SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59223 / January 9, 2009

Admin. Proc. File No. 3-12890

In the Matter of the Application of

THOMAS W. HEATH, III
c/o Gary P. Naftalis
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, New York 10036

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Conduct Inconsistent with Just and Equitable Principles of Trade

Former registered representative of member firm of national securities exchange alleged to have engaged in conduct inconsistent with just and equitable principles of trade by disclosing material non-public information. Held, exchange's findings of violation and imposition of sanctions are sustained.

APPEARANCES:

Gary P. Naftalis, Alan R. Friedman, Michael S. Oberman, and Joel M. Taylor, of Kramer Levin Naftalis & Frankel LLP, for Thomas W. Heath, III.

Linda Riefberg, Martin Mazur, Allen Boyer, Kathleen Lynch, and David Camuzo, for Financial Industry Regulatory Authority, Inc., Department of Enforcement, on behalf of NYSE Regulation, Inc.

Appeal filed: November 15, 2007
Last brief received: February 22, 2008

I.

Thomas W. Heath, III, a former registered representative of New York Stock Exchange, LLC ("NYSE" or the "Exchange") member firm J.P. Morgan Securities Inc. ("JPMorgan"), appeals from NYSE disciplinary action. 1/ The Exchange found that Heath disclosed material non-public information regarding the pending acquisition of a JPMorgan client, and that such disclosure constituted "conduct . . . inconsistent with just and equitable principles of trade" in violation of NYSE Rule 476(a)(6). The NYSE censured Heath and imposed a $100,000 fine. This appeal followed. We base our findings on an independent review of the record.

II.

At the time of the disclosure, Heath was an investment banker and managing director at JPMorgan, but was planning his imminent departure from JPMorgan to begin a new position as a managing director and group head at Banc of America Securities LLC ("BofA"). In early 2005, Tony Ursano, Jr., Global Head of BofA's Financial Institutions Group, began recruiting Heath to head BofA's bank group. After interviews with several senior BofA executive officers, in mid-February Heath was offered and orally accepted a position as BofA's "Head of Banks." In accepting the BofA offer, Heath informed Ursano that he was committed to completing a transaction at JPMorgan before starting the new position at BofA.

While Heath was having these discussions with BofA, JPMorgan had been advising Hibernia Bank ("Hibernia") in connection with its proposed acquisition by Capital One Corp. ("Capital One"). Heath was JPMorgan's "client executive" in charge of the Hibernia account, with primary responsibility for securing and managing JPMorgan's role as Hibernia's lead advisor and primary investment banking representative in connection with the transaction.

After accepting the BofA offer, Heath informed his JPMorgan supervisor of his impending move, but stated his intention to "get [JPMorgan] engaged on Hibernia and get the

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1/ On July 26, 2007, the Commission approved proposed rule changes in connection with the consolidation of the member firm regulatory functions of the National Association of Securities Dealers ("NASD") and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation, Inc. were transferred to NASD, and the expanded NASD changed its name to Financial Industry Regulatory Authority, Inc. See Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because the disciplinary action here was taken before the NYSE-NASD consolidation of regulatory operations, we continue to use the designation "NYSE" in this opinion.

deal across the finish line" before resigning. 2/ Heath completed his pre-hire paperwork for BofA on February 16, 2005, and received a draft of an offer letter from BofA on February 25, 2005. During this period, Heath continued to work at JPMorgan on the Hibernia acquisition.

Prior to Heath's start at BofA and five days before the public announcement of the Hibernia deal, Ursano asked Heath to call Eric Corrigan, the then-head of BofA's depository institutions group. Heath and Corrigan's conversation was potentially sensitive because Corrigan had recently been "very disappointed" and "upset" to learn that Heath would be heading the bank group, when Corrigan may have previously thought that they would be co-heads of the bank group. Ursano urged Heath to "let [Corrigan] know you're fair . . . you're going to be a good partner with him . . . you're not going to stomp all over him . . . [and] talk about the business plan going forward."

When Heath and Corrigan spoke the next day, the two discussed overlapping client accounts and changes in the banking landscape. Near the end of the conversation, Corrigan inquired about Heath's then-current project, stating: "there are a lot of rumors out in the marketplace. And [we] . . . know you have a bank deal somewhere down in the south." Heath testified that he initially demurred, but when Corrigan persisted, he eventually responded: "if you really want to know, I will tell you exactly what it is, but you have to understand, you know, I've got a week to go. This is obviously confidential information. The deal is done, bankers have been hired, nothing is going to change. And you just have to understand and respect that," and stipulated that Corrigan could not "act on this in any way."

After Corrigan agreed to keep the information confidential, Heath described the Hibernia acquisition in detail, describing the parties, JPMorgan's role, the percentage of cash consideration, and the rationale for the stock consideration. Heath testified that he was trying to make it clear that the terms and advisors had already been finalized, and thereby protect his client by preempting any efforts by BofA to solicit business in the transaction. By eliciting Corrigan's promise of confidentiality, Heath testified that he believed that he had "put a firewall around the problem." He also testified that he felt that he was "dealing with someone who's going to be a colleague" and "the whole purpose of this [conversation] is to build trust and -- and build a collegiality with."

Despite his agreement to keep the information confidential, that same day Corrigan discussed the acquisition with Tom Chen, the head of BofA's diversified financial services group. Corrigan and Chen discussed contacting Capital One in an attempt to participate in the transaction -- the result that Heath states that he was trying to preempt. Chen left a voicemail message with Capital One that evening indicating his awareness of a "bank deal" and asking to

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2/ Heath points out that he had no monetary stake in completing the acquisition at JPMorgan because he would forfeit any deal-based bonus by resigning prior to fiscal year end. He testified that he was trying to do "the right thing" by delaying his move rather than disrupting the deal.

get involved. Chen's message was not returned. On March 3, while Heath was hosting meetings at his future BofA office and before the acquisition was announced, Corrigan approached him to ask if "there [was] room for other advisors" on the transaction. Heath responded "don't even go there . . . I can't believe you're even saying that."

The Hibernia acquisition was publicly announced on March 6, 2005. That same day the Chairman of JPMorgan's North American Mergers and Acquisitions group called Heath and told him that BofA had called Capital One attempting to get hired with the "name, price, structure, timing" of the transaction. Heath was told that he had been identified as the source of the leak, and that JPMorgan was placing him on leave.

On March 8, Heath briefed Ursano on his disclosure to Corrigan and his understanding of the subsequent course of events. Heath testified that he requested that Ursano "elevate [the issue] internally to the top of the house immediately." The next day, BofA began an investigation. On March 15, 2005, after interviewing Heath, Chen, Corrigan, and Ursano as part of its internal investigation, BofA revoked Heath's employment offer, and terminated Chen and Corrigan. JPMorgan had previously terminated Heath's employment on March 14, 2005.

III.

On January 25, 2006, the NYSE Division of Enforcement (the "Division") charged that Heath's disclosure violated NYSE Rule 476(a)(6) prohibiting conduct inconsistent with just and equitable principles of trade (the "J&E Rule"). On November 24, 2006, the Chief Hearing Officer of the NYSE Hearing Panel issued an order (the "Summary Judgment Order") granting summary judgment to the Division on the issue of liability, concluding that Heath had violated the J&E Rule. 3/ The Summary Judgment Order held that a "violation of the just and equitable principles of trade codified by NYSE Rule 476(a)(6) may occur either through bad faith or unethical conduct." (emphasis in original)

The Summary Judgment Order held that Heath's disclosure was unethical, finding that Heath violated his duty to maintain the confidentiality of material nonpublic information. The order traced the duty of confidentiality to prohibitions on the disclosure of confidential client information in the JPMorgan Code of Conduct (the "Code of Conduct") and to agency law principles, citing "the ethical obligation to which every financial advisor becomes subject upon learning of sensitive, nonpublic information about a client." The order found that Heath's "reasons for making the disclosures -- while certainly lacking any malevolent or deceitful quality -- were, in the final analysis, self-serving in that they were intended to gain the trust of, and thereby smooth things over with, a soon-to-be colleague."

3/ The hearing officer granted summary judgment under NYSE Rule 476(c), which authorizes the hearing officer to "resolve any and all procedural and evidentiary matters and substantive legal motions."

The NYSE Hearing Panel then held a hearing to determine sanctions, taking testimony from Heath and from the JPMorgan executive that had suspended Heath. 4/ On March 15, 2007, the panel imposed a censure and $100,000 fine. On October 17, 2007, the NYSE Board of Directors affirmed the Summary Judgment Order and the Hearing Panel decision, stating that a J&E Rule violation "may be established by a finding of either bad faith or unethical conduct." This appeal followed.

IV.

We agree with the Exchange's finding that Heath's disclosure constituted unethical conduct in violation of the J&E Rule. In disclosing confidential client information, Heath violated one of the most fundamental ethical standards in the securities industry. The duty to maintain the confidentiality of client information is grounded in fundamental fiduciary principles, 5/ and is further codified in the Code of Conduct. The Code of Conduct expressly prohibits the disclosure of confidential information "to anyone outside the firm unless . . . authorized to do so," and instructs that, even when disclosure is permitted, employees should "use [their] judgment to limit the amount of information shared and disclose it only on a need-to-know basis." 6/ The Code of Conduct also states that this obligation to maintain client confidentiality continues after the termination of employment with the firm. 7/

We find that Heath's disclosure was ultimately self-interested and for his, not his principal's, purposes. As Heath testified, "the whole purpose" of his conversation with Corrigan was "to build trust and -- and build . . . collegiality." We concur with the NYSE Hearing Panel's finding that Heath's disclosure "was motivated by a desire to gain the trust of a future colleague."

Heath does not deny that he disclosed material non-public information regarding the Hibernia acquisition. Instead, he contends that his disclosure did not violate the J&E Rule because he was not found to have acted in bad faith. Heath argues that a violation of the J&E Rule must be based on either a finding of bad faith or the violation of another rule or

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4/ The panel also heard testimony in Heath's defense from the former general counsel at JPMorgan, and from a former officer and member of the Hibernia board of directors that had approved the acquisition.

5/ See Restatement (Third) of Agency §8.05 (setting forth an agent's duty "not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party"); see also Jonathan Feins, 54 S.E.C. 366, 372 (1999) (holding that "[a]s agent, [applicant] was obligated to act solely for his customer's benefit, and in his customer's best interests, in completing the transaction").

6/ JPMORGANCHASE CODE OF CONDUCT § 3.1 (November 2004).

7/ Id. at § 5.11.

regulation. 8/ In the alternative, he argues that he had not received "fair notice" that bad faith is not the standard for J&E Rule liability, and that he had not received notice of the specific state of mind finding required to sustain disciplinary action under the rule. Heath further asserts that "[e]ven if the Commission were to accept the [Exchange's] formulation of 'unethical conduct as something broader than bad faith,'" Heath's actions, when considered in light of all of the surrounding circumstances, do not satisfy that standard. Finally, Heath contends that the Exchange's liability finding should be reversed because the issue was improperly decided by an individual hearing officer acting on a motion for summary judgment. We reject these contentions for the reasons outlined below.

A. Standard for J&E Rule Violation

Heath argues that liability under the J&E Rule must be premised on a bad faith finding. As the Exchange points out, however, we have long applied a disjunctive "bad faith or unethical conduct" standard to disciplinary action under the J&E Rule. 9/ This rule incorporates "broad ethical principles," 10/ and focuses on the "ethical implications of the [a]pplicant's conduct." 11/ The rule serves as an industry backstop for the representation "inherent in the relationship,"

8/ It is well-established that a violation of another self-regulatory organization ("SRO") or Commission rule or regulation will also automatically constitute a violation of the J&E Rule. See, e.g., Stephen G. Gluckman, 54 S.E.C. 175, 185 (1999) (noting the Commission's "long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation . . . constitutes a violation of" the NASD rule regarding just and equitable principles of trade).

9/ See, e.g., Robert E. Kauffman, 51 S.E.C. 838, 839 n.5 (1993) ("The most that is required [for a finding of liability under the J&E Rule] is a finding of bad faith or unethical conduct."), aff'd, 40 F.3d 1240 (3d Cir. 1994) (Table); Chris Dinh Hartley, 57 S.E.C. 767, 773 n.13 (2004) ("If no other rule has been violated, a violation of [the J&E Rule] requires evidence that the respondent acted in bad faith or unethically.").

10/ Peter Martin Toczek, 51 S.E.C. 781, 788 n.14 (1993); Kauffman, 51 S.E.C. at 839 n.5; William F. Rembert, 51 S.E.C. 825, 826 n.3 (1993); Jay Frederick Keeton, 50 S.E.C. 1128, 1134 (1992); see also Larry Ira Klein, 52 S.E.C. 1030, 1031-32 (1996) (stating that the J&E Rule "sets out in broad terms the ethical standard against which the conduct of securities professionals is measured").

11/ Timothy L. Burkes, 51 S.E.C. 356, 360 (1993), aff'd, 29 F.3d 630 (9th Cir. 1994) (Table); Ben B. Reuben, 46 S.E.C. 719, 722 n.7 (1976).

between a securities professional and a customer, "that the customer will be dealt with fairly, and in accordance with the standards of the profession." 12/

Promulgated to discipline "a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace," 13/ the J&E Rule focuses on the securities professional's conduct rather than on a subjective inquiry into the professional's intent or state of mind. 14/ Accordingly, a violation of the rule need not be premised on a motive or scienter finding. 15/ For instance, when most recently confronted with another applicant that, like Heath,

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12/ Atlanta-One, Inc., 52 S.E.C. 161, 163-64 (1995) (citing Duker & Duker, 6 S.E.C. 386, 388-89 (1939)), aff'd, 100 F.3d 105 (9th Cir. 1996); see also C. Brock Lippitt & Thomas M. Svalberg, 48 S.E.C. 524, 526 (1986) (sustaining a violation of the rule when "applicants frustrated the legitimate expectations of investors"), aff'd, 876 F.2d 181 (D.C. Cir. 1989); Leonard H. Zigman, 40 S.E.C. 954, 956 (1962) (finding applicant's actions exhibited "an attitude not consistent with the pervasive duty of fair dealing imposed upon those in the securities business").

13/ Daniel Joseph Alderman, 52 S.E.C. 366, 369 (1995) (holding that the deliberate withholding of payments due to clients for over two months violated the J&E Rule), aff'd, 104 F.3d 285 (9th Cir. 1997).

14/ Leonard John Ialeggio, 52 S.E.C. 1085, 1089 (1996) ("By [his] conduct, Ialeggio acted at least unethically, and thus violated" the J&E Rule), aff'd, 185 F.3d 867 (9th Cir. 1999)(Table); see also Svalberg v. SEC, 876 F.2d 181, 184 (D.C. Cir. 1989) (per curiam) (stating that "knowledge of what one is doing and the consequences of those actions suffices" to sustain a violation of the J&E Rule, and that the disciplinary action did not need to be based on a finding "that the subject believed his action to be illegal" (internal citation omitted)).

15/ See Shultz v. SEC, 614 F.2d 561, 570 n.20 (7th Cir. 1980) (declining to reach motive of market maker who violated the J&E Rule when he engaged in transactions "without legitimate economic purpose"); Keith Springer, 55 S.E.C. 632, 646 (2002) ("We need not ascertain Springer's motive in order to find that he committed the violations charged."); Ernest A. Cipriani, Jr., 51 S.E.C. 1004, 1006 n.8 (1994) ("[T]he NASD is not required to demonstrate motive to prove a violation of [the J&E Rule]."); Kenneth Sonken, 48 S.E.C. 832, 836 (1987) (stating that "it is unnecessary to determine the motivation for Sonken's action in order to conclude that tampering with the price of an option series violates just and equitable principles of trade"); Eliezer Gurfel, 54 S.E.C. 56, 63 (1999) ("Proof of scienter is not required to establish a violation of NASD [J&E Rule]."), petition denied, 205 F.3d 400 (D.C. Cir. 2000); Louis Feldman, 52 S.E.C. 19, 21 (1994) ("Scienter is not an element of the [J&E Rule] violation here."). Although Heath suggests that the J&R Rule holdings in these cases were contingent on the violations of other rules and

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appealed an SRO disciplinary decision under the J&E Rule based on a state of mind defense, we explicitly reaffirmed our long-standing view that the rule applies to either conduct committed in bad faith or conduct violating ethical standards. 16/

As noted, Heath's breach of confidentiality violated one of the most basic duties of a securities professional, a duty that is grounded in fiduciary principles and reflected in the Code of Conduct. This conduct was properly subject to discipline under the J&E Rule. We have repeatedly held that the breach of a security professional's duty to a client is sufficient to sustain a J&E Rule violation. For example, in E.F. Hutton & Company Inc., 17/ and Bateman Eichler, Hill Richards, Inc., 18/ we found that applicants violated the rule based on findings that they violated fiduciary duties by engaging in transactions that created conflicts of interest with their customers' trading. These decisions were grounded in fiduciary principles requiring industry professionals to prioritize the interests of clients above their own interests, not in subjective state of mind findings. 19/ Fiduciary principles have consistently driven the analysis in other cases finding unethical conduct under the rule. 20/ Moreover, we have looked to internal firm

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15/ (...continued)
regulations, the J&E Rule was the only rule found to have been violated in Gurfel and Feldman, and the J&E Rule violation in Springer was determined independent of any other rule violation.

16/ Calvin David Fox, 56 S.E.C. 1371, 1377 (2003) (remanding to the Exchange to "expressly consider whether Fox acted in bad faith or unethically").

17/ 49 S.E.C. 829, 833 (1988) (finding that a firm violated the rule in failing to execute a customer's limit order while simultaneously selling shares of the same security for its own account at a price higher than the customer's limit price).

18/ 47 S.E.C. 1025, 1026, 1028 n.7 (1984) (finding that a firm violated the rule in failing to execute customer market orders "fully and promptly, to the greatest extent possible," and allocating shares to its own short position before customer orders), aff'd, 757 F.2d 1066 (9th Cir. 1985).

19/ See Hutton, 49 S.E.C. at 832 ("Our aim is to give effect to the reasonable expectations of the parties to the relationship. Where there is no explicit agreement to the contrary and the relationship is a fiduciary one, the law governing fiduciary duties provides presumptive definition for such expectations.").

20/ Feldman, 52 S.E.C. at 22 (finding the rule was violated even when there was "no specific NASD rule addressing" the applicant's transfer of customer accounts to a new firm without prior consent because "under fundamental principles of agency law such prior consent is required"); see also Ialeggio, 52 S.E.C. at 1089 (submission of improper
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compliance policies to inform our determination of whether applicants' conduct, like Heath's, violated the professional standards of ethics covered by the J&E Rule. 21/

Heath relies on Buchman v. SEC, 22/ for the proposition that bad faith is a required element of any violation of the J&E Rule, but Buchman is distinguishable. The Buchman court stated that "a breach of contract between [SRO] members is of no concern to the [SRO] or to the Commission if such breach does not contravene the ethical standards embodied in" the J&E Rule, 23/ and cited the "well-settled" proposition that a "breach of contract is unethical conduct in violation of NASD Rules, only if it is in bad faith, just as conduct violates rule 10b-5 only if there is scienter . . . ." 24/ It concluded that the failure to deliver stock under a stock sale contract did not violate the J&E Rule when the breach was "colorably justified by the confusion as to the true state of the market and as to the applicable law." 25/ The Buchman court cited good faith as the "touchstone" and "measure of culpability," for determining whether a breach of contract was justified or whether the breach constituted unethical conduct under the J&E Rule. 26/ Although the court focused on bad faith as a prerequisite to liability, the court's analysis was grounded in the contractual context of that case. The decision was consistent with long-standing Commission precedent holding that a breach of contract alone is not automatically unethical conduct in violation of the rule, but that such breach may constitute a violation if it was "unethical or

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20/ (...continued)
expense reimbursement request "cast doubt on [applicant's] commitment to the fiduciary standards demanded of registered persons in the securities industry and thus properly are the subject of NASD disciplinary action"); Joseph H. O'Brien, II, 51 S.E.C. 1112, 1115 (1994) ("It is well established that a securities firm has a fiduciary obligation to its customers and to the assets the customers entrust to that firm."); Daniel D. Manoff, 55 S.E.C. 1155, 1163 (2002) (finding that the unauthorized use of a customer's credit card violated the J&E Rule based on a finding that respondent breached his fiduciary duties).

21/ Dan Adlai Druz, 52 S.E.C. 416, 425 (1995) (finding that the respondent violated the J&E Rule by settling customer complaints without notifying the legal department when such action violated firm policy), aff'd, 103 F.3d 112 (D.C. Cir. 1996) (Table); Thomas P. Garrity, 48 S.E.C. 880, 884 (1987) (finding that failure to adhere to limits on trading of options under the firm's compliance policy violated the J&E Rule).

22/ 553 F.2d 816 (2d Cir. 1977).

23/ Id. at 820.

24/ Buchman, 553 F.2d at 821.

25/ Id. at 820.

26/ Id. at 821.

dishonorable" or "without equitable excuse or justification." 27/ Following the Buchman decision, we have continued to focus on bad faith to determine whether a breach of contract, in and of itself, constitutes a violation of the J&E Rule. 28/ As noted above, however, bad faith is not the sole standard, and state of mind findings have not been required, for finding liability under the rule in cases not premised on a breach of contract.

Heath argues that we adopted a general bad faith standard for J&E Rule liability in Nicholas T. Avello, 29/ and in the Commission order in Calvin David Fox. 30/ However, the language Heath cites in both instances was dicta and did not reflect a rejection or modification of established J&E Rule precedent. In Avello, we rejected the applicant's good faith defense because the J&E Rule violation in that case was based on recordkeeping and reporting rule violations. 31/ Although the opinion states in dicta that "we have required a showing that the respondent has acted in bad faith before liability can be found" in the absence of another rule violation, 32/ the J&E Rule violation in Avello was in fact based on underlying rule violations.

27/ See, e.g., Samuel B. Franklin & Co., 38 S.E.C. 113, 116 (1957) ("But not every failure to perform a contract violates the NASD rule; it must also appear that such failure was unethical or dishonorable."); Southern Brokerage Co., 42 S.E.C. 449, 453 (1964) ("[I]t is not our function nor that of the NASD under this rule to adjudicate private contract disputes . . . . 'not every failure to perform a contract violates the NASD rule; it must also appear that such failure was unethical or dishonorable' or that the breach was committed 'without equitable excuse or justification.'" (citations omitted)).

28/ See William D. George, 47 S.E.C. 368, 369-70 (1980) (stating that failure to comply with the terms of an indemnification contract did "not constitute a breach of the NASD's ethical standards unless it appears that [applicant] acted in bad faith"); Robert J. Jautz, 48 S.E.C. 702, 704 (1987) ("[I]t is well established that a breach of contract violates NASD standards only if it is committed in bad faith or is accompanied by unethical conduct.").

29/ Exchange Act Rel. No. 51633 (Apr. 29, 2005), 85 SEC Docket 1299, petition dismissed, 454 F.3d 619 (7th Cir. 2006).

30/ Exchange Act Rel. No. 54840 (Nov. 30, 2006), 89 SEC Docket 1282, aff'd, 2008 U.S. App. LEXIS 6647 (D.C. Cir. 2008) (per curiam).

31/ See supra note 8.

32/ In response to Avello's argument that he could not be found liable because he did not act in bad faith, the opinion stated "[w]hen a violation of [the J&E Rule] is not based on the violation of some other rule, we have required a showing that the respondent has acted in bad faith before liability can be found. There is no bad faith requirement, however, when,

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Heath similarly relies on a footnoted parenthetical in the Fox order that alludes to a bad faith measure of liability under the rule. 33/ Our decision in that case, however, dismissed the appeal of a NYSE decision based on his late filing of the appeal before the NYSE Board of Directors -- not based on the standard for determining a violation of the rule. We noted that the underlying NYSE hearing panel decision had found that "Fox's alleged conduct was in bad faith and unethical," 34/ although our decision did not address those findings. Given the applicant's late filing, our order did not address the merits of the hearing panel's findings or analysis under the rule. 35/

Thus, neither the Avello decision nor the Fox order was based on the standard to be applied to J&E Rule violations in the absence of another rule violation. In Avello, the applicant had violated another rule, and in Fox, we dismissed the appeal without reaching the merits. Accordingly, dicta in these decisions may not reasonably be read as signaling a rejection of the Commission's longstanding liability standard under the J&E Rule.

Heath also cites various cases in which we credited equitable excuses to reverse SRO findings of violations of the J&E Rule. These cases are also distinguishable from the direct breach of a duty to a client presented here. 36/ None of these opinions held that good faith is a

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32/ (...continued)
as here, a violation of [the J&E Rule] is based upon the violation of a Commission rule." 85 SEC Docket at 1302-03.

33/ The order included a footnote describing Jautz as "(holding that if only violation alleged by NASD is failure to observe just and equitable principles of trade, there must be a finding of bad faith)." 89 SEC Docket at 1282 n.3. As previously noted, the Jautz decision itself was based on the contractual context of that case. See supra note 28.

34/ Fox, 89 SEC Docket at 1282.

35/ The Fox order also notes that in our earlier order remanding the proceeding, "we asked the NYSE to address whether Fox's alleged conduct was in bad faith or unethical." 89 SEC Docket at 1282 (emphasis added).

36/ See George R. Beall, 50 S.E.C. 230, 231 (1990) (failure to repay debt to prior employer when the debt had been forgiven decided as breach of contract); George, 47 S.E.C. at 369-70 (failure to reimburse customer under indemnity agreement in the absence of bad faith decided as breach of contract); Kirk A. Knapp, 51 S.E.C. 115, 120 n.20 (1992) (inaccurate NASDAQ filing for which respondent was not responsible); Charles Zandford, 50 S.E.C. 782, 783-84 (1991) (deposit of personal funds to cover a margin call based on the advice of officials responsible for margin compliance); James Anthony Morrill, 51 S.E.C. 1162, 1165 (1994) (failure to pay an arbitration award when

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per se defense to a violation of the J&E Rule, and the analysis in these cases often emphasized the unusual circumstances at issue. 37/ Moreover, none of these cases credited a good faith defense for an applicant that, like Heath, violated a non-contractual fiduciary duty owed directly to a client or customer.

B. Fair Notice Challenge to J&E Rule

Heath also contends that he lacked notice that the NYSE could discipline under the J&E Rule for unethical conduct that was not motivated by bad faith. The Supreme Court has stated that notice arguments "may be overcome in any specific case where reasonable persons would know that their conduct is at risk." 38/ Notice requirements should not be "mechanically applied" but rather are to be evaluated based on the context of the regulation at issue. 39/ Accordingly, Heath's notice claim should be evaluated with respect to his "actual conduct" and not "hypothetical situations at the periphery of the [rule's] scope or . . . the conduct of other parties who might not be forewarned by. . . broad language" in the rule. 40/

The Commission and the federal courts have consistently sustained SRO disciplinary decisions based on a finding of unethical conduct under the J&E Rule, deeming the rule fairly

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36/ (...continued)
respondent did not receive notice of the award hearing and relied on advice of SRO official).

37/ See Morrill, 51 S.E.C. at 1164-65 (noting the "unusual situation" in which respondent was pro se and "evidently in good faith, repeatedly brought to the NASD's attention the NASD's apparent failure to give him notice of the rescheduled arbitration hearing"); Zandford, 50 S.E.C. at 783 (noting "the exceptional circumstances of this case -- particularly Zandford's good faith reliance on the advice and counsel of . . . management, including the official in charge of margin requirements").

38/ Maynard v. Cartwright, 486 U.S. 356, 361 (1988).

39/ Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498 (1982) ("The degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment."). Although the Court noted that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice," the Court did not hold that scienter is always required to withstand vagueness review. Id. at 499.

40/ diLeo v. Greenfield, 541 F.2d 949, 953 (2d Cir. 1976).

applied to conduct that "is not ethical and accepted conduct in the securities industry." 41/ In reviewing notice challenges to the J&E Rule, courts have expressly recognized that "an experienced registered representative . . . may be fairly charged with knowledge of the ethical standards of his profession." 42/ Courts have consistently found that the rule "is sufficiently specific and provides an adequate standard of compliance," 43/ even as applied to conduct that does not involve securities or employment-related activities. 44/

As an experienced investment banker, Heath can be fairly charged with notice that his breach of his duty to maintain the confidentiality of his client's information violated the just and equitable principles of trade. Any reasonably prudent securities professional would recognize that the disclosure of confidential client information violates the ethical norms of the industry. Moreover, Heath had actual notice of his duty to maintain the confidentiality of his client's information, further undermining his notice challenge. Heath acknowledged that he had read the JPMorgan Code of Conduct, which explicitly codified his obligation to maintain the strict confidentiality of client information. Heath also testified as to his knowledge of the importance of maintaining client confidentiality, stating that "one of the factors that creates a successful M&A banker is . . . having the judgment of how to use [confidential information] and how to use it in a trustworthy and honest way."

Heath nonetheless argues that he did not have notice that the terms "unethical" and "bad faith," as those terms are used in applying the rule, are meant to have separate meanings. We find this argument unpersuasive. Heath's interpretation deprives the disjunctive language in the standard of any meaning and is contrary to well-established Commission precedent explicitly finding J&E Rule liability without a finding of bad faith. As previously discussed, Heath does identify certain instances of dicta suggesting a bad faith standard for J&E Rule violations.

41/ Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006); see also Alderman v. SEC, 104 F.3d 285, 288-89 (9th Cir. 1997) (finding, when respondent violated duty to act in accordance with "NASD ethical standards," the application of the J&E Rule based on the violation of such duties "cannot have come as a surprise"); Sorrell v. SEC, 679 F.2d 1323, 1326 (9th Cir. 1982) (rejecting due process challenge to J&E Rule). Accord Shultz, 614 F.2d at 571 (holding that a disciplinary rule requiring that market makers "contribute to the maintenance of a fair and orderly market" is "appropriately specific to withstand constitutional scrutiny").

42/ Crimmins v. Am. Stock Exch., 368 F. Supp. 270, 277 (S.D.N.Y. 1973), aff'd 503 F.2d 560 (2d Cir. 1974).

43/ Werner v. SEC, 44 S.E.C. 622, 625 & n.11, aff'd without opinion (D.C. Cir. 1972); see also Rooms, 444 F.3d at 1214; Alderman 104 F.3d at 288.

44/ Vail v. SEC, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam) ("Vail had fair notice" that his non-work conduct "would subject him to sanctions by the NASD.").

However, given our longstanding interpretation of the rule as covering bad faith or unethical conduct, those isolated instances of dicta could not reasonably be interpreted as signaling a reversal of existing precedent directly addressing the standard for liability under the J&E Rule. 45/

Heath cites a series of cases involving disciplinary proceedings against accountants under our former Rule of Practice 2(e). 46/ These cases held that disciplinary action under former Rule 2(e) must be premised on notice of the standard governing the rule, including a specific mental state standard. 47/ Heath cites Checkosky v. SEC, 48/ which held that liability under Rule 2(e) must be based on notice of the mental state "necessary and sufficient" to violate the rule. However, the court's analysis in Checkosky was grounded in our implementation of Rule 2(e) under our "general rulemaking authority" 49/ without a specific statutory mandate. 50/ Under these circumstances, the court cautioned that a broad interpretation of the rule could be deemed "a de facto substantive regulation of the profession" and would "raise questions as to the legitimacy of the rule." 51/

Unlike former Rule 2(e), the Exchange's authority to impose "substantive regulations" on the conduct of securities professionals is grounded in an explicit and longstanding statutory mandate. The Securities Exchange Act of 1934 expressly grants SROs the "statutory responsibility to prevent unethical practices among its membership." 52/ Section 6(b)(5) of the Exchange Act directs national securities exchanges to promulgate and enforce disciplinary rules, among other things, "to promote just and equitable principles of trade . . . and, in general, to

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45/ See supra nn. 29-37 and accompanying text.

46/ 17 C.F.R. § 201.2(e)(1) (1993) (amended and recodified as 17 C.F.R. § 201.102(e)).

47/ See Checkosky v. SEC ("Checkosky I"), 23 F.3d 452 (D.C. Cir. 1994); Checkosky v. SEC ("Checkoksy II"), 139 F.3d 221 (D.C. Cir. 1998); Marrie v. SEC, 374 F.3d 1196 (D.C. Cir. 2004).

48/ Checkosky I, 23 F.3d at 458.

49/ Id. at 456.

50/ The Commission's authority under Rule 102(e) was subsequently codified in the Sarbanes-Oxley Act of 2002, 15 U.S.C. §78d-3. See Marrie, 374 F.3d at 1203.

51/ Checkosky I, 23 F.3d at 459; see also Marrie, 374 F.3d at 1205 ("The Commission's authority to discipline professionals has long been distinguished from the execution of its substantive enforcement functions.").

52/ Valley Forge Sec. Co., 41 S.E.C. 486, 490 (1963).

protect investors and the public interest." 53/ In associating with the Exchange, securities professionals "voluntarily subject [themselves] to the NYSE rules," 54/ and recognize the Exchange's authority "to discipline their members for unethical behavior as well as violations of law." 55/ In contrast to the former distinction between our "authority to discipline professionals" under Rule 2(e) and "the execution of [our] substantive enforcement functions," 56/ the J&E Rule reflects an integral part of the Exchange's express regulatory mandate under the Exchange Act.

Moreover, the court recognized in Marrie that "professional disciplinary rules have withstood vagueness challenges," 57/ and the Rule 2(e) cases cited by Heath do not suggest that the state of mind requirements were meant to be broadly applied to all such disciplinary rules. 58/ We note that courts have rejected notice challenges to disciplinary rules as applied to a wide range of professions without imposing state of mind requirements. 59/ Such challenges have

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53/ 15 U.S.C. § 78f(b); cf. 15 U.S.C. § 78*o*-3(b)(6) (comparable provision for national securities associations).

54/ Gold v. SEC, 48 F.3d 987, 993 (7th Cir. 1995); see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109, 113 (2d Cir. 1990) (indicating that the obligations of securities professionals under the disciplinary rules are "contractual in nature").

55/ Paul K. Grassi, Jr., Exchange Act. Rel. No. 52858 (Nov. 30, 2005), 86 SEC Docket 2494, 2497.

56/ Marrie, 374 F.3d at 1205.

57/ See id. (observing that "the Commission could reasonably conclude that any licensed accountant is on notice of professional standards generally . . . . For this reason, professional disciplinary [r]ules have withstood vagueness challenges.").

58/ Although Heath cites a case addressing requisite state of mind findings in disciplinary action taken by the Patent and Trademark Office ("PTO"), the court's analysis in that case focused on whether the PTO's complaint sufficiently charged a violation of the relevant disciplinary rule. Halvonik v. Dudas, 398 F. Supp. 2d 115, 125 (D.D.C. 2005), aff'd, 192 Fed. Appx. 964 (D.C. Cir. 2006) (mem. per curiam).

59/ See, e.g., Arnett v. Kennedy, 416 U.S. 134, 164 (1973) (regulation authorizing discipline of civil servant "for such cause as will promote the efficiency of the service"); Perez v. Hoblock, 368 F.3d 166, 169 (2d Cir. 2004) (racing community rule prohibiting "any action detrimental to the best interests of racing"); LeRoy v. Illinois Racing Board, 39 F.3d 711, 715 (7th Cir. 1994) (racing community rule forbidding "'improper language' or 'improper conduct' by licensees toward regulators"); U.S. v. Hearst, 638 F.2d 1190, 1197

(continued...)

failed even when the regulation "is admittedly flexible, and officials implementing [the] standard will undoubtedly exercise some discretion in interpreting and applying the regulation." 60/ In assessing such notice claims, courts have evaluated the conduct at issue against the professional "norms" of the vocation or profession "as embodied in codes of professional conduct," 61/ but do not require specific state of mind findings. 62/ As discussed above, Heath's disclosure of his client's confidential information violated such norms.

We conclude that Heath failed to demonstrate that he lacked notice that his conduct violated the just and equitable principles of trade covered under the J&E Rule. Heath's disclosure of confidential client information clearly violated the ethical norms of securities professionals protected under the rule. Heath's position is further undercut by the express restrictions on the use of client information in the Code of Conduct.

C. Circumstances Surrounding Heath's Disclosure

Heath points to circumstances which, he claims, excuse his actions based on the context of his disclosure. He asserts that, "[v]iewed objectively, what Mr. Heath did and the reasons for his conduct do not support any finding of wrongdoing approaching bad faith." Among other things, Heath notes that his disclosure was not premeditated, resulted in no personal enrichment and had no effect on the deal or the markets. We are not persuaded, however, that any of the circumstances cited by Heath absolve his conduct; although, as discussed below, they were considered by the Exchange in determining sanctions and by us in assessing those sanctions.

Heath further claims in particular that he was "authorized -- or, at least, was actively attempting -- to protect Hibernia's interest by making the disclosure to freeze out Mr. Corrigan." However, Heath's decision to divulge unquestionably confidential information was not justified on this basis. The record does not indicate that Heath could have reasonably believed that Corrigan was in a position to threaten the transaction, or that detailed disclosure was otherwise necessary to protect Hibernia's interests. The transaction had not been publicly announced and

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59/ (...continued)
(9th Cir. 1980) (disciplinary rule prohibiting "conduct unbecoming a member of the bar"); diLeo, 541 F.2d at 953 (teacher disciplinary rule authorizing disciplinary action for "other due and sufficient cause . . ."); Allen v. City of Greensboro, 452 F.2d 489, 491 (4th Cir. 1971) (disciplinary regulation for police officers prohibiting conduct "unbecoming an officer and a gentleman").

60/ Perez, 368 F.3d at 175.

61/ In re Snyder, 472 U.S. 634, 645 (1985) (interpreting attorney disciplinary rule prohibiting "conduct unbecoming a member of the bar").

62/ Perez, 368 F.3d at 175-76.

Corrigan had not indicated that he had access to any information sufficient to jeopardize the acquisition. When Corrigan referenced "rumors in the marketplace" about "a bank deal somewhere in the south," the reasonable course of action for protecting Hibernia's interest was to decline to discuss the transaction. Instead, Heath chose to divulge highly sensitive information about the critical terms of the transaction.

In addition, Heath cites the testimony and support of a former officer and director of Hibernia who stated that he did not consider Heath's disclosure to be a breach of Hibernia's confidence under the circumstances. However, this former officer testified in his individual capacity, and the record suggests that he was not aware of the disclosure until after it had been made. Heath's duty of confidentiality was owed to Hibernia as his investment banking client -- not to any individual Hibernia officer or director. At the time of Heath's conversation with Corrigan, Heath did not have general authorization to disclose information about the merger except on a need-to-know basis. In the absence of express prior authorization from his client and in accordance with the Code of Conduct, Heath remained bound by his obligation to safeguard information about the acquisition solely for Hibernia's interest.

Heath further argues that he viewed Corrigan as a future colleague and believed that Corrigan had an independent duty to keep the information confidential. In this regard, he cites Corrigan's express assurance of confidentiality and also argues that Corrigan had a separate duty to keep the information confidential because BofA had represented Capital One in other transactions. However, even if Heath did not believe that Corrigan was permitted to act on the information, that belief did not absolve Heath's own disclosure. Heath owed a duty of confidentiality directly to Hibernia, and Corrigan had no legitimate interest in information about the acquisition before the public announcement of the deal. In choosing to disclose the information, Heath favored his interest in establishing a collegial relationship with Corrigan over his client's interest in the confidentiality of highly sensitive and material pricing information. Nor are we persuaded that the lack of demonstrable client harm in this instance excused his disclosure. The ethical prohibition on the disclosure of confidential client information is not contingent upon future harm. 63/

63/ See Reuben, 46 S.E.C. at 722 n.7 ("The absence of actual harm is of little, if any, mitigative moment. This is not a civil action to collect money damages. It is an ethical proceeding. Hence our concern is with the ethical implications of the applicant's conduct. Those implications can be serious even where, as here, no legally cognizable wrong was inflicted.").

V.

Heath also asserts that the hearing officer erred in granting the Division's motion for summary judgment. 64/ Heath argues that the hearing officer did not resolve questions of fact and draw all reasonable inferences in his favor as required by the first prong of the summary judgment standard. Among other things, Heath argues that the hearing officer did not appropriately consider: Corrigan's responsibility to keep the information confidential; Heath's desire to prevent Corrigan from soliciting business in the transaction; testimony from the former Hibernia executive indicating that he did not consider the disclosure to be a breach of confidentiality; and a purported lower risk of harm to the client from the disclosure "given the advanced stage of the" deal. Heath also contends that the second prong of the summary judgment standard was not satisfied, arguing that the J&E Rule requires a "fact sensitive . . . nuanced determination rarely susceptible to a ruling as a matter of law."

In evaluating Heath's arguments on appeal, we have conducted a de novo review of the record. The record includes Heath's on-the-record testimony taken by the Division during its investigation, and Heath's testimony before the NYSE Hearing Panel during the penalty phase of the NYSE hearing. While Heath has disputed whether his disclosure breached his duty to Hibernia, he does not contest the material facts underlying the NYSE's finding of a violation of the rule, i.e., his disclosure of material non-public information regarding the pending merger of his client and the circumstances surrounding his conversation with Corrigan. As noted above, the Exchange's liability finding was based on Heath's violation of established standards of conduct in the industry. Based on our de novo review, we find that the justifications advanced by Heath do not ultimately excuse his breach of one of the most critical responsibilities of a financial advisor. Under the circumstances, we find no prejudice to Heath resulting from the hearing officer's ruling. 65/

64/ In the absence of a legal standard governing summary judgment in the NYSE rules, the hearing officer looked to the Federal Rules of Civil Procedure two prong test for summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

65/ See McCarthy v. SEC, 406 F.3d 179, 187 (2d Cir. 2005) (finding that the "due process afforded [the applicant] before the Commission cured any alleged defect" in the proceedings before the NYSE); see also Sorrell v. SEC, 679 F.2d 1323, 1326 (9th Cir. 1982).

The disposition of this case was simplified by the clear breach of confidentiality, and the undisputed facts underlying the violation. The unique factual circumstances of this case notwithstanding, we note that the hearing record for SRO disciplinary action is often best-served by restraint in the granting of summary judgment on the issue of liability. See Frank P. Quattrone, Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155,

(continued...)

VI.

Section 19(e)(2) of the Exchange Act directs us to sustain the NYSE's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 66/ Heath does not claim, and the record does not show, that the NYSE's action was excessive or oppressive or imposed an undue burden on competition.

The violation here is "neither technical nor esoteric." 67/ Heath disclosed information he knew to be "obviously confidential" regarding the parties, structure and pricing of a pending merger, even if Heath did not perceive his disclosure as violating his duty of confidentiality. The ability to credibly assure a client that such information will be used solely to advance the client's own interests is central to any securities professional's ability to provide informed advice to clients. Disclosure of such information jeopardizes the foundation of trust and confidence crucial to any professional advising relationship. Whether or not the disclosure ultimately harmed his client, it violated the ethical standards to which all members of the industry must adhere and which the Exchange is charged with protecting.

In determining the sanctions, the Exchange considered the mitigating circumstances in this case, including among other things: the lack of premeditation, bad faith, direct client harm or personal enrichment, Heath's elevation of the issue at BofA and cooperation with the Exchange's investigation, and the promise of confidentiality he received from a future colleague. The Exchange also credited Heath's reputation for integrity and trustworthiness, sincere remorse, and the unlikelihood of repetition of the violative conduct. The Exchange ultimately declined to impose an industry bar but felt that a substantial fine was warranted by the serious nature of

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65/ (...continued)
2166 (setting aside NASD action when "NASD improperly granted summary disposition on" the issue of liability). Such restraint is particularly appropriate when the central issue is whether the respondent's conduct violated industry norms.

66/ 15 U.S.C. § 78s(e)(2).

67/ Protective Group Sec. Corp., 51 S.E.C. 1233, 1242 (1994).

Heath's conduct. Under all the circumstances, we agree. We also find that the sanctions imposed by the Exchange were consistent with the public interest. Accordingly, we sustain the NYSE action.

An appropriate order will issue. 68/

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR, and PAREDES); Commissioner WALTER not participating.

Elizabeth M. Murphy
Secretary

68/ We have considered all of the parties' contentions. We have rejected or sustained them 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. 59223 / January 9, 2009

Admin. Proc. File No. 3-12890

In the Matter of the Application of

THOMAS W. HEATH, III
c/o Gary P. Naftalis
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, New York 10036

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

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 NYSE Regulation, Inc. against Thomas W. Heath, III, be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary