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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51974 / July 6, 2005

Admin. Proc. File No. 3-11627

In the Matter of the Applications of

ROBERT J. PRAGER

and

JAMES ALEXANDER

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDING

Violations of Conduct Rules

Aiding and Abetting a Manipulation

Failure to Supervise

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered representative of member firm aided and abetted a market manipulation. President of another member firm failed adequately to supervise one of its traders who participated in the manipulation, and failed to establish and maintain adequate written supervisory procedures. Held, association's findings of violations and sanctions it imposed are sustained.

APPEARANCES:

Anthony W. Djinis, Paul J. Bazil, and Peter E. McLeod, of Pickard and Djinis LLP, for Robert J. Prager.

Richard N. Friedman, for James Alexander.

Marc Menchel, Alan B. Lawhead, Carla Carloni, and Vickie R. Olafson, for NASD.

Appeal filed: September 15, 2004
Last brief filed: December 21, 2004

I.

Robert J. Prager, a trader with Saperston Financial, Inc., a former NASD member firm, and James Alexander, president, owner, and chief compliance officer of J. Alexander Securities, Inc., a registered broker-dealer and NASD member firm, appeal from NASD disciplinary action. NASD found that Prager aided and abetted a manipulative scheme to raise artificially the volume and price of H&R Enterprises, Inc. ("H&R") common stock, in violation of NASD Conduct Rule 2110. 1/ In addition, NASD found that Alexander violated NASD Conduct Rules 3010 2/ and 2110 3/ in connection with his supervision of Jerome E. Rosen, an Alexander Securities trader who participated in the H&R stock manipulation. 4/ NASD barred Prager from association with

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1/ NASD Conduct Rule 2110 requires members to adhere to "high standards of commercial honor and just and equitable principles of trade."

2/ NASD Conduct Rule 3010 requires members to "establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance" with applicable securities laws, regulations, and NASD rules.

3/ The Commission has determined that a violation of another NASD rule, in this case Conduct Rule 3010, constitutes a violation of Conduct Rule 2110. See Stephen J. Gluckman, 54 S.E.C. 175, 185 & n.31 (1999).

4/ Alexander Securities also was found liable as part of this proceeding, and gave notice of its appeal. It thereafter notified us that it had filed a voluntary petition in bankruptcy. Under 11 U.S.C. § 362, that bankruptcy filing triggered an automatic stay of the proceeding as to Alexander Securities. Robert J. Prager, Securities Exchange Act Rel. No. 50595 (Oct. 26, 2004), 83 SEC Docket 3935; see Steven P. Sanders, 53 S.E.C. 889, 890 n.1 (1998); Franklin N. Wolf, 52 S.E.C. 517, 518 n.1 (1995). As a result, our findings that pertain to Alexander Securities are made solely for purposes of this

(continued...)

any member in any capacity. 5/ Alexander was fined $200,000, suspended for two years, and required to requalify as a principal. We base our findings on an independent review of the record.

II.

A. Overview of the H&R Manipulation

The H&R manipulation was orchestrated by Michael L. Mitton, a Canadian resident, in conjunction with David S. Heredia, a Florida stock promoter who was president of an investor relations firm. 6/ At all relevant times, H&R was a shell company with no business operations, which purported to have interests in vending and leasing industries. H&R's stock traded through the over-the-counter bulletin board.

Mitton acquired control of H&R in January 1997. Over the next several months, Mitton caused H&R to issue nearly three million shares of stock to his nominees and associates at $.05 or less per share. Those shares were placed in accounts held by Mitton's nominees and associates at certain Canadian brokerage firms. Mitton also caused H&R to hire Heredia's firm to promote H&R stock to securities market participants and the public. Heredia's firm received a substantial number of H&R shares as compensation for its services.

Mitton and Heredia devised a complex scheme whereby they would direct traders at United States brokerage firms to create artificial trading activity in the public market for H&R stock. The trading activity was designed to make H&R appear attractive to potential investors, to increase the trading price of H&R stock, and to position themselves to take advantage of the

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4/ (...continued)
proceeding and are not binding on the firm.

5/ NASD ordered Prager to pay $8,521 in hearing costs, jointly and severally with Alexander and Alexander Securities.

6/ Mitton and Heredia were not respondents in this proceeding. Mitton was barred by the British Columbia Securities Commission in 1988 from trading securities or serving as a director or officer of any securities issuer in British Columbia for twenty years, after he admitted that he engaged in stock manipulation and insider trading. Heredia, who was last registered with an NASD member in January 1996, was barred in all capacities by NASD in 1998 as a result of charges that he engaged in fraudulent sales practices and unauthorized transactions while a registered representative at Stratton Oakmont, Inc. In 2000, after a district court entered a permanent injunction against him, the Commission barred Heredia from associating with any broker or dealer and participating in any penny stock offering. See David Scott Heredia, Exchange Act Rel. No. 42513 (Mar. 9, 2000), 71 SEC Docket 2463.

planned increase in the stock's price by selling their shares at the artificially inflated prices. As part of this scheme, Heredia recruited three traders at three different NASD member firms -- Prager at Saperston, Timothy E. Chamberlain at Equitrade Securities Corporation, 7/ and Rosen at Alexander Securities 8/ -- to trade H&R stock, as directed, in exchange for guaranteed profits. With Prager's, Chamberlain's, and Rosen's participation, H&R stock traded in a circular fashion, at continually increasing prices, among the firms of the three traders, NASD member firm Hill Thompson Magid, L.P., and the accounts of Mitton's nominees and associates at the Canadian brokerage firms. This trading arrangement allowed Mitton and Heredia to manipulate the price of H&R from $2.21 to $6.68 per share between September 22 and 25, 1997. Once the price had been manipulated to the higher levels, Mitton's nominees and associates, including Heredia, sold the large blocks of H&R stock that they had obtained at little or no cost and reaped millions of dollars in profits. 9/

On September 24, 1997, certain of Mitton's nominees and associates refused to accept large purchases of H&R stock which they had made from Saperston and Alexander Securities. Two days later, the price of H&R dropped below $2.00 per share, leaving Saperston and Alexander Securities with approximately 1.7 million and 600,000 shares, respectively, that they had bought at higher prices. 10/ Saperston incurred a multi-million dollar loss that it was unable to sustain, and was forced to cease operating because of insufficient net capital. Alexander Securities was able to sustain its loss, which exceeded $1 million, and continue operating.

7/ Chamberlain was named as a respondent in this proceeding, but entered into a settlement with NASD's Department of Enforcement under which he was barred from association with any NASD member in any capacity. Department of Enforcement v. J. Alexander Securities, Inc., Discip. Proc. No. CAF010021 (Sept. 26, 200) (Order Accepting Offer of Settlement).

8/ Rosen was also named as a respondent, but the proceeding was stayed as to him as a result of his filing a bankruptcy petition. An NASD Hearing Officer subsequently granted a motion by Enforcement to withdraw the complaint against Rosen, without prejudice, based on his consent to a Commission administrative order barring him from the securities industry for manipulative trading in Systems of Excellence, Inc. stock. Jerome E. Rosen, Exchange Act Rel. No. 47908 (May 22, 2003), 80 SEC Docket 975.

9/ Through their manipulation of H&R stock, Mitton and Heredia generated gross profits of approximately $6,095,185 and $842,974, respectively. Equitrade earned approximately $1.1 million trading in H&R stock at Mitton's and Heredia's direction.

10/ Had the trades not been disavowed, Saperston and Alexander Securities would have profited by approximately $358,491 and $481,359, respectively, based on H&R's September 25, 1997 stock price.

B. Prager's Involvement in the H&R Manipulation

1. Prager Opens a Saperston Branch Office

Prager entered the securities industry in 1987 as a general securities representative and became a general securities principal in 1993. That same year, Prager joined Emanuel & Co., where he assisted trader Richard L. Newberg. Prager also became acquainted with Rosen, who was then associated with Emanuel. In 1995, Newberg and Rosen moved to the Florida branch office of Alexander Securities, which was an office of supervisory jurisdiction. 11/ In September 1996, Prager went to work in Alexander Securities' Florida office.

In May 1997, Prager left Alexander Securities and opened a Florida branch of Saperston, a Buffalo, New York-based firm. Prager hired a former trading assistant of Rosen's at Alexander Securities to assist him. Prager's business at Saperston consisted of wholesale trading with other broker-dealers. Prager made a market in about twenty-five to sixty securities. Eighty percent of the securities Prager traded were bulletin board stocks, with the remainder consisting of Nasdaq-traded securities.

2. Prager Agrees to Make a Market in H&R Stock at Heredia's Request

Prager testified that he first learned about H&R in July 1997 when his assistant arranged for him to discuss the stock with Heredia by telephone. Prior to this time, Prager had never heard of either Heredia or his firm. Heredia told Prager that he "represented" numerous, unspecified institutional accounts and was interested in buying H&R stock for these accounts. Apparently based solely on their telephone conversations, Prager considered Heredia to be a "player" (in his words, someone who "does a lot of business") and agreed to make a market in H&R stock. Prager entered into an oral agreement with Heredia to purchase and sell H&R shares at Heredia's direction and to be paid a guaranteed profit of $.03 per share.

Prager acknowledged that he did not perform any background check on Heredia or ask Heredia for a "letter of authority" regarding the institutions that Heredia purported to represent. Prager testified that, in his business at Saperston, he got "order flow," i.e., buy and sell orders, and "didn't check out people in that sense." Prager also acknowledged that he did not attempt to learn anything about H&R before agreeing to trade in its stock. Instead, Prager testified, several weeks later he obtained a "standard packet" about the company -- from what source, he did not know or care -- containing "some numbers, some projections, what [H&R] did." Prager claimed at the hearing to have "skimmed through" the packet's contents, but he admitted that it had no impact on his decision to trade H&R stock on Heredia's behalf. Prager's sole consideration, he conceded, was potential "order flow" from Heredia and the profits resulting from those orders.

11/ See NASD Conduct Rule 3010(g) (defining the term "office of supervisory jurisdiction"). Alexander Securities was headquartered in Los Angeles, California.

3. Prager's Early Trading in H&R Stock

Under Prager's trading arrangement with Heredia, Heredia did not open a trading account at Saperston or pay for any of the trades that Prager executed on Heredia's behalf. Rather, Prager traded H&R stock through Saperston's proprietary account. Prager testified that he began trading H&R stock at Heredia's request on August 6, 1997. Prager stated that his H&R stock trading for Heredia followed a pattern. Heredia would call in a market or a limit order for Prager to buy a certain number of shares of H&R stock. 12/ Prager would buy the designated number of shares and, as directed by Heredia, report the number of shares that he had acquired and his average cost per share to Heredia. Heredia then would instruct Prager to sell those shares to Chamberlain at Equitrade, the firm at which Heredia told Prager that he had institutional accounts that he represented. Prager testified that he would sell the shares of H&R stock to Chamberlain at the price designated by Heredia, which was the price that Prager had paid for them plus Prager's profit of $.03 per share, without regard to the price Equitrade was quoting for the stock. Prager testified that, when he first started trading the stock at Heredia's direction, he would contact Chamberlain before accumulating any shares to make sure that Equitrade would buy the shares necessary to flatten out Prager's position in the stock. Prager testified that eventually he stopped contacting Chamberlain because he was confident Equitrade would buy the accumulated shares. In each instance when Prager or his assistant contacted Chamberlain to confirm Equitrade's purchase of H&R stock, Chamberlain already knew the quantity of shares that he was to buy and the average price that Prager had paid for them, trade details that Prager or his assistant had discussed with Heredia prior to speaking to Chamberlain. As a result of this trading arrangement, Prager was able to maintain a flat position in H&R stock so that his purchases of the stock equaled his sales.

From August 6 through September 19, 1997, Prager's trades of H&R stock on Heredia's behalf ranged in size from 500 shares to 25,000 shares. During this period, Heredia directed Prager to trade increasingly greater quantities of H&R stock. Because Prager's trading in H&R stock soon became a major part of Saperston's business, Prager decided that he should meet Heredia in person. The two met over dinner on Friday, September 19, 1997, at which time Heredia praised Prager for doing a good job buying and selling H&R stock for him. Heredia also told Prager that he represented a $50 million institutional account at Wolverton Securities, Ltd., a Canadian firm, and that he would be directing Prager to make large purchases of H&R stock for this account in the coming week. Prager testified that he made no effort to corroborate Heredia's claim that he represented an institutional account at Wolverton or confirm the amount of money that was in the account. Prager stated unequivocally that he "wouldn't question [Heredia] about the [Wolverton] account." Prager explained that he had "been dealing with Heredia for hundreds of trades," and that "there [had not] been a problem on any other trade[s]." As far as Prager was

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12/ A market order is an order to buy or sell a security at the best available price. Barron's Dictionary of Finance and Investment Terms 350 (5th ed. 1998). A limit order is an order to buy or sell a security at a specific price or better. Id. 328.

concerned, it made no difference whether he was selling to Equitrade or Wolverton because, in either case, he was "representing orders" and "doing good business."

4. Price and Volume Increases in H&R Stock from September 22 to September 24, 1997

On Monday, September 22, 1997, the first business day following Prager's meeting with Heredia, the volume of shares that Prager purchased on Heredia's behalf increased to 176,000 shares. Heredia's instructions to Prager on that day were to "take the offer," i.e., to pay the inside offer price, to fill Heredia's purchase orders. As a result, Prager filled most of Heredia's purchase orders for H&R stock from Hill Thompson, the only market maker consistently at the inside offer. 13/ Each time Prager bought H&R stock from Hill Thompson at the inside offer, Hill Thompson would uptick the inside offer for the stock slightly. 14/ Prager would then uptick Saperston's inside bid. The opening and closing price of H&R on September 22, 1997, was $2.21 and $2.68 per share, respectively. The increase in H&R's price was due mostly to Saperston's upticks and those of Alexander Securities, which was also making a market in the stock.

On Tuesday, September 23, 1997, at Heredia's direction, Prager bought more than one million shares of H&R stock from various broker-dealers, including 594,000 shares from Hill Thompson. Prager repeatedly upticked the inside bid to fill Heredia's purchase orders. The price of H&R rose from $2.71 to $3.53 per share on September 23, 1997, based on Saperston's and Alexander Securities' trading activities. Prager sold 1,090,000 shares of H&R stock to Equitrade on that date in accordance with his trading arrangement with Heredia.

Also on September 23, 1997, two Canadian firms that previously had purchased H&R stock from Equitrade "DK'd," or refused to acknowledge, those trades. 15/ After Chamberlain complained to Heredia about the DK'd trades, Chamberlain began receiving purchase orders for H&R stock from Wolverton. That same day, Equitrade management instructed Chamberlain not to purchase any more H&R stock, citing the problem with the DK'd trades. However, Chamberlain continued trading the stock for at least another day.

13/ The inside offer and bid prices, respectively, are the lowest offer and the highest bid. See, e.g., 17 C.F.R. § 240.15g-3.

14/ An uptick occurs when a securities transaction is executed at a price higher than the previous transaction in the same security. Richard D. Chema, 53 S.E.C. 1049, 1051 n.5 (1998).

15/ The term "DK" or "don't know" is used when brokers question a trade and exchange comparison sheets to verify the details of the transaction. See Barron's Dictionary of Finance and Investment Terms 160 (5th ed. 1998).

On Wednesday, September 24, 1997, Heredia directed Prager to purchase more than five million shares of H&R stock. Prager continued repeatedly to uptick the inside bid for the stock pursuant to Heredia's instructions to acquire the stock. The price of H&R increased dramatically on that day. The stock opened at $3.56 and closed at $6.09. As before, Saperston and Alexander Securities were responsible for the majority of upticks to the inside bid price of H&R stock. Prager conceded that the rise in H&R's price on September 24, 1997, was a result of Saperston's and Alexander Securities' trading, and had nothing to do with any positive news event concerning the company.

By noon on September 24, 1997, Prager had accumulated more than 1.4 million shares of H&R stock. At this point, Prager started to fall behind in selling H&R stock due to the size and number of transactions involved and the time it took to compute his average cost and report back to Heredia. Nonetheless, Prager was able to sell 1.2 million shares to Chamberlain at Equitrade shortly after noon that day.

Later in the afternoon on September 24, 1997, Heredia called Prager and, without telling Prager about the Equitrade transactions that had been DK'd, advised that he was going to begin holding H&R stock at Wolverton, the Canadian brokerage firm, instead of Equitrade. To ensure Prager's continued acquiescence in the trading scheme, Heredia told Prager that he would start paying Prager $.06 per share on H&R trades instead of the $.03 he had been paying. Heredia then instructed Prager to buy back from Equitrade 800,000 of the 1.2 million shares that he had sold to Equitrade earlier that day, and to sell those shares to Wolverton. As Heredia directed, Prager bought back the 800,000 shares and continued to purchase large amounts of H&R stock, primarily from Hill Thompson, which Prager, in turn, sold to Wolverton.

Towards the end of the trading day on September 24, 1997, Prager informed Heredia that he still needed to buy 70,000 shares of H&R stock to complete Heredia's order to sell two million shares to Wolverton. Heredia told Prager to purchase the 70,000 shares from Rosen at Alexander Securities. As Heredia directed, Prager bought the final 70,000 shares from Rosen, and then sold the accumulated two million shares to Wolverton.

The trading that occurred between September 22 and 24, 1997, caused the inside bid price for H&R stock to soar from $2.21 to $6.09 per share, an increase of almost 175 percent. During that three-day period, Prager was responsible for over fifty percent of the upticks to the inside bid price, while Rosen, who appeared to be the most active competitor against Prager for H&R stock, was responsible for over forty percent of the upticks. When Prager stopped upticking the inside bid price of H&R after September 24, 1997, Rosen continued to do so, increasing the stock's price from $6.12 to $6.68 per share on September 25, 1997.

5. The End of the H&R Manipulation

On Thursday morning, September 25, 1997, Saperston's back office in Buffalo informed Prager that the prior day's trades with Equitrade and Wolverton were not "comparing," i.e., the terms were not matching. Prager learned that Equitrade and Wolverton were refusing to accept purchases of some 3.2 million shares of H&R stock from Saperston. Later in the day, however, Equitrade and Wolverton decided to accept purchases of 700,000 and 800,000 shares, respectively, from Saperston, leaving the firm with approximately 1.7 million shares that did not compare.

On Friday morning, September 26, 1997, Saperston's back office informed Prager that 1.3 of the two million shares of H&R stock sold to Wolverton on September 24, 1997, still had not compared. Prager spoke to Saperston's owner and compliance officer, and described to them the problem involving the DK'd trades. Prager was instructed to fly to Buffalo that evening to meet with officials of Saperston and its clearing firm and explain what he knew about the DK'd trades.

By the close of trading on September 26, 1997, H&R's share price had dropped below $2.00. The H&R market quickly collapsed thereafter. Saperston incurred a multi-million dollar loss that it could not sustain, and was forced to cease doing business because of insufficient net capital. 16/ Saperston's clearing firm became obligated to cover Saperston's purchases of H&R stock and to absorb the loss. Prager stayed at Saperston until it closed its doors on September 29, 1997. The following month, Prager returned to work in Alexander Securities' Florida branch.

C. Prager Aided and Abetted the H&R Manipulation

The three elements necessary to find aiding and abetting liability on Prager's part are the following: (1) securities law violations by Mitton and Heredia; (2) Prager's substantial assistance in furtherance of those violations; and (3) Prager's providing that assistance with the requisite scienter. 17/ Prager does not dispute the first element, namely, that Mitton and Heredia engaged in a manipulation of H&R stock. Rather, Prager disputes the second and third elements requiring that he substantially assisted that manipulation with the requisite scienter. We find that Prager's conduct established his aiding and abetting liability.

1. Heredia and Mitton's Primary Violations

Market manipulation is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." 18/ A manipulation, in essence, is "the creation of deceptive value or market activity for a security, accomplished by an

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16/ Prager stipulated that the loss Saperston incurred was approximately $9 million.

17/ See Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000); Investors Research Corp. v. SEC, 628 F.2d 168, 178 (D.C. Cir.), cert. denied, 449 U.S. 919 (1980).

18/ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

intentional interference with the free forces of supply and demand." 19/ We have stated that "[m]anipulation strikes at the heart of the pricing process on which all investors rely. It attacks the very foundation and integrity of the free market system." 20/ In determining whether a manipulation has occurred, we generally look to see whether the trading and surrounding circumstances suggest an effort to "interfere with the free forces of supply an demand." 21/ We have noted that "[p]roof 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." 22/

Mitton and Heredia directed the H&R trading by Prager, Chamberlain, and Rosen, providing them guaranteed profits in exchange. The arrangement enabled Mitton and Heredia to increase the price of H&R from $2.21 to $6.68 per share between September 22 and 25, 1997, and to sell their H&R shares at the artificially inflated prices. Mitton's and Heredia's directed trading caused H&R stock to trade in a circular fashion, at continually increasing prices, among the firms of the three traders, Hill Thompson, and their nominees' and associates' accounts at the Canadian firms. The directed trading was manipulative because it artificially increased the volume of trading in, and the price of, H&R stock. 23/

2. Prager's Substantial Assistance

The H&R manipulation was successful in large part because of Prager's involvement. From September 22 to 24, 1997, Prager effected dozens of trades in H&R stock at Heredia's direction. Prager bought from Hill Thompson approximately 3.9 million shares of H&R stock, which represented over fifty percent of the publicly-available float. Additionally, in the same period, Prager's role was pivotal in causing the price of the stock to increase nearly 175 percent, from $2.21 to $6.09 per share. Prager was responsible for the majority of upticks to the inside bid price of H&R stock. His trading had the effect of distorting the market in H&R and creating the false appearance of active trading at ever-increasing prices. Thus, Prager's activities substantially assisted the manipulation.

19/ Swartwood, Hesse, Inc., 50 S.E.C. 1301, 1307 (1992).

20/ L.C. Wegard & Co., Inc., 53 S.E.C. 607, 617 (1998).

21/ Pagel, Inc., 48 S.E.C. 223, 226 (1985), aff'd, 803 F.2d 942 (8th Cir. 1986).

22/ Id.

23/ Compare Markowski v. SEC, 274 F.3d 525 (D.C. Cir. 2001) (finding illegal manipulation even though all trades were "real" and not contrived), cert. denied, 537 U.S. 819 (2002).

3. Prager's Scienter

The courts have held that "extreme recklessness" satisfies the scienter requirement for aiding and abetting liability. 24/ Extreme recklessness "may be found if the alleged aider and abettor encountered red flags, or suspicious events creating reasons for doubt that should have alerted him to the improper conduct of the primary violator." 25/ We find that the evidence establishes Prager's extreme recklessness. 26/

Prager was extremely reckless from the outset of his business dealings with Heredia. Prager orally agreed to make a market in an unknown, bulletin board stock, at the request of a person whom he did not know. Prager took no steps to investigate Heredia's background or his financial resources. Heredia's claims that he represented large institutional accounts at Equitrade and Wolverton would not have withstood scrutiny, but Prager did not question those claims or ask Heredia to provide him with written trading authorizations or other form of corroboration. Additionally, Prager knew that Equitrade was a market maker in H&R stock. However, Prager did not ask why Heredia sought to have Saperston, rather than Equitrade, execute transactions in H&R stock for the institutional accounts at Equitrade. The record suggests that the only reason for Heredia's involving Saperston in the H&R trading is that Heredia and Mitton needed several broker-dealers trading the stock in a circular manner to effectuate their scheme. Prager testified that it was not until he was en route to Buffalo, after the collapse of the H&R manipulation, that he recognized the circular nature of the trading in which he was engaged at Heredia's direction. Prager stated, "We're buying [H&R stock] from Hill [Thompson], you know. It's a lot of stock. Where's Hill [Thompson] getting the stock from? They're getting it from Wolverton . . . . And then we're selling to Wolverton who is selling to Hill [Thompson] who is selling to us and so on and so on." As Prager acknowledged, the circular trading in H&R stock was a "red flag" that he should have heeded.

24/ See Howard v. SEC, 376 F.3d 1136, 1143 (D.C. Cir. 2004); Graham, 222 F.3d at 1004; SEC v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992). Prager claims that NASD applied the wrong legal standard for aiding and abetting. NASD properly evaluated Prager's scienter in a manner consistent with the extreme recklessness standard articulated in Howard. It did not use a negligence standard.

25/ Howard, 376 F.3d at 1143 (internal quotations and citations omitted).

26/ Because the scienter element may be established through recklessness, Prager's reliance on Richard D. Chema, 53 S.E.C. 1049 (1998), for the proposition that knowledge of the manipulative scheme is necessary for aiding and abetting liability, is misplaced. Moreover, in Chema, the respondent's liability as an aider and abettor was based on his disregard of red flags, in addition to his admission that he was aware of certain improper conduct. See id. at 1056-58.

Prager was similarly oblivious to the *bona fide*s of H&R, notwithstanding his obligation to review financial and other information about an issuer before making a market in its unlisted securities. 27/ Prager did not obtain any materials on H&R when he started trading in its stock. When Prager subsequently obtained information about the company, he supposedly skimmed it, but he acknowledged that it had no bearing on his decision to trade in the stock. Prager's only concern was "order flow" and the resulting profits that Heredia had promised. As with Heredia's claimed credentials, H&R, a shell corporation with no assets and no business, would not have withstood even a cursory examination, but Prager took no action to determine if it was a real company whose securities possessed value bearing some relationship to the prices that he was quoting on the bulletin board.

Prager was extremely reckless in disregarding red flags signifying that he was engaged in Heredia's manipulative trading scheme. The record shows that Heredia directed Prager's purchasing activity. Prager testified that, on September 22, 1997, Heredia instructed Prager to accumulate a large number of shares of H&R stock and to "take the offer." Prager testified that he understood that Heredia was directing him to purchase H&R stock from Hill Thompson at its offering price. As a result, Prager filled most of Heredia's purchase orders on that date from Hill Thompson. 28/ Prager also filled a large portion of Heredia's purchase orders on September 23 and 24, 1997, by purchasing H&R shares from Hill Thompson, the only firm consistently at the inside offer.

27/ See Exchange Act Rule 15c2-11, regulating the submission and publication of quotations by broker-dealers for certain over-the-counter securities. 17 C.F.R. § 240.15c2-11. The Commission has stated that the Rule "is intended to require a broker-dealer to give some measure of attention to financial and other information about the issuer of a security before it commences trading in that security." Initiation or Resumption of Quotations Without Specified Information, Exchange Act Rel. No. 21470 (Nov. 8, 1984), 31 S.E.C. Docket 1041, 1042.

28/ Prager argues, without support, that he cannot be found to have engaged in directed trading because there is no evidence that Heredia spoke to Hill Thompson or any of the other firms from whom Prager bought H&R stock. We believe that the trading at issue constituted directed trading. See, e.g., United States v. Corr, 543 F.2d 1042, 1046 n.7 (2d Cir. 1976) (defining "directed order" as "a pre-arranged order where a third party arranges for the buyer of securities to contact the seller, or where a third party pre-arranges a transaction between brokerage firms"). Moreover, we believe, as NASD had found, that certain of the trading in this case had indicia of "wash sales," which have long been associated with manipulative activity. See, e.g., Chema, 53 S.E.C. at 1051 n.3 (defining "wash sale" as a transaction that involves no change in beneficial ownership). In any event, regardless of how the trading at issue is described, it was indicative of a manipulation and, as such, a red flag that Prager recklessly ignored.

The record also shows that Heredia directed Prager's selling activity. Prager testified that Heredia instructed him to buy a specified number of H&R shares each day between September 22 and 24, 1997, and to sell those shares to Equitrade, the firm that Heredia designated, at the price that Heredia specified. Prager also testified that, in each instance, the trader at Equitrade, Chamberlain, had advance knowledge of Prager's price and volume for H&R stock. However, Prager never inquired how Chamberlain obtained this knowledge. Nor did Prager ask why Heredia was directing him to sell H&R stock to Chamberlain at a specified price without regard to the price that Equitrade was quoting on the stock. Prager complied with Heredia's orders for purchases and sales of H&R stock and received a guaranteed profit in return. As discussed, pre-arranged activity of this kind is indicative of a manipulation.

Between September 22 and 24, 1997, the total number of H&R shares traded by Prager grew from 176,000 to more than five million shares. This dramatic increase in the volume of trades should have caused Prager to suspect some motivation for the increase, yet he apparently gave no thought to it. In addition, most of the large blocks of H&R stock that Prager bought came from the same source, Hill Thompson, and were sold to the same buyer, Equitrade. However, Prager did not question the trading activity which Heredia directed him to engage in, including Heredia's specific instruction to buy from Hill Thompson at its offering price. 29/

During this same three-day period, the price of H&R soared from $2.22 to $6.09 per share, with Prager responsible for more than half the upticks to the inside bid price of the stock, and Rosen at Alexander Securities responsible for most of the rest. Prager admitted that his and Rosen's trading activities increased the share price of the stock, yet he never stopped to consider why such a run up would occur in the absence of any favorable news event concerning the company. Instead, Prager continued executing increasingly greater volumes of purchases and sales through Saperston's trading account. Not only a broker-dealer charged with a duty to make diligent inquiry, 30/ but any rational observer should have been highly suspicious under these circumstances and questioned what was taking place.

29/ We have observed that "a market maker generally buys a security from another dealer at its bid and sells that security to another dealer at its offer." Adams Sec., Inc., 51 S.E.C. 311, 313 n.8 (1993). Prager did not pay the bid price or a price close to the bid price. Instead, Prager complied with Heredia's instruction to "take the offer," and paid Hill Thompson's offering price, without any effort to negotiate a lower price.

30/ In the context of market manipulation, we have stated that "[t]he importance of a broker-dealer's responsibility to use diligence where there are any unusual factors is highlighted by the fact that violations of the antifraud and other provisions of the securities laws frequently depend for their consummation . . . on the activities of broker- dealers who fail to make diligent inquiry to obtain sufficient information to justify their activity in [a] security." Alessandrini & Co., Inc., 45 S.E.C. 399, 406 (1973).

We find it particularly significant that Prager failed to question Heredia about his trading instructions on September 24, 1997. After directing Prager to accumulate and sell 1.2 million shares of H&R stock to Equitrade, Heredia instructed Prager to buy 800,000 shares back from Equitrade and sell them to Wolverton. Prager did not question these instructions or Heredia's simultaneous decision to double Prager's profits for his sales to Wolverton. When Prager began selling to Wolverton, the traders there, like Chamberlain at Equitrade, knew before Prager told them how much stock Prager had to sell them and at what price, but Prager did not ask how they knew that information. 31/ Nor did Prager ask how Heredia knew to direct him to Rosen for the last 70,000 shares of stock that he needed to complete the two million share sale to Wolverton, or why Heredia would suggest that Rosen would sell Prager those shares, given that Rosen seemed to be competing with Prager for the inside bid. At the hearing, Prager conceded that Heredia's instructions on September 24, 1997, raised a "big red flag." However, Prager stated that, at the time, he was thinking that he "shouldn't say anything" to Heredia, because he "[did] not want to get anyone in trouble." 32/

In sum, we find that Prager was confronted with an abundance of warning signs that should have aroused his suspicions and caused him to question Heredia's trading and his own involvement in it. However, Prager made no inquiries. Had he done so, he could have learned, for example, that Heredia did not represent large institutional accounts worth millions. Instead, Prager closed his eyes to the manipulative trading, content to execute Heredia's transactions in order to pursue guaranteed profits. 33/ Prager's willingness to disregard red flags of manipulative trading is illustrated by his testimony that he declined to question Heredia about his September 24, 1997 instructions because Prager was reluctant to implicate anyone in improper activity. We conclude that Prager was extremely reckless in executing H&R trades at Heredia's direction.

31/ Prager's investigative testimony belies his argument that the actions of the Equitrade and Wolverton traders gave him no cause for suspicion. Prager told NASD investigators that he was quite perplexed by the extent of the traders' knowledge of trade details such as Saperston's average cost.

32/ Prager also testified that he considered the possibility that he was buying back 800,000 H&R shares from a different Equitrade account. The record shows that Prager made no effort to ascertain whether this supposition was correct.

33/ Prager argues that he had nothing to gain from an increase in the price of H&R stock, and therefore he had no motive to participate or assist in the manipulation. Prager fails to acknowledge that he was motivated to engage in the directed trading because he received a guaranteed payment of $.03 to $.06 per share for a substantial volume of H&R trades with little risk, given that Heredia routinely had purchasers flatten Prager's position in the stock by the end of the trading day. As Prager admitted, he stood to earn almost $400,000 in profits in September 1997 had Saperston not gone out of business.

Prager's extreme recklessness establishes his scienter and, thus, his liability as an aider and abettor of the manipulative conduct under Conduct Rule 2110. 34/

III.

A. Alexander's Supervision of Rosen

Beginning in 1995, Alexander had delegated to Newberg, a general securities principal, supervisory responsibility for the firm's Florida branch, including Rosen. 35/ Newberg testified that during the time that he supervised Rosen he knew Rosen had a disciplinary record because he had seen Rosen's Form U-4. That disciplinary record involved serious sales practice abuse violations and included misconduct for which Rosen's prior supervisors had been sanctioned for failing to supervise him properly. 36/

34/ See Howard R. Perles, Exchange Act Rel. No. 45691 (Apr. 4, 2002), 77 SEC Docket 896, 912 (holding that aiding and abetting is an appropriate matter for disciplinary action by a self-regulatory organization as conduct inconsistent with just and equitable principles of trade).

35/ See NASD Conduct Rule 3010(a)(4) (requiring designation of one or more appropriately registered principals in each office of supervisory jurisdiction with authority to carry out the supervisory responsibilities assigned to that office). Alexander also assigned another principal, Dennis Sturm, to the Florida branch. In 2002, Sturm was barred by NASD for failing to respond to staff requests for documents. See Department of Enforcement v. Sturm, No. CAF000033 (NAC Mar. 21, 2002).

36/ In 1980, a district court permanently enjoined Rosen from violating registration provisions of the Securities Act of 1933. In a related administrative proceeding, we found that Rosen had willfully violated Securities Act Section 5 by engaging in an unlawful distribution of securities. We suspended Rosen from association with any broker or dealer for fourteen days, and ordered that he be subject to enhanced supervisory oversight for two years. See Jerome E. Rosen, Exchange Act Rel. No. 17221 (Oct. 16, 1980), 21 SEC Docket 173. In 1985, Rosen entered into a settlement with NASD with respect to allegations that he and others engaged in a scheme to enrich themselves at the expense of the public through improper redemptions of mutual fund shares substantially below the redemption price. Rosen received a censure, $30,000 fine, and thirty-day suspension. Rosen's supervisors also were sanctioned in that proceeding for failing to supervise him adequately. In 1992, Rosen entered into another settlement with NASD based on allegations that he charged excessive markups in violation of antifraud provisions of the securities laws. Rosen was censured and fined $5,000.

In early 1997, Newberg began having conflicts with Rosen. In a succession of notes and memoranda written to Alexander and/or Gordon Kerr, 37/ a firm compliance officer, Newberg expressed his growing concerns over Rosen. In January 1997, Newberg wrote to Kerr and informed him that NASD had received complaints that Rosen had made harassing and anti-competitive telephone calls to another market maker, and that Rosen was "backing away" from trades. 38/ In February 1997, Newberg wrote to Alexander regarding information that he had obtained during an informal meeting with federal law enforcement authorities. Newberg advised Alexander that Rosen was the subject of a federal investigation into the possible manipulation of a variety of securities that Rosen traded. Newberg informed Alexander that, when the authorities questioned Rosen about his trading, Rosen refused to testify or produce requested documents, asserting his Fifth Amendment privilege against self-incrimination. In March 1997, Newberg wrote to Kerr and reiterated his continuing difficulties in supervising Rosen, Rosen's persistent inability to conform his conduct to applicable rules, and Newberg's need for assistance.

On April 1, 1997, Newberg sent Kerr a memorandum in which he expressly disavowed all supervisory responsibilities over Rosen. The memorandum stated, in pertinent part:

> I can no longer be responsible for Mr. Rosen. He does not respond to any form of authority and has evidenced this on numerous occasions. I believe his conduct and actions are and will continue to be deleterious to the firm. 39/

37/ In 1999, Kerr was barred by NASD in all capacities as a result of conduct, unrelated to the subject matter of this proceeding, that arose during his association with the firm. See Gordon Kerr, 54 S.E.C. 930 (2000).

38/ The failure of a broker-dealer, acting as a market maker in a given security, to make good on a bid for the minimum quantity is known as "backing away." See Barron's Dictionary of Finance and Investment Terms 40 (5th ed. 1998).

39/ At the hearing, Newberg testified that, despite having resigned as Rosen's supervisor on April 1, 1997, in actuality, he never relinquished that responsibility. Newberg's hearing testimony directly conflicted with his written memoranda to Alexander and Kerr, sworn investigative testimony, and statements to an NASD compliance examiner in August 1999. When Newberg was questioned on cross-examination about the inconsistency between his hearing testimony and his prior investigative testimony, Newberg sought to downplay his investigative testimony by claiming that he had merely been "puffing." The Hearing Panel found that Newberg's claim of puffery was "preposterous," and refused to credit his hearing testimony. It also refused to credit the hearing testimony of Newberg's daughter-in-law, a firm employee who was called as a witness to corroborate Newberg's story that he continued to supervise Rosen after April 1, 1997. The NAC deferred to the Hearing Panel's credibility findings, and so do we. The record fairly supports them and contains no substantial contrary evidence justifying a reversal of those findings. See

(continued...)

From that point forward, Alexander assumed responsibility for supervising Rosen. 40/ At all relevant times, Alexander was geographically situated in California, while Rosen was located in Florida. While Alexander could have designated a replacement for Newberg, the record shows that, after Newberg's resignation, there was no on-site principal in the Florida office assigned to monitor Rosen's activities.

In September 1997, Rosen participated in the H&R manipulation. Rosen agreed to trade H&R stock at Mitton's direction in exchange for guaranteed profits and free stock. As directed, Rosen bought H&R stock and reported his position and average price to Mitton. Mitton, in turn, had various Canadian brokerage firms purchase the stock from Rosen. As discussed previously, between September 22 and 24, 1997, when its price rose almost 175%, Rosen was responsible for over forty percent of the upticks to the inside bid price for H&R. Mitton's nominees and associates subsequently DK'd large purchases of H&R stock from Alexander Securities, resulting in a loss to that firm in excess of $1 million. Notwithstanding that loss, Alexander and the firm took no action with respect to Rosen as a result of his H&R stock trading. Rather, they permitted Rosen, one of the firm's top revenue producers, to keep trading and to pay off the losses that the firm had incurred. 41/

Newberg, meanwhile, continued to apprise Alexander and Kerr of Rosen's questionable activities and urge them to take action. In October 1997, Newberg proposed that the firm move Rosen to its Los Angeles headquarters "for regulatory purposes & compliance." In November 1997, Newberg sent Alexander a note about "another stock" with which Rosen was involved and in which the Commission had suspended trading. Newberg wrote, "I do not think for the 1000th time Mr. Rosen is suitable for this industry, no less your firm. He is inherently problematic & unstable." That same month, Newberg informed Kerr that Rosen was continuing to deal with Heredia, and wrote, "I do not think this portends anything positive." In January 1998, Newberg advised Kerr in writing that Rosen was speaking directly with Mitton and Heredia about two additional stocks. "This scares the hell out of me," Newberg confessed, "[and] I believe the [H&R] fiasco is not over yet. Something has to be done. Do we have a responsibility to notify the regulators?" In September 1998, Newberg wrote to Alexander and pleaded with him to

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39/ (...continued)
Perles, 77 SEC Docket at 907 n.20.

40/ Alexander admitted during investigative testimony that he assumed responsibility for supervising Rosen in April 1997. Thereafter, in a letter written to NASD following a routine examination of the firm in August 1999, Alexander reiterated that he was the official responsible for supervising Rosen. In light of these admissions, the Hearing Panel rejected Alexander's hearing testimony that Newberg continued to supervise Rosen.

41/ Alexander testified that he spoke to Rosen about his trading in H&R stock, but that he "did not see anything wrong" with the trading, other than brokerage firms "not honoring their transactions."

resolve the situation. Despite these entreaties, Alexander allowed Rosen to continue working at Alexander Securities until May 2002. 42/

B. Alexander's Supervisory Failures

We have repeatedly emphasized that a broker-dealer's responsibility to supervise its employees by means of effective, established procedures is a "critical component in the federal investor protection scheme regulating the securities markets." 43/ We also have emphasized the need for heightened supervision when a firm chooses to have associated with it a person who has known regulatory problems or customer complaints. 44/ Although Rosen was such a person, Alexander and Alexander Securities took no steps to supervise Rosen with the vigilance called for by his disciplinary record.

Alexander concedes that, as president of Alexander Securities, he had ultimate responsibility for supervising the Florida office. 45/ When Alexander hired Rosen in 1995,

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42/ In April 2002, a district court entered a final judgment against Rosen after a jury found him liable for manipulative activity in connection with Systems of Excellence, Inc., stock. Rosen was permanently enjoined from violating the federal securities law provisions he was found to have violated, fined, and ordered to pay disgorgement. See SEC v. Rosen, Case No. 01-0369-CIV-Middlebrooks (S.D. Fla. 2002). As a result of that judgment, Rosen became statutorily disqualified from associating with any NASD member firm. See NASD By-Laws, Article III, Section 4(h). Notwithstanding Rosen's disqualification, Alexander Securities applied to NASD for permission to continue his association with the firm. NASD's Department of Member Regulation opposed the application and, before a hearing could be held, the firm terminated Rosen.

43/ Seco Sec., Inc., 49 S.E.C. 873, 876 (1988).

44/ See, e.g., James Harvey Thornton, 53 S.E.C. 1210, 1216 (1999) (finding that firm failed reasonably to supervise when its supervisory policies made no provision for heightened supervision of a registered representative with a disciplinary history); Consolidated Inv. Serv., Inc., 52 S.E.C. 582, 588-89 (1996) (stating that "[a] registered representative who has previously evidenced misconduct can be retained only if he subsequently is subjected to a commensurately higher level of supervision").

45/ We have long maintained that "[f]inal responsibility for supervision of the trading activities at a member firm of NASD rests with the firm's president, unless the president reasonably delegates the duties to someone else and has no reason to know that person is not properly performing the delegated duties." Michael T. Studer, Exchange Act Rel. No. 50543 (Oct. 14, 2004), 83 SEC Docket 3662, 3673, appeal filed, No. 04-5901 (2d Cir. Nov. 16, 2004). The record shows that from April 1, 1997, forward, Alexander did not

(continued...)

Alexander knew that Rosen had a significant disciplinary history that had resulted in sanctions for Rosen personally as well as Rosen's previous employers. While Rosen's disciplinary history strongly signaled that Rosen required enhanced supervision from the outset, Alexander failed to provide it. Nor did the firm's supervisory manual provide for heightened supervision of an associated person with a known disciplinary history, such as Rosen.

By early 1997, Alexander knew not only that Rosen had a significant disciplinary record, but that Rosen was the subject of backing away complaints, NASD charges of anti-competitive conduct, 46/ and a federal investigation for securities fraud. Notwithstanding these compliance-related problems, all of which arose during Rosen's association with the firm, Alexander did nothing to heighten Rosen's supervision.

When Newberg relinquished supervisory responsibility for Rosen on April 1, 1997, Alexander admittedly assumed that responsibility, even though Alexander resided in the firm's Los Angeles headquarters, thousands of miles from the Florida office, a circumstance that called for the exercise of particular vigilance. 47/ From April 1, 1997, forward, Rosen had no on-site supervision in the Florida branch. Nor did the firm's supervisory manual address the situation where there is no on-site principal assigned to supervise an individual with a known disciplinary

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45/ (...continued)
delegate the responsibility of supervising Rosen to anyone else, including Dennis Sturm, the other general principal assigned to the Florida branch.

46/ In 1998, NASD found that Rosen violated Conduct Rule 2110 by making harassing and anti-competitive telephone calls to another market maker, and by backing away from a firm quote. Rosen received a censure, $32,000 fine, and ten-day suspension. Market Regulation Committee (MRC) v. Jerome E. Rosen, Complaint No. CM5970027 (Bd. of Gov. June 1, 2000).

Alexander contends that NASD could not consider Rosen's 1980 and 1985 disciplinary actions in finding him liable for failure to supervise. Alexander bases this contention on NASD's statement in MRC v. Rosen that Rosen's disciplinary actions from 1980 and 1985 were "too remote to weigh heavily in establishing a remedial sanction." However, NASD's determination as to the proper weight to be given prior disciplinary actions in sanctioning Rosen has no bearing on the weight that those actions should have been given by Alexander in terms of providing Rosen with heightened supervision.

47/ See, e.g., Bradford John Titus, 52 S.E.C. 1154, 1160-61 (1996) ("[w]here there are ample indications of irregularities and misconduct by a registered representative, . . . we have held that it is 'especially imperative' that those in authority 'exercise particular vigilance' over the registered representative. Such vigilance includes monitoring compliance with a supervisor's instructions, particularly where the representative is located in a distant branch location.").

history. Alexander claimed at the hearing to have "stepped up" his supervision of Rosen after learning that Rosen had asserted his Fifth Amendment rights in refusing to testify or produce requested documents. 48/ As NASD found, however, that claim was belied by Alexander's admission that his supervision of Rosen was essentially no different from his supervision of other employees.

Even after the firm lost over $1 million from Rosen's H&R stock trading, and despite Newberg's repeated warnings about Rosen's continuing dealings with Mitton and Heredia after the H&R manipulation had ended, Alexander did nothing to ensure Rosen's compliance with applicable securities laws and NASD rules. These "red flags and suggestions of irregularities" regarding Rosen's conduct demanded Alexander's "inquiry as well as adequate follow-up and review." 49/ Alexander simply ignored them. We conclude that Alexander violated NASD Conduct Rules 3010 and 2110 by failing to supervise adequately Rosen's activities, and failing to establish, maintain, and enforce written supervisory procedures "reasonably designed to achieve compliance" with applicable laws and rules. 50/

IV.

Alexander raises a variety of procedural challenges to the fairness of the proceedings before NASD, none of which has merit. Alexander first contends that he cannot be found to have failed adequately to supervise Rosen in the absence of any finding that Rosen was liable for his involvement in the H&R manipulation. 51/ A determination that a respondent has violated NASD's supervisory rule is not dependent on a finding of a violation by those subject to the

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48/ Alexander's "stepped up" supervision purportedly consisted of monitoring the filings of companies whose stock Rosen traded to determine if the names of any promoters who were known to deal in shell companies appeared. Under the circumstances, such efforts were inadequate.

49/ Edwin Kantor, 51 S.E.C. 440, 447 (1993).

50/ NASD concluded that the evidence supported a finding of supervisory failures during the period from April 1, 1997, through August 1999, instead of August 2000, as alleged in the complaint. NASD's Department of Enforcement does not dispute this finding.

51/ Alexander frames this argument as an application of the doctrine of respondeat superior, which holds an employer liable for the wrongs committed by its employee. However, NASD did not allege that Alexander's supervisory violations were imputed to him by virtue of respondeat superior. As a result, respondeat superior has no applicability here. See Michael T. Studer, 83 SEC Docket at 3672 (rejecting applicants' argument that NASD should not have found that firm churned an account in absence of finding that employee trading the account churned it; NASD properly found firm liable as primary violator, and did not allege that it was liable based on principle of respondeat superior).

respondent's supervision. 52/ In any event, as discussed, the record establishes significant misconduct by Rosen.

Alexander also contends that the Hearing Panel's decision was tainted by "inflammatory" and "prejudicial" statements in Enforcement's post-hearing briefs that Alexander offered perjured testimony through Newberg when Newberg stated at the hearing that, despite having resigned as Rosen's supervisor, he never actually relinquished that responsibility. 53/ We see no evidence of any taint. The Hearing Panel's decision does not refer to those statements or suggest that the Panel considered them in rendering its decision. The fact that the Panel did not find Newberg's hearing testimony to be credible or rule in Alexander's favor does not make the proceeding unfair. NASD determined that the Hearing Panel proceeding was conducted in accordance with NASD's procedures, and that those procedures were implemented fairly. 54/ Based on our de novo review of the record, we conclude that Alexander received a fair hearing.

Alexander next contends that the Hearing Panel abused its discretion by refusing to grant a continuance of the hearing after Rosen filed for bankruptcy. Alexander asserts that the stay of the disciplinary proceeding as to Rosen made Rosen unavailable to testify as a witness on behalf of Alexander, and that, in light of Rosen's unavailability, Alexander needed more time to prepare his defenses to the charge that he failed to supervise Rosen. 55/ Alexander's contention is

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52/ See NASD Notice to Members 98-96, NASD Elaborates on Member Firms' Supervision Responsibilities for Trade Reporting and Market-Making Activities (Dec. 1998) (stating that a violation of Rule 3010 can occur in the absence of an underlying rule violation), and compare with Exchange Act Section 15(b)(4), which by its language expressly premises supervisory liability on an underlying violation.

53/ In July 2004, an NASD Hearing Panel ordered that Newberg be barred for giving false testimony on the issue of Rosen's supervision in this proceeding. Newberg has appealed that decision. See Richard Newberg, Disciplinary Proc. No. CAF030013 (July 6, 2004) (appeal pending).

54/ Exchange Act Section 15A(b)(8) requires NASD to "provide a fair procedure for the disciplining of members and persons associated with members." 15 U.S.C. § 78o-3(b)(8). See also Exchange Act Section 15A(h)(1), 15 U.S.C. § 78o-3(h)(1) (requiring that NASD proceedings be fair); NASD Procedural Rule 9100 et seq., NASD Manual (Nov. 2003) (setting forth procedural requirements for NASD disciplinary proceedings).

55/ Alexander asserts that, had Rosen testified, he would have confirmed that Newberg supervised him in the Florida branch, notwithstanding Newberg's April 1, 1997, written memorandum relinquishing supervisory authority over Rosen. Alexander's assertion is not supported by any affidavit or other evidence from Rosen. As discussed, the record establishes that Newberg was Rosen's supervisor until he resigned from those duties and

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premised on the erroneous proposition that the bankruptcy stay made Rosen unavailable as a witness at the hearing. Alexander has not established that Rosen failed to attend the hearing on account of the bankruptcy filing. In fact, the Department of Enforcement directed Rosen, who remained subject to NASD jurisdiction, to attend the hearing under NASD Procedural Rule 8210, 56/ and advised him that the stay did not excuse his attendance. Despite this directive, Rosen did not attend the hearing.

Furthermore, at the time of the hearing, it was unclear how long Rosen's bankruptcy stay would be in effect, and a prolonged stay of the NASD proceeding could have adversely affected the availability of witnesses. In addition, Prager wanted the hearing to proceed on schedule, and had joined Enforcement in opposing the motion for a continuance. In NASD proceedings, the trier of fact has broad discretion in determining whether to grant a request for a continuance. 57/ The Hearing Panel acted within its discretion in requiring the hearing to commence as scheduled.

Alexander finally contends that the Hearing Officer abused his discretion in refusing to admit additional evidence consisting of sixty-eight documents that Alexander submitted on the last day of the five-day hearing in this matter. According to Alexander, the documents were proffered to demonstrate "ongoing compliance and supervision." Under NASD Procedural Rule 9261(c), a hearing officer has discretion to admit additional evidence that "may be relevant and necessary for a complete record." 58/ The Hearing Officer refused to admit the documents because they were not listed on Alexander's original exhibit list and were not given to NASD staff until after the deadline set by the pre-hearing order had passed. 59/ We also note that the proffered documents relate to events that occurred after the period at issue in this case. Further, Alexander has made no showing in support of his assertion that the proffered documents "could have served in mitigation of sanctions." Thus, we are unpersuaded that the exclusion of this evidence was an abuse of discretion.

55/ (...continued)
Alexander assumed that responsibility. Even if Rosen would have testified that Newberg was his supervisor during the relevant period, we find, in light of the substantial evidence to the contrary, that such testimony would not have changed the result in this case.

56/ NASD Procedural Rule 8210 authorizes NASD staff, among other things, to require persons subject to NASD jurisdiction to testify in a proceeding.

57/ Falcon Trading Group, Ltd., 52 S.E.C. 554, 560 (1995).

58/ NASD Procedural Rule 9261(c), NASD Manual (Nov. 2003).

59/ Alexander notes that the Hearing Officer allowed Prager to introduce four documents that had not been previously provided to Enforcement. However, Prager's exhibits had been included on his exhibit list, whereas Alexander had not included the disputed sixty-eight documents on his exhibit list.

V.

Our review of NASD's sanctions is governed by Exchange Act Section 19(e)(2), which requires us to determine whether the sanctions imposed are excessive, oppressive, or impose an unnecessary or inappropriate burden on competition. 60/

A. Prager

In assessing an appropriate sanction against Prager, NASD found that its Sanction Guidelines did not specifically address aiding and abetting manipulative activity or violations of Conduct Rule 2110. Consequently, NASD consulted the Principal Considerations that apply to all violations, and determined that there were numerous aggravating factors. We agree and find, among other things, that Prager's misconduct resulted either "directly or indirectly" in injury to others. Prager was part of an effort to manipulate the price and volume of H&R stock that resulted in devastating consequences for Saperston, and substantially assisted in inflicting a multi-million dollar loss on Saperston's clearing firm, a loss that ultimately redounded to the detriment of the investing public. 61/

In addition, we find that Prager engaged in numerous acts of misconduct, acted with scienter, and was motivated by the potential for monetary gain. Prager recklessly bought and sold millions of shares of H&R stock at Heredia's direction notwithstanding numerous signs that the trading activity was suspicious. Prager traded H&R stock for Heredia in exchange for what Prager anticipated would be guaranteed profits on those trades. As Prager testified, had Saperston not gone out of business, he would have made close to $400,000 in profits for the month of September 1997 alone.

We further find that Prager failed to accept responsibility for or acknowledge his actions to Saperston before the H&R stock trading scheme collapsed. 62/ We also note that, throughout these proceedings, Prager has refused to accept responsibility for his pivotal role in furthering the H&R manipulation. Instead, Prager repeatedly has sought to portray himself as an innocent victim of the manipulation. We reject this characterization of Prager's role in the scheme and believe that a significant sanction is warranted. As we have stated previously, "[m]anipulation is a very grave violation," and the elimination of manipulative schemes is "one of the central goals

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60/ 15 U.S.C. § 78s(e)(2).

61/ United States v. Naftalin, 441 U.S. 768, 776 (1979) (noting that "[l]osses suffered by brokers increase their cost of doing business, and in the long run investors pay at least part of this cost through higher brokerage fees").

62/ Id. at 9 (Principal Consideration No. 2).

of the federal securities laws." 63/ We conclude that imposition of a bar against Prager is necessary to protect the markets and investing public. Such a sanction is not excessive, oppressive, or unduly burdensome on competition.

Prager argues that NASD has imposed lesser sanctions in other aiding and abetting cases. It is well-established that each case is evaluated in light of its own particular facts. 64/ Whether or not a sanction is too severe cannot be determined by comparison with the sanctions assessed in other cases. 65/ Prager also argues that he has maintained an otherwise "pristine" disciplinary record, and that he cooperated with regulatory authorities and Saperston's clearing firm. However, we find that these factors do not afford any basis for leniency in view of the serious nature of Prager's conduct. 66/

B. Alexander

NASD considered the specific guidelines related to Alexander's supervisory violations, as well as the Sanction Guidelines' General Principles and Principal Considerations applicable to all rule violations, in determining appropriate sanctions. 67/ NASD observed that Alexander has an extensive disciplinary history. The Guidelines instruct that relevant disciplinary history should be considered in assessing sanctions. 68/ In September 1995, for example, Alexander settled

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63/ R.B. Webster Inv., Inc., 51 S.E.C. 1269,1278 (1994).

64/ See Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. 812, 187 (1973) ("The employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.").

65/ Michael David Borth, 51 S.E.C. 178, 182 (1992).

66/ See, e.g., Ernest A. Cipriani, 51 S.E.C. 1004, 1007 & n.15 (1995) (rejecting respondent's "otherwise spotless" disciplinary record as a mitigating factor for purposes of sanctions).

67/ The Guideline for failure to supervise recommends a monetary sanction in the range of $5,000 to $50,000 and a suspension in all supervisory capacities for up to thirty business days. NASD Sanction Guidelines at 108. In egregious cases, this Guideline recommends considering a bar or a suspension of the responsible individual, in any or all capacities, for up to two years. The Guideline for deficient written supervisory procedures recommends a fine from $1,000 to $25,000 and a suspension in all capacities for up to one year. Id. at 109.

68/ Id. at 3 & 4 (General Principal No. 2) (recommending progressively escalating sanctions on recidivists). Relevant disciplinary history includes past misconduct that is similar to the misconduct at issue, as well as past misconduct unrelated to the misconduct at issue (continued...)

with NASD a matter involving findings that Alexander Securities, through Alexander, issued false confirmations that the firm was acting as agent for customers when it was acting as principal. 69/ In January 1999, Alexander settled with NASD a matter involving findings that he allowed an employee subject to a statutory disqualification to function as a principal. 70/ In February 2002, Alexander settled with NASD a matter involving findings that he was responsible for serious supervisory failures. 71/ In May 2002, a state regulator sanctioned Alexander in a matter alleging that the firm sold securities in that state without the requisite registration. 72/

Based on the record here, and his substantial disciplinary history, we agree with NASD that Alexander has shown an "appalling indifference" to compliance matters over a sustained period. 73/ Alexander, through his supervisory failures, allowed Rosen to participate in an extensive market manipulation. Consequently, NASD determined that sanctions exceeding the Guidelines' range were required to prevent a recurrence of Alexander's misconduct and deter him and others from engaging in the same pattern of compliance failures. We agree with NASD's determination.

Claiming that he was a "victim" of Rosen's misconduct, Alexander argues that the sanctions are unduly harsh given such factors as the losses his firm incurred as a result of the H&R manipulation, and his age (seventy) and years of experience (forty-three) at the time of the hearing. We do not find that these factors are mitigative of his serious misconduct. Alexander received repeated warnings that should have alerted him to Rosen's disregard for regulatory

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68/ (...continued)
that "evidences disregard for regulatory requirements, investor protection, or commercial integrity." Notice to Members 03-65 (Oct. 2003).

69/ Alexander was censured, fined $14,641.50, jointly and severally with Alexander Securities, and ordered to requalify by examination as a general securities principal.

70/ The employee at issue was Kerr. See supra note 37. Alexander was censured and fined $20,000, jointly and severally with Alexander Securities.

71/ Alexander was suspended for thirty days from associating with any NASD member firm in a principal capacity, and fined $62,500, jointly and severally with Alexander Securities.

72/ Alexander was barred from association with any registered dealer, a limited dealer, or an investment advisor in the State of Georgia, and ordered to cease and desist from violating the Georgia Securities Act of 1973.

73/ We reject Alexander's argument that certain of his past disciplinary actions are too stale to be considered for purposes of determining sanctions. His past disciplinary history is important because, as NASD found, it establishes "a disturbing pattern of disregard for regulatory compliance matters."

compliance matters. Alexander ignored those warnings and failed to ensure that Rosen was properly supervised. As a result, Alexander effectively fostered Rosen's misconduct during Rosen's association with the firm. We conclude that the sanctions imposed against Alexander -- a $200,000 fine, a two-year suspension in all capacities, and a requirement that he requalify as a principal -- are not excessive, oppressive, or unduly burdensome on competition.

An appropriate order will issue. 74/

By the Commission (Acting Chairman GLASSMAN and Commissioners GOLDSCHMID, CAMPOS, and ATKINS).

Jonathan G. Katz
Secretary

74/ We have considered all of the parties' contentions. We have rejected or sustained their contentions to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51974 / July 6, 2005

Admin. Proc. File No. 3-11627

In the Matter of the Applications of

ROBERT J. PRAGER

and

JAMES ALEXANDER

For Review of Disciplinary Action Taken by
NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NATIONAL SECURITIES EXCHANGE

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Robert J. Prager and James Alexander, and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary