BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

Market Regulation Committee[1]

Complainant

vs.

Michael B. Jawitz
North Miami Beach, FL,

Respondent.

DECISION

Complaint No. CMS960238

Dated: July 9, 1999

**Respondent was found by Market Regulation Committee to have entered fictitious limit orders, prevented the execution of customer limit orders in violation of the limit order protection rule, and caused non bona-fide transactions to be reported to The Nasdaq Stock Market. Held, findings modified in part and sanctions affirmed.**

Respondent Michael B. Jawitz ("Jawitz") has appealed an October 20, 1997 decision of the Market Regulation Committee ("MRC") pursuant to NASD Procedural Rule 9311. For the reasons discussed below, we hold that Jawitz entered fictitious limit orders, prevented the execution of customer limit orders in violation of the limit order protection rule, and caused reports of non bona-fide transactions to be reported to The Nasdaq Stock Market, in violation of Conduct Rules 2110, 2210, 3310 and IM-2110-2. We affirm the sanctions imposed by the MRC of a censure, a $50,000 fine, a one-year suspension, requalification by examination as an equity trader, and costs.

[1] This case was brought by the Market Surveillance Committee, which is now known as the Market Regulation Committee.

Background

Jawitz entered the securities industry in 1969. From February 1992 until April 1996, when the conduct which is the subject of this proceeding occurred, he was a general securities representative and general securities principal with Mayer & Schweitzer, Inc. ("MASH"). He currently is associated with another firm, Wein Securities Corp.[2]

Facts

The facts are essentially undisputed. Jawitz has been a trader in the securities industry for nearly 30 years. While employed at MASH, he was responsible for entering orders into the firm's internal order routing system, executing trades, and determining the quotations at which MASH would buy and sell in approximately 30 Nasdaq securities in which it made markets. He handled heavy trading volume and approximately 90 percent of the order flow of the broker/dealer that owned MASH, Charles Schwab & Company, Inc. ("Charles Schwab"). In 1996, MASH installed an internal automated order routing and execution system that was designed to comply with the NASD's limit order protection rule. Specifically, limit orders in Nasdaq securities were automatically executed through the firm's internal order system to the extent required by the NASD's Limit Order Protection Rule and MASH's own limit order protection policy.[3] The internal order system was capable of automatically "paying up," whereby it would pay a fraction above the bid or other price thereby legitimately avoiding the obligation to execute customer limit orders residing in the system.[4]

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[2] NASD Regulation's investigation was precipitated by MASH's filing of a Uniform Termination Notice for Securities Industry Registration ("Form U-5") for Jawitz.

[3] The NASD's Limit Order Protection Interpretation eliminated the so-called "Manning safe harbor" that permitted member firms to trade ahead of customers' limit orders if the member disclosed to customers that trading ahead was the firm's practice. Under the Limit Order Protection Interpretation, firms could no longer trade for their own account at prices equal to or superior to their customers' limit orders unless the firm also executed the customers' limit orders. Effective June 21, 1995, IM-2110-2 was expanded to prohibit firms from trading for their own accounts at prices equal to or superior to a customer limit order, whether received from the firm's customer or the customer of another firm, unless the firm also executes the customer's limit order.

During the conduct at issue here, from May 25, 1995 through March 19, 1996, MASH had its own limit order execution policy which extended limit order protection to all customer limit orders (whether received from its customers or the customer of another member firm).

[4] "Paying up" is a recognized practice wherein a market maker may give price improvement of a certain required increment to an incoming market order to prevent an obligation to execute a held limit order. See generally NASD Notices to Members 95-43 and 97-57.

Jawitz testified that he was not able to program the system to "pay up" without accruing losses. Due to heavy trading volume and automatic executions, he had difficulty keeping his positions in line. From May 25, 1995 through March 19, 1996, Jawitz entered 184 fictitious limit orders in 30 Nasdaq stocks into MASH's internal execution system. He entered the fictitious limit orders naming other dealers as contra parties without their knowledge and subsequently canceled the orders.[5] The fictitious limit orders were partially executed in 309 instances and were automatically reported to NASD's Automated Confirmation Transaction Service ("ACT"). Jawitz canceled the 309 partial executions on the same day that they were entered into ACT, however, 236 non bona-fide transactions were reported to The Nasdaq Stock Market. The fictitious limit orders prevented 75 customer limit orders that were residing in MASH's system from being executed in accordance with the limit order protection rule.

<u>MRC Decision</u>

At the MRC hearing, Jawitz admitted having entered the fictitious limit orders and he consented to the hearing panel's finding of violations with respect to nearly all of the complaint's allegations. He denied, however, that he violated Conduct Rule 2120 by engaging in manipulative, deceptive, fraudulent or reckless conduct as alleged in the complaint.[6]

The MRC found that Jawitz placed 184 fictitious limit orders in violation of Conduct Rule 2110, as set forth on Exhibit B to the complaint;[7] that he caused MASH's system to fail to

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[5] Jawitz testified that he entered the fictitious limit orders to obtain the same result as ✌paying up.✍ He illustrated this as follows:

> Say Charles Schwab came in. The order - Say the market is 5 to a quarter . . . . I've got an order in to buy 5,000 at 5 1/16 for [another dealer] in my machine . . . . We'll say Charles Schwab sells me 300 shares. It automatically goes off at 5 1/16 . . . It goes off at the best bid I have in there . . . to [the other dealer]. Now if I canceled the trade with [that other dealer], the net result is that I would buy 300 shares at 5 1/16 from Charles Schwab and be covering my short. I would not be buying it at $5, which was the bid. So, if I had an order at $5 [it wouldn't go off] because I'm paying 5 1/16.

[6] The complaint alleged that Jawitz violated Conduct Rules 2110 and 2120 with respect to each of its three causes: Entering of Fictitious Limit Orders (cause one); Trading Ahead of Customer Limit Orders (cause two); and Non Bona-Fide Transaction Reports (cause three).

[7] Although cause one of the complaint stated that Jawitz caused 309 partial executions of the fictitious limit orders to be reported to ACT, it did not specifically allege the

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execute 75 customer limit orders in violation of Conduct Rules 2110 and IM-2110-2, as set forth on Exhibit C to the complaint; and that he caused 236 non bona-fide transactions to be reported to the public in violation of Conduct Rules 2110 and 3310, as set forth on Exhibit D to the complaint. The MRC dismissed, however, the allegations that Jawitz violated Conduct Rule 2120. The MRC determined that although Jawitz knowingly entered the fictitious limit orders, he did not do so with intent to manipulate or defraud. Rather, the MRC credited his testimony that he was attempting to manage his trading positions.

Discussion

Jawitz has appealed only two issues, namely the composition of the MRC hearing panel and the sanctions imposed by the MRC. [8] We independently review, however, the MRC's dismissal of the Conduct Rule 2120 allegations. Although that dismissal was not appealed by Jawitz, we properly consider the issue pursuant to NASD Procedural Rules 9311(e) and 9348. Finally, we address procedural issues raised in this appellate proceeding regarding Jawitz's motion to disqualify the Subcommittee that presided over the appeal hearing, and his motion to vacate the Subcommittee ruling that requested the parties to brief the dismissed Rule 2120 allegations.[9]

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ACT reporting as a separate violation. Accordingly, we make no finding of violation with respect to the reporting of the 309 partial executions to ACT. We note that the MRC decision is unclear on this point, and only generally stated that it was upholding the allegations in cause one.

[8] Jawitz's notice of appeal stated that some of the MRC's findings did not appear to be supported by the preponderance of the evidence in the record. His appellate briefs, however, did not address this issue, nor did he address it at appellate argument. Because he has not explained that issue and does not contest the MRC's findings as described above, we do not find it necessary to address the preponderance of the evidence as to each allegation. We find that based on our review of the entire record, the MRC's findings in this regard were proper and were based on a preponderance of the evidence.

[9] Jawitz's appellate briefs appear to contest various MRC procedural rulings regarding his requests for production of documents. We note that Jawitz was not entitled to discovery under the Code of Procedure in effect at that time and we find that the MRC's rulings in this regard were proper.

Procedural Issues

Composition of MRC Hearing Panel. Jawitz argues that the MRC's decision should be vacated because the MRC hearing panel was "improperly constituted" under then-existing Procedural Rule 9131 and Article XVI, Section 4 of the NASD By-Laws (now Article XV, Section 4 of the By-Laws and Rule 9160).[10] On appeal, Jawitz introduced evidence which he argues demonstrates that one of the MRC panelists had a conflict of interest, was biased, and received information about the investigation of Jawitz prior to the MRC hearing.[11] Jawitz submitted copies of two documents -- a June 13, 1996 letter from an NASD Regulation examiner to the MRC hearing panelist's firm ("June 13 letter"), and a June 24, 1996 letter from the hearing panelist's firm to the NASD Regulation examiner ("June 24 letter"). The NASD's June 13 letter requested that the hearing panelist's firm explain why two transactions in Florida First Bancorp, Inc. ("FFPC") between the firm and MASH were reported to ACT and then canceled. The June 24 letter responded that the firm's transaction ledger did not reflect the FFPC transactions or cancellations, that there were no order tickets for the trades, and that the trader responsible for FFPC had no recollection of the transactions. The letter apparently was copied to the MRC hearing panelist and the FFPC trader.

We first ratify the Subcommittee's ruling permitting Jawitz to adduce these two letters as additional evidence. Under Procedural Rule 9346, a party seeking leave to introduce additional evidence is required to describe the proposed new evidence, demonstrate good cause for failing to introduce it below, and demonstrate why the evidence is material to the proceeding. We find that the evidence is material and that Jawitz demonstrated good cause for failing to introduce the two letters below. Although Jawitz apparently had the letters in his possession prior to the hearing, he was not specifically informed of the identities of the hearing panelists prior to the

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[10] Although Jawitz generally objected to the composition of the MRC hearing panel before and during the MRC hearing, his objection apparently related to the denial of his request for a Hearing Officer as provided for under the new Code of Procedure. At the MRC hearing, Jawitz stated that he objected to the "use of [MRC present and former members] to sit on the hearing panel, rendering decisions . . . where the firms may have been market makers in securities which are the subject of the cases, taking positions in the securities that suffered losses, and/or otherwise are interested in the subject matter of the cases they're asked to decide . . . [I]t is appropriate to have these matters resolved by professional hearing officer." We agree with the MRC that Jawitz was not entitled to a hearing officer proceeding under the Code of Procedure in effect at that time.

[11] Under Procedural Rule 9346, a party is required to file a motion to adduce additional evidence within 30 days of filing the notice of appeal. Jawitz's motion was timely filed. Although Market Regulation staff opposed this motion, the opposition was not timely filed and was rejected by the Subcommittee. We ratify the Subcommittee's ruling to deny Market Regulation's motion to file instanter its response to Jawitz's request for leave to adduce additional evidence because Market Regulation failed to provide good cause why the motion was not filed within 14 days, as required by Procedural Rules 9146 and 9346.

hearing and therefore may not have placed any significance on the panelist's name at that time.[12] Accordingly, we find that Jawitz has met the standard for adducing the additional evidence under Rule 9346.

Alleged Bias of MRC Hearing Panelist. After considering the adduced evidence and the entire record, we find that the MRC hearing panel was properly constituted under then-existing Article XVI, Section 4 of the NASD By-Laws and Procedural Rule 9131 (now Article XV, Section 4 of the By-Laws and Rule 9160). Rule 9131, which is substantially similar to the conflict of interest provision in Article XVI, Section 4 of the By-Laws, states:

> [n]o member of [any committee] shall in any manner, directly or indirectly, participate in the determination of any matter substantially affecting his interest or the interests of any person in whom he is directly or indirectly interested. In any such case the particular member shall disqualify himself or shall be disqualified by the [Chairman of the Board or the committee].

We find that the MRC hearing panelist's interests were not substantially affected such that the proceeding should be vacated or remanded. We reject Jawitz's argument that the MRC hearing panelist had an interest in the outcome of the proceeding because the NASD had questioned the panelist's firm regarding limit orders that had been placed by MASH and then canceled. Jawitz asserts that if the canceled orders were entered and canceled with the panelist's firm's consent, the panelist's firm would have been a participant in his (Jawitz's) own misconduct. He asserts that in the alternative, if the transactions were entered without the firm's consent, the firm would have been, or would have perceived itself as, a victim of his misconduct under the rationale of In re Datek Securities Corporation, 51 S.E.C. 542 (1993).[13]

We find that the instant case is not similar to Datek. Unlike Datek, where the Commission based its reversal on the panelists' firms' participation in the transactions at issue, there is no showing here that the MRC panelist's firm was involved in any of the transactions at

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[12] By letter following the hearing, MRC counsel acknowledged that Jawitz was not specifically advised of the identities of the MRC hearing panelists prior to the hearing. MRC counsel maintained, however, that Jawitz should have known the identities of the panelists prior to the hearing because the hearing panelists were carbon-copied on two letters to the parties from the MRC hearing panel's attorney-advisor. We conclude that the letters do not in fact provide notice that the carbon-copied individuals would be serving as hearing panelists.

[13] In Datek, two of the three panel members were employed by firms that were on the opposite side of 115 of the 690 violative transactions. The Securities and Exchange Commission ("SEC") concluded that "a person cannot be permitted to participate on an adjudicatory hearing panel in any proceeding in which that person, or the firm at which the person is employed, may be perceived to be a victim of, or a participant in, conduct that is the basis for the respondent's alleged wrongdoing." Id. at 544-45.

issue. Nor is there any showing that the transactions that were the subject of the NASD's June 13 inquiry to the panelist's firm are at issue here.[14] Moreover, Jawitz himself stated that he placed the fictitious limit orders without the contra parties' knowledge.

We also independently see no reason that the panelist would have perceived his firm as a possible victim of the misconduct. Even if the MRC panelist somehow associated the NASD's inquiry with Jawitz's misconduct, we still are unable to see how the panelist would have perceived his firm to have been victimized. None of the contra parties were actually affected by Jawitz's misconduct because the fictitious orders were canceled. Jawitz himself stated that he thought the contra parties would not be harmed, and therefore not victimized. There also is no reason to believe that the MRC hearing panelist knew anything about the investigation of Jawitz before the hearing. The NASD's letters to the panelist's firm do not mention Jawitz. Any claims of bias therefore are "purely speculative." See, e.g., In re Mayer Amsel, Exchange Act Rel. No. 37092, at 8 (1996) (rejecting claims of bias as purely speculative when nothing in the record showed prejudice on the part of the panel members). Cf. Gibbs v. SEC, 1994 U.S. App. LEXIS 10771, at *7 (10th Cir. 1994) ("a substantial showing of personal bias is required to disqualify a[n] [administrative agency] hearing officer or to obtain a ruling that the hearing is unfair") (quoting Roach v. National Trans. Safety Bd., 804 F.2d 1147, 1160 (10th Cir. 1986)). Finally, there also is no showing that the panelist or his firm had any pecuniary stake in the outcome of this proceeding. Cf. In re Datek Securities Corp., 51 S.E.C. at 545.[15] Accordingly, we find no evidence of bias in the MRC proceeding.[16]

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[14] We have considered that Jawitz apparently made a market in FFPC, and we are aware that certain trade data involving the panelist's firm and MASH are contained on exhibits in the record (this data was apparently provided by MASH). Although the record does not reflect what determination if any was made by staff concerning these transactions, it is clear from the staff's schedule of the fictitious trades that the MRC hearing panelist's firm was not involved in any of the violative transactions that were the subject of this complaint.

[15] We note that Jawitz admitted nearly all of the violations alleged in the complaint, and the MRC hearing panel found in his favor on the only disputed violation (involving Conduct Rule 2120). The only remaining issue related to the sanctions, which were imposed by the full MRC, and also are now subject to our de novo review.

[16] Jawitz also contends that the MRC hearing panelists received ex parte copies of a staff Report of Investigation ("Report"). At the appellate hearing, the NAC subcommittee that heard argument on this matter ("Subcommittee") questioned MRC counsel regarding Jawitz's contention and he responded that the Report had not in fact been submitted to the MRC hearing panel. MRC counsel stated, however, that the Report had been provided to the full MRC at the time the complaint was authorized, as was done in all disciplinary cases in accordance with the Code of Procedure in effect at that time. We find no evidence that suggests that the Report was submitted to the MRC hearing panel as Jawitz contends. We also reject Jawitz's argument that two of the three hearing panelists were biased because they served on the MRC and apparently received copies of the Report. Cf. In re Keith DeSanto, Exchange Act Rel. No. 35860 (June 19, 1995) (rejecting claim of bias after an offer of settlement was submitted to the District hearing

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Motion for Disqualification of Subcommittee. Upon the conclusion of the appellate briefing, on October 6, 1998, the Subcommittee notified the parties that in accordance with Procedural Rule 9311(e), the dismissed Conduct Rule 2120 allegations would be considered in connection with the appeal ("October 6 Notice"). The October 6 Notice permitted the parties to submit briefs on the Conduct Rule 2120 issue and to address it at oral argument. On October 8, 1998, Jawitz filed a "Motion . . . to Vacate Order Dated October 6, 1998, to Disqualify the Subcommittee of the NAC and for Other Relief" ("Motion"). Jawitz asserted that in Market Regulation's response to his opening appeal brief, Market Regulation had improperly briefed the Conduct Rule 2120 dismissal in a "back door attempt to relitigate the manipulation charge." He argued that Market Regulation's "unlawful actions [had] served their improper purpose" because the Subcommittee had become "prejudiced" and had determined to consider the dismissed issue on appeal. Jawitz requested that the "October 6, 1998 Order be vacated," that the entire Subcommittee be recused, and that any other member of the NAC who had reviewed "the offending documents" be recused.

Rule 9332(b) provides that a party may move for disqualification of a Subcommittee based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the fairness of the member . . . might reasonably be questioned." In accordance with Rule 9332(d), the Vice Chair of the NAC denied Jawitz's motion to disqualify the Subcommittee. We agree. We see no reason to question the Subcommittee's fairness and find that it was the Subcommittee's prerogative to reconsider any dismissed allegation.[17] The Code of Procedure certainly envisions this, and Jawitz had notice that all issues might be reviewed by the NAC on appeal under Procedural Rules 9311(e) and 9348. Rule 9311(e) provides that parties shall be given "notice of, and an opportunity to submit briefs on, any issue that shall be considered by the National Adjudicatory Council if that issue was not previously set forth in the notice of appeal."[18] The Subcommittee exercised proper

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panel that considered the evidence) citing Withrow v. Larkin, 421 U.S. 35, 55 (1975) ("The mere exposure to evidence presented in nonadversary . . . procedures is insufficient in itself to impugn the fairness of [panel] members at a later adversary hearing.")

[17] We agree, however, that matters on appeal are properly confined to the issues raised by the appellant, and that parties should submit briefs confined to these issues. Rule 9311(c) of the Code of Procedure provides that a party may file a notice of appeal which must contain a "brief statement of the findings, conclusions, or sanctions as to which exceptions are taken." Rule 9347(a) provides that the parties' appellate briefs "shall be confined to the particular matters at issue." We nevertheless find that merely because Market Regulation argued against the dismissal of the Rule 2120 violation, an issue that was not raised by appellant, this had no dispositive bearing on which issues might have been considered by the Subcommittee; all issues are subject to the Subcommittee's possible consideration on appeal.

[18] In addition, Procedural Rule 9348 provides, in pertinent part, that the NAC "may affirm, dismiss, modify or reverse with respect to each finding."

authority by requesting briefing on an issue not raised by respondent that would be considered by the NAC in connection with the appeal. We thus adopt the Vice Chair's decision to deny Jawitz's motion to disqualify the Subcommittee.[19]

Conduct Rule 2120 Violation. We now turn to the MRC's dismissal of the Conduct Rule 2120 allegations. On this point, the MRC decision stated: "[w]hile Respondent Jawitz knowing [sic] entered the fictitious orders into [MASH's system] we do not find he did so with an intent to manipulate or defraud. Instead, we credit his testimony that he was attempting to manage his trading positions." We reverse and find that Jawitz violated Conduct Rule 2120 because his conduct was intentional and deceptive.

Conduct Rule 2120 provides that "[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." A violation of this rule requires a showing that the respondent acted with scienter. Scienter is defined as the mental state of knowingly intending to deceive, manipulate, or defraud. See Aaron v. SEC, 446 U.S. 680, 686-87 n.5 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Scienter is also established by a showing that a respondent acted with severe recklessness, or conduct defined as highly unreasonable involving not merely simple or excusable negligence, but an extreme departure from the standards of ordinary care. See Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991) (citing cases from 11 circuit courts of appeal holding that recklessness suffices to show scienter).

The complaint alleged that Jawitz violated Conduct Rule 2120 by intentionally and/or recklessly entering 184 fictitious limit orders (cause one), by causing MASH's system to fail to execute 75 customer limit orders (cause two), and by causing 236 reports of non bona-fide transactions to be published (cause three). We note at the outset that there is no dispute that Jawitz's actions in entering the fictitious limit orders were intentional. Although Jawitz maintains that he placed the fictitious limit orders in order to manage his trading positions, his conduct to achieve that purpose was deceptive. We find that fictitious orders by their very nature are deceptive. False trades deceive market participants as to the state of the market, and thus undermine the integrity of the market as an independent pricing mechanism. Accordingly, we find that Jawitz violated Conduct Rule 2120 as alleged in the first cause of the complaint by entering the fictitious limit orders. Cf. In re Walter T. Black, 50 S.E.C. 424 (1990) (rejecting respondent's argument that he did not violate Article III, Section 18 of the Association's Rules of Fair Practice (now Conduct Rule 2120) when he placed fictitious reports as an "internal bookkeeping expedient").

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[19] We also affirm the Subcommittee's denial of Jawitz's motion to vacate the Subcommittee’s October 6 Notice, and the Subcommittee's ruling to postpone the hearing and to grant additional time for the briefing of the Rule 2120 issue. In addition, we adopt the Subcommittee's ruling to strike those portions of the Market Regulation's initial brief that discussed the Conduct Rule 2120 violation.

With respect to the second cause, Jawitz does not dispute that the fictitious trading caused MASH’s system to fail to execute 75 customer limit orders. He does dispute, however, that he entered the fictitious limit orders for the purpose of preventing the execution of customer limit orders residing in the system. We find that by Jawitz's own admission, he entered the fictitious limit orders in an attempt to simulate the practice of "paying up." Because by definition "paying up" prevents the execution of inferior-priced customer limit orders, Jawitz knew that the customer limit orders residing in the system might not be executed. He entered the fictitious limit orders at superior prices in order to achieve his ultimate purpose of avoiding having to execute the customer limit orders. This involved deceptive trading, and a deception on his customers who placed limit orders with the understanding that the orders would be protected and executed in accordance with the law. Accordingly, we find under the second cause that Jawitz violated Conduct Rule 2120.

Finally, as to the third cause of the complaint,[20] we find that Jawitz knew that when the fictitious limit orders were executed, they would be reported to ACT as legitimate transactions. Jawitz testified that he knew that MASH’s system automatically reported trades to the Nasdaq Stock Market tape even if they were subsequently canceled. He thus knew that by entering the fictitious limit orders and then canceling them in ACT, he ran the risk of having those trades reported to the tape. Although he apparently canceled the trades in ACT, 236 non bona-fide transactions were reported to the Nasdaq tape. Dealers and the investing public had no reason to believe that the reported transactions did not reflect legitimate trades and legitimate cancellations. Accordingly, we find that Jawitz caused 236 non bona-fide transactions to be reported to the public in violation of Conduct Rule 2120. Cf. In re Walter T. Black, 50 S.E.C. at 426 (finding that respondent's fictitious reports "resulted in a material deception being practiced not only on his employer but on the investing public as well").[21]

Sanctions

The MRC imposed sanctions of a censure, a $50,000 fine, a one-year suspension,

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[20] Jawitz does not dispute that he violated Conduct Rule 3310, which provides: "No member shall publish or circulate, or cause to be published or circulated, any notice . . . or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such member believes that such transaction was a bona-fide purchase or sale of such security."

[21] Finally, we find respondent's reliance on In re Peter Toczek, 51 S.E.C. 775 (1993) (appeal from disciplinary proceedings of New York Stock Exchange), to be misplaced. Toczek entered orders on the New York Stock Exchange at the close of trading that raised closing prices. The Commission upheld the finding that such conduct contravened just and equitable principles of trade, but set aside the finding of manipulation after determining that the exchange had failed to demonstrate intent to manipulate the market. Toczek is not relevant here because we find that Jawitz placed the fictitious orders not with an intent to manipulate the market, but with deceptive intent, in violation of Conduct Rule 2120.

requalification by examination and hearing costs.[22] In assessing the sanctions, the MRC considered that Jawitz had engaged in serious misconduct involving numerous orders over a significant period of time. In mitigation, the MRC noted that Jawitz had cooperated fully with the NASD staff, acknowledged his misconduct, and exhibited genuine remorse. The MRC also considered that MASH had retained approximately $80,000 of Jawitz's compensation in salary and bonus, of which MASH used $64,680.50 to pay restitution to customers whose limit orders were not protected due to the fictitious orders. In addition, the MRC noted its finding that Jawitz was not motivated to defraud, but was attempting to manage his trading positions.

Jawitz appeals the MRC's imposition of sanctions in several respects. He argues that the sanctions are "excessive and oppressive considering [his] unblemished prior disciplinary history," his "cooperation with the NASD investigation," and the MRC's dismissal of the Rule 2120 allegations. He also argues that the $50,000 fine is "punitive" and "excessive" in light of the $80,000 retained by his former employer.[23] Regarding the one-year suspension, he argues that it is punitive given the fact that he is a 30-year veteran in the industry who has not posed any threat to the public in the past and has assured that he will not pose a threat again in the future.[24]

We have independently reviewed the record under the applicable Sanction Guidelines, and we have determined to affirm the sanctions imposed by the MRC. We note that the MRC's decision failed to cite the specific Sanction Guidelines it considered. We analyze Jawitz's entering of the 184 fictitious orders and the resulting false reports to The Nasdaq Stock Market

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[22] The MRC ordered that Jawitz be suspended in all capacities for one year and "suspended thereafter as an equity trader until he takes and passes the Series 7 general securities examination, provided however, if the Series 55 equity trader examination requirement is approved by the [SEC] prior to his taking and passing the Series 7 examination then he must take and pass the Series 55 examination in lieu of the Series 7 before acting again as an equity trader." We note that the SEC has approved the Series 55 examination and we find it appropriate to require only that Jawitz pass the Series 55 examination prior to acting again as an equity trader.

[23] Jawitz also argues that the MRC improperly assessed against him the costs of the MRC proceeding. He argues that his answer to the complaint did not contest any of the allegations except the Rule 2120 violation, which was dismissed by the MRC. We find that Jawitz was properly assessed the costs of the MRC proceedings under Procedural Rule 8330.

[24] Jawitz also argues that the sanctions should be vacated or reduced because a 1997 NASD Notice to Members incorrectly announced that the MRC had found that Jawitz "engaged in manipulative, deceptive, and fraudulent conduct." While we certainly do not condone such inaccurate statements in Notices to Members, we note that the Subcommittee questioned MRC counsel about this at the appellate hearing who advised that the Notice had since been corrected. Although we are disturbed by the inaccurate release, we see no evidence that the inaccurate announcement was placed intentionally. We conclude that it would not be in the public interest, or otherwise a proper discharge of our disciplinary responsibilities, to consider the inaccurate statement when determining appropriate disciplinary sanctions.

under the analogous Sanction Guideline pertaining to "Marking the Close." The recommended sanction under that Guideline is a fine of $5,000 to $100,000 and a suspension of three months to three years.[25] For Jawitz's violations of the limit order protection rule, we refer to that Sanction Guideline, which recommends monetary sanctions of $1,000 for first violations, $1,000 to $10,000 for second violations, and $10,000 to $100,000 for subsequent violations, plus consideration of any profits, and restitution. Higher fines and a suspension are recommended in egregious cases.[26]

As stated above, we find that Jawitz acted with scienter in placing the fictitious limit orders and in not protecting the customer limit orders. We have considered that the fictitious orders were numerous, occurred over a 10-month period, and involved 30 securities. We consider this to be an egregious case of both fictitious trading and violating the limit order protection rule. Jawitz's misconduct resulted in a substantial number of false reports, and he prevented 75 customer limit orders from receiving the execution to which they were entitled. Not only was the market misled as to the legitimacy of the trading activity, but customers accrued losses when their limit orders did not receive proper executions. Moreover, in engaging in this course of action, Jawitz, holding customer limit orders as an agent, abdicated his fiduciary responsibility by not protecting their limit orders.

In mitigation, we leave undisturbed the MRC's determination that Jawitz acknowledged his misconduct, exhibited remorse, and cooperated with the NASD Regulation staff. In addition, we find that Jawitz's nearly 30 years of service in the industry without any disciplinary history deserves significant consideration.[27]

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[25] There is no sanction guideline that specifically applies to the entering of fictitious orders. We analyze the fictitious trading by analogy under the "Marking the Close" sanction guideline, which specifies that it applies to Conduct Rule 3310 violations (Non Bona-Fide Reports to the Public). See Guidelines (1996 ed.) (Marking the Close) at 32 n.2. The Sanction Guideline recommends consideration of: prior or similar misconduct; the size of respondent's inventory protected or enhanced by misconduct; amount of direct benefit to respondent; duration of misconduct and number of transactions; whether the transactions are real or fictitious; range of fictitious price increase or decrease; number of affected securities; whether conduct was willful; damage to market integrity; the absence of supervisory controls; attempts to conceal misconduct; and other aggravating or mitigating factors. The sanctions imposed are consistent with the Guideline.

[26] See Guidelines (1996 ed.) (Limit-Order Protection Rule) at 30. Principal considerations for violations of the limit order protection rule include any prior disciplinary history; the number, size and character of related transactions; absence of reasonable explanation for the occurrence, whether the violation was reckless, intentional, or negligent; and the adequacy of supervisory procedures and any corrective measures taken. The sanctions imposed are consistent with the Guideline.

[27] We reject respondent's argument that he was somehow denied access to potentially mitigating information in the NASD's files regarding an investigation and

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Although this conduct in another case might warrant a bar from the industry, we do not think such a sanction would be appropriately remedial in this instance. We find that the one-year suspension and the $50,000 fine are significant sanctions that are appropriately remedial to serve as a deterrent to Jawitz and to others in the industry from engaging in similar misconduct. We apportion the fines as follows: $25,000 for the fictitious orders and $10,000 for the false reports (causes one and three); and $15,000 for the limit order protection violations. We likewise impose non-concurrent suspensions of six months for the entering of the fictitious limit orders, three months for the publication of the non-bona fide transactions, and three months for the limit order protection rule violations. We find Jawitz's actions in entering the fictitious limit orders under cause one, which ultimately led to the other misconduct at issue, to be particularly reprehensible and to warrant greater sanctions than causes two and three. We do not find the misconduct to be a single instance of violation requiring categorization as a "first time violation" as Jawitz asserts, but rather we consider the misconduct to constitute repeated violations.

Finally, we reject Jawitz's argument that the fine should be reduced in consideration of the $80,000 in salary and commissions retained by MASH. The $50,000 fine is well within the Guidelines' ranges. In this instance, we have not ordered restitution in addition to the fine because Jawitz apparently has already paid restitution through MASH. However, were this not

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disciplinary action against MASH. We first note that the Market Regulation staff was not required to provide discovery to the respondent under the Code of Procedure at that time. Nevertheless, the respondent did receive certain documents from the staff pursuant to his document requests. Finally, we note that in any event it is well established that a respondent cannot shift responsibility for his misconduct to an employer. See, e.g., In re Thomas J. Kocherhans, Exchange Act Rel. No. 36556, at 5-6 (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 Patricia H. Smith, Exchange Act Rel. No. 35898, at 4 & n.8 (June 27, 1995) (rejecting respondent's argument that she had been improperly trained by a previous employer).

the case, Jawitz would be ordered to pay restitution in addition to the $50,000 fine, and we therefore reject his argument that the fine should be reduced by the amount of the restitution made. We also reject his argument that the fine should be reduced by the approximately $15,000 (representing the $80,000 withheld less $64,680.50 in restitution) that was retained by MASH. Whatever amount may have been retained by his employer has no bearing on the fine determined by the NASD to be appropriate in light of the misconduct at issue.

Accordingly, we order that Jawitz be censured, suspended for one year in all capacities, fined $50,000, required to requalify by Series 55 examination before entering the industry again as an equity trader,[28] and required to pay MRC hearing costs of $1,312.85 and appeal costs of $ 1,256.75.[29]

On Behalf of the National Adjudicatory Council,

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Joan C. Conley, Senior Vice President and Corporate Secretary

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[28] The suspension shall begin 30 days from the date of this decision.

[29] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.