Prudential command center, he told Respondent Montelbano that ASWI was not going to be an IPO, but was going to be a Rule 504 private placement.¹³⁰

Finally, as discussed above, the great weight of the evidence establishes that McMahon was not truthful during his on-the-record interview when he testified that he never spoke to any brokers at Monitor about ASWI prior to May 13, 1996.¹³¹

C. RESPONDENT MONTELBANO

1. *The Fourth Cause of the Complaint: Violations of Section 10(b), Rule 10b-5, and NASD Rules 2110 and 2120*

*The Sixteenth Cause of the Complaint: Violations of Rule 10b-6 and NASD Rules 2110 and 2120*¹³²

The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent Montelbano, with the requisite scienter, engaged in manipulative and deceptive acts in connection with the purchase and sale of ASWI on May 13 and 14, 1996. The Hearing Panel finds that the same evidence also supports the violations alleged in the Sixteenth Cause of Complaint that Respondent Montelbano solicited purchases of ASWI during the distribution of ASWI by using special selling techniques.

¹³⁰ *Id.* at 154-55.

¹³¹ Tr., 12/29/98 at 228-229. At the Hearing, McMahon confirmed this prior testimony and stated that all the brokers who testified respecting such meetings were incorrect. He further confirmed his prior testimony that he first he heard of ASWI in the first quarter of 1996.

¹³² The Hearing Panel determined that the same evidence supports violations both of the Fourth and Sixteenth Causes of the Complaint. In addition, much of the evidence which supports the Panel's findings as to Respondent McMahon concerning the Fifth and Sixteenth Causes of the Complaint discussed in sections B 1 and B 2 above also supports the Panel's findings as to Respondent Montelbano and will not be repeated here.

Respondent Montelbano's activities included allocating shares of ASWI to the brokers¹³³ and providing them with baseless information about ASWI.¹³⁴ Respondent Montelbano also offered brokers special compensation in the form of credits to induce them to sell shares of ASWI.¹³⁵ He also told the brokers the price at which ASWI would be offered.¹³⁶

As for the violations alleged in the Sixteenth Cause of Complaint, the Panel concludes that Respondent Montelbano, both by virtue of his position as the Firm's President and the above-described activities, knew that Monitor was engaged in a distribution of ASWI shares. The above-described special selling efforts all were intended to make such distribution more profitable for Monitor, its officers, and employees.

Respondent Montelbano offered no credible evidence to refute the brokers' testimony concerning his involvement in the ASWI scheme.¹³⁷ Rather, as did

¹³³ Tr., 12/16/98 at 107-108 (Sierp); CX-106 at 3256-57 (Herkert); CX-110 at 3303, 3310, 3323 (Telemetry). At his on-the-record interview, Telemetry testified that Respondents McMahon and Montelbano told him that the ASWI offering was a private placement, "[i]t was the 'before' stage of an IPO." CX-110 at 3315.

¹³⁴ Tr., 12/30/98 at 158-59 (Shields); CX-130 at 3912-3913, 3916. At his on-the-record interview, Herkert testified that he received materials concerning ASWI from Montelbano (CX-106 at 3242-3243). Respondent Goldstein testified that Respondent Montelbano was present at Monitor's 919 Third Avenue office when Respondent McMahon gave his sales presentation regarding ASWI (Tr., 12/17/98 at 137-38). Sierp testified that he spoke with Respondent Montelbano about ASWI (Tr., 12/16/98 at 137-38).

¹³⁵ Tr., 12/16/98 at 109-110 (Sierp); CX-110 at 3307 (Telemetry). Sierp testified that based on what Respondent Montelbano told him, he wrote \$1.00 in the commission box on his order tickets (*Id.* at 115-16).

¹³⁶ Tr., 12/16/98 at 108 (Sierp); CX-110 at 3327 (Telemetry).

¹³⁷ In his Post-Hearing Submission ("Br"), Respondent Montelbano demonstrated some inconsistencies in the brokers' testimony as to what they were told as to ASWI by Respondents Montelbano and McMahon. Br. at 2-3. The Hearing Panel determined that this was not surprising since the evidence demonstrates that Respondents McMahon and Montelbano spoke with different brokers at different times about ASWI and the information they were given may not have been consistent. Further, to the extent a broker's testimony at

Respondent McMahon, he accused the brokers who testified against him of lying because they feared for their safety or loss of their NASD licenses.¹³⁸ Respondent Montelbano, however, offered no evidence to support this position which, in fact, was contradicted by Sierp.¹³⁹

2. *The Twenty-First Cause of the Complaint: Violations of NASD Rules 3010 and 2110*

The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent Montelbano was Monitor's acting President during the ASWI distribution and, thus, had ultimate responsibility to ensure that Monitor's brokers were not committing sales practices violations. The evidence also demonstrates that Respondent Montelbano, as the acting President and one of the supervising principals at Monitor, failed to prevent the brokers from engaging in manipulative and deceptive sales practices while selling ASWI.

Respondent Montelbano held himself out to the NASD Staff on multiple occasions as the President of Monitor. Wayne Freeman, an NASD Staff supervisor, testified that on April 3, 1996, the first date that he visited the Firm as a part of his examination, Respondent Montelbano introduced himself as the President of Monitor.¹⁴⁰ Shields testified that during his visits to Monitor in May 1996, Respondent Montelbano

the Hearing was inconsistent with his prior statements made during an on-the-record interview, the Panel took such factor into consideration in evaluating the testimony against Respondent Montelbano.

¹³⁸ Tr., 1/28/99 at 148-149.

¹³⁹ Tr., 12/16/98 at 144.

¹⁴⁰ Tr., 12/10/98 at 275-276, 297.

held himself out as the Firm's President.¹⁴¹ Further, in written correspondence to the NASD, Respondent Montelbano held himself out as the President of Monitor.¹⁴²

The evidence also demonstrates that Respondent Montelbano, as the acting President and one of the supervising principals at Monitor, failed to prevent the brokers from engaging in manipulative and deceptive sales practices while selling ASWI.

Respondent Montelbano's supervisory responsibilities were established by several former Monitor employees and brokers who testified that he was the Firm's President and/or their supervisor.¹⁴³ For example, Sharon Feliciano, who assisted Respondent Gennuso in the Operations Department, stated during her on-the-record interview that Respondent Montelbano was the President and that she brought certain issues to his attention, such as the securities business being conducted by an unregistered representative employed by the firm.¹⁴⁴

¹⁴¹ Tr., 11/17/98 at 175.

¹⁴² CX-66 (This letter is addressed to Respondent Montelbano as President and receipt was acknowledged by him. It is dated April 19, 1996, almost a month before ASWI started trading.). In fact, Respondent Montelbano made clear his authority as President when he wrote a letter, in April of 1996, criticizing Freeman's conduct at Monitor (Tr., 12/10/98 at 277-81). After this letter, Respondent Montelbano requested that, prospectively, Freeman deal exclusively with him and make all future NASD requests for Monitor documents to him directly (*Id.* at 289). Freeman testified that it was Respondent Montelbano who ultimately produced documents (branch and employment agreements and organizational charts) in response to the Staff's requests (*Id.* at 266-67, 269-71).

¹⁴³ Tr., 12/16/98 at 102-03 (Sierp); Tr., 12/17/98 at 12-13 (McGuinn), 89 (Basile); Tr., 12/18/98 at 119 (Giglio). Certain Monitor brokers testified that Respondent Montelbano was their supervisor and had hired them. CX-125 at 3716, 3741-42 (Grant); CX-130 at 3897(Gonzalez); CX-131 at 3941(Cavallo); CX-106 at 3234, 3236 (Herkert).

¹⁴⁴ CX-126 at 3785-3786, 3805. In addition, the branch manager of Monitor's 20 Exchange Place office, William Muscarrella ("Muscarrella") testified during his on-the-record interview that Respondent Montelbano hired him over a lunch meeting at which Piazza was present (Tr. 12/16/98 at 53-55). In addition, Muscarrella provided the Staff with documentary evidence demonstrating that Respondent Montelbano asserted his supervisory authority by instructing Muscarrella not to fire employees (CX-67 and Tr., 12/16/98 at 57-58).

The Hearing Panel finds that Respondent Montelbano offered no credible evidence to refute these facts except his own self-serving denials that he was President or had any supervisory responsibilities at the Firm until June 1996.¹⁴⁵

As Monitor's President, Respondent Montelbano had an obligation to ensure that Monitor brokers were following the federal securities laws and NASD rules. The evidence shows that he failed to prevent the brokers from engaging in sales practice violations and that he also affirmatively provided false information to the brokers that they relied upon in making misrepresentations regarding ASWI to their customers.¹⁴⁶

3. *The Thirty-Third Cause of the Complaint: Violations of NASD Rules 8210 and 2110*

The Hearing Panel finds that Respondent Montelbano failed to respond completely and truthfully during his on-the-record interview regarding his knowledge of the involvement of Pokross in the day-to-day activities of Monitor and his (Montelbano's) own involvement in ASWI.

For example, Respondent Montelbano stated that he did not know of Pokross' financial interest in stocks that Monitor was selling to its customers or of his financial interest in the Firm.¹⁴⁷ This statement is not credible. Respondent Montelbano testified

¹⁴⁵ Respondent Montelbano's Br. at 8-9. In support of his position, Respondent Montelbano cites to the testimony of certain brokers that Palla was the President of Monitor. While Palla may have been President of Monitor at one time, the credible evidence of record establishes that Respondent Montelbano accepted a promotion to this position in the Spring of 1996 and held himself out as President before, during, and after the ASWI distribution on May 13-14, 1996.

¹⁴⁶ Tr., 12/30/98 at 155-59. The points raised by Respondent Montelbano in his Br. all were considered by the Hearing Panel in making their findings. The Panel determined that much of the "evidence" cited therein either is irrelevant or contradicted by the clear weight of the credible evidence of record.

¹⁴⁷ Tr., 12/29/98 at 148-49.

that he negotiated with Pokross concerning his employment at Monitor¹⁴⁸ and that he frequently visited Pokross at the offices of DMN to have business meetings.¹⁴⁹ Respondent Montelbano admitted that he observed Pokross give a sales meeting to the Monitor sales force when he urged the brokers “to book stock.”¹⁵⁰ Further, Respondent Montelbano testified that Pokross attended a meeting that he held on fixed income products.¹⁵¹

During his on-the-record interview, Respondent Montelbano also was not truthful about his own activities concerning the marketing of ASWI. For example, he stated that he never spoke to any of the brokers about ASWI.¹⁵² This statement was rebutted by the testimony of Sierp and McGuinn,¹⁵³ and other brokers from the 30 Broad Street office who stated at their on-the-record interviews that Montelbano told them about ASWI.¹⁵⁴

D. RESPONDENT GENNUSO

1. The Sixth Cause of the Complaint: Violations of Section 10(b), Rule 10b-5, and NASD Rules 2110 and 2120

The Sixteenth Cause of the Complaint: Violations of Section 10(b), Rule 10b-6, and NASD Rules 2110 and 2120

The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent Gennuso actively participated in the ASWI fraudulent scheme. The Hearing

¹⁴⁸ Tr., 12/29/98 at 139-40.

¹⁴⁹ Id. at 145-46, 150-51.

¹⁵⁰ Id. at 148.

¹⁵¹ Id. at 147-48.

¹⁵² Id. at 160.

¹⁵³ Tr., 12/16/98 at 107-110, 116, 137 (Sierp); CX-171 and C-172 (McGuinn).

¹⁵⁴ CX-106 at 3240-3241 (Herkert); CX-129 at 3877(Cushing); CX-130 at 3912 (Gonzalez); CX-110 at 3301, 3307, 3327 (Telmany).

Panel also finds that Respondent Gennuso knew of and assisted in the distribution of ASWI by using special selling techniques.

First, Respondent Gennuso had knowledge of the marketing of ASWI prior to trading on May 13. During his on-the-record interview, Respondent Gennuso stated that he knew that there was a meeting at 30 Broad Street about ASWI before the shares started trading.¹⁵⁵ He also testified that he had heard Respondents Montelbano and McMahon discussing ASWI before it began trading.¹⁵⁶ Respondent Gennuso testified that he was aware that the brokers at the 30 Broad Street office were calling their customers prior to ASWI trading to determine if they were interested in purchasing shares of ASWI.¹⁵⁷

Second, Respondent Gennuso instructed brokers to write predetermined prices on their tickets.¹⁵⁸

Third, Respondent Gennuso coordinated the sales force efforts at the 30 Broad Street office by receiving all of the ASWI order tickets, with predetermined prices and markups, and then relaying them to the trading room at the 919 Third Avenue office.¹⁵⁹ In fact, Sierp¹⁶⁰ and Giglio¹⁶¹ testified that they each handed Respondent Gennuso their ASWI order tickets at one time and in one stack.

¹⁵⁵ CX-212.

¹⁵⁶ CX-211.

¹⁵⁷ Tr., 12/30/98 at 66-67.

¹⁵⁸ Tr., 12/16/98 at 140, 142 (Sierp). Sierp testified that Gennuso told him what limit price to put on the ASWI tickets and also told him at one point to put the price of \$6 3/8.

¹⁵⁹ Tr., 1/28/99 at 36-40.

¹⁶⁰ Tr., 12/16/98 at 110-11.

¹⁶¹ Tr., 12/18/98 at 118, 165.

Fourth, on May 13, Respondent Gennuso determined which orders for ASWI were to be filled and which were not to be executed, i.e., marked “not done” for the 30 Broad Street office brokers.¹⁶²

Fifth, after the tickets were marked “not done,” Respondent Gennuso then instructed brokers at the 30 Broad Street office to rewrite those tickets with different predetermined prices to be executed on May 14.¹⁶³

Finally, Respondent Gennuso played a critical role in attempting to cover up the ASWI scheme by approving order tickets from 30 Broad Street – all of which contained the same reported, executed, and limit price. As discussed previously, the purpose was to conceal from Monitor’s customers any compensation that the brokers were earning on their orders. He then worked with the clearing firm, RAF, in canceling and rebilling the original ASWI order tickets and replacing them with order tickets showing lower sales credits.¹⁶⁴

As to the Sixteenth Cause of Complaint, because of the magnitude of the ASWI distribution, the Hearing Panel draws the inference that Respondent Gennuso, as the Firm’s Compliance and Operations Officer,¹⁶⁵ knew about the distribution. In fact, as discussed above, the evidence unequivocally demonstrates that he played a key role in processing the 30 Broad Street order tickets.

¹⁶² Tr., 12/4/98 at 566-67. Respondent Galasso testified that Respondent Gennuso sent by facsimile a list of which tickets should be marked “not done.”

¹⁶³ Tr., 12/16/98 at 160 (Sierp).

¹⁶⁴ Tr., 12/4/98 at 354-355 (Galasso); Tr., 12/30/98 at 70; Tr., 1/28/99 at 38 (Gennuso).

¹⁶⁵ CX-63.

The Panel also concludes that during the ASWI distribution, Respondent Gennuso was engaged in special selling efforts. As noted above, he treated the public trading of ASWI as if it were an IPO by allocating shares to specific customers and instructed Respondent Galasso not to execute certain customers' orders on May 13, but to mark the tickets "not done."¹⁶⁶

In addition, as also discussed above, Respondent Gennuso was involved in ensuring that the brokers at the Firm received special compensation for the shares of ASWI that they sold to their customers. He approved all the order tickets for shares of ASWI sold by the brokers at the 30 Broad Street office.¹⁶⁷ Almost all of those tickets contained evidence of special compensation in the form of credits to each broker.¹⁶⁸

2. *The Fifteenth Cause of the Complaint: Violations of Section 10(b), Rule 10b-5, and NASD Rules 2110, 2120 and 2440*

The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent Gennuso charged the Firm's customers undisclosed excessive markups.

As discussed above, the markups that were charged to customers who purchased ASWI shares on May 13 and 14 were between 10.48% and 74.19%, far in excess of NASD guideline of 5%.¹⁶⁹ The evidence demonstrates that Respondent Gennuso was directly involved with the markups that Monitor charged its customers on May 13 and 14.

¹⁶⁶ Tr., 12/4/98 at 566-67 (Galasso).

¹⁶⁷ Gennuso Joint Stipulation at ¶8; Tr., 12/30/98 at 70.

¹⁶⁸ See e.g., CX-42 at 1669-1684, 1727, 1728, 1734, 1738, 1740, 1743, 1745, 1749, 1751, 1754, 1758, 1768 and 1770.

¹⁶⁹ CX- 150. The majority of the markups were greater than 50%.

In his joint stipulation and during the Hearing, Respondent Gennuso admitted that he was the person at the 30 Broad Street office who was responsible for reviewing and signing all the ASWI order tickets on May 13 and 14.¹⁷⁰ Respondent Gennuso also admitted,¹⁷¹ and the tickets¹⁷² confirm, that on May 13 and 14 he actually reviewed and initialed the ASWI tickets in compliance with the NASD 5% markup policy.¹⁷³ In addition, he testified that in certain instances he actually wrote in a numerical amount in the box labeled “commission.”¹⁷⁴ Finally, when he was shown order tickets¹⁷⁵ reflecting his initials and a credit to the broker of \$1.25, he stated that he saw no problem with a mark-up of \$1,250.00 on a sale of 1000 shares. He confirmed that the amount of the commission was not disclosed to the customer and did not need to be.¹⁷⁶

¹⁷⁰ Joint Stipulation at 3, ¶8; Tr., 12/30/98 at 69-74, 80.

¹⁷¹ Tr., 12/30/09 at 27, 71-73.

¹⁷² CX-141 at 1310-1342 (excluding 1322).

¹⁷³ Tr., 1/28/99 at 39-40. Respondent Gennuso testified that he believed the 5% was to be a markup from the reported price on the tape and that the broker could earn an extra point that was then added on but would not be disclosed to the customer.

¹⁷⁴ Tr., 12/30/98 at 75.

¹⁷⁵ See, e.g., CX-41 at 1510.

¹⁷⁶ Tr., 12/30/98 at 96-97. Respondent Gennuso attempted to justify his position by characterizing the markup as a “credit.” (Tr., 12/30/98 at 97). Under the circumstances of this case, however, this is a distinction without difference since the prices were predetermined and the customer was charged the markup (“credit”) without disclosure. When Monitor canceled and rebilled all the tickets for May 13-14 and lowered the commissions, the price to the customer did not change. The effect of the cancels and rebills simply was that the Firm got more money and the brokers got less. The customers, however, paid the same artificial prices for ASWI shares that had nothing to do with the true prevailing market price of ASWI.

3. ***The Nineteenth Cause of the Complaint: Violations of NASD Rules 3010 and 2110***

The Twenty-Second Cause of the Complaint: Violations of NASD Rules 3010 and 2110¹⁷⁷

The Hearing Panel finds that the preponderance of the evidence establishes that Respondent Gennuso was Monitor's Compliance Officer. Indeed, Respondent Gennuso admitted at the Hearing and during his on-the-record interview that he performed functions typically associated with a Compliance Officer such as: (1) reviewing trade blotters; (2) ensuring that brokers did not make price predictions; (3) overseeing registrations of brokers and their Forms U-4 and U-5; (4) reviewing new account forms; (5) reviewing brokers' commissions; and (6) reviewing trade tickets.¹⁷⁸ In addition, Respondent Montelbano, the Firm's acting President, testified that Gennuso was the head of compliance.¹⁷⁹

As Monitor's Compliance Officer, Respondent Gennuso was responsible for establishing, maintaining and enforcing the written supervisory procedures.¹⁸⁰ The evidence establishes that Monitor, acting through Respondent Gennuso, failed to do so and, as a result, numerous violations of NASD Rules and federal securities laws occurred. The written supervisory procedures that were provided to the NASD were wholly

¹⁷⁷ The Hearing Panel has determined that similar evidence supports findings of the violations alleged in the Nineteenth and Twenty-Second Causes of Complaint.

¹⁷⁸ CX-205, 206; Tr., 12/30/98 at 23-27; Tr., 1/28/99 at 40-41.

¹⁷⁹ Tr., 12/29/98 at 175-176.

¹⁸⁰ CX-73 at 2643.

inadequate in many regards.¹⁸¹ For example, Respondent Gennuso testified that one part of the procedures--the organizational chart--was inaccurate and that he fabricated the chart to conceal from the NASD that Monitor did not have enough supervisory principals assigned to supervise the brokers.¹⁸² Moreover, Respondent Gennuso *stipulated* that the written supervisory procedures were inadequate in many regards.¹⁸³

As Monitor's Compliance Officer and the person responsible for overseeing the day-to-day activities at 30 Broad Street, Respondent Gennuso also was responsible for ensuring that the brokers were complying with NASD Rules and the federal securities laws.¹⁸⁴ The evidence demonstrates, however, that Respondent Gennuso took no action to remedy or prevent the abuses attendant to the marketing and sale of ASWI. Moreover, the evidence further demonstrates that Respondent Gennuso actively and knowingly participated in activities that furthered the Firm's fraudulent ASWI scheme.

4. *The Twenty-Seventh Cause of the Complaint: Violations of NASD Membership and Registration Rule IM-1000-3 and NASD Conduct Rule 2110*

The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent Gennuso, as Monitor's Compliance Officer, failed to prevent an unregistered representative, James Garcia ("Garcia"), from conducting a securities business.

¹⁸¹ Tr., 12/30/98 at 150-154.

¹⁸² Tr., 12/30/98 at 39-40; CX-63.

¹⁸³ Gennuso Joint Stipulation at 3, ¶¶ (11) (12).

¹⁸⁴ In fact, CX-63, Monitor's Organizational Charts, which Respondent Gennuso admits to preparing (Tr., 12/30/98 at 39-40), show him as Chief Operating Officer, Branch Manager, and Sales Supervisor for the 30 Broad Street office as well as the Compliance Officer for Monitor Investment Group.

Respondent Gennuso knew that Garcia was not registered¹⁸⁵ and, yet, permitted Garcia to engage in a securities business.¹⁸⁶ By way of example, the following evidence supports the conclusion that Garcia, an unregistered representative, conducted a securities business at Monitor with the full knowledge and, indeed, assistance of Respondent Gennuso:

- new account forms signed by Garcia and approved by Gennuso;¹⁸⁷
- pay checks to Garcia approved and signed by Gennuso;¹⁸⁸
- commission runs showing that Garcia was compensated for conducting business at Monitor using other brokers' numbers;¹⁸⁹
- order tickets for Garcia customers;¹⁹⁰
- declarations from Garcia customers;¹⁹¹ and
- on-the-record interview statements by Garcia.¹⁹²

Indeed, Respondent Gennuso admitted that he knew Respondent Garcia was unregistered and still permitted him to conduct a securities business at Monitor.¹⁹³

5. *The Thirtieth Cause of the Complaint: Violations of NASD Rules 8210 and 2110*

The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent Gennuso failed to respond truthfully to a number of inquiries during his on-the-record interviews.

¹⁸⁵ Tr., 12/30/98 at 28-29.

¹⁸⁶ Tr., 12/11/98 at 42-62 (Mazur).

¹⁸⁷ Tr., 12/30/98 at 29-30; CX-78.

¹⁸⁸ *Id.* at 34-35; CX-80.

¹⁸⁹ Tr., 12/11/98 at 48-49; CX-81.

¹⁹⁰ CX-79.

¹⁹¹ CX-83.

¹⁹² CX-85.

¹⁹³ *See* Respondent Gennuso Joint Stipulation at ¶¶15-18.

First, Respondent Gennuso was not truthful when he stated that Pokross never conducted a sales meeting at Monitor.¹⁹⁴ Respondent Gennuso's testimony was refuted by Respondent Montelbano who testified that Pokross conducted sales meetings at Monitor and that Respondent Gennuso was present at least at one such meeting.¹⁹⁵

Second, Respondent Gennuso was not honest when he stated that Pokross had nothing to do with Monitor's business activities¹⁹⁶ and, specifically, that Pokross had no involvement in the handling of customer complaints.¹⁹⁷ Andrew Basile, who served as Monitor's Compliance Officer for a very short period, testified that he was instructed by Respondent Gennuso to call Pokross about settling a customer complaint.¹⁹⁸ Moreover, during their on-the-record interviews, several Monitor brokers testified that, pursuant to Pokross' orders, Respondent Gennuso specifically refused to process trades for non-house stocks, or process sell orders for house stocks.¹⁹⁹

¹⁹⁴ CX-209, Tr., 12/30/98 at 46-47.

¹⁹⁵ Tr., 12/29/98 at 145-146.

¹⁹⁶ Tr., 12/30/98 at 47.

¹⁹⁷ Tr., 12/30/98 at 47-48.

¹⁹⁸ Tr., 12/17/98 at 96-97. Basile's testimony was confirmed by his memorandum to Respondent Gennuso and Respondent Gennuso's own memorandum in response. CX-75 at 2757 and 2769.

¹⁹⁹ Tr., 12/30/98 at 148-49 (Shields testifying as to the testimony of Cushing and Gonzalez); CX-125 at 3719-21 (Grant). See also CX-126 at 3795-3797 (Feliciano stated that she complained to Gennuso about Pokross ordering her to perform business functions that she did not agree with). In addition, Shields testified that he learned during the on-the-record interviews that Respondent Gennuso, among others, reported directly to Pokross (Tr., 12/30/98 at 147).

Third, Respondent Gennuso was not truthful when he stated he did not know that Piazza had any business involvement with Monitor. Monitor corporate checks were admitted into evidence co-signed by Respondents Gennuso and Piazza.²⁰⁰

Fourth, Respondent Gennuso's testimony that he knew Labate only through Labate's construction work at Monitor was not truthful.²⁰¹ The evidence demonstrates that Respondent Gennuso handled two of Labate's Monitor accounts, one of which had a portfolio in excess of \$600,000.²⁰²

Gennuso testified in his direct case. His offered no credible evidence to refute Complainant's proof. Rather, his testimony consisted of uncorroborated statements and general denials.²⁰³

E. RESPONDENT NEJAIME

1. Fourteenth Cause of the Complaint: Violations of Section 10(b), Rule 10b-5, and NASD Rules 2110 and 2120

Complainant alleges that Respondent Nejaime participated in manipulative and deceptive acts in connection with the sale of ASWI. In support of its allegations, Complainant contends that Respondent Nejaime participated in the management of Monitor's 919 Third Avenue office and that his responsibilities included coordinating sales efforts and assisting with the process by which shares in ASWI were allocated to brokers at that office. Complainant cites various examples to demonstrate that

²⁰⁰ Tr., 12/30/98 at 51-52; CX-28.

²⁰¹ Tr. 12/30/98 at 53-54.

²⁰² Tr., 12/30/98 at 54-57; CX-118 at 3413 and 3422; CX-37 at 1212-13.

²⁰³ Tr., 1/28/99 at 32-35.

Respondent Nejaime's position at 919 Third Avenue exceeded those of a registered representative.²⁰⁴

It is undisputed that when Respondent Nejaime joined Monitor he was assigned the title of "managing director" by Palla. Respondent Nejaime testified that he was given the title because he had been a Senior Vice President at his prior firm and he believed it would be perceived as a more senior position. Respondent Nejaime further testified that there were no duties attendant to the title other than being a stockbroker.²⁰⁵

It also is undisputed that Respondent Nejaime recruited brokers for Monitor's 919 Third Avenue office²⁰⁶ and that he assisted Palla with administrative duties in running the branch.²⁰⁷ In fact Palla testified at his on-the-record interview that he (Palla) was responsible for supervising the sales force at 919 Third Avenue, and that

Todd [Nejaime] used to help me out. He wasn't a manager. He wasn't a principal, but he was a very knowledgeable young man who I trust and he worked with me and helped develop relationships, bring in brokers. Take care of things if I wasn't there.²⁰⁸

²⁰⁴ Complainant's Br. at 44-46.

²⁰⁵ Tr., 2/1/99 at 540-41. See also, Tr., 12/16/98 at 179-83 (Respondent Nejaime admitted that when he left Monitor and went to Laidlaw Securities he described his previous position as managing director and that in May 1996 he also represented himself to NASD Staff as "managing director."); Tr., 2/1/99 at 625 (Respondent Nejaime admitted that when he joined Monitor, even before becoming registered, his business card said "managing director."). See also Tr., 12/16/98 at 290-291 (Davies testified that Respondent Nejaime identified himself as "managing director" and assisted her with the collection of documents when she visited the Firm on May 16, 1996).

²⁰⁶ Tr., 12/16/98 at 176, 178; Tr., 2/1/99 at 544. Respondent Nejaime testified that other brokers also had the authority to recruit new brokers. Tr., 2/1/99 at 595-596.

²⁰⁷ Tr., 12/16/98 at 176, 177; Tr., 2/1/99 at 544. Respondent Kardish testified that Respondent Nejaime announced meetings, but as far as he knew he was just another broker. Tr., 12/17/98 at 221. Respondent Goldstein also testified that to his knowledge Respondent Nejaime was another broker at 919 Third Avenue. Id. at 233.

²⁰⁸ CX-133 at 4136.

In addition, Respondent Nejaime admitted that for approximately a two week period in March 1996, he mistakenly signed new account forms for brokers at the 919 Third Avenue office as “branch manager.”²⁰⁹

Part of Monitor’s manipulative scheme involved soliciting indications of interest in ASWI from its retail customers and then allocating shares. Complainant alleges that Respondent Nejaime “coordinated” the allocation process at the 919 Third Avenue office.²¹⁰ Specifically, Hogan testified that there was an allocation process and that, at the time of ASWI trading, Respondent Nejaime told him to write down how many ASWI shares he would be interested in.²¹¹ Hogan did not testify, however, that Respondent Nejaime actually was responsible for allocating shares or that he asked any other brokers to write down their indications of interest.²¹² Respondent Nejaime denied that he ever told any broker to prepare indications of interest or that he ever collected indications of interest from the brokers.²¹³

The Hearing Panel concludes that notwithstanding his purported “title,” and the fact that he had some administrative responsibilities at 919 Third Avenue beyond that of a broker, Respondent Nejaime was not a “manager” or supervisor. Further, even if

²⁰⁹ Respondent Nejaime admitted he signed two new account forms for McGuinn’s personal accounts (CX-215A and 215B; Tr., 2/1/99 at 617-18). Respondent Nejaime also admitted that he signed other transfers and ACATs for the brokers, but that it was a mistake, that he was not the branch manager, and that he ceased doing so when he realized it was wrong. Tr., 2/1/99 at 591-92.

²¹⁰ Complainant’s Br. at 46.

²¹¹ Tr., 12/16/98 at 246, 262, 272. Hogan was the only broker to testify that Respondent Nejaime asked him to write down his indications of interest.

²¹² *Id.* at 262, 272.

²¹³ Tr., 2/1/99 at 588.

Respondent Nejaime did ask Hogan to write down his indications of interest for ASWI shares, this evidence, standing alone, is insufficient to support a finding that Respondent Nejaime “coordinated” the allocation process. Accordingly, the Hearing Panel concludes that the evidence does not support a finding that by virtue of his title Respondent Nejaime affirmatively assisted in the implementation of Monitor’s plans regarding the manipulation of ASWI.²¹⁴

The evidence, however, supports the finding that Respondent Nejaime actively participated in the ASWI scheme by selling shares to his customers at predetermined prices having nothing to do with the prevailing market price. Based on his close relationship with Palla, and the fact that he also knew Pokross and Piazza prior to joining Monitor, the Hearing Panel draws the inference that Respondent Nejaime was well aware of the ASWI scheme.²¹⁵ Moreover, the Hearing Panel does not find credible Respondent Nejaime’s testimony that he did not discuss with Palla the compensation the brokers would receive for selling ASWI.²¹⁶

Respondent Nejaime sold shares of ASWI to seven of his own customers in a manner consistent with the way in which ASWI was sold to other Monitor customers.

²¹⁴ See Complainant’s Brief at 46.

²¹⁵ See, e.g., Tr., 12/16/98 at 174 (Respondent Nejaime was hired by Palla and knew him for three years prior to the time he joined Monitor. Palla had an account with Respondent Nejaime at another firm.); *Id.* at 175-176 (Piazza had an account with Respondent Nejaime at his prior firm. Respondent Nejaime met Pokross at a due diligence meeting prior to joining Monitor.); CX-133 at 4136 (Palla’s on-the-record testimony); Tr., 2/1/99 at 544 (Respondent Nejaime’s testimony that Palla told him if he helped get the office started he would sponsor him for a 24 to run an office); *Id.* at 575-76 (Respondent Nejaime traveled with Palla overseas on business).

²¹⁶ Tr., 2/1/99 at 575-576. The record reflects that Respondent Nejaime’s testimony regarding his discussions with Palla concerning ASWI was vague and evasive. *Id.* at 574-577.

All of his customers' order tickets had a \$6.75 limit price.²¹⁷ Similarly, the vast majority of ASWI order tickets for the brokers at 919 Third Avenue had limit prices of \$6.75.²¹⁸ Nejaime testified that he personally marked the limit price on all of his ASWI order tickets.²¹⁹ Further, Respondent Nejaime's orders ultimately were executed at \$6.75, as were the majority of all ASWI trades for the 919 Third Avenue office.²²⁰

At his on-the-record interview, Respondent Nejaime stated that McMahon had told him the price at which ASWI was to be sold at, namely, "\$6, \$7."²²¹ When asked at the Hearing, however, why all seven customers had the same limit price, Nejaime stated that this was because, when he recommended ASWI to his customers, he gave them "the same parameters."²²² He also stated that he did not know why all seven customers had the same execution price.²²³

The Hearing Panel finds that the credible evidence of record supports the finding that Respondent Nejaime, with the requisite scienter, sold ASWI to customers at predetermined prices. The Hearing Panel also finds that, since Respondent Nejaime's order tickets all had the same order, limit, and execution price, he knowingly concealed

²¹⁷ Tr., 12/16/98 at 199-207; CX-41 at 1377, 1378, 1379, 1380, 1386-1395.

²¹⁸ See CX-41.

²¹⁹ Tr., 12/16/98 at 200, 201, 203-206.

²²⁰ *Id.* at 217.

²²¹ CX-167.

²²² Tr., 12/16/98 at 206. Respondent admitted that he told NASD Staff at his on-the-record interview that he had no idea why all the transactions for his customers were at the same price. Tr., 12/16/98 at 198. Respondent Nejaime also testified that he did no independent research with respect to ASWI. Tr., 12/16/98 at 198-99.

²²³ Tr., 12/16/98 at 207. Respondent Nejaime admitted that prior to recommending ASWI to his customers, he did not conduct any research on the company. *Id.* at 198-99.

his compensation from his customers.²²⁴ Thus, even though the Hearing Panel does not find that Respondent Nejaime participated in the management of Monitor, it finds that he engaged in deceptive sales practices with respect to the sale of ASWI to his customers.

2. *The Forty-First Cause of the Complaint: Violations of NASD Rules 8210 and 2110*

Complainant charges that on four occasions during his March 27, 1997 on-the-record interview, Nejaime was not truthful in his answers to the NASD Staff.

First, Nejaime stated that he did not know James Tagliareni, the president of ASWI.²²⁵ Davies testified, however, that Respondent Nejaime told her, during her visit to the 919 Third Avenue office on March 16, 1996, that he “had met with . . . James Tagliareni, about a year ago over drinks.”²²⁶ At the Hearing, Respondent Nejaime denied knowing James Tagliareni.²²⁷

The Hearing Panel finds it is more likely than not that Davies confused Respondent Nejaime with Respondent Galasso whom she met with the same day and who did meet Tagliareni over drinks.²²⁸

²²⁴ The Hearing Panel has considered and rejected Respondent Nejaime’s testimony that he watched his Quotron during the day and determined the same limit price for all his customers because that was where the stock must have been trading when he got the orders. Tr., 2/1/99 at 549-550. His testimony as to how he determined the limit price for his customers simply was not credible especially since he admitted he was calling his customers throughout the day. *Id.* at 550. Moreover, his testimony as to how he set the limit price was vague, ambiguous and, at times, evasive.

²²⁵ Tr., 12/16/98 at 196.

²²⁶ *Id.* at 291-292.

²²⁷ *Id.* at 197; Tr. 21/1/99 at 545.

²²⁸ Tr., at 12/4/98 at 492 (Galasso); Tr., 12/16/98 at 289, 294.

Second, Respondent Nejaime stated that he had never told any brokers to submit their requested allocations. This portion of Respondent Nejaime's on-the-record interview, however, never was introduced at the Hearing or admitted into evidence. Thus, it cannot be considered for purposes of determining a violation of Rule 8210.

Third, Respondent Nejaime told the Staff that he did not know why all the ASWI transactions for his customers were executed at the same price.²²⁹ Respondent Nejaime also testified, however, that Respondent McMahon told him the price at which ASWI would be available.²³⁰ The Hearing Panel concludes that Respondent Nejaime failed to respond truthfully; he knew why his customer orders all were executed at the same price.

Fourth, Respondent Nejaime stated that he did not receive commissions on any of the ASWI trades he effected.²³¹ The evidence demonstrates, however, that Respondent Nejaime shared commissions and utilized a joint registered representative number with Kevin Radigan, a broker at the 919 Third Avenue office.²³² The evidence further demonstrates that Radigan was compensated for the periods May 20 to June 17, 1996 and June 20 to July 15, 1996.²³³

The commission recap forms for Radigan, which correspond to the checks issued to Radigan, list customer transactions and include Respondent Nejaime's seven ASWI

²²⁹ Tr., 12/16/98 at 198.

²³⁰ CX-167.

²³¹ Tr., 12/16/98 at 207.

²³² Tr., 12/16/98 at 187.

²³³ CX-121 at 3605, 3609, 3639, 3641, 3642.

customer transactions.²³⁴ Thus, the Hearing Panel concludes that the evidence supports the conclusion that Respondent Nejaime failed to respond truthfully when he denied receiving commissions on the ASWI trades that he effected for his customers.²³⁵

F. RESPONDENT LEVERETT

1. The Thirteenth Cause of the Complaint: Violations of Section 10(b), Rule 10b-5, and NASD Rules 2110 and 2120

Complainant alleges that the preponderance of the evidence supports a finding that Respondent Leverett, with the requisite scienter, engaged in deceptive sales tactics by making material misrepresentations to two of his customers in connection with ASWI.²³⁶

Complainant charges that Respondent Leverett made material misrepresentations to customer FM to induce him to purchase shares of ASWI. FM did not testify at the Hearing and the evidence presented is based solely on a signed declaration which was not executed under oath.²³⁷ FM's declaration states that Respondent Leverett told him that he had researched the company and it looked promising and it would go up a point or two.²³⁸

During the course of the Hearing, there were instances where the testimony of a customer witness was not totally consistent with a prior declaration or additional, relevant facts only became apparent through examination of the witness. Since neither Respondent's counsel nor the Panel was afforded an opportunity to question FM, the

²³⁴ CX-119 at 3493, 3494, 3495.

²³⁵ A contrary conclusion only can be reached if the Hearing Panel assumes that Radigan did not pay Respondent Nejaime his share. There is no evidence, however, to support such a finding.

²³⁶ The customers are "JC" and "FM." JC testified at the Hearing. FM did not. Complainant introduced an unsworn declaration for FM.

²³⁷ CX-105 at 3222.

²³⁸ *Id.* at ¶6.

Hearing Panel determined not to accept as evidence against Respondent Leverett the statements in FM's declaration.

As to customer JC, Complainant argues that since JC believed that ASWI was an IPO, Respondent Leverett must have told him so.²³⁹ JC testified that he had one conversation with Respondent Leverett and that he purchased the shares of ASWI based upon his recommendation.²⁴⁰ JC also testified that prior to his purchase he knew nothing about ASWI and did no independent research on the company.²⁴¹

JC, however, had no recollection as to the basis for his belief that ASWI was an IPO and his declaration does not state that Respondent Leverett told him it was an IPO.²⁴² JC testified that the basis for his belief **either** was that Respondent Leverett told him ASWI was an IPO or he assumed it was an IPO based on the prior deal he had done with Respondent Leverett.²⁴³

²³⁹ Complainant's Br. at 53-54. JC testified at the Hearing, however, other than reading what he had written in his declaration of September 30, 1996, he had no recollection whatsoever of his discussions with Respondent Leverett concerning ASWI. Tr., 12/10/98 at 99, 102. The declaration did not refresh his recollection, but he testified that nothing in it had changed since he signed it. *Id.* at 99.

²⁴⁰ Tr., 12/10/98 at 100, 116-117. Respondent Leverett confirmed that JC purchased ASWI based on his recommendation. Tr., 12/29/98 at 67.

²⁴¹ Tr., 12/10/98 at 100.

²⁴² Tr., 12/10/98 at 103, 106. His declaration simply states that "I believed, at the time of the purchase, that Accessible Software, Inc. was an IPO." CX-104 at ¶10.

²⁴³ Tr., 12/10/98 at 100, 104, 115-116.

Based on the foregoing, the Hearing Panel finds that Complainant failed to prove that Respondent Leverett told JC that ASWI was an IPO.²⁴⁴ The evidence demonstrates, however, that Respondent Leverett recommended ASWI to JC without a reasonable basis.

At the Hearing, Respondent Leverett acknowledged that he told JC the price of ASWI would go up.²⁴⁵ He also acknowledged he had not done any review of ASWI's financials nor had he undertaken any independent review of the company.²⁴⁶ Rather, he allegedly relied solely on what Respondent McMahon told the brokers concerning ASWI,²⁴⁷ although he provided no specifics in this regard.²⁴⁸ Further, he testified he did not know whether the research Respondent McMahon conducted on ASWI was reliable.²⁴⁹

In addition to finding that Respondent Leverett recommended ASWI to JC without a reasonable basis, the Hearing Panel also finds that Respondent Leverett actively participated in the ASWI scheme by selling shares to his customers at predetermined prices without regard to market demand.

²⁴⁴ Similarly, the Hearing Panel rejects Complainant's contention that Respondent Leverett was reckless in not explaining to JC the true nature of the ASWI shares. Complainant's Br. at 53. There is no evidence to support such a finding.

²⁴⁵ Respondent Leverett explained this representation by stating he would not recommend a stock if he did not believe it was going to increase in value. Tr., 12/29/98 at 67.

²⁴⁶ Id. at 68-69, 75.

²⁴⁷ Tr., 1/29/99 at 301.

²⁴⁸ Tr., 12/29/98 at 119-120, 132; Tr., 1/29/99 at 249-51, 272, 300-01. Respondent Leverett testified that based on his experience at his prior firm, Paine Webber, he never had any reason to question an analyst. Tr., 12/29/98 at 70; Tr., 1/29/99 at 254-55. He also agreed, however, that Monitor was not the same caliber of firm as his prior employer. Tr., 12/29/98 at 70-71.

²⁴⁹ Tr., 12/29/98 at 132-33.

As discussed with respect to Respondent Nejaime, the Hearing Panel finds that Respondent Leverett sold ASWI shares to JC and FM in a manner consistent with the way such shares were sold to other Monitor customers. The original order tickets for JC and FM all had the same limit, reported, and execution price of \$6.75,²⁵⁰ as did the majority of tickets for brokers at 919 Third Avenue. Further, Respondent Leverett's tickets ultimately were executed at \$6.75,²⁵¹ consistent with the majority of ASWI trades for the 919 Third Avenue office. In fact, Respondent Leverett testified that he knew the price of ASWI was going to be \$6.75 per share and that the markup was predetermined.²⁵²

The Hearing Panel finds that Respondent Leverett, with the requisite scienter, sold freely tradable ASWI shares at predetermined prices. The Hearing Panel also finds that since Respondent Leverett's order tickets all had the same limit, reported, and execution price he knowingly concealed his compensation from his customers. In fact, Respondent Leverett acknowledged that his customers' confirmations did not disclose a markup or commission.²⁵³ Thus, the Hearing Panel finds that Respondent Leverett engaged in deceptive sales practices with respect to the sale of ASWI to his customers.

²⁵⁰ CX-41 at 1373, 1375; Tr., 12/29/98 at 53-59. Respondent Leverett testified that he completed a portion of each order ticket, including the limit price. Tr., 12/29/98 at 96, 99.

²⁵¹ Id. at 58-59.

²⁵² Tr., 12/29/98 at 23, 78-79. According to Shields, in May 16, 1996, Respondent Leverett told the Staff that he obtained the price of between \$6-\$7 for ASWI off his screen (Quotron). Tr., 2/1/99 at 651. At the hearing, however, Respondent Leverett admitted that if he already knew the price of ASWI, there would be no reason to look at his screen. Tr., 12/29/98 at 78-79. See also Tr., 1/29/99 at 274, 344.

²⁵³ Tr., 12/29/98 at 72, 73, 76.

2. The Seventeenth Cause of the Complaint: Violations of NASD Rules 8210, 2110 and 3110

Complainant charges that Monitor, acting through Respondent Leverett: (a) failed to provide original order tickets for the ASWI trades as requested by NASD Staff; and (b) provided altered tickets, which Respondent Leverett reviewed and approved.²⁵⁴ Complainant also charges that Respondent Leverett failed to provide the Staff with the original order tickets for his two customers, JC and FM.

The evidence demonstrates that on May 16, 1996, the NASD went to Monitor's 919 Third Avenue office to commence its investigation of ASWI trading.²⁵⁵ Among others, the Staff interviewed Respondent Leverett, the only General Securities Principal ("GSP") in the office.²⁵⁶ Respondent Leverett told the NASD that he was in charge of the retail sales force when Palla was not in the office and that he reviewed the order tickets from the brokers when Palla was not there.²⁵⁷ In response to certain requests, the NASD received from Monitor *some* of the order tickets relating to ASWI trading ("the May 16 Tickets").²⁵⁸

The NASD reconciled the May 16 Tickets both with NASD internal reports and external documents provided by Monitor and RAF.²⁵⁹ Based on this analysis, the NASD concluded that the May 16 Tickets were not the original order tickets for ASWI trades

²⁵⁴ Complainant charges that Respondent Leverett knowingly altered and falsified order tickets in violation of NASD Rule 3010. See Complainant's Br. at 92.

²⁵⁵ Tr., 11/16/98 at 101-103; Tr., 12/16/98 at 290; see also, Tr., 11/17/98 at 177-180.

²⁵⁶ Tr., 12/29/98 at 19-20. See also Tr., 12/29/98 at 27-8, 82. It is undisputed that Palla was not in the office on May 16, 1996.

²⁵⁷ Tr., 12/16/98 at 292-294.

²⁵⁸ Tr., 2/1/99 at 653.

executed on May 13 and 14, 1996.²⁶⁰ This was confirmed by Miskill, a RAF supervisor, who testified that he had received from Monitor a set of order tickets (“the Original Tickets”)²⁶¹ on May 13 and 14 that the firm never provided to the Staff.²⁶² Miskill testified that these Original Tickets were canceled and rebilled twice. First, on May 14 Monitor canceled and rebilled 65 customer orders that had been executed on May 13 because the CUSIP number was incorrect.²⁶³ Second, on May 16 Monitor canceled and rebilled the May 13 and 14 Original Tickets, this time reducing the sales credits on the tickets.²⁶⁴

The evidence establishes that the May 16 Tickets differed from the Original Tickets as follows:²⁶⁵

- lower markups: $\frac{1}{4}$ vs. $2\frac{1}{4}$;
- different time stamps: 3:30 p.m. vs. 4:30 p.m.;
- principal: DL (Dwayne Leverett) initials vs. no initials; and
- reported prices different than execution and limit prices: $6\frac{1}{2}$ reported, $6\frac{3}{4}$ limit and execution v. $6\frac{3}{4}$ for all prices.

Respondent Leverett admittedly reviewed some of the Original Tickets on May 13²⁶⁶ and all of the May 16, 1996 Tickets.²⁶⁷ Thus, Complainant charges that the May 16 tickets were falsified by Respondent Leverett.

²⁵⁹ Tr., 12/3/98 at 239-241.

²⁶⁰ Id. at 257-261.

²⁶¹ CX-42 (ASWI order tickets that NASD received from RAF); Tr., 12/3/98 at 240.

²⁶² Tr., 12/4/98 at 345-349, 354.

²⁶³ CX-45; Tr., 12/4/98 at 345-353.

²⁶⁴ Tr., 12/4/98 at 354-357. Miskill testified “[t]hey were changing the commission on the trades from the 13th and 14th. * * * [T]hey were changing them from like \$2,000 to \$200 * * *.” Id. at 355. See also, Tr., at 12/3/98 at 256-259, 291, 295.

²⁶⁵ Tr., 12/3/98 at 256-263.

The evidence, however, does not support this finding. Respondent Leverett did not initial all the Original Tickets.²⁶⁸ And, Complainant failed to demonstrate that for each May 16 Ticket initialed by Respondent Leverett there is a corresponding Original Ticket initialed by Respondent Leverett.²⁶⁹ Further, with respect to the May 16 Tickets, Respondent Leverett testified that the words “commission should be” were not in his handwriting,²⁷⁰ and there is no evidence to the contrary. Accordingly, the Hearing Panel will not assume that Respondent Leverett knew that the May 16 Tickets were false since they were different from the Original Tickets.²⁷¹

With respect to Respondent Leverett’s own customers – JC and FM – Respondent Leverett admitted that he wrote two sets of order tickets.²⁷² In addition, Leverett must have known that these tickets were canceled and rebilled on May 16 because his initials are on those tickets.²⁷³ Again, however, the Panel cannot conclude on the basis of the evidence presented that Respondent Leverett falsified the May 16 Tickets for his

²⁶⁶ Tr., 12/29/98 at 27-28, 82, 84, 86; CX-41 at 1440, 1470, 1477, 1504, 1512; CX-42 at 1647, 1649, 1658, 1664, 1666, 1668, 1726. See also Tr., 1/29/99 at 311.

²⁶⁷ CX-45 at 1961-1999 (except 1979); CX-41, e.g., at 1344, 1346, 1348, 1350, 1352.

²⁶⁸ Tr., 1/29/99 at 311.

²⁶⁹ Cf., e.g., CX-41 at 1439 with 1440, 1469 with 1470, 1502 with 1504; CX-42 at 1467 with 1468, 1469 with 1470.

²⁷⁰ Tr., 12/29/98 at 94, 95.

²⁷¹ The Hearing Panel does not accept Respondent Leverett’s testimony that his initials on order tickets did not signify he had “approved” the ticket, but, rather, that he just “looked” at it. His testimony in this respect was vague and inconsistent. Moreover, although he was given many opportunities to do so, he never was able logically to articulate or explain what he did to “review” tickets. See, e.g., Tr., 12/29/98 at 86-87; Tr., 1/29/99 at 325-326, 338-339.

²⁷² Tr., 12/29/98 at 53-61; CX-41 at 1373-1376.

²⁷³ CX-45 at 1976, 1977. See also, CX-41 at 1374, 1376.

customers. The evidence is confused at best as to what information was on which set of order tickets at any given time.²⁷⁴

The preponderance of the evidence also does not support a finding that Respondent Leverett violated Rule 8210 by failing to provide to the NASD on May 16 original tickets for his two customers. At best, the evidence is conflicting as to whether Respondent Leverett ever was asked to produce the original order tickets for his customers.²⁷⁵ Similarly, there is no evidence that Respondent Leverett ever was asked any questions concerning the canceled and rebilled tickets.

Accordingly, based on the foregoing, the Hearing Panel finds that Complainant failed to meet its burden to prove the violations alleged in the Seventeenth Cause.

3. *The Twenty-Third Cause of the Complaint: Violations of NASD Rules 2110 and 3010*

The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent Leverett, a GSP, took no action to prevent or remedy the trading practice abuses at Monitor's 919 Third Avenue office. Respondent Leverett's responsibilities admittedly included supervising brokers²⁷⁶ and reviewing tickets for excessive markups.²⁷⁷ Further, on May 13 and 14 Leverett was the *only* GSP at the 919 Third Avenue office.²⁷⁸

²⁷⁴ See Tr. 12/29/98 at 96-97, 99, 100; Tr., 1/29/99 at 240-241.

²⁷⁵ Cf. Tr., 1/29/99 at 257, 266-67, 340-341 (Respondent Leverett) with Tr., 2/1/99 at 652 (Shields). See also Complainant's Br. at n. 276. The record references cited there make no reference to requests for order tickets.

²⁷⁶ Tr., 12/16/98 at 292-294. Davies also testified on DOE's rebuttal case that Respondent Leverett identified the brokers that he supervised in addition to informing her that he supervised all brokers in Palla's absence. Tr., 2/1/99 at 643.

²⁷⁷ Tr., 12/16/98 at 292-293; Tr., 12/29/98 at 12; Tr., 2/1/99 at 643.

The evidence demonstrates that Respondent Leverett took no action to prevent the trading abuses that occurred on May 13 and 14, 1996. Indeed, the Hearing Panel does not credit his testimony that:

- he did not recall the ASWI tickets being canceled and rebilled,²⁷⁹ but he was sure he had not been involved in the process;²⁸⁰
- he did not recall reviewing any of the ASWI tickets specifically,²⁸¹ but he was sure that when he signed the order tickets only a limit price was on each ticket (not a reported or executed price) and there was no markup on the tickets.²⁸²

While Leverett only recently passed his Series 24 examination, the evidence demonstrates that he was not inexperienced in the securities industry. He had been working in the industry since 1991 at various member firms.²⁸³ Thus, the Hearing Panel concludes that Respondent Leverett, as the only GSP at Monitor on May 13 and 14, and the person who admittedly was charged with the responsibility for reviewing order

²⁷⁸ Tr., 12/29/98 at 27-28. It is undisputed that Palla was the only other Series 24 Principal and he was not available to review the ASWI trading tickets.

²⁷⁹ Tr., 1/29/99 at 260, 360. It also is difficult for the Panel to accept Respondent Leverett's testimony that he had no recollection of canceling and rebilling over 50 order tickets. Tr., 12/29/98 at 43-44. As a relatively new GSP, which he repeatedly stressed at the Hearing, surely he would remember such an unusual event.

²⁸⁰ Tr., 1/29/99 at 259, 260.

²⁸¹ Tr., 1/29/99 at 249, 351.

²⁸² Tr., 1/29/99 at 325-326, 338. In fact, Respondent Leverett's testimony that he reviewed and initialed tickets which only had the limit price makes no sense because, under such circumstances, he could not have determined excessive markups or commissions. Moreover, Respondent Leverett acknowledged that there would be no reason for him to review order tickets for excessive markups if they had not yet been executed. Id. at 330-331. See also, Tr., 12/29/98 at 49 (Respondent Leverett acknowledged that even if something "was built into [the ticket]," it still was his job to make sure that number was in compliance with NASD rules for markups).

²⁸³ CX-7; see also, Tr. at 1/29/99 at 251.

tickets, should have taken affirmative steps to prevent the trading abuses that occurred and did not do so.

4. *The Forty-Second Cause of the Complaint: Violations of NASD Rules 8210 and 2110*

The preponderance of the evidence establishes that on two occasions during his on-the-record interview Respondent Leverett failed to respond truthfully to NASD inquiries regarding ASWI order tickets.

Respondent Leverett testified that markups were present on his customer confirmations for their purchases of ASWI.²⁸⁴ This representation, however, is refuted by his customer confirmations which reflect no markups or commissions.²⁸⁵ In addition, Respondent Leverett stated that in his review of the ASWI order tickets, he had not seen a markup higher than \$1.²⁸⁶ The evidence, however, demonstrates that Respondent Leverett initialed order tickets that had markups ranging from \$1 to \$2.25 per share.²⁸⁷

²⁸⁴ CX-194; see also Tr., 12/29/98 at 49-50.

²⁸⁵ CX-104 at 3217, 3218, 3219; CX-105 at 3225, 3226.

²⁸⁶ CX-195; Tr., 12/29/98 at 50-53.

²⁸⁷ CX-41; CX-42 at 1726; Tr., 12/29/98 at 35, 47-48. The Hearing Panel does not find that Respondent Leverett failed to respond truthfully when he testified that he did not initial ASWI order tickets from branches other than 919 Third Avenue (Tr., 12/29/98 at 79-80). Even though the evidence demonstrates that Respondent Leverett did initial order tickets received from 30 Broad Street (CX-41, e.g., 1440, 1470, 1477; Tr. 12/29/98 at 80), there is no evidence that Respondent Leverett knew the origin of these tickets. (Tr., 12/9/98 at 80; Tr., 1/29/98 at 265-66, 287, 320-321).

G. RESPONDENT GOLDSTEIN

1. *The Eighth Cause of the Complaint: Violations of Section 10(b), Rule 10b-5, and NASD Rules 2110 and 2120*

The Hearing Panel finds that the preponderance of the evidence demonstrates that in connection with sales of ASWI to five customers,²⁸⁸ Respondent Goldstein made false and misleading statements, omitted material facts, made inappropriate price predictions, and knowingly or recklessly sold ASWI to these customers at predetermined prices not reflective of free market forces.

The customer witnesses testified as follows:

- Customer CL²⁸⁹ testified that Respondent Goldstein told him that ASWI was an IPO.²⁹⁰ Further, Respondent Goldstein told CL that ASWI would reach nine dollars a share²⁹¹ and that he more than likely would double his money.²⁹²
- Customer KR testified that Respondent Goldstein told him that ASWI was an IPO or “equivalent to an IPO,”²⁹³ that “he might be able to get it at six, and six is where the stock was trading and if [KR] acted fairly quickly, * * * [he] would be able to get it at that price.”²⁹⁴ Respondent Goldstein indicated that “within three months [ASWI] would go up to between \$10 and \$15 a share.”²⁹⁵

²⁸⁸ Six of Respondent Goldstein’s former customers testified at the Hearing. The Panel, however, determined not to credit the testimony of CH who obviously was confused, had no clear recollection of what Respondent told him about ASWI and, indeed, could not even affirm his prior statements to the NASD. Tr., 12/11/98 at 8-35.

²⁸⁹ The Hearing Panel did not find that customer CL “exhibited hostility toward Goldstein” nor did it find that his testimony was inconsistent. See Respondent Goldstein’s Post-Hearing Submission at 8. Indeed, the testimony cited by Respondent Goldstein demonstrates the consistency of CL’s testimony and that he was not at all “confused.” Id.

²⁹⁰ Tr., 12/10/98 at 122-123, 135-136.

²⁹¹ Id. at 122-123, 125-126, 132-134; see also CX-95 at 3129-3130 (CL’s signed declaration).

²⁹² Id.

²⁹³ Tr., 12/10/98 at 163, 170.

²⁹⁴ Id. at 163; see also CX-96 at 3140 (KR’s signed declaration).

²⁹⁵ Tr., 12/10/98 at 167-168.

- Customer PA testified that Respondent Goldstein told him that “Monitor was being asked by a number of other brokerages to participate in a deal to help raise money for [ASWI] * * * to get listed.”²⁹⁶ Respondent Goldstein told him that his investment probably would double and that he then would have to sell ASWI back to Respondent Goldstein.²⁹⁷ PA also testified that Respondent Goldstein told him he thought he could get ASWI at 6 ¾.²⁹⁸ Specifically, with respect to Respondent Goldstein’s prediction that ASWI would double, PA stated “he was certainly doing more than [stating] a mere opinion, especially in light of the sort of ‘trust me’s’ that frequently came into his conversations.”²⁹⁹
- Customer TL testified that Respondent Goldstein told him that ASWI “would be a quick hit * * *. It was an IPO that we would be selling in three or four days.”³⁰⁰ Respondent Goldstein told him that within a week’s time he could make \$2,000 or \$3,000 on his approximately \$6,000 investment.³⁰¹
- Customer GD testified that he purchased ASWI after Goldstein called him up and told him he had “a hot IPO, he could allocate me 500 shares. That’s all I could get.”³⁰² GD also testified that: (i) he requested and Respondent Goldstein told him he would mail him some information about ASWI;³⁰³ which GD never received;³⁰⁴ (ii) Goldstein told him Monitor was bringing ASWI public, “but a few months down the road these other big firms [would]

²⁹⁶ Tr., 12/11/98 at 87; see also CX-92 at 3096 (PA’s signed declaration).

²⁹⁷ Id. at 87-88, 104.

²⁹⁸ Id. at 89.

²⁹⁹ Id. at 108, 109. In response to a question from Respondent’s counsel, PA testified that Respondent Goldstein’s prediction that the price would double was quite different from presentations he heard from other brokers because there “weren’t any of the kinds of specifics behind the claim being made that it was likely to double that I have heard in cases where people were making price predictions and sort of providing a mathematical argument to back up that claim.” Id. at 107-108.

³⁰⁰ Tr., 12/11/98 at 152; see also id. at 154, 164, 165. TL admitted that his prior declaration did not state that Goldstein told him ASWI was an IPO. (Id. at 186).

³⁰¹ Id. at 152.

³⁰² Tr., 12/11/98 at 196; see also id. at, 197, 212. Respondent Goldstein also told him the price was 6 ¾ (id. at 196).

³⁰³ Tr., 12/11/98 at 196; see also CX-93 at 3106-3107 (Dunning’s declaration).

³⁰⁴ Tr., 12/11/98 at 213.

jump in the back and start promoting the stock;”³⁰⁵ and (iii) ASWI would triple and go to \$18 within six months time.³⁰⁶

The evidence demonstrates that Respondent Goldstein clearly knew that the shares of ASWI he sold on May 13 and 14 were not part of an IPO. Indeed he admitted that, prior to trading, he attended a meeting held by Palla and Respondent McMahon at which Respondent McMahon spoke about ASWI³⁰⁷ and said that Monitor was going to be “getting a piece” of ASWI’s Regulation D, Rule 504 shares.³⁰⁸ In fact Respondent Goldstein repeatedly testified that he was told ASWI was a “504 offering”³⁰⁹ and that he knew it was not an IPO.³¹⁰

Five of Respondent Goldstein’s six customers consistently testified that he told them ASWI was an IPO.³¹¹ Respondent Goldstein attempted to explain his customer’s recollections of his statements by asserting that they all were “confused.”³¹² He testified

³⁰⁵ Id. at 197. At the Hearing GD testified, and it also is stated in his declaration, that when he became concerned about ASWI and later questioned Respondent Goldstein, he was told that an accounting error had delayed commencement of the public offering (id. at 198; CX-93 at 3106-3107).

³⁰⁶ Id. at 197; see also id. at 210-211.

³⁰⁷ Tr. 12/17/98 at 136-138.

³⁰⁸ Id. at 138. Respondent Goldstein also testified that: (1) Palla told him to “put together a list of clients that would be interested in” purchasing some of these shares, which he did (id. 138-139); (2) Palla and Respondent McMahon told him the price at which ASWI would be sold (id. at 140-142); and (3) Palla and Respondent McMahon told him the commissions he would earn on ASWI sales (id. at 144).

³⁰⁹ Id. at 153, 214, 242, 249.

³¹⁰ Id. at 155. Respondent Goldstein acknowledged that if he told a customer that ASWI were an IPO, it would have been an inaccurate statement (id.)

³¹¹ The customer witnesses, several of whom traveled a considerable distance to testify, had no pecuniary motive to misrepresent what Respondent Goldstein told them. They had not pursued any claims against Respondent Goldstein and will not receive restitution as a result of this Decision.

³¹² Tr., 12/17/98 at 158-159. See also Respondent Goldstein’s Post-Hearing Submission at 9 as to CL, 11 as to GD, and 13 as to PA. According to Respondent Goldstein, GD also was “confused” as to whether he later told him that Monitor and Laidlaw Securities had merged. Id. at 162.

that he told them they had “an opportunity to get a 504 offering,”³¹³ and that he explained to those customers who were not familiar with a Rule 504 offering that “it was very similar to an IPO in that the shares did not exist beforehand.”³¹⁴

Respondent Goldstein’s testimony simply is not believable.³¹⁵ Not only is it unlikely that the majority of his customers were “confused” about whether Respondent Goldstein represented ASWI as an IPO, but his testimony, at best, is inconsistent.³¹⁶ For example, Respondent Goldstein asks the Panel to believe that he told his customers that they were purchasing shares in a Rule 504 offering and explained to them that a Rule 504 offering was like an IPO. Yet, (1) he testified he had done no independent research of ASWI prior to speaking to his customers about ASWI;³¹⁷ (2) he admitted that he did not

³¹³ Id. at 247-248.

³¹⁴ Id.; Tr., 12/18/98 at 25.

³¹⁵ The Hearing Panel does not credit most of Respondent Goldstein’s testimony. It is inconceivable that he had an absolutely clear recollection of everything Palla and Respondent McMahon allegedly told the brokers regarding ASWI (see, e.g., Tr. 12/17/98 at 144-145, 241-242, 248-249, 260-61), a similarly clear memory of what he told his customers regarding ASWI (see, e.g., Tr. 12/17/98 at 251-252, 256-257, 261-262, 264, 265-66, 271-272), but no recollection whatsoever of completing two order tickets for each customer (see, e.g., Tr. 12/17/98 at 152, 244-245; Tr., 12/18/98 at 48, 51, 98-99).

³¹⁶ For example, Respondent Goldstein testified at the Hearing that he believed that he told TL that an IPO was coming in the future. Tr., 12/17/98 at 252. Similarly, he also testified that he told CL that they were looking to an IPO in the future. Id. at 262. Yet, at his October 30, 1996 on-the-record interview (CX-183) he testified as follows: “Q: Do you recall telling customers an IPO would be coming out in Accessible Software? A: **I don’t believe I ever used IPO.**” Tr., 12/18/98 at 75-76 (emphasis added). See also, id. at 103-105 for other examples of inconsistencies in Respondent Goldstein’s testimony.

³¹⁷ Tr., 12/17/98 at 154; see also Tr., 12/18/98 at 57-58.

understand, in May 1996, what a Rule 504 offering was;³¹⁸ and (3) when shown the Rule 504 offering memorandum³¹⁹ at the Hearing, he testified that he had never seen it.³²⁰

Based on the customers' testimony, the Hearing Panel concludes that Respondent Goldstein clearly misrepresented ASWI as an IPO to his customers.³²¹

In addition, Respondent Goldstein sold shares of ASWI to seven of his own customers consistent with the way in which ASWI was sold to customers of the other 919 Third Avenue office brokers. The order tickets for his customers all had the same limit, reported, and execution price of \$6.75,³²² as did the majority of tickets for brokers at 919 Third Avenue.³²³ Further, the majority of Respondent Goldstein's tickets ultimately were executed at \$6.75,³²⁴ consistent with the majority of ASWI trades for the 919 Third Avenue office.³²⁵ In fact, Respondent Goldstein testified that prior to trading, he knew

³¹⁸ Tr., 12/18/98 at 60. ("Q. [I]n May of 1996, what was your understanding of [what] the 504 offering was? A. I was unfamiliar.").

³¹⁹ CX-32.

³²⁰ Tr., 12/18/98 at 82. Again, Respondent Goldstein's testimony was inconsistent. He testified that he never saw the 504 offering memorandum and yet he also testified "a couple of weeks or a month or two after the [ASWI] deal had traded" he had seen the Rule 504 offering memorandum and requested a copy of it (*id.* at 21-22). See also *id.* at 103-105.

³²¹ Notwithstanding what he appears to have told his clients, that ASWI was an IPO, during the Hearing Respondent Goldstein testified that he was told ASWI was a Rule 504 offering. See, e.g., Tr. 12/17/98 at 157-158, 241-242; Tr., 12/18/97 at 57-58. In light of his experience and the fact that ASWI shares had none of the characteristics of a Rule 504 offering, Respondent Goldstein's purported reliance on Respondent McMahon's and Palla's representations concerning ASWI was unreasonable. The uncontradicted evidence establishes that ASWI, as sold by Respondent Goldstein on May 13 and 14, 1996, was a freely tradable OTC Bulletin Board security. Accordingly, Respondent Goldstein's misrepresentations concerning the nature of the ASWI shares was an abdication of his fiduciary responsibility to research recommended investments and, at a minimum, reckless.

³²² CX-41 at 1404-1411, 1414, 1415, 1419-1422.

³²³ CX-41.

³²⁴ Id.

³²⁵ Tr., 11/17/98 at 241.

the price of ASWI was going to be \$6.75 per share and that he also was told his commission for ASWI sales.³²⁶

Respondent Goldstein acknowledged that he understood that a customer limit order obligates him to try and get the best purchase price.³²⁷ He also testified that: (1) throughout the day of May 13, 1996, he watched his Quotron;³²⁸ (2) he remembered seeing ASWI as low as one-and-a-half that day;³²⁹ and (3) he made no attempt to get a limit lower than six-and-three-quarters, the price at which the orders were ultimately executed.³³⁰ The Hearing Panel concludes that Respondent Goldstein, like many other Monitor brokers, knowingly sold ASWI to customers at predetermined prices which were not reflective of free market forces.

The Hearing Panel also finds that since Respondent Goldstein's order tickets all had the same limit, reported, and execution price, he knowingly concealed his compensation from his customers.

³²⁶ Tr., 12/17/98 at 140, 142, 144; CX-178.

³²⁷ Tr., 12/17/98 at 135.

³²⁸ Id. at 154.

³²⁹ Id.

³³⁰ Id. There is no support for the assertion in Respondent Goldstein's Post-Hearing Submission (at 7) that "[t]he limit price of 6^{3/4} appearing on the order tickets for Goldstein's clients was within the bid and ask range at the times they were prepared and delivered to the order room for execution." Indeed, in light of Respondent Goldstein's own testimony that the price of 6 3/4 was predetermined, this representation is wholly disingenuous.

H. RESPONDENT GIGLIO

1. *The Eleventh Cause of Complaint: Violations of Section 10(b), Rule 10b-5, and NASD Rules 2110 and 2120*

The Hearing Panel finds that the preponderance of the evidence demonstrates that Respondent Giglio knowingly, or at least recklessly, made material misrepresentations and/or predictions, in connection with the sale of ASWI to his customers. The Hearing Panel also finds that Respondent Giglio had no reasonable basis for recommending ASWI.

Specifically, as demonstrated by the testimony of customer witness FH, Respondent Giglio misrepresented the nature of the ASWI shares being sold. Both on direct and cross-examination, FH testified³³¹ that, based on what Respondent Giglio told him, he believed ASWI was an IPO or he was being sold the rights to an IPO that would happen in June 1996.³³² FH testified that in June 1996, after he purchased ASWI, he called Respondent Giglio to find out when ASWI would be going public.³³³ Respondent Giglio advised him that the ASWI offering would be extended and it was not going to go

³³¹ As was the case with the other customer witnesses, FH had no pecuniary motive to misrepresent what Respondent Giglio told him. In fact, FH stated that the reason he agreed to testify was because he felt some wrong information was given to him. “It certainly isn’t because I lost money.” Tr., 12/10/98 at 205.

³³² See, e.g., *id.* at 197-198, 200, 205, 217-219. FH’s testimony was corroborated by a signed declaration (CX-103) which he testified was accurate at the time it was signed on September 5, 1996 (Tr., 12/10/98 at 204). Contrary to Respondent Giglio’s post-hearing assertion, FH never testified that “he may have been informed ASWI was a 504 offering.” Respondent Giglio’s Post-Hearing Submission at 12.

³³³ Tr., 12/10/98 at 201.

public at that time.³³⁴ Further, FH testified that Respondent Giglio predicted that the price of ASWI would rise to between \$12-\$15 per share.³³⁵

As he acknowledged at the Hearing, Respondent Giglio knew at the time that he sold ASWI to his clients that the offering was not an IPO.³³⁶ Moreover, the evidence demonstrates that Respondent Giglio had no reasonable basis for making any representations to his clients about ASWI.

Respondent Giglio testified that he failed to conduct any research or to learn anything about ASWI before offering it to his customers.³³⁷ Instead, Respondent Giglio testified that he relied on a piece of paper describing information about the company which he found on his desk and assumed came from management.³³⁸ He could not recall, however, anything disclosed in this piece of paper other than ASWI was a software company.³³⁹ Respondent Giglio testified that he subsequently proceeded to offer his customers shares of ASWI based on this information, without verifying its accuracy,³⁴⁰

³³⁴ Id.

³³⁵ Id. at 198. Even though FH testified that he understood the price prediction to be Respondent Giglio's opinion (id. at 215; see also Respondent Giglio's Post-Hearing Submission at 5), it is clear that there was no reasonable basis for this "opinion." Further, Respondent Giglio's post-hearing assertion that Respondent Ruggiero could have made the price prediction (see Respondent Giglio's Post-Hearing Submission at 8) is pure speculation and has no basis in the record.

³³⁶ Tr., 12/18/98 at 132.

³³⁷ Id. at 129.

³³⁸ Id. at 129-30, 131, 168-70. Respondent Giglio admitted that he never asked anyone where this piece of paper came from. Id. at 131. Although on further examination, after having his recollection refreshed by his counsel with a portion of his on-the-record interview (id. at 170-172), he testified that he believed the piece of paper came from Respondent McMahon, he provided no basis for this belief.

³³⁹ Id. at 130, 169.

³⁴⁰ Id. at 131.

and the fact that other brokers in the office were buying it.³⁴¹ In fact, Respondent Giglio testified that he never heard of ASWI prior to the day he sold it.³⁴²

Respondent Giglio also testified (contrary to the testimony of FH) that in selling ASWI to his customers, he described it as a Rule 504 offering.³⁴³ He admitted, however, that he had no idea what a Rule 504 offering was and made no effort to find out.³⁴⁴

The evidence demonstrates that Respondent Giglio contributed to a concentrated effort at the 30 Broad Street office to sell ASWI, a speculative security, to customers who were not cautioned about the investment risks and to whom the brokers conveyed predictions of price rises and other optimistic prospects without any factual basis.³⁴⁵ The Hearing Panel finds that Respondent Giglio acted recklessly, blatantly disregarding his duty as a broker to understand what he was selling, not to make baseless representations and predictions about a stock, and to deal fairly with his customers.³⁴⁶ Thus, the Hearing Panel finds that Respondent Giglio violated Section 10(b), Rule 10b-5, and NASD Rules 2110 and 2120.

³⁴¹ Id. Respondent Giglio's testimony indicates that he thought he was justified in recommending and selling ASWI to his customers simply because everyone else was buying it and software companies were hot. Id. at 169; see also id. at 189.

³⁴² Id. at 196. Unlike the other brokers, Respondent Giglio did not testify that he ever attended a meeting where ASWI was discussed.

³⁴³ Tr., 12/18/98 at 153.

³⁴⁴ Id.

³⁴⁵ Respondent Giglio admitted that he cold called all his clients -- approximately 20-30 customers -- about ASWI. Id. at 197.

³⁴⁶ Although not argued by Complainant with respect to Respondent Giglio, the evidence also supports the conclusion that he sold ASWI shares at predetermined prices. Respondent Giglio purchased ASWI for all four of his customers at 6 ½ (id. at 114, 118). Further, his testimony that all four of his customers determined the same 6 ½ limit price which he put on the order tickets (id. at 148, 166) was confused and not credible.

**2. *The Thirty-Ninth Cause of Complaint: Violations of NASD
Rules 8210 and 2110***

The evidence demonstrates that on a number of occasions Respondent Giglio failed to provide truthful answers to the NASD during his on-the-record interview.

Respondent Giglio represented that he never was paid for selling ASWI.³⁴⁷ The commission recap report, however, reflects Respondent Giglio's commissions for selling ASWI during the month of May, 1996.³⁴⁸ The evidence also demonstrates that Respondent Giglio received paychecks which included amounts attributable to such commissions for the time period during which ASWI was sold.³⁴⁹

Respondent Giglio also was not truthful concerning the circumstances under which he came to know Piazza. During his on-the-record interview, Respondent Giglio testified that he first met Piazza in December of 1995 or January of 1996.³⁵⁰ This statement was contradicted by the fact that Respondent Giglio witnessed Piazza's signature on a Baird Patrick cash account agreement dated August 22, 1995.³⁵¹ At the Hearing, Respondent Giglio asked the Panel to believe that he simply signed the cash

³⁴⁷ Id. at 111.

³⁴⁸ CX-119 at 3464. The commission recap report demonstrates that sales of ASWI accounted for most of Respondent Giglio's commissions during this time period.

³⁴⁹ Tr., 12/18/98 at 111-114; Panel Exhibit #3, Tr., 12/14/98 at 415; CX-121 at 3552, 3557, 3614, 3621, 3647, 3652. Respondent Giglio also admitted to splitting commissions with Sal Ruggerio, who also was compensated for selling shares of ASWI during the relevant time period (Tr., 12/18/98 at 110, 111-114; CX-119 at 3456-57; CX-121 at 3552, 3557, 3614, 3625, 3647, 3654). Respondent Giglio asserts that the commission recap report is inaccurate since it shows him selling three times the number of ASWI shares he actually sold (see Post-Hearing Submission at 10). This is not correct. A careful review of that report (CX-119 at 3464) shows that the original four transactions were canceled out.

³⁵⁰ Tr., 12/18/98 at 122-123.

³⁵¹ CX-51 at 2221; Tr., 12/18/98 at 123-124.

account agreement at someone's request, but he did not know what he witnessed nor did he recall meeting Piazza.³⁵² His testimony simply was not believable.

Respondent Giglio was not truthful regarding his dealings with customers. During his on-the-record interview, Respondent Giglio claimed that: (1) he never told his customers that ASWI was an IPO;³⁵³ (2) he never gave his customers specific price predictions, but instead only told them that the price was "going north;"³⁵⁴ (3) none of his customers ever called to ascertain ASWI prices after Monitor no longer was actively trading ASWI;³⁵⁵ and (4) he told his customers that ASWI was a Rule 504 Offering.³⁵⁶ All of these representations were contradicted by the testimony of FH.³⁵⁷

IV. Legal Discussion and Conclusions of Law

A. Fraudulent Manipulation and Deceptive Sales Practices: Section 10(b), Rule 10b-5, and NASD Rules 2120 and 2110

Section 10(b) makes it unlawful for any person to use, "in connection with the purchase or sale of any security," any "manipulative or deceptive device or contrivance" in contravention of rules or regulations that the Securities and Exchange Commission ("SEC") may prescribe. Pursuant to its authority under Section 10(b), the SEC adopted Rule 10b-5 which prohibits manipulative or deceptive acts, by use of any means or

³⁵² Tr., 12/18/98 at 125-126, 174.

³⁵³ Id. at 135-136.

³⁵⁴ Id. at 136.

³⁵⁵ Id. at 136-138; CX-187.

³⁵⁶ Tr., 12/18/98 at 151-153.

³⁵⁷ Further, Respondent Giglio claimed during his on-the-record interview that he charged his customers a 5% commission for ASWI (CX-188; Tr., 12/18/98 at 141-142). The evidence demonstrates otherwise as

instruments of transportation or communication in interstate commerce, or of the mails, "in connection with the purchase or sale of any security."

To violate Section 10(b) and Rule 10b-5, a person must act with scienter,³⁵⁸ which the Supreme Court has defined as "a mental state embracing intent to deceive, manipulate or defraud."³⁵⁹ Scienter is established by a showing of either intentional or reckless conduct, the latter of which has been defined as "highly unreasonable conduct which is an extreme departure from the standards of ordinary care."³⁶⁰ Scienter is a question of fact and can be proved by circumstantial evidence.³⁶¹

NASD Rule 2120 is the counterpart to Rule 10b-5. It also prohibits the use of manipulative, deceptive, or other fraudulent devices in connection with the purchase or sale of any security. As with Rule 10b-5, a violation of NASD Rule 2120 requires a finding of scienter.³⁶²

NASD Rule 2110 requires adherence to "high standards of commercial honor and just and equitable principles of trade." Clearly, manipulative or deceptive conduct in connection with the sale or purchase of securities represents a departure from the high

reflected by Respondent Giglio's ASWI order tickets showing a \$1.25 credit as well as commissions in excess of 5% (CX-41 at 1307, 1308, 1312-1315, 1328-1329).

³⁵⁸ Aaron v. SEC, 446 U.S. 680, 695 (1980).

³⁵⁹ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-94 n. 12 (1976).

³⁶⁰ SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985)(quoting Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 741 (6th Cir. 1980).

³⁶¹ Morgan v. Prudential Group, Inc., 527 F. Supp. 957, 958-959 (S.D.N.Y. 1981), aff'd, 729 F. 2d 1443 (2d Cir. 1983). In Lanza v. Drexel & Co., 479 F.2d 1277, 1306 n. 98 (2d Cir. 1973), the court stated that a scienter determination "will of course depend upon the circumstances of the particular case, including the nature and duties of the corporate positions held by the defendants."

³⁶² District Business Conduct Committee ["DBCC"] No. 5 v. Putterman, 1997 NASD Discip. LEXIS 52, at *21 (National Business Conduct Committee [hereinafter "NBCC"], Oct. 10, 1997).

standards of commercial honor that the Association demands of its members and associated persons.³⁶³

1. Market Manipulation: Fourth Cause (Montelbano), Fifth Cause (McMahon), Sixth Cause (Gennuso), and Seventh Cause (Galasso)

Market manipulation is a "term of art . . . connot[ing] intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."³⁶⁴ Manipulation subverts the objectives of the Exchange Act which, among other things, is intended to "insure the maintenance of fair and honest markets,"³⁶⁵ that is, "markets where prices may be established by the free and honest balancing of investment demand with investment supply."³⁶⁶

The "classic elements" of manipulation, as defined by the federal courts and the SEC, include: a rapid surge in a security's price that is driven by control of the security's supply and that occurs despite scant investor interest in the security and in the absence of any known prospects for, or favorable developments affecting, the issuer; a series of transactions which create actual or apparent trading in, and raise the price of a security for the purpose of inducing its purchase by others; and a price rise effected by a firm's

³⁶³ In re Pace, Exchange Act Release No. 32153, 51 S.E.C. 361, 53 SEC Docket 2330, 1993 SEC LEXIS 960 (April 15, 1993).

³⁶⁴ Pagel, Inc. v. SEC, 803 F.2d 942, 945 (8th Cir. 1986) (quoting Ernst & Ernst, 425 U.S. at 199).

³⁶⁵ 15 U.S.C. §78b.

³⁶⁶ H.R. REP. No. 73-1383, at 11 (1934). See also United States v. Stein, 456 F.2d 844, 850 (2d Cir. 1972) ("The purpose of the [Exchange Act] is to prevent rigging of the market and to permit operation of the natural law of supply and demand.").

dominion and control of the market in the security and its total price as further evidenced by the virtual collapse of the market in the stock following the manipulation.³⁶⁷

Ultimately, proof of a manipulation generally is not based on a single activity, but rather on a course of conduct showing interference with the normal functioning of the market for a security. Thus,

Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces.³⁶⁸

In the instant case, the Hearing Panel finds that many of the classic elements of manipulation are present. Moreover, the “mass of factual data” supports the conclusion of a manipulative scheme designed to interfere with free market forces.

As demonstrated by the evidence, during the relevant period, Monitor dominated and controlled the market for ASWI stock. Further, Monitor manipulated the price and supply of ASWI as evidenced by the following: a rapid surge in ASWI’s price occurred despite scant investor interest in the security and in the absence of any known prospects for or favorable developments affecting the issuer; and once the price for ASWI had

³⁶⁷ See SEC v. Resch-Cassin & Co., 362 F.Supp. 964, 976-977 (S.D.N.Y. 1973); In re Pace, 1993 SEC LEXIS 960, at * 6 (Apr. 15, 1993). Accord In re Fertman, Exchange Act Release No. 34-33479, 51 S.E.C. 943, 55 SEC Docket 2367, 1994 SEC LEXIS 149, at *13 n. 23 (Jan. 14, 1994) (and cases cited therein) (SEC noted that “[i]t is not necessary for all (or any particular combination) of these ‘classic elements’ to be present for us to find a manipulation.”).

³⁶⁸ In re Pagel, Inc., Exchange Act Release No. 22280, 48 S.E.C. 223, 226, 33 SEC Docket 1003, 1005, 1985 SEC LEXIS 988, at *7 (Aug. 1, 1985); see, e.g., In re Patten Securities Corp., Exchange Act Release No. 32619, 51 S.E.C. 568, 574, 54 SEC Docket 1126, 1993 SEC LEXIS 1762, at *14-15 (1993)(“a finding of manipulation does not hinge on the presence or absence of any particular device usually associated with a manipulative scheme. Rather, each case must be judged on its own facts.”)[footnotes omitted].

increased, Monitor sold ASWI to its retail customers;³⁶⁹ and there was little interest in ASWI common stock away from Monitor or those having a relationship to Monitor.

The evidence demonstrates that Respondent Galasso, the only trader at Monitor on May 13 and 14, played an essential role in the manipulation in that he: (1) signed the necessary paperwork with the NASD to permit Monitor to be a market maker in ASWI; (2) utilized trading techniques on May 13 and 14 to move the price of ASWI upward and downward, artificially inflating the price of ASWI and permitting the brokers to receive credits of \$2.25 per share; and (3) allocated shares of ASWI to customers' orders at predetermined prices with no relationship to market forces.

Respondent McMahon, the Firm's analyst, also played a primary role in the manipulation in that he encouraged Monitor's sales force to make misrepresentations and baseless predictions to their clients in an effort to pump up the artificial demand in order to raise the price of ASWI. Respondent McMahon also assisted with coordination of the manipulation by allocating shares and offering special compensation to the brokers.

Respondents Montelbano and Gennuso, like Respondent McMahon, actively participated in implementation of a coordinated sales effort by Monitor brokers for the purpose of further raising and maintaining the artificial market price.³⁷⁰ The coordinated effort included Respondent Montelbano providing brokers with information on ASWI,

³⁶⁹ See In re Thornton & Co., Exchange Act Release No. 4115, 28 S.E.C. 208, 1948 SEC LEXIS 432, *35 (July 15, 1948) (Further evidence of the existence of a manipulative scheme is found when a person who purchases securities in a series of transactions and raises the price of the securities sells those securities at the artificially inflated price), aff'd per curiam sub nom., Thornton v. SEC, 171 F.2d 702 (2d Cir. 1948).

³⁷⁰ See In re Harold B. Hayes, Exchange Act Release No. 34-34662, 51 S.E.C. 1294, 1298, 57 SEC Docket 1510, 1513, 1994 SEC LEXIS 2870, at *9 (September 13, 1994) (Several factors point to the presence of manipulation including "a rapid surge in the stock's price . . . and a coordinated effort . . . to conduct a high pressure sales campaign for the purpose of raising the market price.") [footnotes omitted].

allocating shares of ASWI to brokers, and informing the brokers what credits they would receive for selling shares in ASWI. Respondent Gennuso: (1) informed brokers of the predetermined prices to write on their tickets; (2) relayed these tickets with predetermined prices to the firm's trading room; and (3) determined which customers' orders from the 30 Broad Street office would be executed on May 13 and which would be canceled and rewritten on May 14 at different predetermined prices with no relationship to market demand for ASWI.

There is no question that these Respondents acted with the requisite manipulative scienter or intent. It is well established that “[i]ntent, like the other elements of a manipulation charge, may be inferred from the facts and circumstances of a given case because ‘manipulators seldom publicize their intentions.’”³⁷¹ Respondents knew, or were reckless in not knowing,³⁷² that their actions would result in shares of ASWI being sold to customers of Monitor at artificially high prices having nothing to do with unimpeded market supply and demand.³⁷³

The SEC consistently has stated that investors are:

entitled to assume 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.

³⁷¹ In re Fertman, 51 SEC at 949, citing, In re Mawod & Co., 46 SEC 865 (1977), aff'd, 591 F.2d 588 (10th Cir. 1979).

³⁷² See, e.g., Rolf v. Blyth, Eastman Dillion & Co., 570 F.2d 38 (2d Cir. 1978); see also Market Surveillance Committee v. Markowski, 1998 NASD Discip. LEXIS 35, at *38 n.31 (NAC July 13, 1998).

³⁷³ The Panel does not credit Respondents' arguments made during the Hearing that they lacked sufficient intent to manipulate because they received little or no financial benefit from the sale of ASWI. The evidence presented at the Hearing demonstrates that Respondents received a financial benefit – either through a raise or by receiving overrides on brokers' sales of ASWI. See, e.g., Tr. 12/29/09 at 219-220 (McMahon); Tr., 12/29/98 at 141-143 (Montelbano). Moreover, a failure to profit monetarily is not inconsistent with a finding of intent to manipulate. See In re R.B. Webster Investments, Inc., Exchange Act Release No. 34569, 51 S.E.C. 1269, 1274, 57 SEC Docket 1491, 1497-98, 1994 SEC LEXIS 2868, at *12 (Sept. 13, 1994).

Manipulations frustrate those expectations. They substitute fiction for fact * * *. The vice is that the market has been distorted and made into a 'stage-managed performance.'³⁷⁴

Because of Respondents' unlawful conduct, this is exactly what happened here. Accordingly, the Hearing Panel concludes that Respondents Galasso, Gennuso, McMahon, and Montelbano manipulated the supply and price of ASWI in violation of Section 10(b), Rule 10b-5 and NASD Rule 2120. Such conduct also violates NASD Rule 2110.

2. *Deceptive Sales Practices: Eighth Cause (Goldstein), Eleventh Cause (Giglio), Thirteenth Cause (Leverett), and Fourteenth Cause (Nejaime)*

Complainant did not demonstrate the existence of high pressure sales tactics as alleged in the Complaint or some other aspects typically associated with a boiler room operation.³⁷⁵ Complainant, however, need not show the existence of a boiler room to meet its burden to prove the alleged violations.³⁷⁶ Moreover, the evidence showed that Monitor's operations with respect to the sale of ASWI -- lack of supervision, lack of research, the non-disclosure of information about the true nature of ASWI, and baseless price predictions -- had some of the *indicia* of a boiler room. These techniques resulted

³⁷⁴ Patten, 51 SEC at 572, citing, Mawod, 46 SEC at 871-872.

³⁷⁵ See Hanly v. SEC, 415 F.2d 589, 597 n.14 (2d Cir. 1969).

³⁷⁶ See, e.g., In re Armstrong, Jones & Co., Exchange Act Release No. 8420, 43 S.E.C. 888, 1968 SEC LEXIS 249 (Oct. 3, 1968) (holding that it is not necessary to establish that boiler room or high pressure tactics existed for Section 10(b) and 10b-5 violations); In re Newport Securities Corp., 1973 SEC LEXIS 3471 (Feb. 16, 1973) (where predictions of price are made without a full disclosure of facts and uncertainties, such statements are inherently misleading which support 10(b) and 10b-5 violations. It is irrelevant whether boiler room tactics were engaged in.); In re Teller & Co., 1972 SEC LEXIS 4256 (July 20, 1972) (fact that firm is not operating as a boiler room does not justify misrepresentations which violate antifraud provisions). See Hanly at 597 n.14.

in the Monitor brokers selling 120,000 shares of ASWI in less than two days to about 100 customers in approximately 20 states³⁷⁷ by misrepresenting ASWI as an IPO.

The facts demonstrate that these Respondents: “(1) made a material misrepresentation, omitted to state material facts, or otherwise engaged in a scheme to artifice and defraud; (2) acted with the requisite scienter; (3) committed the fraudulent acts in connection with the offer, purchase or sale of a security; and (4) employed the jurisdictional means.”³⁷⁸

The purpose of the antifraud provisions is “to ensure that investors obtain full disclosure of material facts in connection with their investment decisions.”³⁷⁹ “[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information.”³⁸⁰ It is well established that false and misleading statements and omissions of material facts made in connection with the purchase or sale of securities are in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.³⁸¹ Further, both the NASD and the SEC have held that predictions

³⁷⁷ CX-43; CX-60.

³⁷⁸ In re Abraham & Sons Capital, 1999 SEC LEXIS 187 (Jan. 28, 1999).

³⁷⁹ SEC v. Hasho, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992).

³⁸⁰ In re Daniel L. Zessinger, SEC Initial Decisions Release No. 94, 62 SEC Docket 1482, 1996 SEC LEXIS 2179, at *18 (Aug. 2, 1996), citing, Basic, Inc. v. Levinson, 485 U.S. 224, 240 (1988).

³⁸¹ See Zessinger, 1996 SEC LEXIS 2179; accord DBCC No. 9 v. Euripides, 1997 NASD Discip. LEXIS 45 (July 28, 1997) (same elements required by NASD for 10b-5 and 2120 violations, except for jurisdiction).

of increases in the price of speculative securities of an unseasoned company are fraudulent and cannot be justified.³⁸²

Here, Respondents made material misrepresentations and/or omissions as well as baseless price predictions about ASWI that were intended to and did artificially condition the market to facilitate the distribution of ASWI to customers of Monitor. Such activities included mischaracterizing the nature of the ASWI shares being sold, baseless price predictions, selling ASWI at predetermined prices having no relation to market demand, and failing to disclose compensation.

Specifically, the evidence shows that Respondents Goldstein and Giglio informed their respective customers that ASWI was an IPO, when, in fact, the shares were already freely tradable and publicly available. These statements are inherently significant.³⁸³

With respect to the price predictions, the evidence demonstrates that Respondents Goldstein, Leverett, and Giglio, without any reasonable basis, told their customers that the price of ASWI would go up in a few weeks. These price predictions are not ameliorated merely because they are cast as an opinion or a possibility rather than as a guarantee.³⁸⁴

In addition, Respondents Goldstein, Leverett, Nejaime, and Giglio freely admitted that they did not conduct any independent research on ASWI. Rather, Respondents Goldstein and Leverett allegedly relied on information provided by Respondent

³⁸² See In re Roche, Exchange Act Release No. 38742, 64 SEC Docket 1973, 1997 SEC LEXIS 1283, at *5 (June 17, 1997); In re Michael J. Fee, Exchange Act Release No. 31070, 50 S.E.C. 1124, 52 SEC Docket 1082, 1992 SEC LEXIS 1989, * 4 (Aug. 24, 1992).

³⁸³ The nature of the security being sold (*i.e.*, whether ASWI was an IPO) certainly was a material fact since it affected the “total mix” of information provided to Monitor’s customers and the desire of investors to purchase the securities. See Basic v. Levinson, 485 U.S. at 231-32; Hasho, 784 F. Supp. at 1108.

³⁸⁴ See Hasho, 784 F. Supp. at 1109.

McMahon, and Respondent Giglio allegedly relied on a piece of paper found on his desk and the fact that other brokers were selling ASWI.

Securities dealers owe a “special duty of fair dealing to their clients. By making a recommendation, a securities dealer implicitly represents to a buyer of securities that he has an adequate basis for the recommendation.”³⁸⁵ Indeed, the SEC has stated that recommending securities without a reasonable basis “flagrantly violate[s] perhaps the most central duty of a securities salesman, that is to ensure that his representations to clients have a reasonable basis.”³⁸⁶ In an oft-cited passage from Hanly, the Second Circuit held that a salesman “cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant.” Further, he “must analyze sales literature and must not blindly accept recommendations made therein.”³⁸⁷ Moreover, “although the degree of independent investigation which must be made by a securities dealer will vary in each case. Securities issued by smaller companies of recent origin obviously require more thorough investigation.”³⁸⁸

Under the circumstances of this case where there are indicia of a “boiler-room” and where the security being offered was of a small, untested company, decisional law makes clear that registered representatives do not satisfy their duty to investigate merely

³⁸⁵ Hasho, 784 F.Supp. at 1107[citations omitted].

³⁸⁶ In re Puccio, (“Puccio”) SEC Initial Decision No. 68, 59 SEC Docket 1985, 1995 SEC LEXIS 1724, at *18 (July 10, 1995)(citing In re Kuznetz, 48 S.E.C. 551, 36 SEC Docket 332, 1986 SEC LEXIS 1001 (Aug. 12, 1986)).

³⁸⁷ 415 F.2d at 595-96.

³⁸⁸ Id. at 597. Here there is no dispute that ASWI was a start-up company with no earnings.

by relying on materials or opinions furnished by their employer.³⁸⁹ Similarly, the SEC has recognized that failure to conduct any independent investigation or research, at the very least, amounts to recklessness sufficient to satisfy the scienter requirement of the antifraud provisions.³⁹⁰

Moreover, an associated person's duty to act in accordance with NASD ethical standards cannot be shifted to another.³⁹¹ Even though the evidence demonstrates that the officers of Monitor were derelict in their duty to supervise the activities of Monitor's brokers (and even encouraged the brokers to make predictions and misrepresentations), Respondents' misconduct is not excused by inadequate supervision.³⁹²

In addition to the foregoing, Respondents Goldstein, Leverett, Giglio, and Nejaime³⁹³ violated the antifraud provisions by failing to disclose to their customers that

³⁸⁹ See, e.g., Berko v. SEC, 316 F.2d 137, 142 (2d Cir. 1963).

³⁹⁰ Puccio, 1995 SEC LEXIS 1724 at *25. See also Walker v. SEC, 383 F.2d 344, 345 (2d Cir. 1967) ("The Commission is justified in holding a security salesman chargeable with knowledge of the contents of the sales literature.").

³⁹¹ See In re Thomas J. Kocherans, Exchange Act Release No. 36556, 52 S.E.C. 528, 60 SEC Docket 2210, 1995 SEC LEXIS 3332, at *9-10 (Dec. 6, 1995) ("Participants in the securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements."); In re Smith, Exchange Act Release No. 35898, 52 S.E.C. 346, 59 SEC Docket 1676, 1995 SEC LEXIS 1531, at *5 .8 (June 27, 1995). See also, DBCC No 9 v. Euripides, 1997 NASD Discip. LEXIS 45 (July 28, 1997).

³⁹² See In re Perkins, Exchange Act Release No. 32188, 51 S.E.C. 380, 53 SEC Docket 2442, 1993 SEC LEXIS 882 (April 21, 1993); In re Sheldon, Exchange Act Release No. 31475, 51 S.E.C. 59, 52 SEC Docket 2496, 1992 SEC LEXIS 3052, at *74 (Nov. 18, 1992) (failure to supervise salesmen did not insulate those salesmen from liability under the antifraud provisions of the securities laws). In Puccio, the SEC found that Respondent's failure to conduct any independent research, at a minimum, amounted to recklessness and satisfied the scienter requirement of the antifraud provisions. 1995 SEC LEXIS 1724, at *25.

³⁹³ Despite the fact that Complainant offered no evidence of customer complaints against Respondent Nejaime, the documentary evidence (order tickets) and Respondent Nejaime's own testimony showed that he engaged in the same misconduct as the other Respondent brokers. His conduct, offering shares of ASWI at predetermined prices with undisclosed excess markups, furthered the ASWI scheme in violation of Rule 10b-5 and NASD Rules 2120 and 2110. Complainant does not have to establish that Nejaime's customers

the price of ASWI was predetermined and was not the result of free market forces.³⁹⁴ This is a material omission since a reasonable investor would want to know the factors affecting the value and liquidity of his investment.³⁹⁵ There is no question that these Respondents acted with scienter since they knowingly sold ASWI stock at the predetermined prices.

Further, these Respondents did not disclose to their customers the special compensation they were receiving for selling ASWI. Decisional law makes clear that failing to disclose to customers the amount of commissions constitutes a material omission since it deprives the customer of the knowledge that his registered representative might be recommending a security based upon the registered representative's own financial interest rather than the investment value of the recommended security.³⁹⁶

Based on all the foregoing evidence, the Hearing Panel concludes that Respondents Giglio, Goldstein, Nejaime and Leverett engaged in deceptive sales practices in violation of Section 10(b), Rule 10b-5, and NASD Rules 2120 and 2110.

relied on or were harmed by his misrepresentations to prove a violation of Rule 10b-5 and NASD Rules 2120 and 2110. See In re Bernard D. Gorniak, Exchange Act Release No. 35996, 52 S.E.C. 371, 59 SEC Docket 2073, 1995 SEC LEXIS 1820, at *5 n.5 (July 20,1995) (“The NASD’s power to enforce its rules is independent of a customer’s decision not to complain, which may be influenced by many factors.”). See also SEC v. Hasho, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992).

³⁹⁴ See, e.g., SEC v. Graystone Nash, Inc., 820 F. Supp. 863, 871 (D.N.J. 1993)(violations of Rule 10b-5 for failing to disclose that the prices of house stocks “were not the result of free market forces.”).

³⁹⁵ Id. at 872.

³⁹⁶ Hasho, 784 F. Supp. at 1110; see also In re Barbato, 1996 SEC LEXIS 3138, at *38 (November 12, 1996).

B. Fraudulent and Excessive Markups: Fifteenth Cause (Galasso and Gennuso)

Both the federal securities laws and NASD's Rules require members to charge fair prices in transactions with their retail customers. NASD Rule 2440 states, in relevant part, that in selling securities in the over-the-counter market, "if a member * * * sells for his own account to his customer, he shall * * * sell at a price which is fair, taking into account all relevant circumstances * * *."³⁹⁷

The NASD uses what is known as the "5% policy."³⁹⁸ Under that policy, markups for equity securities greater than 5% above the prevailing market price generally are considered to be unreasonable and, thus, violative of NASD rules.³⁹⁹ An undisclosed markup of more than 10 percent above the prevailing market price is fraudulent *per se*.⁴⁰⁰

The SEC has held that when:

a dealer marks up the price of a security so that the price charged is excessive when considered in relation to the prevailing market price, and fails to disclose that excessive markup to the customer, the dealer has failed to disclose a material fact and, accordingly, has deceived its customers and committed fraud.⁴⁰¹

³⁹⁷ Interpreting this section, as well as Rule 2110 -- which requires adherence to just and equitable principles of trade -- the NASD has stated: "[i]t shall be a violation of Rule 2110 and Rule 2440 for a member to enter into any transaction with a customer in any security at any price not reasonably related to the current market price of the security or to charge a commission which is not reasonable." See NASD Rule IM-2440. See also Grandon v. Merrill Lynch & Co., 147 F.3d 184, 191 (2d Cir. 1998); SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1469 (2d Cir. 1996) ("Sales of securities by broker-dealers to their customers carry with them an implied representation that the prices charged in those transactions are reasonably related to the prices charged in an open and competitive market."); In re Horner & Associates, Exchange Act Rel. No. 30884, 50 SEC 1063, 1992 SEC LEXIS 1568, *6 (July 2, 1992).

³⁹⁸ Id.

³⁹⁹ First Jersey Securities, Inc., 101 F.3d at 1469; In re Zero-Coupon Securities, Exchange Act Rel. No. 24368, 1987 SEC LEXIS 2005, *8 (April 21, 1987).

⁴⁰⁰ See, e.g., First Jersey Securities, Inc. 101 F.3d at 1469; Orkin v. SEC, 31 F.3d 1056, 1063 (11th Cir. 1994).

⁴⁰¹ In re Richfield Securities Inc., Exchange Act Release No. 33188, 51 S.E.C. 797, 55 SEC Docket 1219, 1993 SEC LEXIS 3132, at *11 n.22 (November 12, 1993). "It is a notion basic to the federal securities

Establishment of the prevailing market price is “the starting point in determining the legality or illegality of a broker's markup on a sale of stock.”⁴⁰² Where, as here, a broker-dealer dominates and controls⁴⁰³ the market for a security and that broker-dealer “makes few or no purchases in the inter-dealer market, or if the volume of trading among dealers is insignificant in comparison to the controlling dealer's retail trades, the best evidence of that security's prevailing market price is generally” the contemporaneous cost at which the broker-dealer *acquired* the security.⁴⁰⁴

In this case, the Panel determined that the best evidence of Monitor’s contemporaneous costs for ASWI on May 13-14, 1996 was the prices Monitor paid to Baird Patrick which were the closest in time to the sales that Monitor effected with its retail customers on those dates. As the evidence demonstrates, Monitor’s contemporaneous cost for ASWI on May 13, 1996 was \$3.875 per share, and on May 14, 1996 was \$5.00 per share. Based on these contemporaneous costs, the prices charged to Monitor’s retail customers resulted in excessive markups ranging from 10.48% to

laws that information as to an excessive markup is always material to the purchaser of a security.” *Id.* at *11. See also, Grandon v. Merrill Lynch & Co., 147 F. 3d 184, 189-190 (2d Cir. 1998).

⁴⁰² SEC v. First Jersey Securities, Inc., 101 F.3d at 1459(quoting SEC v. First Jersey Securities, Inc., 890 F. Supp. 1185, 1197 (S.D.N.Y. 1995)).

⁴⁰³ “Domination and control occurs when real competition is not present in the marketplace, and the wholesale and retail trading by a single market maker, or by two or more market makers willfully acting together, accounts for a substantial percentage of the volume and transactions during the particular period.” NASD 1992 Notice to Members 92-16, 1992 NASD LEXIS 47, at *19 (April 1,1992).

⁴⁰⁴ First Jersey Securities, Inc., 101 F.3d at 1469-1470 (citing In re Blinder, Exchange Act Release No. 31095, 50 S.E.C. 1215, 52 SEC Docket 1145, 1992 SEC LEXIS 2019, at *19 (Aug. 26, 1992); In re Salloum, Exchange Act Release No. 35563, 52 S.E.C. 208, 59 SEC Docket 39, 1995 SEC LEXIS 807, at *12 (April 5, 1995)).

74.19%, well above the 5% policy. Moreover, 101 of the 107 transactions on May 13-14, 1996 involved markups that were in excess of 10% and, thus, were fraudulent *per se*.⁴⁰⁵

Respondents Galasso and Gennuso both bear responsibility for the excessive markups. During the relevant time period, Respondent Galasso was the Firm's trader and executed the ASWI transactions with sales credits to the brokers which resulted in the excessive markups. Indeed, in furtherance of the scheme to prevent customers from learning the true level of compensation being earned by Monitor and its brokers on ASWI trades, Respondent Galasso, at Palla's direction, took affirmative steps to ensure that trade confirmations for ASWI trades would not reflect any compensation to the Firm or broker. He admitted doing this by ensuring that the "reported price," "execution price" and "limit price" indicated on the tickets were the same, even though this did not accurately reflect the transactions which occurred.

During the relevant time period, Respondent Gennuso was the Firm's Operations and Compliance Director. As such, he was responsible for overseeing pricing to ensure that markups were not excessive.⁴⁰⁶ The evidence shows that Respondent Gennuso not only failed to ensure that the markups were not excessive, but that he reviewed and approved ASWI order tickets for transactions that involved excessive and fraudulent markups for the 30 Broad Street office.

⁴⁰⁵ The six involving markups less than 10% nevertheless were excessive and in violation of Conduct Rule 2110.

⁴⁰⁶ In re Blalock, Exchange Act Release No. 35002, 52 S.E.C. 77, 58 SEC Docket 147, 1994 SEC LEXIS 3677 (Nov. 23, 1994), aff'd, 96 F.3d 1457 (11th Cir. 1996)(Table decision).

Respondents Galasso and Gennuso, knew, or were reckless in not knowing, that the markups charged were excessive. As the SEC has made clear:

Where a dealer knows the circumstances indicating the prevailing inter-dealer market price for the securities, knows the retail price that it is charging the customer, and knows or recklessly disregards the fact that its markup is excessive, but nonetheless charges the customer the retail price, the scienter requirement is satisfied.⁴⁰⁷

Accordingly, the Hearing Panel concludes that Respondents Galasso and Gennuso violated Section 10(b), Rule 10b-5, and NASD Rules 2120, 2440 and 2110.

C. Manipulative Conduct in Violation of Rule 10b-6: Sixteenth Cause (Galasso, McMahon, Montelbano and Gennuso)

Rule 10b-6,⁴⁰⁸ promulgated by the SEC under Section 10(b) of the Exchange Act, is designed to prohibit market manipulation in the distribution of a security.⁴⁰⁹ The rule prohibits, subject to certain exceptions, persons or entities engaged in a distribution of securities⁴¹⁰ from bidding for or purchasing for their own account the security being

⁴⁰⁷ In re Blinder, 1992 SEC LEXIS 2019, at *34.

⁴⁰⁸ On December 18, 1996, the Commission adopted a comprehensive revision of Rules 10b-6, 10b-7, 10b-8, and 10b-21, which became effective on March 4, 1997. Among other things, these amendments deemed Rules 101 and 102 under Regulation M as successor rules to Rule 10b-6. See Anti-Manipulation Rules Concerning Securities Offerings, Exchange Act Release No. 38067 (Dec. 20, 1996).

⁴⁰⁹ A "distribution" is defined by paragraph (c)(5) of Rule 10b-6 as an offering of securities that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods. Review of Anti-Manipulation Regulation of Securities Offerings, Exchange Act Release No. 33924 (April 19, 1994). Evidence that a firm engaged in special selling efforts may include the "preparation and wide-spread dissemination of research reports, mobilization of the entire sales force to sell the security, provision of special selling compensation, or high pressure sales efforts to a large number of geographically dispersed retail customers." DBCC No. 7 v. Berkely Securities Corporation, 1994 NASD Discip. LEXIS 59 (NBCC, June 22, 1994). See also, In re First Albany Corp., Exchange Act Release No. 30515, 50 S.E.C. 890, 51 SEC Docket 87, 1992 SEC LEXIS 719 (March 25, 1992) (volume of 9.5 % shares outstanding held to be a distribution with the presence of special selling methods).

⁴¹⁰ The provisions of Rule 10b-6 apply to issuers, selling shareholders, underwriters, prospective underwriters, dealers, brokers, and other persons who have agreed to participate or are participating in the distribution, as defined in Rule 10b-6(c)(5), and their "affiliated purchasers," as defined in Rule 10b-6(c)(6), including broker-dealer affiliates.

distributed until after the completion of the distribution. The Rule also prohibits persons or entities engaged in a distribution from attempting to induce other persons to purchase the security being distributed.⁴¹¹

The purpose of Rule 10b-6 is to assure prospective investors that the price of an offering has not been influenced by persons with a significant interest in the success of the offering.⁴¹² To this end, distribution participants may solicit offers to buy the security being distributed *so long as such solicitations are not* “for the purpose of creating actual, or apparent, active trading in or raising the price of” the distributed security. Such solicitations may also not be designed to directly or indirectly maintain the artificially high price of the offered security.⁴¹³

Here, the evidence is clear that Monitor engaged in a distribution of ASWI on May 13 and 14, 1996. Monitor sold 24% of the publicly tradable float.⁴¹⁴ In a 24 hour period, the individual Respondents directed the placement of 120,600 shares of ASWI,

⁴¹¹ Id.

⁴¹² Id.

⁴¹³ Review of Anti-Manipulation Regulation of Securities Offerings, Exchange Act Release No. 33924, 56 SEC Docket 1362, 1994 SEC LEXIS 1302, at * 36 (April 19, 1994). The SEC has not determined that a finding of scienter is an essential element of a Rule 10b-6 violation. See In re Swartwood, Hesse, Inc., Exchange Act Rel. No. 31212, 1992 SEC LEXIS 2412, *8-9 (September 22, 1992). Cf. SEC v. Burns, 614 F. Supp. 1360, 1363 (S.D. Cal. 1985), aff'd on other grounds 816 F.2d 471 (9th Cir. 1987) (“the Congressional intent embodied in Section 10b requires the Commission to allege and prove scienter as an element of a violation of Rule 10b-6”) with Market Regulation Committee v. J.C. Bradford Co., 1999 NASD Discip. LEXIS 25, *9-14 (NAC June 10, 1999) (the NAC declined to read a scienter requirement into Rule 10b-6A).

⁴¹⁴ Volume is not the only deciding factor; the percentage of the public float represented by the securities being distributed also must be considered. Prohibitions Against Trading By Persons Interested In A Distribution, Exchange Act Release No. 18528 (March 3, 1982).

thus demonstrating that the distribution of shares was of great magnitude.⁴¹⁵ Further, Monitor brokers were mobilized specifically to sell ASWI shares and were offered special compensation for such sales.⁴¹⁶

Monitor, acting through Respondents Galasso, Gennuso, McMahon, and Montelbano, purchased shares of ASWI for its own account during the distribution and encouraged and directed Monitor's sales force to induce customer purchases of ASWI during the distribution.

Specifically, Respondent Galasso manipulated the price of ASWI upwards and downwards during May 13 and 14. In addition, he allocated shares of ASWI to customer accounts at the end of the day on May 13 and executed order tickets that gave brokers special compensation of \$2.25 per share. Respondents McMahon and Montelbano, among others, both informed brokers that they would receive special compensation for selling ASWI shares and allocated ASWI shares to certain brokers. Respondent Gennuso, as did Respondent Galasso, treated trading of ASWI shares on May 13 as if they were

⁴¹⁵ "Factors relevant to the magnitude element are the number of shares for sale, the trading volume that those shares represent, the percentage of outstanding shares, and the public float." DBCC No. 10 v. Goldman, Complaint No. C1096208, at 12 (NAC May 14, 1999). See also Review of Anti-Manipulation Regulation of Securities Offerings, Exchange Act Release No. 33924. As the evidence herein demonstrates, there is no question, and it was not challenged by any Respondent, that the distribution of ASWI on May 13-14, 1996 met the magnitude requirement of Rule 10b-6. For example, Monitor was responsible for 47.83% of all volume in ASWI on those dates. See In re Collins Securities Corp., Exchange Act Release No. 11766, 46 S.E.C. 20, 1975 SEC LEXIS 537 (Oct. 23, 1975), rev'd on other grounds, Collins Securities Corp. v. SEC, 562 F.2d 820 (D.C. Cir. 1977); In re Billings Assoc., Inc., Exchange Act Release No. 8217, 43 S.E.C. 641, 1967 SEC LEXIS 571 (Dec. 28, 1967); In re J.H. Goddard & Co., Exchange Act Release No. 189, 42 S.E.C. 638, 1965 SEC LEXIS 209 (June 4, 1965).

⁴¹⁶ As the SEC has recognized, "the presence of special selling efforts and selling methods may be indicated in a number of ways, including the payment of compensation greater than that normally paid in connection with ordinary trading transactions." Prohibitions Against Trading by Persons Interested in a Distribution, Exchange Act Rel. No. 19565 at n. 13 (March 4, 1993). Further evidence of special selling techniques is that ASWI shares appear to be virtually the only securities sold by Monitor's brokers on May 13-14, 1996. See, e.g., Goldman at 13. The SEC views "any major sales campaign" as a distribution. Exchange Act Release No. 33924.

part of an IPO distribution. Respondent Gennuso instructed Respondent Galasso which customer orders to execute on May 13 and which should be executed on May 14. He also reviewed and approved order tickets with special compensation to the brokers for selling shares of ASWI. The Hearing Panel concludes that all of this activity constitutes special selling methods and efforts.

Respondents had a substantial interest in the success of the ASWI distribution and took active steps to increase and maintain the price of ASWI.⁴¹⁷ The inducements to the brokers to sell ASWI (special compensation ranging from \$1-\$2.25 per share) allowed Respondents to capitalize on their manipulation of ASWI's price and to maintain ASWI's artificially high price.

Accordingly, the Hearing Panel concludes that these Respondents knowingly, or at least recklessly, engaged in the distribution of ASWI shares while inducing others to purchase ASWI in violation of Section 10(b) and Rule 10b-6.⁴¹⁸ For the same reasons they also violated NASD Rules 2120 and 2110.

D. Creating and Providing False and Fictitious Records: Eighteenth Cause (Galasso)

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

⁴¹⁷ As the SEC has stated: "A person contemplating or making a distribution has an obvious incentive to artificially influence the market price of the securities in order to facilitate the distribution or to increase its profitability. [The Commission has] accordingly held that where a person who has a substantial interest in the success of a distribution takes active steps to increase the price of the security, a prima facie case of manipulative purpose exists." Review of Anti-Manipulation Regulation of Securities Offerings, Exchange Act Release No. 33924, 1994 SEC LEXIS 1302, at *20 (April 19, 1994).

⁴¹⁸ Although the Hearing Panel declines to find that scienter is required for a Rule 10b-6 violation, here there is sufficient evidence to support the conclusion that Respondents' conduct was at least sufficiently reckless for the Panel to conclude they acted with scienter. Even in the absence of a finding of scienter, however, the Panel concludes that Respondents' conduct violates Rule 10b-6.

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.”⁴¹⁹ Failure to cooperate fully and promptly when requests for information are made subverts the NASD’s ability to carry out its regulatory functions.⁴²⁰ There is no question that providing incomplete or misleading records in response to a Rule 8210 request constitutes a violation of NASD Rule 2110.⁴²¹

NASD Rule 3110 requires, in pertinent part, that member firms shall “keep 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.” Falsifying firm books and records constitutes a violation of NASD Rules 3110 and 2110.⁴²²

On May 16, 1996, the NASD requested that Respondent Galasso provide the original order tickets for the ASWI trades. Respondent Galasso knowingly did not

⁴¹⁹ 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).

⁴²⁰ 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).

⁴²¹ Id.

⁴²² See DBCC No. 10 v. Mangan, Complaint No. C10960612, 1998 NASD Discip. LEXIS 33 (NAC July 29, 1998), <http://www.NASD.com/publications> (sustaining Rule 3110 violation for creating false customer records).

provide the Staff with a complete set of the tickets. The withheld tickets were those executed on May 13 at a price of 6 ¾ with a \$2.25 sales credit. Even if these tickets were not in his possession at the time of the NASD's request, Respondent Galasso had an obligation to inform the Staff of their existence, which he did not. Moreover, the tickets that were provided to the NASD with lower markups had been falsified so that they appeared to have been executed on May 13, when, in fact they had been created on May 16.

In addition, Respondent Galasso assisted in the creation of bogus trade confirmations by ensuring that the limit price, reported price and execution price were the same on all the order tickets. The Hearing Panel concludes that this conduct, coupled with his remittal of an incomplete set of tickets in response to the NASD's Rule 8210 request, violates NASD Rules 8210, 3110 and 2110.

E. Supervisory Failures: Nineteenth Cause (Gennuso), Twenty-First Cause (Montelbano), Twenty-Second Cause (Gennuso) and Twenty-Third Cause (Leverett)

Monitor, acting through Respondents Gennuso, Montelbano and Leverett failed to comply with the requirements of NASD Rule 3010 in two separate violations.

NASD Rule 3010 provides, in pertinent part, as follows:

(a) Each member shall establish and maintain a system to supervise the activities of each registered representative * * * that is reasonably designed to achieve compliance with applicable securities laws and regulations,

(b)(1) Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives * * * that are reasonably designed to achieve compliance with applicable securities laws and regulations.

The SEC has stated:

to ensure investor protection, a broker-dealer must establish and enforce effective procedures to supervise employees (citations omitted). The procedures must assure that restrictions issued are not ignored by branch managers, registered representatives, or any other office personnel. A firm's failure to establish such guidelines is symptomatic of a failure to supervise reasonably.⁴²³

Written supervisory procedures will be deemed inadequate if they fail to establish mechanisms for ensuring compliance.⁴²⁴ Absent such mechanisms, the presence of compliance manuals on a firm's bookshelf alone will not satisfy a broker-dealer's supervisory responsibilities.⁴²⁵

Here, Monitor, acting through Respondent Gennuso, violated NASD Rules 3010 and 2110 by failing to establish, maintain and enforce adequate written supervisory procedures. Significantly, both Respondents Gennuso and Montelbano admitted that Monitor's supervisory procedures and systems were inadequate.⁴²⁶ In addition, the procedures were not updated in a timely manner. Accordingly, the procedures did not contain the information required by NASD Rule 3010.

⁴²³ In re Bryant, Exchange Act Release No. 32357, 51 S.E.C. 463, 54 SEC Docket 345, 1993 SEC LEXIS 1347, at *19 (May 24, 1993).

⁴²⁴ Id., at * 20.

⁴²⁵ See In re First Jersey Securities, Inc., 890 F.Supp. 1185, 1202 (S.D.N.Y. 1995), aff'd, 101 F.3d 1450 (2d Cir. 1996).

⁴²⁶ Monitor's written supervisory procedures were deficient in several areas, including, but not limited to, failing to assign its registered persons to appropriately registered principals for supervision (the inaccurate organizational chart); and failing to identify procedures to be followed by its supervisory personnel to prevent and detect the violations which are the subject of this disciplinary hearing.

In addition, as persons charged with certain supervisory responsibilities, Respondents Gennuso, Montelbano, and Leverett,⁴²⁷ violated NASD Rule 3010 by failing properly to perform their respective duties. Persons charged with supervisory responsibilities must take affirmative steps to prevent fraudulent activity. The SEC has held:

Red flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review. When indications of impropriety reach the attention of those in authority, they must act decisively to detect and prevent violations of the federal securities laws.⁴²⁸

Under the federal securities laws, supervisors are required to respond vigorously when wrongdoing or possible indications of wrongdoing are brought to their attention.⁴²⁹

Notwithstanding his position as the Firm's Chief Operations and Compliance Officer, Respondent Gennuso violated NASD Rules 3010 and 2110 by taking no action to detect, prevent or remedy regulatory abuses notwithstanding the existence of many red flags and suggestions of irregularities.⁴³⁰ Rather, as discussed herein, he actively participated in furtherance of the fraudulent scheme.

⁴²⁷ There is no question that Respondent Montelbano, the Firm's acting President, Respondent Gennuso, the Firm's Chief Operations and Compliance Officer, and Respondent Leverett, the only principal at the 919 Third Avenue office on May 13 and 14, 1996 and admittedly responsible for supervising the brokers and reviewing order tickets, had supervisory responsibilities.

⁴²⁸ In re Kantor, Exchange Act Release No. 32341, 51 S.E.C. 440, 54 SEC Docket 270, 1993 SEC LEXIS 1240, at *16 (May 20, 1993).

⁴²⁹ In re Gutfreund, Exchange Act Release No. 31554, 51 S.E.C. 93, 52 SEC Docket 2849, 1992 SEC LEXIS 2939, at *34-35 (Dec. 3, 1992).

⁴³⁰ Gennuso was responsible for, among other things: (i) participating in overseeing all day-to-day activity at the 30 Broad Street office; (ii) relaying all orders from the 30 Broad Street office to the trader at 919 Third Avenue (30 Broad did not have a trader); (iii) advising and instructing the sales force of Monitor how to conduct its business under the NASD Rules and the securities laws; and, (iv) overseeing the compliance functions of Monitor, as detailed in its written supervisory procedures. He did not perform any of these duties effectively.

Respondent Leverett violated NASD Rules 3010 and 2110 by taking no action to detect, prevent or remedy regulatory abuses and also by reviewing and approving the ASWI order tickets with excessive markups and over 50 order tickets which were canceled and rebilled on May 16, 1996.⁴³¹ The number of cancel and rebills alone was a sufficient red flag or suggestion of irregularity to require inquiry, follow-up, and review. Yet, Respondent Leverett did nothing.

Respondent Montelbano also violated NASD Rules 3010 and 2110 by taking no action to detect, prevent or remedy regulatory abuses notwithstanding the existence of many red flags and suggestions of irregularities. As the Firm's acting President, Respondent Montelbano ultimately is responsible for the firm's failure to comply with federal securities laws and NASD Rules.⁴³² Respondent Montelbano failed to ensure that the employees of Monitor, the designated supervisors as well as the brokers, complied with the federal securities laws and NASD Rules. Rather, when confronted with numerous red flags of suspicious activity, rather than notifying the NASD, Respondent Montelbano called a headhunter.⁴³³

Accordingly, the Hearing Panel concludes that Respondents Montelbano, Gennuso, and Leverett violated NASD Rules 3010 and 2110.

⁴³¹ As the SEC has recognized, "[r]eview and endorsement of trading tickets is a key supervisory task that must be performed each day by a principal." In re L.H. Alton & Co., Exchange Act Release No. 40886, 1999 SEC LEXIS 17, at *15 (Jan. 6, 1999).

⁴³² See In re Patrick, Exchange Act Release No. 32314, 51 S.E.C. 419, 54 SEC Docket 230, 1993 SEC LEXIS 1213, at *7-8 (May 17, 1993) (in affirming the NYSE's findings, the SEC stated, "it is not sufficient for the [Firm President who has] overarching supervisory responsibilities to delegate supervisory responsibility to a subordinate, even a capable one, and then simply wash his hands of the matter until a problem is brought to his attention. . . . Implicit is the additional duty to follow-up and review that delegated authority to ensure that it is being properly exercised.").

⁴³³ Tr., 12/29/98 at 179-180; see also, Tr., 1/28/99 at 191-192.

F. Registration Violations: Twenty-Seventh Cause (Gennuso)

The Association requires that associated persons who engage in a securities business be registered prior to engaging in such activity.⁴³⁴ The SEC has stated that the “requirement that an associated person be registered before engaging in any securities business provides an important safeguard in protecting public investors” and goes to the heart of securities regulation.⁴³⁵ A violation of the Association’s registration rules also constitutes a violation of NASD Rule 2110 since such conduct is inconsistent with just and equitable principles of trade.⁴³⁶

Member firms⁴³⁷ and associated persons⁴³⁸ have an affirmative duty to ensure that the associated person’s registration has been effected prior to his or her engaging in proscribed activities. The SEC also has stated that “assisting someone who is not

⁴³⁴ See NASD Membership and Registration Rules 1031 (which provides, *inter alia*, that “all persons engaged or to be engaged in the . . . securities business of a member who are to function as representatives shall be registered as such with the Association . . .”) and 1032 (which provides, *inter alia*, that “each Representative shall be required to register with the Association as a General Securities Representative and shall pass an appropriate Qualification Examination before such registration may become effective...”).

⁴³⁵ In re Shah, Exchange Act Release No. 37954, 52 S.E.C. 1100, 63 SEC Docket 538, 1996 SEC LEXIS 3191, at *14 (Nov. 15, 1996); see also In re L. B. Securities Co., Exchange Act Release No. 7806, 42 S.E.C. 885, 1966 SEC LEXIS 719, at *8 (Jan. 28, 1966) (“The requirement of NASD approval of registration before a member’s employee may engage in dealings with the public serves a significant purpose in the policing of the securities markets and in the protection of the public interest, and strict adherence to it is essential.”).

⁴³⁶ DBCC v. Pecaro, 1998 NASD Discip. LEXIS 5 (NBCC Jan. 7, 1998) (Respondent violated Rule 2110 and the NASD registration rules by engaging in a securities business without being registered with the NASD). With respect to member firms, NASD Membership and Registration IM-1003-3 provides that “the failure of a member to register an employee, who should be so registered, as a Registered Representative may be deemed to be conduct inconsistent with just and equitable principles of trade and when discovered may be sufficient cause for appropriate disciplinary action.”

⁴³⁷ See, e.g., In re L. B. Securities, Co., 1966 SEC LEXIS 719; In re Cohee, Exchange Act Release No. 25210, 48 S.E.C. 917, 39 SEC Docket 1024, 1987 SEC LEXIS 2985 (Dec. 17, 1987); In re First Capital Funding, Inc., Exchange Act Release No. 30819, 50 S.E.C. 1026, 51 SEC Docket 1105, 1992 SEC LEXIS 1369 (June 17, 1992).

⁴³⁸ See In re Shah, 1996 SEC LEXIS 3191; DBCC v. Pecaro, 1998 NASD Discip. LEXIS 5.

properly registered to engage in the securities business deprives the public of a protection to which they are entitled.”⁴³⁹

Respondent Gennuso allowed James Garcia to engage in a securities business notwithstanding that his registration was not effective.⁴⁴⁰ Moreover, Respondent Gennuso routed commissions to Respondent Garcia through the registered representative numbers of other brokers, and issued checks outside of the normal payroll procedures so that Garcia could perpetuate his securities business and be compensated for his trades.

Accordingly, the Hearing Panel concludes that Respondent Gennuso violated NASD Registration and Membership Rule IM-1000-3 and NASD Rule 2110.

G. Failing to Respond Truthfully to NASD Inquiries: Thirtieth Cause (Gennuso), Thirty-Third Cause (Montelbano), Thirty-Fourth Cause (McMahon), Thirty-Fifth Cause (Galasso), Thirty-Ninth Cause (Giglio), Forty-First Cause (Nejaime), and Forty-Second Cause (Leverett)

As discussed herein, the evidence demonstrates that Respondents Galasso, Giglio, Gennuso, Leverett, Nejaime, McMahon, and Montelbano failed to respond truthfully to NASD inquiries during their respective on-the-record interviews.

The legal principles pertaining to NASD Rule 8210 discussed above are equally applicable when an associated or registered person fails to respond truthfully to NASD inquiries at on-the-record interviews conducted pursuant to Rule 8210. There is ample case law to support the proposition that NASD Procedural Rule 8210 and NASD Conduct

⁴³⁹ DBCC v. First Choice Securities Corp., 1992 NASD Discip. LEXIS 33, at *15 (NBCC Oct. 28,1992).

⁴⁴⁰ See Gennuso Joint Stipulation at 4, ¶15.

Rule 2110 are violated when a respondent's statements are inconsistent with documentation alone or documentation combined with other evidence.⁴⁴¹

In this case, there is substantial evidence that each Respondent was untruthful during his on-the-record interview, thereby violating NASD Rules 8210 and 2110.

V. Sanctions

A. General Principles and the Public Interest

In determining sanctions, the Hearing Panel gave foremost consideration to the seriousness of Respondents' misconduct. As demonstrated throughout the Hearing, Respondents disregarded their obligations under the federal securities laws and NASD Rules. In many instances, Respondents conduct was egregious and merits the imposition of sanctions at the higher end of the NASD Sanction Guidelines ("Guidelines"), especially when the principal considerations which adjudicators always should consider are applied.⁴⁴²

⁴⁴¹ See DBCC No. 10 v. Doshi, Complaint No. C10960047, 1999 NASD Discip. LEXIS 6 (NAC Jan. 20, 1999) <http://www.nasd.com/publications> (NAC finding that 8210 and 2110 violations occurred where respondent told Staff during OTR that voice on customer's tape recording was not his but later admitted it was his voice); DBCC No. 9 v. Shear, 1997 NASD Discip. LEXIS 24 (NBCC Jan. 24, 1997) (holding that where respondent denied knowledge of exam impostor's identity during an 8210 interview, but later admitted friendship with impostor in addition to record showing that the two were acquaintances, 8210 and 2110 violations were sustained); DBCC No. 3 v. Nevers, 1994 NASD Discip. LEXIS 66 (NBCC May 13, 1994) (sustaining 8210 and 2110 predecessor rule violations where respondent advised Staff that he did not deposit customer checks in his personal account, but bank documentation showed he did); In Re Brian L. Gibbons, Exchange Act Release No. 37170, 52 S.E.C. 791, 61 SEC Docket 2203, 1996 SEC LEXIS 1290 (May 8, 1996), aff'd, 1997 U.S. App. LEXIS 8875 (9th Cir. April 21, 1997) (holding that where NASD inquired about respondent's compensation and respondent stated that he made no financial gain but later conceded that he was paid, 8210's predecessor rule was violated).

⁴⁴² The Hearing Panel applied the relevant considerations set forth in the Guidelines for each specific violation as well as the general principles applicable to all sanctions determinations (pp. 3-7) and the principal considerations that adjudicators always should consider (pp. 8-9).

There are numerous aggravating factors present here. For example:

- None of the Respondents accepted responsibility for or acknowledged the misconduct to the NASD prior to detection and intervention by the NASD.⁴⁴³
- None of the Respondents voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct.⁴⁴⁴
- Respondents engaged in numerous acts and/or a pattern of misconduct.
- Respondents' conduct resulted in injury to the investing public, both directly and indirectly since customers purchased securities at an artificially inflated price and a fraud on the market was committed.
- Respondents attempted to delay NASD Regulation's investigation, to conceal information from NASD Regulation, and to provide inaccurate or misleading testimony or documentary information to NASD Regulation.
- Respondents' misconduct was the result of intentional and/or reckless acts.
- Respondents' misconduct resulted in the potential for Respondents' monetary gain.
- The misconduct was broad in scope, affecting over 100 customers.

By comparison, the Hearing Panel finds no general mitigating factors present in this case. Although the majority of the Respondents have no prior disciplinary history, this is not a mitigating factor.⁴⁴⁵ As the National Adjudicatory Council recently stated –

While we concur that the existence of disciplinary history is an aggravating factor, we do not concur that the lack thereof is mitigating. Registered individuals are required as part of the terms of their admission

⁴⁴³ Indeed, Respondents' lack of remorse and failure to accept responsibility for their misconduct was evidenced by their continually placing blame on others -- in the case of Respondents Galasso, Gennuso, McMahon, and Montelbano on Palla and Pokross, and in the case of Respondents Leverett, Nejaime, Goldstein, and Giglio on Respondent McMahon, Palla, or other brokers. Such lack of remorse and failure to accept responsibility for one's actions was considered a significant aggravating factor by the NAC in MSC v. Markowski, Complaint No. CMS920091, 1998 NASD Discip. LEXIS 35 (July 13, 1998) <http://www.nasd.com/publications>, where a bar was imposed. In so holding, the Markowski panel cited In re Patrick G. Keel, Exchange Act Release No. 31716, 51 S.E.C. 282, 53 SEC Docket 460, 1993 SEC LEXIS 41 (1993), in which the Commission affirmed an NASD bar against a respondent who failed to accept responsibility for his own actions while placing the blame for the misconduct on others.

⁴⁴⁴ Although many of the sales credits to the brokers were lowered by Monitor when it canceled and rebilled the ASWI transactions, this had no effect on the price that the customers paid for their shares of ASWI. Instead, the owners of the firm reduced the brokers' profits and increased their own.

⁴⁴⁵ In re Balbirer, Complaint No. C07980011 at 5 (NAC Oct. 18, 1999).

to the securities industry to comply with NASD Rules and observe high standards of conduct. We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry as a registered person.⁴⁴⁶

The Panel seeks to ensure that the specific sanctions imposed are “remedial in nature” and “designed to deter future misconduct and to improve overall business standards in the securities industry.”⁴⁴⁷ Taking into consideration all these factors, and applying them to the specific instances of misconduct present in this case, the Panel determined that the sanctions imposed should be at the higher end of those recommended by the Guidelines.⁴⁴⁸

With respect to Respondents Nejaime and Leverett, however, the Panel determined that their conduct was not as egregious as the other Respondents. Accordingly, rather than permanently bar these individuals from associating with any member firm, the Panel has imposed requalification requirements with certain minimum passing scores. The purpose of these requalification requirements not only is to remind these Respondents of their obligations to the investing public, which they appear to have forgotten, but also to ensure that if they reenter the securities industry they do so with a greater understanding of the securities laws and NASD regulations.

⁴⁴⁶ Id.

⁴⁴⁷ Guidelines at 3.

⁴⁴⁸ The Hearing Panel recognizes that, pursuant to Notice To Members (“NTM”) 99-86, fines generally will not be imposed in most cases where a respondent is barred. NTM 99-86, however, gives adjudicators discretion to impose fines in sales practice cases, especially where, as here, there is widespread customer harm, and make such monetary sanctions payable when a respondent seeks to re-enter the industry. Because Respondents’ conduct was egregious, the Panel has determined, in most instances, to impose permanent bars and fines in keeping with this policy.

B. Specific Sanctions

1. *Manipulation of Price and Supply of ASWI: Section 10(b) and Rule 10b-5, NASD Rules 2110 and 2120: Fourth Cause (Montelbano), Fifth Cause (McMahon), Sixth Cause (Gennuso), and Seventh Cause (Galasso)*

Bidding For, Purchasing, or Inducing Others to Purchase ASWI while Engaged in a Distribution: Section 10(b), Rule 10b-6, NASD Rules 2110 and 2120: Sixteenth Cause (Montelbano, McMahon, Galasso and Gennuso)

In the absence of any applicable Sanction Guidelines directly addressing violations of Section 10(b) and Rule 10-b5 for manipulation of the price and supply of shares of ASWI, case law provides proper guidance on this issue. Depending on the circumstances, the NAC has held that Section 10(b) and Rule 10b-5 violations for price manipulation schemes call for a bar in all capacities and a substantial fine due to the seriousness of the offense.⁴⁴⁹

Respondents Galasso, McMahon, Montelbano, and Gennuso each knowingly, or at least recklessly, violated Rule 10b-5 and NASD Rules 2120 and 2110.

Respondent Galasso engaged in activities to manipulate the price and supply of ASWI shares. Moreover, he is singularly responsible for the trading of ASWI on May 13-14, 1996, and must accept responsibility for Monitor's trading practices.⁴⁵⁰

⁴⁴⁹ See, e.g., MSC v. Markowski, 1998 NASD Discip. LEXIS 35, at *56-57 (holding that a bar in all capacities is necessary because "[t]he integrity of the securities markets is paramount, and those who engage in activities that manipulate markets cause great harm not only to the investors who are involved in the manipulated markets, but to the overall public perception that the markets are driven by the free forces of supply and demand") (citations omitted). But see DBCC No. 10 v. A.S. Goldmen & Co., ("Goldmen") Complaint No. C10960208 (NAC May 14, 1999) (where bars and substantial fines were not imposed on respondents notwithstanding evidence of manipulation and excessive markups).

⁴⁵⁰ Goldmen at 17.

Respondents McMahon and Montelbano each participated in furthering this manipulation by promoting ASWI to Monitor brokers and providing them with baseless information to pitch the shares to their customers.⁴⁵¹ Given their considerable years in the securities industry they should have been aware of the fraudulent scheme which was being perpetrated on the investing public and how their own conduct contributed to the violative activity.

Respondent Gennuso assisted the brokers in processing their ASWI customer orders at predetermined prices on May 13 and May 14. Respondent Gennuso also directed Respondent Galasso to violate the securities laws and NASD regulations by instructing him not to execute certain trades on May 13, 1996. Respondent Gennuso's conduct during the distribution period, as well as his insistence at the Hearing that he did nothing wrong, support the conclusion that he was fully aware of and intended the consequences of his actions.⁴⁵²

There is no question that these are serious violations. All of these Respondents are veterans of the securities industry, and they should have known that their conduct was unlawful. Even if Respondents Galasso, Montelbano, and McMahon were used by Monitor's owners, especially Palla, to further the fraudulent scheme, there is no evidence that they were anything other than willing participants in its execution.

⁴⁵¹ Because of his direct involvement with Accessible Software, his knowledge of its business plan, and the seemingly specific unsupported information he gave to the brokers concerning the future potential of the Company, the Panel finds Respondent McMahon's conduct more egregious than that of Respondent Montelbano. Moreover, as a research analyst with years of experience in the securities industry, there is no question that Respondent McMahon should have known better.

⁴⁵² What is most troubling to the Panel as to Respondent Gennuso's conduct is that for all his years in the securities industry, he appears to have little or no understanding of the securities laws or NASD regulations.

Thus, the Hearing Panel concludes that Respondents Montelbano, McMahon, Galasso, and Gennuso pose a threat to the public interest if allowed to continue in the securities industry.

As for the conduct charged in the Sixteenth Cause of Complaint, since the Guidelines do not specifically address Rule 10b-6 violations, it also is appropriate to look to case law addressing sanctions on this issue. In DBCC No. 7 v. Graystone Nash, Inc., 1991 NASD Discip. LEXIS 54 (May 17, 1991), a bar in all capacities and a fine equal to the amount of the profit made from the sale of the stock were determined to be appropriate sanctions for a Rule 10b-6 violation.

There is no question that Respondents Galasso, Gennuso, Montelbano and McMahon each contributed to the success of the distribution of ASWI shares to the public at artificially high prices. There also is no question that these Respondents engaged in special selling techniques. There is no evidence, however, of these Respondents' specific profits from their activities. Moreover, the violative activities are the same as or overlap substantially with those charged as Rule 10b-5 violations. Thus, the Hearing Panel determined not to impose separate sanctions for violations of Rule 10b-6.

Accordingly, the Hearing Panel finds that the following sanctions best will serve the public interest as well as the remedial purposes of the Guidelines for the violations charged above:

Respondent Montelbano: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent McMahon: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Galasso: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Gennuso: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

2. ***Manipulative and Deceptive Sales/Trading Practices in ASWI, Section 10(b) and Rule 10b-5, NASD Rules 2110 and 2120: Eighth Cause (Goldstein), Eleventh Cause (Giglio), Thirteenth Cause (Leverett), and Fourteenth Cause (Nejaime)***

The applicable Guideline for misrepresentations recommends that for intentional or reckless misconduct adjudicators consider imposing a suspension of ten days to two years and in egregious cases, consider a bar.⁴⁵³ The Guideline also suggests the imposition of fines ranging from \$10,000 to \$100,000. In imposing sanctions, “the Adjudicator may impose a set fine amount per investor rather in the aggregate. Adjudicators may increase the recommended fine amount by adding the amount of a respondent’s financial benefit.”⁴⁵⁴

Here, the evidence proves that Respondents Goldstein, Leverett, and Giglio each knowingly, or recklessly, made material misrepresentations to their customers to induce them to buy shares of ASWI. Not one of the Respondents conducted any research on

⁴⁵³ Guidelines at 80.

⁴⁵⁴ Guidelines at 80, n.2. Factors to be considered in the calculation of financial benefit may include commissions, concessions, or other profits that respondent derived in connection with the violative transactions. See also id. at 7.

ASWI. Instead, Respondents, with little regard for the best interests of their customers, made representations regarding ASWI that they had no reasonable basis to believe were accurate. Further, these Respondents, as well as Respondent Nejaime, engaged in deceptive sales practices by selling ASWI shares at predetermined prices and failing to disclose their compensation.

The Hearing Panel credits the testimony of seven of the customers who testified at the Hearing -- one customer each for Respondents Giglio and Leverett, and five customers for Respondent Goldstein.⁴⁵⁵ The evidence establishes that not one customer expected to gain in any way from his testimony at the hearing. Each customer stated that he purchased ASWI shares because he trusted the Respondent. Respondents abused this trust. Rather than comply with the federal securities laws and the NASD Rules, to deal fairly with their customers, Respondents intentionally or recklessly chose to put their own interests first, motivated by the desire to make a large, quick commission.

In imposing sanctions for these violations, the Hearing Panel has taken into consideration the extent of an individual Respondent's misrepresentations concerning ASWI and his experience in the securities industry.⁴⁵⁶ Specifically, with respect to Respondent Giglio, the Hearing Panel considered that he recently passed his Series 7 examination. Being new and relatively untrained, however, does not excuse his

⁴⁵⁵ Although six customers testified with respect to Respondent Goldstein, the Panel did not credit the testimony of one of the witnesses.

⁴⁵⁶ The Hearing Panel did not take into consideration the amount of a Respondent's financial benefit in determining the sanctions since the evidence was not clear as to the amount of commissions actually earned from sales of ASWI.

conduct.⁴⁵⁷ For someone who just has studied for and passed the Series 7 Examination, Respondent Giglio demonstrated an amazing absence of understanding of the securities laws, NASD regulations, and his obligations to the investing public.

As for Respondent Goldstein, in addition to the general aggravating factors discussed above, the Panel also considered that he tried to lull his customers into inactivity and mislead and deceive them.⁴⁵⁸ Moreover, even if his testimony were to be believed, given his considerable years in the industry as a registered representative, he should have known that what he was selling were not shares either in a Rule 504 offering or an IPO.

With respect to Respondent Nejaime, the Hearing Panel considered that Complainant presented no evidence as to what representations he made to his customers to persuade them to purchase shares of ASWI. Similarly, with respect to Respondent Leverett, the Panel considered that only one customer testified as to representations made concerning ASWI and that customer could not recall whether Respondent Leverett represented ASWI as an IPO.⁴⁵⁹

⁴⁵⁷ Being new or inexperienced in the industry is not a mitigating factor. See Hasho, 784 F. Supp. at 1108 (“Youth or inexperience does not excuse a registered representative’s duty to his clients. Moreover, such youth or inexperience does not excuse violations of the anti-fraud provisions of the securities laws.”); accord MSC v. Benz, 1996 NASD Discip. LEXIS 29 (March 15, 1996), aff’d, Exchange Act Release No. 38440, 52 S.E.C. 1280, 64 SEC Docket 396, 1997 SEC LEXIS 672 (March 16, 1997) (Respondent argued in mitigation that he was young, untrained, and uninformed; panel was not persuaded. Respondent recently had studied for, taken, and passed principal’s exam which should have alerted him to his responsibilities.).

⁴⁵⁸ For example, Respondent Goldstein told TL to “blow off” the NASD (Tr., 12/11/98 at 155-157); he told GD to “throw away the letter” (id. at 200-201; see also Tr., 12/10/98 at 165 (KR), Tr., 12/11/98 at 96-97 (PA)).

⁴⁵⁹ The Hearing Panel concluded, however, that Respondents Nejaime and Leverett sold ASWI shares at predetermined prices and did no independent investigation prior to recommending the investment to their customers.

Accordingly, the Hearing Panel finds the following sanctions appropriate for these violations:

Respondent Goldstein: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Giglio: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Leverett: a fine of \$20,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, requalification by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 within 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum score of 80, and a suspension of 45 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

Respondent Nejaime: a fine of \$10,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, requalification by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 within a 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum score of 80, and a suspension of 45 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

3. ***Excessive Markups: Section 10(b) and Rule 10b-5, NASD Rules 2110, 2120 and 2440: Fifteenth Cause (Galasso and Gennuso)***

The applicable Guideline for Rule 2440 violations provides that adjudicators consider suspending the individual for 30 business days and in egregious cases consider imposing a suspension for up to two years or barring the individual.⁴⁶⁰ It also suggests the imposition of fines ranging from \$5,000 to \$100,000, plus the gross amount of the

⁴⁶⁰ Guidelines at 82.

excessive markups.⁴⁶¹ The Guideline lists the relevant principal consideration of “whether respondent * * * had discretion as to the amount of markups, markdowns, or commissions on each trade.”⁴⁶²

Case law shows that markups in the 20% range, which generated several hundred thousand dollars of illegal profits, are considered to be “egregious” warranting a bar and significant fines.⁴⁶³ Here, the markups obviously were egregious since they ranged between 10.48% to 74.19% and generated profits of over \$221,000.⁴⁶⁴

Respondent Galasso executed each ASWI transaction resulting in an excessive markup. In his defense, Respondent Galasso claims he only was executing the tickets at the price he was given by the brokers and he did not determine the amount of the markups.⁴⁶⁵ Nevertheless, as the only trader at Monitor on May 13-14, 1996, Respondent Galasso had a responsibility to the Firm’s customers to ensure that the price they paid for ASWI shares was indicative of the market.⁴⁶⁶

⁴⁶¹ Id.

⁴⁶² Id.

⁴⁶³ In re Steven P. Sanders, Exchange Act Release No. 40600, 68 SEC Docket 745, 1998 SEC LEXIS 2302 (Oct. 26, 1998) (holding that bar in all capacities, censure and fines of \$25,000 and \$250,000 were appropriate in excessive markup case); In re Frank L. Palumbo, Exchange Act Release No. 36427, 52 S.E.C. 467, 60 SEC Docket 1473, 1995 SEC LEXIS 2814 (Oct. 26, 1995) (holding bar, censure and \$75,000 fine appropriate where respondent engaged in excessive markup scheme since respondent recklessly overcharged his customer, had no justification for basing prices on illusory quotations, and demonstrated a marked insensitivity to his obligation to deal fairly with customers).

⁴⁶⁴ This sentence has been corrected to reflect the Panel’s decision to rely on Monitor’s contemporaneous costs for acquiring ASWI shares on May 13-14, 1996 as the correct basis for determining the prevailing market price from which markups are to be calculated. See Footnote 66.

⁴⁶⁵ Tr., 12/10/98 at 37, 39.

⁴⁶⁶ Respondent Galasso admitted that he made no effort to get a better price for Monitor’s customers than was written on the order tickets because he was “instructed to print the tickets exactly the way they were written to me.” Tr., 12/10/98 at 41-42. “A trader has the responsibility to charge fair markups and is not

As for Respondent Gennuso, he directed, approved, and processed many of the ASWI order tickets resulting in excessive and fraudulent markups. In certain instances, he actually wrote the amount of the sales credits on certain tickets. Most troubling of all was Respondent Gennuso's position that Monitor's customers need not be informed of the compensation earned by Monitor's brokers.

In determining sanctions for these violations, the Hearing Panel applied both the relevant general and specific considerations suggested by the Guidelines.⁴⁶⁷ Thus, the Hearing Panel finds the following sanctions appropriate for the violations alleged in the Fifteenth Cause of Complaint:

Respondent Galasso: a permanent bar from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent may seek to re-enter the securities industry.

Respondent Gennuso: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

4. *Creating False and Fictitious Records: NASD Rules 8210, 2110 and 3110: Eighteenth Cause (Galasso)*

The Guideline for Rule 3110 violations suggests suspending the responsible party for up to 30 business days and in egregious cases, a lengthier suspension or a bar. It also suggests a fine in egregious cases of \$10,000 to \$100,000.⁴⁶⁸ Further, in imposing

relieved of that obligation because the firm or its compliance officers approved or even directed his method of calculating markups.” Goldmen at 18, quoting, In re Field, Exchange Act Release No. 33952, 51 S.E.C. 1074, 56 SEC Docket 1408, 1994 SEC LEXIS 1169 (April 21, 1994).

⁴⁶⁷ Even though the Guidelines suggest an additional fine of the gross amount of the excessive markups, the Hearing Panel determined that this was not appropriate here since there was no evidence that Respondents Galasso and Gennuso received directly any portion of the \$600,000.00 in excessive profits.

⁴⁶⁸ Guidelines at 28.

sanctions, adjudicators should consider the “[n]ature and materiality of inaccurate or missing information.”⁴⁶⁹ For Rule 8210, if the individual failed to respond truthfully, the Guidelines provide that a bar should be standard and fines should range between \$25,000 and \$50,000.⁴⁷⁰

Here, some ASWI order tickets were not turned over to the NASD by Respondent Galasso. These orders tickets were of the utmost importance to the NASD in determining the nature and extent of the fraudulent scheme. Even if Respondent Galasso did not have these tickets in his possession on May 16, 1996 when first requested by the NASD, he had an obligation to inform the Staff of their existence, which he did not do. Further, Respondent Galasso’s actions in ensuring that each ticket had the same execution, reported price and limit price, resulted in the generation of false and misleading trade confirmations.

Thus, for the violations charged in the Eighteenth Cause of Complaint against Respondent Galasso, the Hearing Panel finds that the following sanctions are appropriate: a permanent bar from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

⁴⁶⁹ Id.

⁴⁷⁰ Guidelines at 31. Additional considerations in determining sanctions are: “the nature of the information requested;” and “[w]hether the requested information has been provided and, if so, * * * the number of requests, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response.”

5. *Supervisory Failures*

a. *Deficient Written Supervisory Procedures: NASD Rules 3010 and 2110: Nineteenth Cause (Gennuso)*

Failure to Supervise: NASD Rules 3010 and 2110: Twenty-First Cause (Montelbano), Twenty-Second Cause (Gennuso), and Twenty-Third Cause (Leverett)

Since the violations charged in the above causes of the Complaint arise from similar conduct and activities, the Hearing Panel considered such violations collectively for purposes of imposing sanctions.

The Guidelines for deficient written supervisory procedures state that in egregious cases, a one year suspension in all capacities and a fine of \$1,000 to \$25,000 should be considered.⁴⁷¹ In determining sanctions, adjudicators should take into consideration “[w]hether deficiencies allowed violative conduct to occur or to escape detection” and “[w]hether the deficiencies made it difficult to determine the individual or individuals responsible for specific areas of supervision or compliance.”⁴⁷²

Respondent Gennuso, Monitor’s Compliance Officer, was responsible for the firm’s written supervisory procedures. There is no dispute that Monitor’s supervisory procedures were seriously inadequate; indeed, Respondents Montelbano and Gennuso admitted this at the Hearing. There also is no doubt that the deficient supervisory procedures, in conjunction with a total failure to supervise the registered representatives, directly resulted in the non-detection of a multitude of violations. Moreover, the Firm’s

⁴⁷¹ Guidelines at 90. Authority also exists for imposing sanctions beyond the guidelines in the form of a bar. See Sanders, 1998 SEC LEXIS 2302 (holding firm president in violation of 3010 for deficient supervisory system and written supervisory procedures in fraudulent markup case while sustaining bar in all capacities, censure, and fine of \$250,000).

⁴⁷² Guidelines at 90.

written supervisory procedures specifically assigned supervisory responsibility to Respondent Gennuso. In fact, Respondent Gennuso admitted that he fabricated Monitor's organizational chart depicting the Firm's reporting structure, to prevent the NASD from detecting the inadequate supervisory structure.

For failure to supervise, the Guidelines suggest suspending the individual in all supervisory capacities for up to 30 days and a fine of \$5,000 to \$50,000.⁴⁷³ In egregious cases, the Guidelines suggest suspending the responsible individual for up to two years or barring the responsible person.⁴⁷⁴ In imposing sanctions, an adjudicator should consider the following relevant factors: “[w]hether respondent ignored the ‘red flag’ warnings * * *; whether individuals responsible for underlying misconduct attempted to conceal misconduct from respondent; [and the] nature, extent, size, and character of the underlying misconduct.”⁴⁷⁵ Adjudicators also are directed to consider the “[q]uality and degree of a supervisor's implementation of the firm's supervisory procedures and controls.”⁴⁷⁶

Here, Respondents Montelbano, Gennuso and Leverett each ignored the red flags that were evident as to the violative conduct. Moreover, Respondents Montelbano and Gennuso were actively involved in the ASWI fraudulent scheme – there was no

⁴⁷³ Guidelines at 89.

⁴⁷⁴ Id. See In re Robert T. Nelson, Exchange Act Release No. 34932, 52 S.E.C. 15, 57 SEC Docket 2510, 1994 SEC LEXIS 3427 (Nov. 3, 1994) (holding that supervision violation in connection with stock registration violation warranted censure, bar with right to reapply in non-supervisory capacity, and fine of \$73,000).

⁴⁷⁵ Guidelines at 89.

⁴⁷⁶ Id.

concealment by the Monitor brokers of their sales practices. Further, there is no evidence that Respondents Montelbano or Gennuso made any effort whatsoever to implement any supervisory system or controls.⁴⁷⁷ The end result of these Respondents' abandonment of their responsibilities was that a massive fraud was perpetrated on the investing public.

In imposing sanctions for these violations, the Hearing Panel has taken into consideration the fact that Respondent Leverett was a GSP for only a short period of time as of May 13, 1996. Although this fact does not excuse his conduct,⁴⁷⁸ Respondent Leverett had far less responsibility at Monitor than Respondents Gennuso and Montelbano. By comparison, Respondent Gennuso, as the Firm's Compliance and Operations Officer, and Respondent Montelbano, as acting President, must bear the most responsibility for the supervisory violations.

Accordingly, for violating NASD Rules 3010 and 2110, the Hearing Panel finds the following sanctions appropriate:

Respondent Montelbano: a permanent bar from associating with any member firm in any capacity and a fine of \$10,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Gennuso: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

⁴⁷⁷ In fact, the evidence is overwhelming that Monitor's business operations were pretty much a free-for-all and there was no oversight whatsoever.

⁴⁷⁸ Absence of experience in performing the duties of a supervisory principal is not a mitigating factor. See MSC v. Benz, 1996 NASD Discip. LEXIS 29, at *37 (“[Respondent] studied for, took, and passed the principal's exam immediately prior to assuming his position as a branch manager, and that this exam should have alerted him to the responsibilities of a supervisor in the securities business.”); see also, Hasho, 784 F. Supp. 1059.

Respondent Leverett: a fine of \$5,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, requalification by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 examination within 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum score of 80, and a suspension of 45 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

6. *Failure to Register an Employee: NASD Registration Rules 1000 through 1120 and NASD Conduct Rule 2110: Twenty-Seventh Cause (Gennuso)*

The Guidelines do not provide any specific guidance for an IM-1000-3 violation. Accordingly, the Hearing Panel determined that the applicable Guideline is that concerning general registration violations of NASD Rule 2110 and Membership and Registration Rules 1000 through 1120.⁴⁷⁹

For registration violations, the Guidelines recommend a fine of \$2,500 to \$50,000 and in an egregious case a suspension for 30 business days to two years or a bar.⁴⁸⁰

Here, Respondent Gennuso permitted Garcia, an unregistered broker, to conduct securities transactions at Monitor. Moreover, he compounded this violation by participating in the creation of a payroll/commission system using other brokers' registered numbers to conceal the misconduct. Based on the evidence, the Hearing Panel concludes that Respondent Gennuso's conduct was egregious.

⁴⁷⁹ Guidelines at 43.

⁴⁸⁰ *Id.* In egregious cases the NASD has upheld a bar and fine of \$10,000. See *DBCC No. 3 v. First Choice Securities Corp.*, 1992 NASD Discip. LEXIS 33 (NBCC Oct. 28, 1992) (respondents assisted unregistered person engaged in the securities business).

Accordingly, the Hearing Panel finds that for the violations alleged in the Twenty-Seventh Cause of Complaint against Respondent Gennuso the following sanctions are appropriate: a permanent bar from associating with any member firm in any capacity and a fine of \$25,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

7. Failure to Respond Truthfully: NASD Rules 8210 and 2110: Thirtieth Cause (Gennuso), Thirty-Third Cause (Montelbano), Thirty-Fourth Cause (McMahon), Thirty-Fifth Cause (Galasso), Thirty-Ninth Cause (Giglio), Forty-First Cause (Nejaime), and Forty-Second Cause (Leverett)

The applicable NASD Sanction Guidelines recommend a fine of \$25,000 to \$50,000 for failure to respond or failure to respond truthfully. If the individual did not respond in any manner, a bar should be standard.⁴⁸¹ For the purposes of sanctions for violations of Rule 8210, there is “no distinction between failing to provide information and providing untruthful information.”⁴⁸²

Here, Respondents Galasso, Montelbano, McMahon, Gennuso, Nejaime, Leverett and Giglio each provided false testimony during their respective on-the-record interviews. The information requested concerned the events giving rise to the ASWI scheme. At the time the information was requested, it was of great regulatory significance because the NASD was investigating whether misconduct had occurred, by whom, and to what extent.

⁴⁸¹ Guidelines at 31.

⁴⁸² Shear, 1997 NASD Discip. LEXIS 24 at *10 (sustaining bar and fine of \$7,500 while holding that any sanctions for providing untruthful information to the NASD “which did not include a bar would fail to achieve the remedial purposes of general and special deterrence, whose importance the Securities and Exchange Commission . . . has repeatedly emphasized.”). In fact, the NAC has recently sustained a bar in all capacities and \$22,500 fine for giving untruthful testimony during an on-the-record interview. See Doshi, 1999 NASD Discip. LEXIS 6; DBCC No. 3 v. Nevers, 1994 NASD Discip. LEXIS 66 (NBCC modified sanctions to include bar for failure to provide complete and truthful responses to Staff’s investigatory demands).

By failing to respond truthfully each Respondent, in some way, obstructed the NASD's investigation and prevented the NASD from accomplishing its regulatory mission of ensuring a fair market place for its member firms and the investing public.

In imposing sanctions, the Hearing Panel considered the type of information withheld or misrepresented, the circumstances surrounding each Respondent's on-the-record interview, the clarity of the questions asked, and the Respondent's experience in the securities industry.

Accordingly, for the violations alleged in the Complaint for failing to respond truthfully during on-the-record interviews, the Hearing Panel finds the following sanctions appropriate:

Respondent Gennuso: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Montelbano: a suspension of two years from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent McMahan: a suspension of two years from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Galasso: a suspension of one year from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Giglio: a suspension of two years from associating with any member firm in any capacity and a fine of \$40,000, such fine to be

suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Nejaime: a suspension of 45 business days from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Leverett: a suspension of 30 business days from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

C. Sanctions Summary

The following is a summary of the Hearing Panel's findings concerning sanctions for each Respondent:

Respondent Michael Galasso

7th and 16th Causes: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

15th Cause: a permanent bar from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

18th Cause: a permanent bar from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

35th Cause: a suspension of one year from associating with any member firm in any capacity and a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

In summary, Respondent Galasso is permanently barred from associating with any member firm in any capacity and is fined a total amount of \$130,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Gerard McMahon

5th and 16th Causes: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

34th Cause: a suspension of two years from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

In summary, Respondent McMahon is permanently barred from associating with any member firm in any capacity and is fined a total of \$90,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent John Montelbano

4th and 16th Causes: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

21st Cause: a permanent bar from associating with any member firm in any capacity and a fine of \$10,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

33rd Cause: a suspension of two years from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

In summary, Respondent Montelbano is permanently barred from associating with any member firm in any capacity and is fined a total of \$90,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Emmanuel Gennuso

6th and 16th Causes: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

15th Cause: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

19th and 22nd Causes: permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

27th Cause: a permanent bar from associating with any member firm in any capacity and a fine of \$25,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

30th Cause: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

In summary, Respondent Gennuso is permanently barred from associating with any member firm in any capacity and is fined a total of \$215,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Patrick Giglio

11th Cause: a permanent bar from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

39th Cause: a suspension of two years from associating with any member firm in any capacity and a fine of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

In summary, Respondent Giglio is permanently barred from associating with any member firm in any capacity and is fined a total of \$80,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

Respondent Todd Nejaime

14th Cause: a fine of \$10,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, requalification by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 examination within 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum passing score of 80, and a suspension of 45 business days from

associating with any member firm in any capacity, such suspension to run concurrently with requalification.

41st Cause: a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, and a suspension of 45 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

In summary, Respondent Nejaime is fined a total of \$40,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, required to requalify by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 examination within 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum passing score of 80, and suspended for 90 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

Respondent Dwayne Leverett

13th Cause: a fine of \$20,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, requalification by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 examination within 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum score of 80, and a suspension of 45 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

23rd Cause: a fine of \$5,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, requalification by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 examination within 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum score of 80, and a suspension of 45 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

42nd Cause: a fine of \$30,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry and a suspension of 30 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

In summary, Respondent Leverett is fined a total of \$55,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry, required to requalify by passing the Series 7 and Series 63 examinations within 90 days of the date this decision becomes the final disciplinary action of the Association and the Series 24 examination within 180 days of the date this decision becomes the final disciplinary action of the Association, all with a minimum score of 80, and suspended for 120 business days from associating with any member firm in any capacity, such suspension to run concurrently with requalification.

Respondent Steven Goldstein

8th Cause: a permanent bar from associating with any member firm in any capacity and a fine of \$50,000, such fine to be suspended until such time as Respondent seeks to re-enter the securities industry.

VI. CONCLUSION

The costs of the Hearing, \$25,349.00 (\$24,599.00 for transcripts and \$750.00 administrative fee) are assessed jointly and severally against all Respondents.

The sanctions shall become effective on a date determined by the Association, but no sooner than 30 days from the date this decision becomes the final disciplinary action of the NASD; provided, however, that a bar or an expulsion shall become effective

immediately upon the decision becoming the final disciplinary action of the Association.⁴⁸³

Hearing Panel

By _____
Ellen A. Efros
Hearing Officer

Copies to:

Monitor Investment Group, Inc. (via over-night delivery and first class mail)
Michael A. Cavallo (via over-night delivery and first class mail)
Michael Anthony Galasso, Jr. (via over-night delivery and first class mail)
James J. Garcia, Jr. (via over-night delivery and first class mail)
Emmanuel G. Gennuso (via over-night delivery and first class mail)
Patrick Giglio (via over-night delivery and first class mail)
Steven Goldstein (via over-night delivery and first class mail)
Scott Herkert (via over-night delivery and first class mail)
Norman M. Lescht (via over-night delivery and first class mail)
Dwayne Leverett (via over-night delivery and first class mail)
Gerard McMahon (via over-night delivery and first class mail)
John Montelbano (via over-night delivery and first class mail)
Todd Nejaime (via over-night delivery and first class mail)
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⁴⁸³ The Panel considered all the arguments of the Parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the findings herein.