SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No.49052 / January 12, 2004

Admin. Proc. File No. 3-11101

In the Matter of the Application of

STEPHEN MICHAEL SOHMER

and

SPYDER SECURITIES, INC.
c/o Suzanne E. Auletta, Esquire
Brunelle & Hadjikow
40 Broad Street
New York, New York 10004

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Trading for Accounts in Which Members Had an Interest

Conduct Inconsistent with Just and Equitable Principles of Trade

Acts Detrimental to the Interest or Welfare of the Exchange

Recordkeeping Violations

Improper Crossing of Securities Orders

Making Material Misstatements to Exchange

Former lessee member of national securities exchange and former member organization executed trades for two accounts in which member and member organization had an interest; prepared inaccurate records; and improperly crossed orders. Former member made material misstatements to the exchange. Held, exchange findings of violations and sanctions imposed are sustained.

APPEARANCES:

George Brunelle and Suzanne E. Auletta, of Brunelle & Hadjikow, for Stephen Michael Sohmer and Spyder Securities, Inc.

Susan Light, Joy A. Weber, and Dorian M. Gross, for the New York Stock Exchange, Inc.

Appeal filed: April 29, 2003
Last brief received: September 10, 2003

I.

Stephen Michael Sohmer, a former lessee member of the New York Stock Exchange, Inc. ("Exchange"), and Spyder Securities, Inc. ("Spyder"), a former Exchange member organization, appeal from Exchange disciplinary action. 1/ The Exchange found that Applicants violated Section 11(a)(1) of the Securities Exchange Act of 1934 2/ and Exchange Act Rule 11a-1 3/ by effecting orders for two accounts in which they had an interest; engaged in conduct inconsistent with just and equitable principles of trade and in acts detrimental to the Exchange, in contravention of

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1/ Spyder ceased to be a member organization in December 2001 when Sohmer terminated his employment with Spyder. Sohmer subsequently retired as a floor broker.

2/ 15 U.S.C. § 78k(a). Section 11(a), subject to certain exemptions not relevant here, makes it "unlawful for any member of a national securities exchange to effect any transaction on such exchange for its own account, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion." For a discussion of the regulatory framework governing floor brokers and their trading for accounts in which they have an interest or over which they exercise discretion, see John R. D'Alessio and D'Alessio Securities, Inc., Securities Exchange Act Rel. No. 47627 (Apr. 3, 2003), 79 SEC Docket 3627, appeal pending, No. 03-4883 (2d Cir.).

3/ 17 C.F.R. § 240.11a-1. Rule 11a-1, with certain exceptions not relevant here, prohibits an exchange member, while on the trading floor, from initiating any transaction in any security traded on the exchange for any account "in which such member has an interest, or for any such account with respect to which such member has discretion."

Exchange Rule 476(a); 4/ violated Exchange Rule 440 5/ and Exchange Act Rule 17a-3 6/ by preparing or causing to be prepared inaccurate records; and violated Exchange Rule 91, in that, after accepting for execution an order for the purchase or sale of securities, they filled such order by selling or buying such securities for accounts in which they had an interest. 7/ The Exchange further found that Sohmer made material misstatements in his investigatory testimony to the Exchange in violation of Exchange Rule 476(a)(4). 8/

The Exchange censured Sohmer, barred him for three years from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization, and permanently barred him from membership or employment on the Exchange floor. The Exchange also censured and permanently barred Spyder as a member organization of the Exchange. We base our findings on an independent review of the record.

4/ Exchange Rule 476(a) provides that members and their employees can be disciplined by the Exchange for conduct inconsistent with just and equitable principles of trade, acts detrimental to the interest or welfare of the Exchange and, among other things, for violating any provision of the Securities Exchange Act of 1934 or Exchange Act rules, violating any rule of the Exchange, and making a material misstatement to the Exchange.

5/ Exchange Rule 440 requires every member organization to make and preserve records as prescribed by the Exchange and Exchange Act Rule 17a-3.

6/ Exchange Act Rule 17a-3 requires members of a national securities exchange to make and keep current books and records regarding executed securities transactions and customer accounts. 17 C.F.R. § 240.17a-3.

7/ Exchange Rule 91 prohibits a member from crossing trades of a customer with an account in which the member or its member organization, among others, "is directly or indirectly interested," without first ensuring that the order has an opportunity for an improved price on the Exchange floor and providing notification to, and obtaining acceptance of the trade from, the member who placed the trade.

8/ Exchange Rule 476(a)(4) provides that the Exchange may discipline members who make a "material misstatement to the Exchange."

I.

Applicants' Trading for the Oakford Account and Creation of Inaccurate Billing Records

From approximately November 1994 through November 1997, Applicants executed orders for the Oakford Corporation ("Oakford"), a non-member broker-dealer. Applicants effected transactions for a sub-account (the "Oakford Account") maintained by Oakford at its clearing agent, Spear, Leeds & Kellogg ("Spear Leeds").

In 1994, Frances Bisogno asked Sohmer to execute trades for her and told him that she was a registered person. 9/ Bisogno and Sohmer were long-time business acquaintances. Bisogno had been Sohmer's bookkeeper for over ten years. Sohmer had designated Bisogno as the office contact person for Spyder, and her office address was Spyder's official mailing address. During the relevant period, Sohmer met with Bisogno on numerous occasions and visited her office weekly. Nonetheless, Sohmer claimed that he was unaware that Bisogno was associated with Oakford.

Bisogno instructed Sohmer to call "Bill or Tom" to report orders executed for her. "Bill" was William Killeen, and "Tom" was Tom Bock, both principals of Oakford. 10/ Killeen and Bock would occasionally give Sohmer orders to execute trades on the floor for the Oakford Account.

Sohmer sent bills addressed to "Broker Fran" to Bisogno. Although Sohmer testified that he did not know that Bisogno, Killeen, and Bock were affiliated with Oakford, the National Securities Clearing Corporation ("NSCC") commission statements that Sohmer received bore the acronym "OAK." Sohmer testified that his default billing rate for all his clients, including "Broker Fran," was a rate of $1 per 100 shares executed. 11/ In certain months, Oakford paid Applicants substantially more than the amount billed. For example, in November 1994, Applicants executed trades for 154,000 shares in the Oakford Account and billed $1,540. Instead, Applicants received a payment of $8,717 (approximately 54% of the net profits realized in that month's

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9/ Sohmer testified that Bisogno told him that she had "her [Series] 7 with Spear Leeds."

10/ Sohmer testified that he did not know until after he stopped executing trades for Bisogno that "Bill" was William Killeen. Sohmer also testified that he never knew Tom Bock's last name.

11/ Sohmer claimed that the $1 per 100 shares rate was the "default" on his computer.

trading in the Oakford Account). This payment would have equaled a billing rate of $5.66 per 100 shares. In July 1995, Applicants billed $1,406 but received a payment of $10,428, approximately 81% of the net profits realized in that month's trading in the Oakford Account (the equivalent of a billing rate of $7.41 per 100 shares). Between November 1994 and November 1997, Oakford generally paid Applicants approximately 54% of the net profits realized from Applicants' trading in the Oakford Account. 12/

In months in which there were losses in the Oakford Account, or in which the Oakford Account had losses carried over from previous months' trading, Applicants received no payments until profits had made up the losses. Losses would be carried forward until there were cumulative net profits, at which time Oakford resumed its payments to Applicants, based on a percentage of net profits.

For example, in March 1996, when trading in the Oakford Account resulted in a loss of $2,940.78, Applicants did not receive any payment from Oakford for that month, even though Applicants' commission bills reflected trades in 272,400 shares for the Oakford Account, for which they billed $2,724. In April 1996, the Oakford Account achieved a profit of $927.69, which did not fully offset the loss from March 1996. As a result, Applicants did not receive any payment from Oakford for April 1996, although Applicants billed Oakford $2,200 for 220,000 shares traded for the Oakford Account. In May 1996, however, trading in the Oakford Account generated a profit of $5,150.04, which offset the net loss of $2,013.09 remaining from March 1996, resulting in a net profit of $3,136.95. Instead of the $920 they billed for Oakford trades in May 1996, Applicants received a payment of $1,600 from Oakford, which represented 51% of the net profits realized in that month's trading in the Oakford Account. 13/

Applicants received no payments from Oakford between July 1997 and November 1997, a period during which the Oakford Account suffered large cumulative losses and had insufficient profits to offset such losses. However, Applicants did not demand payment from Oakford and continued to execute trades for the Oakford Account.

12/ In November 1995, Applicants received payments that equaled 89.6% of the net profits in the Oakford Account, but received 36.01% in the next month. Except for those months and July 1995 discussed above, the payments ranged from 50.12% to 55.83% of the Oakford Account's net trading profits. The record does not explain these discrepancies.

13/ For the three-year period, the equivalent billing rates would have ranged from 27 cents to $10.12 per 100 shares traded.

Throughout the relevant period, Applicants prepared inaccurate commission bills purportedly charging $1 for every 100 shares they traded for the Oakford Account instead of their actual compensation of approximately 54% of the net profits generated by their trades for that account.

Applicants stopped accepting orders from Oakford around November 1997, only after they learned that Oakford was under investigation by the United States Attorney. Between November 1994 and November 1997, Applicants received payments totaling approximately $119,000 in connection with their trading for the Oakford Account; they billed only $53,720.

Applicants' Trading for the Generic Trading Account and Creation of Inaccurate Billing Records

Between October 1995 and June 1997, Applicants executed orders for Generic Trading Associates LLC ("Generic Trading"), a non-member broker-dealer, in a sub-account (the "Generic Trading Account") maintained by Generic Trading at its clearing agent, Spear Leeds. In 1994 or 1995, Sohmer agreed to execute trades for Sanford Burwick, then a trader for Generic Trading. 14/

Sohmer sent his commission bills to Burwick "care of Generic Trading." Nonetheless, Sohmer testified that he thought Burwick was employed at Spear Leeds. While, throughout this period, Applicants issued commission bills to Burwick that reflected commissions due at the rate of $1 per 100 shares executed, the amount that Burwick paid Applicants bore no apparent relationship to the amount billed. Instead, Applicants received on average 60% of the net profits realized in the Generic Trading Account. 15/ For example, in September 1996, Applicants executed a total of 163,000 shares for the Generic Trading Account. Instead of the $1,630 they billed (at the rate of $1 per 100 shares), Applicants received $10,178, or 60% of the net profits from September's trading in the Generic Trading Account. In March 1997, Applicants billed $660 but received $10,931, again 60% of that month's net profits. 16/ In May 1997, Applicants billed $2,004 but received a payment of $12,760.

In months in which there were losses in the Generic Trading Account, Burwick paid nothing to Applicants until profits had made up the losses. Applicants did not receive any payments from Burwick in October 1995, January 1996, June 1996, November 1996, and April 1997 for trades they executed for the Generic Trading

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14/ Burwick had previously been employed as a trader at Oakford.

15/ The payments ranged from 59.96% to 60.40% of the Generic Trading Account's net trading profits.

16/ To receive a payment of this amount, Applicants would have had to bill $16.56 per 100 shares.

Account. Sohmer testified that he was unconcerned about Burwick's failure to pay because Burwick's daughter was seriously ill and because Burwick was having financial difficulties. In spite of Burwick's alleged financial difficulties, Sohmer nonetheless claimed that he was not deterred in continuing to do business with Burwick. 17/

Between approximately October 1995 and June 1997, Applicants received payments totaling approximately $102,000 in connection with their trading for the Generic Trading Account. During that period, they billed Generic Trading a total of $42,600 on inaccurate commission bills that requested $1 for every 100 shares they traded for the Generic Trading Account. Instead, they received compensation of approximately 60% of the net profits generated by their trades for that account.

Testimony of the Exchange's Expert Witness

David Shields, who was qualified as an expert witness on the business practices of floor brokers, testified that the amounts that Applicants received, as reflected in the record, were "extremely high rates; in fact, rates that I would never have heard of for floor brokerage, even in the old fixed-commission days." Shields maintained that it would have been highly unusual for a customer to overpay a commission bill during the relevant period. He also observed that, whenever there was a loss in the trading accounts, Applicants did not receive any payments from Oakford or Generic Trading. Moreover, whenever a loss in one of the accounts was succeeded by a gain, the gain and the loss appeared to be netted out.

Shields further opined that he could not conceive of any business rationale to explain why a floor broker who did not get paid for five consecutive months would not question the customer. Shields himself had never experienced such an extensive period of nonpayment. Shields concluded that the record evidence "strongly indicate[s] . . . there was some sort of a shared arrangement in the account[s], some sort of profit-sharing of some sort." 18/

17/ Between October 1995 and June 1997, Burwick paid Applicants the equivalent of billing rates ranging from 11 cents to $16.56 per 100 shares traded.

18/ Shields also reviewed a "post-analysis" chart, introduced by Applicants, which purported to extrapolate a billing rate of $2.22 per 100 shares executed for the relevant period, based on the "cumulative" average billing rate, taking into account all the payments Applicants received for the Oakford trades from November 1994 through 1997. Shields criticized Applicants' methodology as a "stretch." He observed that Applicants' analysis averaged the total payments that they

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Crossing of Trades

The record reflects that, on 22 occasions, Applicants crossed trades for the Oakford Account or the Generic Trading Account with orders executed for other customers. Applicants accepted for execution customer orders for purchase or sale, and then sold such securities from (or bought such securities for), either the Oakford Account or the Generic Trading Account. On those 22 occasions, Applicants acted as both buyer and seller representing a customer order on one side and either the Oakford Account or the Generic Trading Account on the other side. For example, the record indicates that on June 6, 1997, Applicants executed a sale of 3,000 shares of Warner-Lambert stock for Bisogno at $101.75 and, positioning themselves on the other side of that transaction, matched that sale with a purchase of those 3,000 shares for another customer. This pattern occurred repeatedly throughout the relevant period.

False Statements to the Exchange During Investigation

On November 16, 2000, during the Exchange's on-the-record interview of Sohmer, the following colloquy occurred between Sohmer and Exchange counsel Dorian Gross:

Gross: The orders identified in Exhibit Number 2 which are your commission bills, those orders that are identified that relate to Sandy Burwick --

Sohmer: Yes.

Gross: -- under the broker Sandu heading --

Sohmer: Yes.

Gross: -- did you have any arrangement with Sandy Burwick whereby you received approximately 60 percent of the profits or net profits concerning any of those orders?

Sohmer: No.

Gross: Did you ever have any profit-sharing arrangement whatsoever with Sandy Burwick with respect to any order or any account?

18/ (...continued)
received during the relevant period (something that could only be done in hindsight), as opposed to looking at payments on a month by month basis. He characterized their analysis as an attempt to "back into" a more acceptable billing rate.

Sohmer: No.

Gross: Did you ever have any profit-sharing arrangement whatsoever with Generic Trading or anyone associated with Generic Trading with respect to any order or any account?

Sohmer: No.

Gross: Again, with respect to Exhibit Number 2 and the orders which are designated as being executed for broker Fran, with respect to those orders did you ever receive a percentage of the profits or net profits with respect to any of those orders?

Sohmer: Could you repeat the question?

Gross: Yes. With respect to the orders in Exhibit 2 that were designated as related to broker Fran, did you ever receive a percentage of the profits or net profits --

Sohmer: No such arrangements.

Gross: -- of those orders? Did you ever have any type of profit-sharing arrangement whatsoever with Fran Bisogno with respect to any order or any account?

Sohmer: None.

After a brief digression, the colloquy continued:

Gross: Did you ever have any profit-sharing arrangement whatsoever with the Oakford Corporation or anyone associated with the Oakford Corporation with respect to any order for any account?

Sohmer: No.

Gross: Did you ever have any interest whatsoever in an account maintained by the Oakford Corporation or anyone associated with the Oakford Corporation?

Sohmer: No.

Gross: Did you ever have any interest whatsoever in any account maintained by Generic Trading or anyone associated with Generic Trading?

Sohmer: No.

Gross: Did you ever take or receive or agree to take or receive a percentage of the profits or net profits concerning any order executed by you for any customer?

Sohmer: No.

Gross: Did you ever share or agree to share in any losses concerning any order executed by you for any customer?

Sohmer: No.

Gross: Did you have any kind of payment or commission arrangement with Fran Bisogno other than what you have already testified to?

Sohmer: I had no arrangement with her.

Gross: If I understood your testimony, did you also testify that you had no arrangement with Sandy Burwick?

Sohmer: Yes. The answer is I have no arrangement.

After some additional back-and-forth between Sohmer and Gross, their colloquy continued:

Gross: Did you ever initiate any order on the floor of the Exchange for any account in which you had an interest?

Sohmer: I had no interest. Therefore, no.

Gross: That question pertains to any account, not necessarily any account that was discussed today.

Sohmer: I have no interest in any accounts. Therefore, no. 19/

19/ It also appears that Sohmer's handwritten notations on some of Applicants' National Securities Clearing Corporation ("NSCC") commission bill statements were altered. For example, Sohmer would list brokers' names and their corresponding payment amounts on the NSCC statements, designating Bisogno as "FRAN" and Burwick as "SANDU". In months in which Applicants received no payments from Oakford or Generic Trading, Sohmer would enter a "0" next to their names on the statements.

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III.

A. Applicants Had An Interest in the Oakford Account and the Generic Trading Account

Exchange Act Section 11(a) and Exchange Act Rule 11a-1 prohibit a floor broker from trading for an account in which the broker has an interest. 20/ We have found that, where a member shares the economic risk of trading in an account, that member has an interest in the account. 21/ Here, Applicants' trading through the Oakford Account resulted in their receiving approximately 54% of the trading profits of, and also required them to share in the trading losses incurred by, the Oakford Account. Similarly, Applicants received approximately 60% of the trading profits of, and were also required to share in the losses incurred by, the Generic Trading Account. Thus, Applicants shared with Oakford and Generic Trading the economic risk of the

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19/ (...continued)
During the course of its investigation, the Exchange received two versions of the NSCC statement for the period ending May 12, 1997. The statement that was submitted on February 12, 1999 by Applicants bore Sohmer's handwritten list of names and payments received, with a "-0-" entered alongside the names "FRAN" and "SANDU". The same statement submitted in August 1999 was identical to the previous version, except that the names "FRAN" and "SANDU" and the zeros next to those names were missing.

Sohmer denied altering the NSCC commission statements or deleting any notations from them. He claimed that Bisogno kept Sohmer's NSCC commission statements and that Bisogno must have produced copies of the altered statements to the Exchange. However, we agree with the Exchange that, while Bisogno might have had a motive to conceal information relating to her, there would be no reason for her to remove information relating to nonpayments associated with Burwick.

20/ See generally John R. D'Alessio and D'Alessio Securities, Inc., Exchange Act Rel. No. 47627 (Apr. 3, 2003), 79 SEC Docket 3627, appeal pending (2d Cir.) (explaining regulatory background of Section 11(a) and Exchange Act Rule 11a-1).

21/ Id.; Anthony A. Adonnino and Thomas Cannizzaro, Exchange Act Rel. No. 48618 (Oct. 9, 2003), ___ SEC Docket ___.

trades, and that sharing of risk gave Applicants an interest in the Oakford and Generic Trading Accounts. 22/

The record establishes that the payments received by Applicants had no relationship to the amounts they billed. Instead, they equaled a portion of the profits and losses in the Oakford and Generic Trading Accounts. From this we conclude that Applicants' compensation from Oakford and Generic Trading was based on a percentage of the net profits generated by Applicants' trades: approximately 54% of the net trading profits from the Oakford Account, and approximately 60% of the net trading profits from the Generic Trading account. Losses suffered by these accounts were offset against profits before the customers paid Applicants. 23/ Minor variances from the target percentages do not detract from the pattern established. 24/

Applicants argue that the Exchange failed to sustain its burden of proof in this case because it did not produce any fact witness to dispute Sohmer's denial of any profit-sharing arrangement, but instead relied on payment percentages contained

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22/ See John R. D'Alessio, 79 SEC Docket 3627.

23/ Thus, there were no payments to Applicants during periods in which the account was operating at a net loss. See Anthony A. Adonnino, __ SEC Docket at __.

24/ Id. Generic Trading's payments to Applicants remained constant at approximately 60% of net profits. Oakford's payments to Applicants were generally consistent, at approximately 54% of net profits, but on two occasions rose into the 80% to 90% range. Applicants cite Matter of X, where the Exchange found that the alleged profit-sharing arrangement was not established. There, however, payments ranging from 25.3% to 257.4% of profits were inconsistent with an alleged agreement to pay 70% of profits. Matter of X, New York Stock Exchange Panel Hearing Decision 02-114 (July 29, 2002), www.nyse.com/pdfs/02-114x.pdf. We note that, in Matter of X, there was also evidence of the account "being actively managed upstairs." In addition, it appears that critical records were destroyed during the September 11, 2001 terrorist attack. In any event, Oakford's payments to Applicants were generally consistent over a three-year period, supporting the existence of an interest.

in charts it created. 25/ However, Applicants appear to concede that they were paid according to a profit-and-loss formula. At the hearing, Applicants' counsel stated that "two people upstairs used profits and losses as a method of calculating the payments they paid to [Applicants]. I don't think there's too much dispute about that." Sohmer himself admitted that the numbers presented in the Exchange's exhibits looked "awful" and that he was "ashamed of basically that I had a role in impairing the reputation of the floor of the New York Stock Exchange." 26/

Nevertheless, Sohmer argues that there is no proof that he agreed to be paid on the basis of net profits. He asserts that the amount that he was paid was determined unilaterally by the customers. Applicants claim that these customers were very demanding and, because they were difficult to serve, Sohmer believed that the customers were paying more because of the quality of service that he provided.

The Exchange hearing panel did not credit Sohmer's assertions. We give deference to the credibility determination of the fact-finder. 27/ Here, Applicants received payments from Oakford and Generic Trading that were substantially in excess of their billing rate, and also tolerated long periods of nonpayment. Sohmer claimed that he did not know Bisogno was associated with Oakford, notwithstanding his long-time business relationship with her and the fact that NSCC identified "OAK" as the source of his commissions. Sohmer sent commission bills to Burwick in care of "Generic Trading" and NSCC commission

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25/ Applicants did not offer testimony to corroborate Sohmer's denial. There does not appear to have been any impediment to Applicants' calling either Bisogno or Burwick as witnesses, should Applicants have wished to do so.

26/ Applicants also suggest that the overpayments were compensation for earlier missed payments. Applicants, however, do not provide any evidence to support this contention, and our analysis of the pattern of payments does not support this contention. See David M. Levine and Triple J Partners, Exchange Act Rel. No. 48760 (Nov. 10, 2003), __ SEC Docket __ (rejecting applicants' contention that overpayments were compensation for earlier missed or under-payments).

27/ Credibility determinations of an initial fact-finder are entitled to considerable weight and deference because they are based on hearing the witnesses' testimony and observing their demeanor. David M. Levine, __ SEC Docket at __ n. 21 (citing Brian A. Schmidt, Exchange Act Rel. No. 45330 (Jan. 24, 2002), 76 SEC Docket 2255, 2258 n.5 (citations omitted)).

statements reflected the entry "GEN." Over a significant period of time, Applicants prepared commission bills that appear to have no relationship to their compensation. We sustain the Exchange's findings that Applicants violated Exchange Act Section 11(a) and Exchange Act Rule 11a-1.

B. Commission Bills

Exchange Act Rule 17a-3 requires, among other things, the keeping of accurate records regarding executed securities transactions and customer accounts. Exchange Rule 440 requires every member organization to make and preserve records as prescribed by the Exchange and by Exchange Act Rule 17a-3. The requirement that records be kept entails that those records be true and accurate. 28/ Here, Applicants prepared and maintained commission bills for their Oakford and Generic Trading trades that were inaccurate. The bills reflected a billing rate of $1 per 100 shares executed, the "default rate" on Sohmer's computer. Instead, Applicants received substantial overpayments, reflecting the profit-sharing formula that was actually employed. Nowhere on the commission bills that Applicants submitted to Oakford and to Generic Trading did Applicants indicate that they were to receive a percentage of the net profits and share in the losses of the Oakford and Generic Trading Accounts. We find that Applicants violated Exchange Act Rule 17a-3 and Exchange Rule 440.

C. Improper Crossing of Trades

Exchange Rule 91 prohibits a member from crossing trades of a customer with an account in which the member or its member organization, among others, "is directly or indirectly interested," without first ensuring that the order has an opportunity for an improved price on the Exchange floor and providing notification to, and obtaining acceptance of the trade from, the member who placed the order. On 22 occasions, Applicants crossed trades for the Oakford Account and the Generic Trading Account - - accounts in which Applicants had an interest - - without following the requirements of Exchange Rule 91. Applicants used customer orders to facilitate their trading for the Oakford and Generic Trading accounts. For example, the record indicates that on September 16, 1997, Applicants executed a sale of 5,000 shares of Bristol-Myers Squibb stock for Bisogno at $81.25 and matched that sale by executing a purchase of those 5,000 shares by another customer. In this manner, Applicants traded as principals with their customers, "abrogating [their] duty to act in [their] customers' best interests and violating

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28/ See Anthony A. Adonnino, __ SEC Docket at __.

the fundamental principles of agency law embodied in [Exchange] Rule 91." 29/ We find that Applicants violated Exchange Rule 91.

D. Misstatements to the Exchange

Sohmer made material misstatements to the Exchange in violation of Exchange Rule 476(a)(4). As discussed above, Sohmer testified that he did not have any interest in any accounts maintained by Oakford or Generic Trading, or by anybody associated with Oakford or Generic Trading. Sohmer further testified that he neither received a percentage of net profits in connection with any customer order that he executed, nor did he share in any losses concerning any such orders. He asserted that he did not have any profit-sharing arrangement with Bisogno or Burwick. Sohmer also claimed to have no interest in any customer accounts. Sohmer denied the existence of any agreement to take or receive a percentage of the profits or net profits concerning any order that he executed for any customer. Sohmer further insisted that he never took any such profits, nor did he agree to share in any losses.

Sohmer's statements are belied not only by the payments that Applicants received from Oakford and Generic Trading, but also by Applicants' later concession that Oakford and Generic Trading paid them (albeit allegedly without Applicants' consent) according to a profit-and-loss formula. We find that these statements, made by Sohmer to the Exchange during its investigation, were false. These were material misstatements because they went to the essence of the Section 11(a) and Exchange Act Rule 11a-1 charges. 30/ We therefore find that Sohmer violated Exchange Rule 476(a)(4).

IV.

Applicants make a number of procedural and fairness arguments.

A. Applicants argue that the Exchange unfairly deprived them of their right under Exchange Rule 476(c) to obtain exculpatory evidence in the form of witness statements that were material to their defense. 31/ Applicants observed that, when

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29/ Richard Kwiatkowski, __ SEC Docket at __; Edward John McCarthy, __ SEC Docket at __.

30/ See Anthony A. Adonnino, __ SEC Docket at __.

31/ In relevant part, Exchange Rule 476(c) authorizes hearing officers to require the Exchange to permit applicants "to inspect and copy documents or records in the possession of the Exchange which are material to the preparation of the

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they received the Exchange's investigatory file (which was made available to Applicants in June 2002), the file contained the statements of only one witness, Sohmer. They complain that the file did not contain records of any other witness interviews. At the hearing, Exchange counsel stated that no such witness statements existed. In particular, Exchange counsel informed the panel that Burwick refused to cooperate with the Exchange in this proceeding. 32/

Exchange Rule 476(c) pertains only to documents and records that the Exchange has in its possession. The rule does not require the Exchange to create documents, and it does not provide a basis for attacking an Exchange disciplinary proceeding on the ground that Exchange staff did not create a document or record. 33/

B. Applicants assert that the hearing officer permitted prejudicial and improper expert testimony to be introduced at the hearing. The hearing officer qualified Shields, the Exchange's expert witness, as an expert in the customary business practices of floor brokers on the Exchange floor with respect to payment for services. We have found testimony regarding industry practice helpful in resolving enforcement and self-regulatory actions. 34/ Shields' testimony regarding business practices was

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31/ (...continued)
defense or are intended for use by the Division or Department of the Exchange initiating the proceeding as evidence in chief at the hearing."

32/ Applicants question the Exchange's representation that Burwick would not cooperate. They note that Burwick testified in the Adonnino proceeding. Anthony A. Adonnino, __ SEC Docket at __. Burwick testified that he had an arrangement to share profits and losses with the Applicants in Adonnino. However, his willingness to cooperate in that proceeding does not suggest that Burwick would have been willing to testify here.

33/ During the hearing, the Exchange interviewed a prospective witness. That witness made statements that could be deemed exculpatory. The Exchange immediately informed Applicants about those statements.

34/ See Mark David Anderson, Exchange Act Rel. No. 48352 (Aug. 15, 2003), __ SEC Docket ___, and cases cited therein (finding expert testimony on industry practice on pricing of debt securities supported contention that respondent's pricing was improper).

(continued...)

helpful in evaluating Applicants' failure to seek explanations for overpayments or to object to prolonged periods of no payment.

C. Applicants contend that the applicable regulatory standards regarding whether a broker had an interest in an account were "vague and non-existent" during the events in question. They assert that they lacked fair and timely notice that their arrangements with Oakford and Generic Trading were prohibited, and are being punished under regulatory interpretations and prohibitions that were promulgated after the events in question. 35/ However, Sohmer testified that, at the time Applicants were trading for Oakford and Generic Trading, he would have considered it unlawful to have been paid on the basis of net profits and to share in the losses of a customer's account. 36/ In any event, we have stated that Section 11(a), Exchange Act Rule 11a-1, and the related Exchange rules, are sufficiently specific to put Applicants on notice that they were prohibited from trading for the Oakford Account and the Generic Trading Account because they were sharing in the profits and losses of those accounts. 37/

34/ (...continued)
Applicants complain that Shields expressed views about the ultimate legal issues in this proceeding. However, to the extent that Shields' testimony might be construed to express opinions regarding such issues, we have limited our consideration of Shields' testimony to his discussion of business practices.

35/ See, e.g., Edward John McCarthy, Exchange Act Rel. No. 48554 (Sept. 26, 2003),__ SEC Docket at __ n. 22 (noting that due process requires that "'laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'") (quoting Upton v. SEC, 75 F.3d 92, 98 (2d Cir. 1996)).

36/ Applicants claim that their understanding of this prohibition is irrelevant because they did not have an interest in the Oakford or Generic Trading Accounts. As we discussed above, however, Applicants' argument is belied by record evidence demonstrating that they did in fact have an interest in those accounts.

37/ See, e.g., John R. D'Alessio, 79 SEC Docket at 3644 n.44 (holding that D'Alessio, who traded for an account at Oakford from June 1994 until February 1998, had fair notice of the requirements we cited earlier of Section 11(a) and Exchange Act Rule 11a-1).

Applicants argue that, in United States v. Oakford Corp., the district court determined that the Exchange adopted a flexible interpretation of the ban on a floor broker's trading for an account in which the broker had an interest. 38/ However, the court found in Oakford Corp. that, while the Exchange interpreted the ban on trading for one's own account "somewhat more flexibly" 39/ than the Commission's subsequent position, 40/ floor brokers long had been aware that they risked violating Section 11(a) and Rule 11a-1 if they shared in a customer's profits. 41/

Materials cited by Applicants demonstrate that the improper nature of their conduct was sufficiently clear. An October 7, 1998 letter sent to the Commission's Director of the Division of Enforcement by Richard Grasso, then Chairman and Chief Executive Officer of the Exchange, articulates the Exchange's position that partnership relationships in which the partners shared in both the profits and the losses of each transaction -- a traditional indication of ownership -- were prohibited. 42/ In addition, Applicants point to the testimony of Brian McNamara, the Exchange's vice president of Regulatory Development and Market Evaluation, in D'Alessio. 43/ Applicants attempt to focus on that portion of McNamara's testimony explaining an Exchange interpretation (which the Commission subsequently rejected in

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38/ 79 F. Supp.2d 357 (S.D.N.Y. 1999).

39/ Id. at 365.

40/ The court identified the source of this bright-line rule as New York Stock Exchange, Inc., Exchange Act Rel. No. 41574 (June 29, 1999), 70 SEC Docket 153, 156 (Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Ordering Compliance With Undertakings), our settled action in which we noted that "any compensation arrangement that results in the exchange member sharing in the trading performance of an account, however structured, makes the account that member's 'own account,' or constitutes an 'interest' in the account."

41/ Oakford, 79 F. Supp.2d at 366 (concluding that the Exchange did not hide from Exchange members that sharing in a customer's profits could violate Section 11(a) and Rule 11a-1.)

42/ For a detailed discussion of this letter, see John R. D'Alessio, 79 SEC Docket at 3645.

43/ Id.

1998) that sharing only in the profits of an account, as opposed to sharing in the profits and losses of an account, did not create, in and of itself, an interest in the account for purposes of Exchange Act Section 11(a). However, McNamara further testified that it had always been the Exchange's regulatory position that sharing in profits and losses created an interest in an account because this established a partnership relationship between the broker and the customer. 44/

D. Applicants contend that the Exchange's Board of Directors deprived them of procedural fairness by summarily affirming the hearing panel's decision. Applicants filed briefs and exhibits and presented their arguments before the Board's Committee for Review, which makes a recommendation to the Board. The Committee questioned Sohmer extensively during the review hearing. We believe that record evidences considered review of the hearing panel's decision. As discussed above, our de novo review supports the Board's decision to affirm the hearing panel.

E. Applicants claim that they were prejudiced by unreasonably long delays in the investigation and initiation of the Exchange proceedings against them. Applicants assert that "[w]ith the passage of time, memories fade, witnesses become unavailable and documents are lost or destroyed." Applicants do not identify witnesses who became unavailable as a result of that delay, nor do they pinpoint specific instances of material memory lapses.

The profit-sharing arrangements at issue here ended in June 1997 and November 1997, respectively. Oakford's activities became public in 1998. The Exchange's Enforcement Division notified Applicants that they were under investigation in January 1999 and Sohmer testified before the Exchange in November 2000. After the offices of the Exchange's Enforcement Division were destroyed in the terrorist attacks on the World Trade Center, the Exchange needed to reconstruct the file. Applicants aided in the reconstruction of the investigative files by providing copies of documents that they had previously produced. The Exchange's Enforcement Division filed the charges that commenced this proceeding in February 2002. Under all the circumstances, we do not think there was unreasonable delay.

44/ Id.

V.

Applicants contend that the sanctions imposed by the Exchange are excessive and oppressive. They argue that their conduct was not as serious as that in D'Alessio and, as a result, the sanctions imposed should be mitigated.

We review sanctions imposed by the Exchange to determine whether those sanctions are excessive or oppressive, or whether they impose an unnecessary or inappropriate burden on competition. 45/ We have consistently held that the appropriate sanction depends on the facts and circumstances of each case and cannot be calibrated by comparison with action taken in other proceedings. 46/ Applying this standard, we see no basis for reducing the sanctions.

Applicants here engaged in profit-sharing with not one, but two, trading firms. These arrangements spanned three years and two years, respectively. Sohmer also prepared false bills to conceal the magnitude of Applicants' wrongdoing.

These are serious violations. We believe that, in imposing these sanctions, the Exchange properly considered the magnitude of Applicants' misconduct, as well as any mitigating factors. 47/

45/ Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2). Applicants do not assert, and the record does not show, that the Exchange's action places an undue burden on competition.

46/ See, e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); John R. D'Alessio, 79 SEC Docket at 3651; Anthony A. Adonnino, __ SEC Docket at __; Jonathan Feins, Exchange Act Rel. No. 41943 (Sept. 29, 1999), 70 SEC Docket 2116, 2131 n.36.

47/ For example, the Exchange recognized that Applicants had no prior disciplinary history.

After he retired as a floor broker, Sohmer consented, on behalf of himself and Spyder, to a censure and a $25,000 fine for doing business in 1998 with a firm that was not registered as a broker-dealer. See Exchange Hearing Panel Decisions 02-135 and 02-136. The Exchange found that Sohmer was unaware that the unregistered firm was a public customer until he was so informed by Exchange examiners in 1999. Id.

Under the circumstances, we do not find the sanctions imposed by the Exchange on Applicants - - censure, three-year plenary bar, and a permanent floor bar for Sohmer, and censure and a permanent bar for Spyder - - to be excessive or oppressive.

An appropriate order will issue. 48/

By the Commission (Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS); Chairman DONALDSON not participating.

Jonathan G. Katz
Secretary

48/ We have considered all of the contentions advanced by the parties. We have rejected or sustained these 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.49052 / January 12, 2004

Admin. Proc. File No. 3-11101

In the Matter of the Application of

STEPHEN MICHAEL SOHMER

and

SPYDER SECURITIES, INC.
c/o Suzanne E. Auletta, Esquire
Brunelle & Hadjikow
40 Broad Street
New York, New York 10004

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, 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 the New York Stock Exchange, Inc. against Stephen Michael Sohmer and Spyder Securities, Inc., be, and it hereby is, sustained.

By the Commission.

Jonathan G. Katz
Secretary