SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES ACT OF 1933
Rel. No. 8622 / October 3, 2005

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 52551 / October 3, 2005

Admin. Proc. File No. 3-11346

In the Matter of

STEVEN E. MUTH
and
RICHARD J. ROUSE

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDINGS
CEASE-AND-DESIST PROCEEDINGS

Grounds for Remedial Action

Fraud in the Offer and Sale of Securities
Failure to Supervise

Salesperson of registered broker-dealer misrepresented and omitted material facts and engaged in unauthorized and unsuitable trading. Held, it is in the public interest to order salesperson to cease and desist from committing or causing any violation or future violation of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5; to pay a civil money penalty; and to disgorge illegal profits, plus interest.

Vice president and director of registered broker-dealer failed to exercise reasonable supervision over salesperson with a view towards preventing salesperson's violations of antifraud provisions of the securities laws. Held, it is in the public interest to suspend vice president from association with any broker or dealer in any capacity for nine months and to bar vice president from association with any broker or dealer in a supervisory capacity, with the right to reapply after one year.

APPEARANCES:

Steven E. Muth, pro se.

Richard J. Rouse, pro se.

Robert M. Fusfeld and Julie K. Lutz, for the Division of Enforcement.

Appeal filed: October 29, 2004
Last brief received: March 28, 2005

I.

Steven E. Muth, formerly a salesperson with Schneider Securities, Inc. ("Schneider" or the "Firm"), which, in 2000 and 2001, the period at issue, was a registered broker-dealer, and Richard J. Rouse, formerly a Schneider owner, executive vice president, regional sales manager, and a director, each appeal a decision of an administrative law judge. 1/ The law judge found that Muth willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5 in connection with his handling of certain Schneider customer accounts. 2/ The law judge ordered Muth to cease and desist from committing or causing any violation or future violation of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5 and ordered him to pay a civil money penalty of $2,090,000 and to disgorge $14,204.75, plus interest.

The law judge found that Rouse failed reasonably to supervise Muth with a view to preventing Muth's violations. The law judge suspended Rouse from association with any broker or dealer in any capacity for nine months; barred him from association with any broker or dealer in a supervisory capacity, with the right to reapply for association after one year; and ordered him to pay a civil money penalty of $110,000. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

1/ Steven E. Muth, Initial Decision Rel. No. 262 (Oct. 8, 2004), 83 SEC Docket 3701.
2/ 15 U.S.C. § 77q(a), 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5.

II.

Background

Muth entered the brokerage industry in 1983. He was associated with Schneider as a salesperson from September 2000 until May 2001. 3/ Immediately prior to Schneider, Muth had been associated with Kirkpatrick, Pettis, Smith, and Polian, Inc. ("KPSP"), where he was the top salesperson.

Rouse joined Schneider in April 1995. Rouse worked in the Schneider corporate office in Denver.

In his sales activities, Muth focused on one or two issuers. Rouse testified that it was unusual for a salesperson to focus on only two securities. At both Schneider and KPSP, Muth urged customers to purchase on margin the stock of Bonso Electronics International, Inc. ("Bonso"), a manufacturer of electronic products, and of Creative Host Services, Inc. ("Creative Host"), an airline catering company. Bonso and Creative Host were high-risk stocks, suitable only for investors with the financial resources and risk tolerance for speculative investments. Bonso traded on the NASDAQ National Market. Its closing stock price ranged from $6.00 to $12.87 per share. After March 2001, it generally closed between $4.00 and $6.00 per share. Bonso's daily trading volume ranged from a low of 1,100 shares on November 17, 2000, to a high of 295,000 shares on April 5, 2001. Creative Host traded on the NASDAQ Small-Cap Market. Its closing stock price steadily declined from $8.75 per share on October 9, 2000, to $0.75 per share on April 12, 2001. Its daily trading volume ranged from a high of 381,400 shares on November 29, 2000, to a low of 200 shares on January 26, 2001.

During 2000, KPSP received at least four customer complaints about Muth, alleging unauthorized trading, failure to execute sell orders, and/or unsuitability for margin trading, all with respect to Creative Host transactions. KPSP prohibited margin purchases of Bonso and Creative Host. In May 2000, KPSP began an internal review of Muth's sales activities. KPSP terminated the review before its completion when Muth resigned in September 2000.

Rouse, along with other members of Schneider's board, such as Thomas O'Rourke, 4/ and Patrick Driver (Schneider's compliance director), 5/ participated in the decision to hire Muth.

3/ Muth was referred to Schneider by Bob Zappa, one of Muth's customers who was acquainted with Tom Schneider.

4/ O'Rourke worked at Schneider from May 1987 until September 30, 2002, in various capacities, including director of marketing, director of corporate finance, president, chief executive officer, and member of the board of directors.

5/ Driver succeeded Rouse as compliance director. In connection with this matter, Driver consented to the entry of a sanction barring him from association in a supervisory capacity with any broker or dealer with the right to reapply for association after two years. See James Patrick Driver, Securities Exchange Act Rel. No. 34-48852 (Nov. 26,

At the time Muth was hired, Rouse knew that Muth wanted to engage in customer margin transactions in Bonso and Creative Host, that Muth had left KPSP because KPSP no longer permitted margin transactions in those securities, and that Muth had been a "big producer" at KPSP. 6/ Muth joined Schneider based on the Firm's agreement to permit him to engage in margin transactions in Bonso and Creative Host. 7/

Rouse also knew that Muth had at least four customer complaints pending at KPSP for unauthorized trades, unsuitable use of margin, and refusal to effect customer sell orders as to Bonso and/or Creative Host. 8/ Rouse did not contact anyone at KPSP for more information about these complaints.

When Schneider sought approval to associate Muth, several state securities regulators required that Schneider undertake heightened supervision, granted only conditional registration, or, in one instance, requested that Schneider withdraw its request. The State of Colorado Division of Securities ("CDS") required Schneider to impose heightened supervisory procedures as a condition for registering Muth. Rouse was copied on the Schneider letter, dated October 2, 2000, memorializing those procedures. Schneider stated that Rouse would be Muth's "direct supervisor" and that Rouse, among other things, would hold quarterly reviews with Muth, review his initial transactions to determine suitability, conduct daily review of Muth's transactions, and review monthly a journal of telephone calls to Colorado customers that Muth was to keep. 9/

2003), 81 SEC Docket 2778, 2781-2782.

6/ Rouse has known Muth since 1990, when they both worked at another broker-dealer.

7/ After Muth joined Schneider in September 2000, the Firm, in December 2000, raised margin maintenance requirements for Creative Host and Bonso to 100% and 50%, respectively. However, for reasons that are not clear from the record, it appears that Muth was permitted to initiate margin transactions for customer accounts in both securities after that date.

8/ At the time Muth was hired, none of the complaints had been resolved.

9/ The Schneider letter stated:

> (1) Muth will act only as a Series 7 registered agent conducting the majority of his business in equity securities in states in which he is registered; (2) Muth's direct supervisor is Richard J. Rouse. Muth and his supervisor will hold quarterly reviews, which will consist of daily and monthly reviews of Muth's accounts with Colorado residents and a review for excessive activity. All new accounts with Colorado residents will be reviewed and approved by Muth's supervisor to determine the suitability of the transaction prior to the execution of the initial transaction; (3) All of Muth's transactions will be reviewed on a daily basis by Rouse or his designee in his absence; (4) Muth and Rouse will meet monthly to discuss the transactions during the period. Muth will maintain a journal of all conversations that result in a transaction with Colorado residents, and this journal will be reviewed and initialed by Rouse on a monthly basis; and (5) Schneider will provide the CDS any written customer complaints on Muth within fifteen days of receipt.

Although Schneider represented to CDS that Rouse would be Muth's "direct supervisor," Rouse knew, when Schneider hired Muth, that Muth intended to open a Schneider branch office in Englewood, Colorado ("Branch Office"), away from Rouse. Muth was to be a partial owner of the Branch Office. On October 19, 2000, Schneider hired Bruce Joe Bates as the branch office manager for the Branch Office. 10/ Bates was the husband of Kelli Bates, Muth's assistant. Bates learned of the branch manager opening from Muth and his wife. Bates testified that he previously had supervised only himself and one other salesperson for a period of one month at another broker-dealer. Bates considered himself a "supervisor in training."

Schneider had agreed that the Branch Office would keep 80% of revenues generated by the Branch Office. The remaining 20% would go to Schneider. As part of the division of revenues between Schneider and the Branch Office, the Branch Office agreed to pay salaries out of its share of the revenues. Rouse knew that both Bates' and Kelli Bates' salaries were to be paid out of the revenues of the Branch Office, where Muth was a partial owner and the biggest producer. Rouse testified that he was not concerned about the potential conflict of interest for Bates' performance of his supervisory duties under these circumstances.

Rouse also was aware that Bates had virtually no prior experience supervising registered representatives. Rouse admits that he was concerned about Bates' lack of managerial experience and the need for "a lot more hand-holding . . . and look[ing] over [Bates'] shoulder." However, neither Rouse nor anyone else at Schneider gave Bates formal training. Rouse had no system for monitoring Bates' performance other than to conduct a "spot check" approximately once a month, at which time Rouse would "go through the files and procedures." 11/

10/ From the record, it appears that, although Bates began work in the Branch Office in October 2000, preparing it for occupancy, he was still negotiating his salary with the Branch Office in December 2000.

Bates was named as a respondent in the Order Instituting Proceedings in this matter. Without admitting or denying the findings, Bates consented to the entry of an order barring him from association in any supervisory capacity with any broker or dealer, barring him from association with any broker or dealer with the right to reapply for association other than in a supervisory capacity after two years, and ordering him to pay a civil penalty of $15,000. See Steven E. Muth, Exchange Act Rel. No. 34-49790 (June 2, 2004), 82 SEC Docket 3773, 3776-77.

11/ Rouse states that he exercised oversight of Bates, but his testimony on this oversight is contradictory. At one point, he testified that, "[b]ecause of Mr. Muth and because I did not know Joe Bates, I felt that it was important from Schneider Securities' standpoint to make sure that certain of these special enhanced procedures were being done. And it was an office that was under me, as a regional sales manager. So I would stop by and I would make sure that Joe understood – and I would help him and compliance would help him." However, Rouse later said that he did not recall going to the Branch Office on a consistent basis to see whether Bates was complying with the specific terms of the CDS

Rouse testified that he was responsible for Schneider's heightened supervision of Muth when Muth worked in Schneider's Denver office. However, Rouse claims that, when Muth moved to the Branch Office in early November 2000, Bates became Muth's supervisor and was responsible for the CDS heightened supervisory procedures. Neither Rouse nor anyone else at Schneider informed CDS that Bates had become Muth's supervisor. Bates, Driver, and O'Rourke each testified that they believed that Rouse would continue to be responsible for implementing some portion of the CDS heightened supervisory procedures through February 2001, although they were unclear as to which specific tasks. For example, Driver testified that, because Bates had minimal supervisory experience and Muth was subject to heightened supervision, "there was a transition period" of about three months where Rouse "was still overseeing what Mr. Muth was doing" and that "[i]t wasn't like: shut the door; here's Joe Bates; and you're off and running, Joe. . . That's why there was a transition period there." Bates believed that the responsibility for Muth was divided between Rouse and himself.

Rouse, in fact, continued to perform some of the procedures mandated by CDS. Rouse held meetings with Muth in the Denver office on October 2, 2000, November 6, 2000, and December 1, 2000. Bates did not attend these meetings in person or by telephone. After conducting the monthly reviews in October, November, and December 2000, Rouse held no further monthly or quarterly reviews.

Rouse also reviewed some of Muth's journals of Muth's telephone contacts with Colorado customers. Although Rouse now argues that the logs were not intended to be detailed journals of Muth's conversations with customers, Rouse admitted that Muth's logs were unsatisfactory and that he had asked Muth to provide more detail. Subsequently, Kelli Bates began completing Muth's logs. Rouse claims that he delegated the review of the logs to Bates. Rouse was not concerned that Kelli Bates, not Muth, completed the majority of the entries. He also was not troubled by the fact that Bates was reviewing log entries generated by his wife or that Bates failed to initial most of the log's entries. Rouse did not question the gaps in dates of Muth's call logs, which skip dates between October 2000 through January 2001 and then jump to the end of February 2001. 12/

When Muth transferred to the Branch Office, Rouse stopped reviewing Muth's daily transactions and approving new accounts for Colorado residents to determine suitability of a proposed initial transaction as required by CDS. Rouse admitted in testimony that he never questioned Muth as to whether any orders were suitable. Rouse did not notice that certain of Muth's customers were effecting trades without a new account form or effecting margin trades

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heightened supervisory procedures.

12/ The record contains fifty-seven pages of handwritten call logs recording Muth's activities for some, but not all, days between October 23, 2000 and January 10, 2001. Forty-four pages are in handwriting that is not Muth's. The record also contains eight pages of typed call logs recording Muth's activities between February 26, 2001 and March 1, 2001. None of the pages reflects Rouse's initials.

without a margin agreement.

Rouse drafted and signed the first quarterly report that Schneider submitted to the CDS about Muth, dated January 29, 2001, covering the period from November 2000 through January 2001. In that report, Rouse represented that he was Muth's supervisor, that he performed the required monthly reviews and reviewed the telephone logs, that he had discussed suitability of the customer transactions with Muth, and that he had reviewed the monthly statements of the active accounts. 13/ Rouse also stated "on a daily basis, all of the purchase and sale transactions are reviewed." Rouse concluded that there were no problems during the period covered by the report. Rouse did not indicate in the report that he was no longer supervising Muth or that Bates, not Rouse, was conducting the daily reviews and reviewing the telephone logs. Bates was not mentioned in this report.

In a letter dated February 16, 2001, Schneider informed CDS that Bates, not Rouse, would be Muth's supervisor, and further represented that Bates would be responsible for implementing the special supervisory procedures outlined in the October 2, 2000 letter, for which Rouse previously was responsible. 14/

On January 18, 2001, one of Muth's customers, Paul V. Lundy, sent a written complaint to the Commission, accompanied by a tape of Lundy's telephone conversation with Muth. 15/ On January 31, 2001, Commission staff notified Schneider about Lundy's complaint. Driver testified that Rouse also read the letter. 16/ At a meeting held on May 10, 2001, among Muth, Driver, and members of Schneider's board of directors, including Rouse, a copy of the tape was played. 17/ Following the meeting, Schneider suspended Muth for two weeks, "which eventually led to [Muth's] termination or his resignation from the firm."

III.

Steven E. Muth

A. *Misrepresentations and Omissions*. *Gloria Poljanec*. On October 25, 2000, Gloria Poljanec, a resident of Littleton, Colorado, transferred her account from KPSP to Schneider.

13/ Rouse testified that he "viewed the active accounts that [Muth] had had for the months of November and December." However, he denied having to review any account that was not "active," including Paul V. Lundy's. He defined "active" as five or more trades a month. However, the CDS procedures did not limit review to "active" accounts. When he examined Lundy's new account form at the hearing, Rouse agreed that the information in the form required "some further investigation" that might include talking to Lundy and Muth as to suitability.

14/ Muth, Rouse, and Bates were copied on this letter.

15/ See infra text accompanying notes 24, 25.

16/ Driver also testified that it was his "standard operating procedure" to show a serious customer complaint to the regional branch office manger, in this case Rouse.

17/ Bates did not participate in this meeting.

Poljanec was seventy-five years old and caring for her husband and sister, both of whom had Alzheimer's disease. Muth pressured Poljanec into signing a margin agreement and trading on margin although he knew that Poljanec did not want to engage in margin transactions. Muth assured Poljanec that margin trading would not cost her any money, that she would become a millionaire, and that he could double her money quickly. Muth did not explain margin trading or its risks to Poljanec. 18/ While Poljanec testified that she knew that a margin call meant paying more money, she did not understand the concept of margin or the risks associated with it.

Muth persuaded Poljanec to make two margin purchases of Bonso in February 2001, telling her that an impending Schneider research report would drive Bonso's price up so that she could get a "100 percent return on her investment." She testified that Muth "was pushing really hard." He told Poljanec that he had mortgaged his home and put all of his money into buying Bonso. Muth did not tell Poljanec that she was investing in risky and speculative stocks. Poljanec's husband had been placed into a nursing home in 1999. Concerned about covering her husband's medical expenses, Poljanec instructed Muth to sell Bonso, but he repeatedly "talked [Poljanec]. . . out of it," claiming that it "would throw the market." Poljanec followed his advice because "he just put a lot of pressure on" not to sell. 19/

Poljanec received margin calls on March 7 and March 29, 2001. After paying $2,040 to cover a margin call, Poljanec's account essentially was liquidated in April 2001 to cover the remaining margin call balance. 20/

Tena Saltzman. Tena Saltzman (Poljanec's daughter) was fifty-five years old and helping her mother care for her ailing father and aunt. Saltzman had an account with Muth at KPSP, which she transferred to Schneider. 21/

18/ Poljanec's account statement at KPSP for the period ending August 31, 2000, showed that she had more than $36,000 in stock, including Bonso, a margin balance of almost $4,000, and a total portfolio value of approximately $33,000.

19/ Poljanec stated that she "begged and pleaded and tried to get out of all of this, and he wouldn't listen to me."

20/ After Poljanec complained, Schneider reinstated her positions in Bonso and New China Homes, Ltd. and credited her account $2,040. Poljanec explains that she accepted the terms of the settlement because, "I wanted some peace and quiet and time in my life when I wasn't so stressed out. I just wanted to get rid of the stress. That's all. I didn't want to argue or fight with anybody. I just wanted out."

21/ At the time of the transfer to Schneider, Saltzman's account held Bonso and Creative Host stocks, had a margin balance of more than $4,000, and had a total value of more than $19,000. Saltzman also testified that, after the account was transferred to Schneider, "there was more money put into the account over time."

Saltzman testified that the account was for the benefit of her son, a former student at the United States Air Force Academy. According to Saltzman, she had her son's power of attorney to make investment decisions. The Division was unable to obtain from

On December 20, 2000, Saltzman purchased 1,000 shares of Creative Host, based on Muth's representations that Creative Host "was just going to be the most phenomenal company around," and that the stock price would soon reach "$20, $40, $80." Muth did not tell Saltzman that he was purchasing Creative Host for the account on margin, and she never authorized him to do so. At the time of the transaction, Saltzman had not signed a Schneider margin agreement.

Saltzman subsequently purchased shares of Bonso based on Muth's representation that its price would soon "go up to $20, $40 . . . even $100," and that an impending Schneider research report "would show us what a great company it was" and drive the price of the stock up. On December 14, 2000, Muth had requested, but did not receive, approval to distribute a draft Bonso analyst report prepared by the Branch Office on December 7, 2000. On December 20, 2000, Patrick Driver, Schneider's compliance officer, informed Muth that no draft Schneider research reports could be disseminated without the prior approval of the compliance department and Schneider's main office. Schneider's main office did not issue a report on Bonso until April 12, 2001, several months after Muth made this representation.

On several occasions, Saltzman instructed Muth to sell her Bonso stock because her son was out of school, and she wanted to pay his school bills and buy a house. However, Muth convinced her not to sell. Subsequently, Bonso's stock price dropped, and Saltzman began receiving margin calls, which eventually amounted to almost $30,000. 22/ On April 16, 2001, Saltzman signed a margin agreement because Muth told her that she had to sign it or lose everything.

Robert J. Cassidy. Robert J. Cassidy was a seventy-four year old retired plumber and plumbing inspector living in Denver, Colorado. At the time of the account transfer to Schneider, 23/ Cassidy had a margin balance of approximately $100 and a total value of almost $102,000. Cassidy bought Bonso on margin on December 11, December 15, and December 18, 2000, based on Muth's representations that Bonso "was a sure thing" and that the stock price would rise "to at least $40." Cassidy bought Creative Host on margin on December 29, 2000 and recalls Muth telling him that Creative Host was "no risk . . . [and] was going to go sky high." Muth never told Cassidy that Bonso or Creative Host were risky.

On February 12, 2001, Cassidy bought more Bonso on margin based on Muth's representation that ". . . it wouldn't cost . . . a dime[.]" On March 5, 2001, Cassidy bought more Creative Host on margin based on Muth's representation that it was a "sure thing."

Schneider a complete set of Saltzman's account documents.

22/ Saltzman testified that, after the initial investment of $9,000 upon opening the account at KPSP, the account value rose, but "then it just kept continuing to go down."

23/ Cassidy transferred his account from KPSP to Schneider because, having positions in Creative Host and Bonso, he assumed that "nobody else knew anything about the stocks" and was therefore "stuck with Mr. Muth."

Cassidy received a margin call in April 2001. He sold shares of Creative Host and Bonso to pay for the call because he refused to "put any more money in." As a result, Cassidy's account balance at the end of April 2001 was just over $1,000. Cassidy transferred his account away from Schneider in May 2001.

Bernald Acker. In 2000, Bernald Acker was a sixty-five year old resident of Castle Rock, Colorado. He retired in 1998. Acker transferred his account from KPSP to Schneider. At the time of the transfer, Acker's account held shares of Bonso, had a margin balance of more than $4,000, and had a total value of approximately $55,000.

In December 2000, Acker asked Muth to sell his Bonso stock. Muth persuaded Acker not to sell Bonso, and instead urged Acker to buy Creative Host by representing that its price would increase "significantly" – that the "stock would explode" due to "some kind of court case that was to be cleared in a matter of days." When Acker expressed concern that he could not afford to purchase the Creative Host stock, Muth suggested buying on margin. Although Acker then told Muth that he "didn't like margin accounts," Muth reassured Acker that the price of Creative Host would increase. Based on Muth's representations, Acker agreed to buy 5,000 shares of Creative Host, but Muth insisted that he buy 10,000 shares. Muth purchased Creative Host on margin for Acker on December 29, 2000, although Acker had not signed either a Schneider new account form or a margin agreement.

Acker received a margin call on January 9, 2001 and told Muth that he could not afford to pay it. Muth informed Acker that he would have to sell stock in Acker's account to cover the margin call. In an effort to stem further losses, Acker repeatedly instructed Muth to sell all of his holdings in Creative Host and Bonso. Muth refused, insisting that the stock prices would increase, that Bonso specifically would increase to $40, even $70 or $80 per share, and that "a glowing report" on Bonso would affect the price.

Acker received a margin agreement, which he signed without reading on January 19, 2001, after his purchases of Creative Host and the resulting margin calls had occurred. Subsequently, Acker was asked to sign quickly and return a new account form, which had already been completed for him. Acker had "no idea" how the completed information had been supplied because no discussions had taken place. Acker signed the form on January 31, 2001.

In April 2001, Acker received additional margin calls that resulted in the sale of his Bonso and Creative Host shares. By May 2001, Acker closed his account at Schneider with a zero balance.

John Nabozniak. John Nabozniak was a sixty-four year old engineer living in Edmonton, Alberta, Canada. In December 2000, Nabozniak purchased shares of Bonso on margin based on Muth's representations that Schneider shortly would issue a research report on Bonso and that the stock "had the potential of going up to $20 a share." Nabozniak testified that Muth represented that this purchase offered the potential for recovery on prior losses in Nabozniak's account.

After the purchase, Nabozniak "was panicking" and wanted to sell a good portion of the Bonso stock. However, he repeatedly was unable to reach Muth and instead spoke to Daniel Murphy, another Schneider salesperson who worked with Muth. Murphy told Nabozniak, "Steve won't let you sell it." Nabozniak understood that Murphy meant that selling would affect the price of Bonso.

Subsequently, Nabozniak received margin calls. At the time Nabozniak closed his account with Schneider, he had lost the majority of his retirement savings and was unable to retire.

Paul V. Lundy, Jr. During the time at issue, Paul V. Lundy, Jr. was a seventy-two year old federal government retiree living in Boulder, Colorado. Lundy had accounts with Muth at Cohig and Associates, as well as KPSP. When he transferred his account to Schneider in October 2000, Lundy owned positions in Bonso and Creative Host, and his account had a total value of more than $49,000, with minimal margin debt.

Lundy was reluctant to enter into margin purchases because he had received "a blizzard of margin calls" in his KPSP account with Muth. However, on December 12, 2000, two months after opening his account, Lundy purchased 5,000 shares of Bonso on margin, based on representations made by Muth in a telephone conversation on that date. Lundy taped this conversation with Muth. 24/ During this conversation, Muth represented that his branch office controlled Schneider's research, that Schneider had prepared research reports on Creative Host and Bonso, that Creative Host was about to make the "biggest announcement in the company's history," that Muth indirectly owned a hedge fund, which would purchase millions of dollars in Bonso and Creative Host and be operational in days, that Muth obtained inside information from Bonso's president, and that Bonso would trade at $80 per share in the next twelve months. When Lundy stated that he did not want to buy on margin because of the margin calls that he had received at KPSP when he was retired, Muth assured Lundy that there would be "[n]o margin calls." Lundy subsequently refused to sign a margin agreement.

At the time of this conversation, no one had contributed any money to the alleged hedge fund; indeed the hedge fund never was formed. Schneider had not issued any analyst reports on Bonso or on Creative Host, and Schneider never issued a report on Creative Host. There is no evidence that Creative Host made any type of announcement. Lundy received margin calls after this purchase, and he immediately tried to contact Muth because Muth had reassured him that no margin calls would occur. Muth was evasive, and Lundy thought he "had been had." On December 28, 2001, shares of Bonso in Lundy's account were sold to cover the margin call. 25/

24/ Muth claims that "Lundy's tape was spliced and was a clear set-up due to Lundy's prior experience and knowledge." The law judge, however, credited Lundy's testimony that he had a hearing problem and routinely tape recorded his telephone calls to ensure that he understood the content of the conversations. Further, Muth admitted that he made the statements on the tape. We therefore reject Muth's contention that the tape "cannot be used to understand the contents of the conversation."

25/ Lundy received another margin call for $4,700 in early January 2001. Lundy paid this

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It is a violation of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5 to make a misstatement of or to omit a material fact in connection with securities transactions. The law judge found that Muth misstated and omitted material facts, as well as engaged in unauthorized and unsuitable trades. As an initial matter, Muth complains that the law judge failed to credit his testimony asserting that he did not make misrepresentations and that the trades at issue were authorized and suitable. The law judge found that Muth was not credible, noting that he made a series of contradictory statements. The law judge found Muth's customers to be truthful and credible as individuals and collectively. We further note that the customers' testimony was consistent regarding Muth's statements and actions. As we have held, "credibility determinations of an initial fact finder are entitled to considerable weight." 26/ We find no reason to reject the law judge's credibility determinations.

Predictions of specific and substantial price increases for any security violate the antifraud provisions of the federal securities laws if made without a reasonable basis. 27/ In order to persuade customers to buy, or not to sell, Bonso and Creative Host stock, Muth made stock price predictions without any basis. 28/ Muth told Saltzman that Creative Host would soon reach $20, $40, or $80 per share and Bonso would soon go up to $20, $40, even $100 per share. Muth told Cassidy that Bonso would go up to at least $40 per share and told Acker that Bonso would increase to $40, even $70 or $80 per share. Muth also told Lundy that Bonso would reach $80 per share and told Nabozniak that Bonso had the potential to go up to $20 per share. Each of these predictions occurred in December 2000, when the closing price of Creative Host ranged from $1.87 to $5.12 per share, and the closing price of Bonso ranged from $7.87 to $11.56 per share.

The record establishes that Muth had no reasonable basis for making these price predictions. Muth claimed to several of his customers that "unbelievable" Schneider research reports on Bonso and Creative Host would be provided in "about two weeks" and would drive each stock's price up. He also represented that his office controlled the research at Schneider. However, Schneider had ordered him not to issue reports without main office approval, and it appears that Schneider had not issued any analyst's report on Bonso or Creative Host at the time

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margin call by wire transfer because he believed there was no alternative. In May 2001, Lundy entered into a settlement with Schneider, which restored his account to the balance it had held when he transferred it to Schneider.

26/ Laurie Jones Canady, Exchange Act Rel. No. 41250 (Apr. 5, 1999), 69 SEC Docket 1468, 1480 n.23 (citing Anthony Tricarico, 51 S.E.C. 457, 460 (1993), pet. denied, 230 F.3d (D.C. Cir. 2000)). See also Universal Camera v. NLRB, 340 U.S. 474 (1950).

27/ Joseph J. Barbato, 53 S.E.C. 1259, 1273 (1999); Donald A. Roche, 53 S.E.C. 16, 18-19 (1997); Lester Kuznetz, 48 S.E.C. 551, 553 (1986).

28/ See Steven D. Goodman, 54 S.E.C. 1203, 1209 (2001) (finding fraud where sales increased customer losses by dissuading them from selling).

Muth made his representations. Although, at the hearing, Muth continued to claim that his representations were valid, he introduced only a draft of a Bonso research report, an undated draft of a Creative Host analyst report, and a Schneider-prepared report on Bonso dated April 12, 2001, months after Muth made his statements. 29/

In December 2000, Muth represented to Lundy that Muth was creating a hedge fund that would buy large amounts of Bonso, thereby driving up its price. Muth also explicitly stated that this hedge fund would be operational within a matter of days. However, at the time of the conversation, no one had contributed any money to the fund. The hedge fund never became operational.

Muth admitted at the hearing that margin trading is inherently risky and that one cannot guarantee the absence of a margin call or an increase in a stock price. Muth argues that these customers were aware of the risks associated with margin purchases of Bonso and Creative Host because they previously had purchased these securities on margin at other firms on Muth's recommendation. However, Muth misrepresented the impact of purchasing these securities on margin. Muth pressured and ultimately convinced Poljanec to open a margin account and purchase on margin by representing that margin trading would not cost her any money and would make her a millionaire. He persuaded Cassidy to purchase Bonso on margin by representing that it ". . . wouldn't cost . . . a dime[.]" Muth told Lundy that a margin purchase of 5,000 shares of Bonso would result in, "[n]o margin calls, no money due . . . none of that." 30/ Muth also failed to inform Poljanec or Cassidy of the risks associated with margin trading or that they were purchasing risky stocks. Several of these customers received margin calls following their margin purchases and, as a result, had virtually nothing left in their accounts by the time Muth resigned from Schneider.

The record establishes that Muth acted with scienter. 31/ Muth repeatedly exploited the

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29/ Muth also introduced an analyst's report on Bonso, dated February 4, 2001, that was not prepared by Schneider. It is unclear whether this report ever was published or is a draft copy.

30/ Muth testified that when he said "no margin call" to Lundy, he meant no margin call only on the initial trade and that Lundy shared this interpretation. The law judge found this explanation unbelievable, and we agree. The tape and transcript show that Muth made his representation after Lundy informed him that he could not take any more margin calls. In addition, Lundy's prompt complaints following receipt of margin calls establish that he interpreted Muth's statements quite differently.

31/ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976); SEC v. Randy, 38 F. Supp. 2d 657, 668 (N.D. Ill. 1999). Scienter is satisfied if the defendant acts recklessly. Panter v. Marshall Field & Co., 646 F.2d 271, 282 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Randy, 38 F. Supp. 2d at 670. Reckless conduct includes "[a]n extreme departure from the standards of ordinary care . . . that present[s] a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." Meadows v. SEC, 119 F.3d 1219, 1226 (5th Cir. 1997) (internal quotations omitted). Scienter is not required for violations of Securities Act Sections 17(a)(2) and

trust his customers placed in him. He assured the customers that whatever concerns they had about his recommendations – whether it was about losing money, satisfying pre-existing financial obligations, or covering margin costs – were unfounded. Muth made these statements despite knowing that, or at a minimum being recklessly indifferent to whether, the statements were false.

As further evidence of scienter, Muth made other misrepresentations to induce his customers into buying Bonso and Creative Host on margin. For instance, he told Poljanec that he mortgaged his own home to invest in Bonso, implying that it must be a great buy. Muth told Lundy that he spoke with Bonso's president about an imminent and monumental corporate announcement, which implied that Muth had inside information to support his statements about Bonso. 32/

B. *Unauthorized Trading. Poljanec*. Poljanec's Schneider account was non-discretionary. On March 7, 2001, one day before her husband's death, a margin purchase of 1,000 shares of Creative Host was made in Poljanec's account. Poljanec did not authorize this purchase. She received a margin call on March 29, 2001. Poljanec asked Muth to explain why she owed the margin call, but Muth did not respond. She received another margin call on April 4, 2001; Muth again failed to give her an explanation.

Gert DeHerrera. Gert DeHerrera had been a friend of Muth's. In October 2000, DeHerrera transferred his securities account to Schneider from another firm. The account was non-discretionary. Muth asked DeHerrera if he was interested in purchasing a $50,000 block of Creative Host stock. DeHerrera said that he did not have sufficient funds in cash or margin to purchase the stock. 33/

DeHerrera thought it unlikely that he had sufficient funds in his account to make the Creative Host purchase. The law judge credited DeHerrera's testimony that, based on Muth's assurances, DeHerrera believed that, if the Creative Host purchase were made, Muth would use his own funds to purchase the stock because Muth felt badly about having failed to repay money DeHerrera had loaned to Muth. DeHerrera left for a six-week vacation in Mexico. On November 10, 2000, after DeHerrera had gone to Mexico, Schneider purchased 10,000 shares of Creative Host on margin for one of DeHerrera's accounts. 34/ While he was still in Mexico,

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17(a)(3). Aaron v. SEC, 446 U.S. 680, 701-702 (1980).

32/ Muth claims he had a "zealous" belief in Bonso and Creative Host. An honest belief in an issuer's prospects does not in itself give one a reasonable basis for recommending the stock to others. Gilbert F. Tuffli, 46 S.E.C. 401, 405 (1976). In any event, we find that Muth did not honestly believe in Bonso and Creative Host given his conflicting opinions about the companies.

33/ DeHerrera's opening statement at Schneider shows over $84,000 in equities and approximately $67,700 in margin debt.

34/ For reasons that are unclear, Schneider opened two accounts for DeHerrera. The record does not include the account statements for the account in which this Creative Host

Kelli Bates, Muth's assistant, notified DeHerrera of a margin call and the need to liquidate stocks to satisfy the call. DeHerrera did not know about the Creative Host purchase and believed that the cash in his account should cover a margin call on his holdings. 35/ DeHerrera told Kelli Bates to use the cash in his account before any securities were liquidated. However, on December 18, 2000, his securities were liquidated to meet the call.

On December 19, 2000, the day after DeHerrera's account was liquidated, while he was still on vacation, there was a second margin purchase of 10,000 shares of Creative Host stock in his account. DeHerrera did not authorize this second purchase of Creative Host stock.

After meeting with Muth in January 2001 to complain about the transactions, DeHerrera faxed a complaint to Schneider on February 9, 2001 regarding the unauthorized trades. 36/ Although DeHerrera had both telephone calls and personal meetings including Muth, with respect to his complaint, the complaint was never resolved.

* * * *

Unauthorized trading violates the antifraud provisions when it is accompanied by deceptive conduct. 37/ "The deceptive conduct element is met when the broker omits 'to inform the customer of the materially significant facts of the trade before it is made.'" 38/ Muth failed to inform DeHerrera and Poljanec in advance about his effecting trades in their accounts, the quantity of securities he was purchasing on their behalf, and his use of margin. 39/ These

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purchase was made.

35/ Schneider failed properly to process the cash transferred from DeHerrera's Piper Jaffray account, which led to the sale of stocks in his Schneider account to cover the margin calls. He was not informed of the processing error until after a second margin purchase of Creative Host stock was made.

36/ DeHerrera testified that Bruce Bates, the branch office manager, initially asked DeHerrera to postpone having Schneider address his complaint, stating that Muth currently was unavailable and "that it would probably cause less trouble than if it was handled by the office and it might get done quicker." Based on Bates' representations, DeHerrera sent a second letter deferring his complaint.

37/ See Messer v. E.F. Hutton & Co., 847 F.2d 673, 678 (11th Cir. 1988); Brophy v. Redivo, 725 F.2d 1218, 1220-1221 (9th Cir. 1984); SEC v. Hasho, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992) (unauthorized trades violate the antifraud provisions of the securities laws when they are the result of, and accompanied by, "deception, misrepresentation or non-disclosure"); Edgar B. Alacan, Exchange Act Rel. No. 49970 (July 6, 2004), 83 SEC Docket 842, 854.

38/ Alacan, 83 SEC Docket at 854; Sandra K. Simpson, Exchange Act Rel. No. 45923 (May 14, 2002), 77 SEC Docket 1983, 2001-2002 (quoting Donald A. Roche, 53 S.E.C. 16, 24 (1997)).

39/ Alacan, 83 SEC Docket at 854, n.25 (noting that a securities purchase that otherwise is authorized can constitute a violation of the antifraud provisions if it is purchased on margin where the customer did not authorize margin trading). See, e.g., J. Stephen Stout,

customers had not given him discretion over their accounts. Muth acted with scienter in that he was aware that the trading at issue was done without authorization or, at a minimum, was recklessly indifferent to whether his customers had authorized the trades. 40/

C. *Unsuitable Trading. Poljanec*. In 2000, Poljanec was seventy-five years old. Her only sources of income were Social Security and her husband's pension. On October 25, 2000, she transferred her account from KPSP to Schneider. 41/ She signed but did not fill out the requested information on the Schneider new account form. Neither Muth nor anyone else at Schneider ever discussed with her the financial and risk tolerance information that Schneider recorded on the form. The resulting new account form inflated her income and misstated her investment objectives and risk tolerance. 42/

Poljanec's investment goals were "very conservative." 43/ Prior to transferring her account to Schneider, Poljanec was "very stressed out." She was caring for her husband and sister

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Exchange Act Rel. No. 43410 (Oct. 4, 2000), 73 SEC Docket 1441, 1459-1460 ("'Purchasing securities on margin in customer accounts without customer approval violates the antifraud provisions of the securities laws.'") (quoting Hasho, 784 F. Supp. at 1110).

40/ The Order Instituting Proceedings in this matter alleged that Muth engaged in various sales practice violations, although it did not specify unauthorized trades. However, at the prehearing conference, Muth stated that he understood that "some of the general allegations are unauthorized trade allegations." During the hearing, Muth vigorously defended the allegations that he had engaged in unauthorized trades in DeHerrera's and in Poljanec's accounts.

As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, notice is sufficient. See e.g., William C. Piontek, Exchange Act Rel. No. 48903 (Dec. 11, 2003), 81 SEC Docket 3044, 3054 n.23, (citing KPMG Peat Marwick LLP, Exchange Act Rel. No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, 1354, (quoting Aloha Airlines v. CAB, 598 F.2d 250, 262 (D.C. Cir. 1979) (notice is "sufficient if the respondent 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation."). We find that Muth had notice of these allegations.

41/ Poljanec's account statement at KPSP for the period ending August 31, 2000, showed that she had more than $36,000 in stock, including Bonso, a margin balance of almost $4,000, and a total portfolio value of approximately $33,000.

42/ The new account form overstated her annual income by approximately 100% (it stated "$70,000+"), incorrectly set forth her investment objectives as including fifty percent speculation and thirty percent aggressive growth, and incorrectly set forth her risk tolerance as fifty percent maximum risk, thirty percent high risk, and twenty percent businessman's risk.

43/ Poljanec testified that her net worth was $300,000, which included her house, and that her liquid net worth was $40,000.

– both of whom had been suffering from Alzheimer's disease. 44/ When Poljanec transferred her account to Schneider in October 2000, "the bills were mounting up." As Muth knew, Poljanec's husband had entered a nursing home that cost at least $3,000 per month, so she "didn't want to take any risks." Poljanec depended on Muth because she did "not understand the stock market that well."

Cassidy. Muth was aware that Cassidy suffered from cardiac-related medical problems. Although Muth effected trades for Cassidy in December, Cassidy did not sign a blank Schneider new account form until January 31, 2001. He did not complete the information on the form. No one at Schneider, including Muth, asked him about his risk tolerance or about any other information on the form. Cassidy stated that the risk tolerance information entered on the form inflated his willingness to accept risks. 45/ Cassidy executed a margin agreement on January 18, 2001. The handwritten words, "Doesn't Qualify," appear at the top. 46/

Nabozniak. Nabozniak "did not like high risk." Muth took over Nabozniak's account at Cohig and Associates, a broker-dealer, and knew that Nabozniak had a medium risk tolerance. 47/ Nabozniak understood that margin trading was risky and initially refused to trade on margin based on a previous bad experience with margin. However, Muth gained Nabozniak's trust and convinced Nabozniak that "you can't make money unless you go on margin."

When Nabozniak transferred his account to Schneider from KPSP in October 2000, he owned positions in Bonso and Creative Host, had a margin balance of more than $5,500, and his account had a total value of more than $28,000. While he received a new account form, Nabozniak did not complete the form or sign it. 48/ However, someone at Schneider completed the form despite the absence of Nabozniak's signature. Because of pressures at work, Nabozniak did not review the resulting account form or his account statements in detail. However, at the hearing, Nabozniak stated that the risk tolerance information was overstated. 49/

44/ In addition, in 1998, her daughter (Tena Saltzman) had brain surgery, and her grandson was attending Columbine High School at the time of the 1999 shooting tragedy.

45/ Because of his health problems, Cassidy did not want to invest in speculative securities. Cassidy testified that the risk tolerance breakdown of fifty percent businessman's risk, thirty percent high risk, and twenty percent maximum risk was "too high. I'm too old to get in that much risk." Cassidy's net worth was $535,000, and his annual income and liquid net worth were accurately described as $40-45,000 and $25,000, respectively.

46/ The record does not identify the source of the handwriting.

47/ Nabozniak typically invested only "very small amounts of money" in speculative stocks, which he traded with Muth at previous firms.

48/ The record does not indicate whether Nabozniak signed a margin agreement at Schneider.

49/ The form claimed that Nabozniak's risk tolerance was fifty percent maximum risk, thirty percent high risk, and twenty percent "businessman's risk." The record does not indicate whether Nabozniak's financial information (net worth - $500,000+, annual income - $80,000+, or liquid net worth - $50,000+) was accurate.

Lundy. Lundy was retired. He did not want to engage in margin transactions. When Lundy opened his account, he signed a blank new account form, but he did not sign a margin agreement. Lundy testified that the liquid net worth figure was somewhat overstated. 50/ According to Driver's notes, at the May 10, 2001 meeting between Muth and the Schneider board to review Lundy's tape of his conversation with Muth, Muth admitted that the transaction was not suitable for Lundy.

* * * *

A salesperson's recommendations "must be suitable for the client in light of the client's investment objectives, as determined by the client's financial situation and needs." 51/ A salesperson's unsuitable recommendations violate the antifraud provisions of the securities laws if (i) the recommended securities were unsuited to the customer's needs; (ii) the salesperson knew that his recommendations were unsuitable or acted recklessly regarding their suitability in making them; and (iii) the salesperson made material misrepresentations or failed to disclose material information relating to the suitability of the securities, including the associated risks. 52/

50/ Lundy's new account form stated that he had a $250,000 net worth; $50,000 in income, and $90,000 liquid net worth.

Muth notes that Lundy was a securities broker for approximately two years in the late 1950s. We do not believe that this fact, alone, makes the otherwise unsuitable transaction in 2000 in Lundy's account suitable.

51/ Alacan, 83 SEC Docket at 863 n.50 (citing Stout, 73 SEC Docket at 1460 n.47 (citing Donald T. Sheldon, 51 S.E.C. 59, 74 n.59 (1992) ("[T]he broker has a duty to satisfy himself that speculative investments are suitable for the customer and that the customer understands and is willing to undertake the risks."), aff'd, 45 F.3d 1515 (11th Cir. 1995)). As we have held, it is "incumbent" on salespersons, "as part of their basic obligation to deal fairly with the investing public, to make only such recommendations as they had reasonable grounds to believe met the customers' expressed needs and objectives." Richard N. Cea, 44 S.E.C. 8, 18 (1969). See also Kenneth Ward, Exchange Act Rel. No. 47535 (Mar. 19, 2003), 79 SEC Docket 3035, 3057 (salesman violated antifraud provisions based on unsuitable recommendations where salesman failed to disclose associated risks), aff'd, 75 Fed. Appx. 320 (5th Cir. 2003) (unpublished opinion); Canady, 69 SEC Docket at 1482-1483 (finding fraud based on salesperson's unsuitable recommendations of securities purchases on margin).

52/ See Brown v. E.F. Hutton Group, Inc., 991 F.2d 1020, 1031 (2d Cir. 1993) (discussing elements of a private unsuitability claim under Exchange Act Section 10(b)). Scienter, according to the Second Circuit, "may be inferred by finding that the defendant knew or reasonably believed that the securities were unsuited to the investor's needs, misrepresented or failed to disclose the unsuitability of the securities, and proceeded to recommend or purchase the securities anyway." Id. at 1031; Alacan, 83 SEC Docket at 864 n. 52.

Muth admits that Bonso and Creative Host were highly speculative securities. He nonetheless urged his customers to purchase them, although these stocks were not consistent with the customers' investment needs. Poljanec, Cassidy, Lundy, and Nabozniak were each more than sixty years old, and only Nabozniak still was working. Poljanec, Cassidy, and Lundy had relatively modest financial profiles. Poljanec, Cassidy, and Nabozniak were unsophisticated. These customers wanted to pursue relatively conservative investment strategies. Poljanec told Muth that she needed money for her husband's medical treatment. Muth knew that Cassidy had serious cardiac disease. Nabozniak had only moderate risk tolerance and was hoping to retire. At his meeting with the Schneider board, Muth admitted that the transactions in Lundy's account were not suitable for Lundy.

Muth increased the risks to these customers by recommending that they purchase these speculative securities on margin. 53/ Poljanec and Lundy told Muth that they did not want the risk of margin or did not want to make additional purchases on margin. 54/ Muth misrepresented material facts to persuade his customers that there was no risk to purchasing on margin at Schneider, claiming that the price of the stock would rise substantially or that their accounts would not be subject to margin calls. 55/

While Muth suggests that the customers' account documents demonstrate that they were suitable for purchasing these securities on margin, none of the customers completed the information reported in their account forms. 56/ Nabozniak did not even sign his account form.

53/ Alacan, 83 SEC Docket at 865 n.54 (citing Stephen Thorlief Rangen, 52 S.E.C. 1304, 1307-1308 (1997) ("As we have noted, while margin trading increases the risks to customers it also increases the salesperson's commissions by 'permit[ting] the customers to purchase greater amounts of securities, thereby generating increased commissions for' the salesperson, and the potential for abuse.").

54/ Acker also expressed concern about purchasing on margin.

55/ Id. at 865 n.55 (citing Simpson, 77 SEC Docket at 2005-2006) (finding fraudulently unsuitable recommendations based on margin trading where the customers had conservative investment objectives, modest means, and were ignorant of the associated risks and generally unsophisticated regarding investment matters); Stout, 73 SEC Docket at 1461 (finding fraud in connection with unsuitable recommendations based, among other things, on salesman's failure to disclose, to trusting customers, risks associated with margin, and related aggressive trading strategies); see also Canady, 69 SEC Docket at 1482 n.27 (finding fraud based on excessive margin trading and noting the associated risks)).

56/ Muth also suggests that the customers were wealthy and/or sophisticated. Even if true, this argument is without merit. See Steven D. Goodman, 54 S.E.C. 1203, 1210 (2001) (rejecting argument that customers were not defrauded because they were sophisticated or experienced); Henry James Faragalli, Jr., 63 SEC Docket 826, 837 (Nov. 26, 1996); Arthur Joseph Lewis, 50 S.E.C. 747, 749 (1991) (stating that "[t]he fact that a customer . . . may be wealthy does not provide a basis for recommending risky investments"); David Joseph Dambro, 51 S.E.C. 513, 517 (1993) ("Suitability is determined by the

The information Schneider inserted subsequent to receiving customers' signatures inflated the customers' financial information and/or risk tolerance. Many of these customers did not understand the mechanics of margin. Some customers did not sign margin agreements until after margin purchases were made, and at least one customer never signed any margin agreement. 57/ Muth gave these customers a false sense of security by misleading them regarding the adverse impact of margin trading on their accounts.

Muth claims that the investments were suitable for these customers because they had previously purchased Creative Host and/or Bonso on margin. This fact did not give Muth a license to disregard his customers' current financial situation or investment objectives. Muth failed to fulfill his responsibility to ensure that his customers, on a current basis, fully understood the risks involved and were both able and willing to take those risks. 58/

* * * *

Accordingly, we find that Muth, by making material misstatements and omissions and engaging in unauthorized and unsuitable trades, willfully violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5.

D. *Muth's Other Arguments* 1. Muth argues that the law judge unfairly denied his "request for discovery . . . e.g., phone records, subpoenas, depositions and not having the opportunity to cross examine the states witness[es]." 59/ The law judge correctly explained to Muth that the Commission's Rules of Practice provide for only limited discovery. She also repeatedly explained the process for issuing subpoenas to Muth. However, Muth failed to avail himself of that process.

2. Muth asserts that the law judge erred in "leaving less than a few hours for the defense to properly defend." 60/ We do not believe that the law judge hampered Muth's defense in any way. Although he submitted a witness list with sixteen names on it, Muth produced no

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appropriateness of the investment for the investor, not simply by whether the salesman believes that the investor can afford to lose the money invested.").

57/ Although Cassidy's margin agreement was signed, it contains the handwritten words, "Doesn't Qualify," at the top.

58/ Lewis, 50 S.E.C. at 749.

59/ For example, in a pre-hearing conference, Muth claimed that phone records would contradict witnesses "depositions" that he had not spoken to the witnesses in months. The law judge found that the phone records were not sufficiently probative of that issue. She stated that Muth could cross-examine the customers as to the extent of communication they had with Muth, and she permitted lengthy cross-examination of those witnesses.

60/ Muth also claims that attending to his son's severe illness provided "clear grounds for a retrial/mistrial." However, Muth does not explain how this affected his ability to defend himself.

witnesses. Muth vigorously cross-examined the other parties' witnesses. In response to the law judge's inquiry, Muth told the law judge that he was not denied the ability to present witnesses.

3. Muth claims the he was denied the opportunity to testify on direct. The Division called Muth as its witness, and he testified at length. At the close of the hearing, after the law judge had repeatedly admonished Muth that it was his obligation to produce witnesses, Muth stated that he did not have anything further to present. The law judge then determined that Muth was overcome with emotion and that he had rested his case. Muth did not object to this determination. We believe Muth was afforded ample opportunity to present his testimony.

4. Muth argues that the law judge unfairly excluded exhibits that would have contradicted his customers' statements that they were not knowledgeable about margin or about the risks of purchasing Bonso and Creative Host. Muth claims the exhibits demonstrate the customers' "previous investment experience, level of knowledge concerning the speculative nature of the stocks they purchased, and previous experience trading speculative securities on margin."

Two days after submitting his post-hearing brief on August 23, 2004, Muth informed the law judge by facsimile transmission that he would submit exhibits at a later date although he did not identify the exhibits. Muth did not submit those to the law judge. Instead, Muth mailed the forty-seven exhibits to the Division, which moved to strike on September 15, 2004. The law judge concluded that the proffered exhibits either were not relevant to the allegations in the Order Instituting Proceedings or duplicated material previously admitted.

We believe the law judge acted properly. The law judge permitted Muth the opportunity to cross-examine the customers about their previous investment experience. On the basis of their testimony, she found the customers generally were unsophisticated and that their prior experience did not mean that the transactions at issue were appropriate for the customers given their then-current financial situation and/or risk tolerance. Particularly given the evidence of Muth's misrepresentations to these customers about the prospects of Bonso and Creative Host and the lack of risk in margin trading, we agree with the law judge that Muth's proposed exhibits with respect to this issue are duplicative and not relevant. 61/

61/ On appeal, Muth attached to his brief six pages of information relating to the suitability of purchasing speculative stocks for Lundy while he was a customer at two of Muth's former employers. The Division moved to strike this information.

Rule of Practice 452 permits a party to adduce additional evidence only if it is material and there is reason why the documents were not produced at an earlier time. While the documents proffered by Muth evidence that Lundy had dealt with Muth at other firms, they do not refute the evidence of the suitability of these transactions for Lundy at Schneider in 2000. Moreover, the record demonstrates that Muth made misrepresentations to Lundy in the December 12, 2000 conversation that his transaction would not be subject to margin calls. Muth also does not explain why these documents

IV.

Richard J. Rouse

Exchange Act Sections 15(b)(6) and 15(b)(4)(E) provide that we may sanction any person associated with a broker-dealer if we find that such person "failed reasonably to supervise, with a view to preventing [securities law] violations[,] . . . another person who commits such a violation, if such other person is subject to his supervision." 62/ As set forth below, we find that Muth was a person subject to Rouse's supervision within the meaning of the statute and that Rouse failed to exercise reasonable supervision with a view to preventing Muth's antifraud violations.

A. *Muth Was Subject to Rouse's Supervision*. The Division contends that Rouse was Muth's supervisor from October 2000 through February 16, 2001. Rouse testified that he had no responsibility for supervising Muth after Muth moved to the Branch Office in November 2000. The law judge did not credit Rouse's testimony, observing that it conflicted with his investigatory testimony, the testimony of other witnesses, and documentary evidence. As noted above, we do not overturn credibility findings of the fact finder absent compelling evidence to the contrary. 63/ We see no basis to do so here.

Determining if a particular person is a "supervisor" depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability, or authority to affect the conduct of the employee whose behavior is at issue. 64/ There can be little doubt that Rouse had the "requisite degree of responsibility, ability, or authority" to affect Muth's conduct. As an owner, regional sales manager, executive vice president, and a member of the Schneider board, Rouse participated in the decision to hire Muth and in the subsequent determination to suspend Muth and to cause him to resign. 65/

In connection with the actions that were required for Muth to be permitted to associate with the Firm, Schneider informed CDS that Rouse would be Muth's "direct supervisor" and would perform the CDS-mandated heightened supervisory procedures. We reject Rouse's

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were not adduced before the law judge. We therefore grant the Division's motion to strike Muth's exhibit.

62/ 15 U.S.C. §§ 78o(b)(6), 78o(b)(4)(E).

63/ See supra Section III.A.

64/ George J. Kolar, Exchange Act Rel. No. 46127 (June 26, 2002), 77 SEC Docket 3400, 3405-3406; see also Kirk Montgomery, Exchange Act Rel. No. 45161 (Dec. 18, 2001), 76 SEC Docket 1394, 1402, 1408; Patricia Ann Bellows, Exchange Act Rel. No. 40411 (Sept. 8, 1998), 67 SEC Docket 2910, 2912; Conrad C. Lysiak, 51 S.E.C. 841, 844 n.13 (1993), aff'd, 47 F.3d 1175 (9th Cir. 1995) (Table).

65/ As noted above, Bates did not participate in the meeting that led to Muth's suspension and resignation.

contention that, after November 2000, Muth was no longer subject to Rouse's supervision. Although Bates joined Schneider in October 2000, Schneider personnel, including Driver, Bates, and O'Rourke, believed that Rouse would continue to implement at least some portion of the CDS heightened supervisory procedures. Moreover, Rouse admits that he continued to perform some of these responsibilities. For example, until December 2000, he conducted Muth's monthly reviews, which Bates did not attend. He signed the first quarterly report to the CDS dated January 29, 2001, and represented that he continued to be Muth's direct supervisor and had performed the requirements outlined in the October 2, 2000 letter. All of Lundy's, Acker's, and DeHerrera's transactions, and certain of Saltzman's and Cassidy's transactions, occurred during this period.

Rouse argues that the Schneider organizational chart shows that Rouse supervised Bates, not Muth. 66/ However, the chart is contradicted by testimony of other Schneider personnel, the representations made to CDS, and Rouse's admissions that he retained some supervisory responsibilities for Muth.

Rouse also notes that he observed Bates' initials on two order tickets dated December 12, 2000 for purchases of Bonso by Lundy and Cassidy. Rouse argues that this shows Bates' responsibility for reviewing the trade tickets. Bates' initials, however, are consistent with Bates' testimony that he reviewed order tickets as part of the supervisory duties he shared with Rouse. The fact that, between November 2000 and February 2001, Bates exercised some supervisory authority over Muth does not preclude a finding that Rouse also had such authority. As we have held, even where supervisory responsibility is shared, each individual can be held liable for supervisory failure. 67/ Therefore, we conclude that Rouse was Muth's supervisor from October 2000 through February 16, 2001, when Schneider notified CDS that Bates would supervise Muth.

B. *Rouse Failed Reasonably to Supervise Muth*. We agree with the law judge that Rouse failed reasonably to supervise Muth. At the time Muth was hired, Rouse was well aware of Muth's potential for wrongdoing and therefore had an obligation to insure that procedures were in place to supervise him properly. 68/ Rouse knew that Muth had at least four customer complaints pending at KPSP and that Muth wanted to continue to focus in margin transactions

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66/ Rouse further claims that his supervision of Bates was limited to supervision of Bates' sales activities.

67/ Cf. Steven P. Sanders, 53 S.E.C. 889, 904 (1998); Houston A. Goddard, 51 S.E.C. 668 (1993) (compliance director and principal both held liable under NASD rules for failure to supervise salesperson). See also John H. Gutfreund, 51 S.E.C. 93, 111-112 (1992) (settled case) (finding supervisory failure by both president and chief executive officer of firm); Robert J. Check, 49 S.E.C. 1004, 1008 (1988) ("The fact that other officials . . . shared responsibility for supervising the firm's salesmen did not relieve [respondent] of his supervisory obligations.") (citation omitted).

68/ Consolidated Inv. Serv., Inc., 52 S.E.C. 582, 588 (1996) (finding heightened supervision required where registered representative was subject of NASD complaint).

in two speculative stocks. Rouse also knew that various state securities regulators had conditioned, restricted, or requested withdrawal of Muth's registration. CDS had required Schneider to perform heightened supervision of Muth as a condition for granting his registration.

Rouse had undertaken to supervise Muth; yet, he did not object when Muth almost immediately moved to the Branch Office. When Bates became branch manager of the Branch Office in October 2000, Rouse knew, and was concerned, about Bates' lack of managerial experience and his need for "a lot more hand-holding." However, Bates received no training from Schneider, including Rouse, prior to exercising his supervisory responsibilities. Rouse also understood that Bates and his wife received their salaries from the revenue of the Branch Office in which Muth had an ownership interest. 69/

Nonetheless, Rouse began sharing responsibility for implementing the CDS heightened supervisory procedures with Bates in an informal and casual manner. Rouse gradually distanced himself from monitoring Muth's conduct without notifying CDS or determining whether Bates' supervision of Muth was adequate.

The CDS' heightened supervisory procedures required review and approval of all new accounts prior to execution of the initial transaction and daily review of all of Muth's transactions. Rouse claims that the account documents for the customers indicate the suitability of their transactions. However, although Rouse undertook to review the suitability of new accounts, he failed to discover that several customers did not complete new account documentation before transactions were effected for the accounts or signed blank new account documents that subsequently were completed with inflated financial and/or risk tolerance information. Customers also did not complete margin agreements until after margin transactions had been effected in their accounts, and at least one customer, who engaged in margin transactions, never completed a margin agreement.

Moreover, the available new account information indicated that many of Muth's customers were elderly, retired, and/or of limited means. At the hearing, Rouse agreed that the information on Lundy's new account form required "some further investigation." If Rouse had

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69/ Rouse argues that the law judge improperly concluded that the owners of the Branch Office, including Muth, could replace Bates if they wanted to do so. He cites Driver's testimony that Schneider's Compliance Department would be required to file a Form U-5 if the Branch Office tried to fire Bates. He concludes, "Bates was therefore not under the control of Muth[.]"

However, the record demonstrates that Muth controlled Bates' position within the Branch Office. Driver conceded that Muth could have replaced Bates as branch manager and limited Bates to sales activities. This was significant risk for Bates, who, Driver testified, had few if any customers. Rouse also acknowledged that Bates' and his wife's salary were derived from the revenue of the Branch Office. Thus, the level of Muth's sales activity directly affected the income of Bates and his wife.

examined Cassidy's margin agreement, he might have observed that it was marked "Doesn't Qualify." Yet, Muth was concentrating his customers' accounts into highly speculative stocks on margin. We believe that, given what he knew about Muth and the responsibilities he had undertaken for the CDS procedures, Rouse should have examined those accounts more carefully, an examination that reasonably could have included contacting the customers by telephone or mail.

Rouse further asserts that CDS understood that he would not be performing the daily review because the October 2, 2000 letter states that the review could be performed "by Rouse or his designee in his absence." He asserts that Bates was his designee. We think the plain meaning of this language is that someone could perform the daily review if Rouse was temporarily absent, not that it could be performed by an inexperienced supervisor at a distant location with only minimal oversight from Rouse. We believe that the fact that, when Rouse prepared the January 2001 report to CDS, he did not disclose that Bates had been performing the daily reviews reflects that he understood this as well. 70/

Rouse admits that, in spite of the CDS' requirements, he performed only limited reviews of Muth's call logs only until December 2000 and did not initial the call logs as required. At the hearing, Rouse admitted that he found the call logs deficient and required Muth to provide more detail regarding his sales activities. Rouse now claims that the call logs were adequate, and, based on Driver's testimony, that the logs were not required to provide particularized information. Driver, however, testified only that, while the information to be included in the call logs was not defined, the log was not intended to reflect verbatim transactions. As the law judge noted, the inadequacy is evidenced by the entries for Cassidy and Lundy, which merely state "recommend Bonso buy."

Rouse also contends that he became aware of the tape recorded conversation between Lundy and Muth only two weeks before Muth was permitted to resign in May 2001, well after he supervised Muth. However, Schneider received a copy of Lundy's written complaint on January 31, 2001, mentioning the tape. Driver testified that Rouse read the letter. DeHerrera's complaint went to Schneider on February 9, 2001. Given the red flags surrounding Muth, Rouse at a minimum, should have had a system in place for being informed of any complaints that arose in relation to Muth.

Accordingly, we find that Rouse failed reasonably to supervise Muth within the meaning of Section 15(b)(4)(E) of the Exchange Act. 71/

70/ Rouse asserts that Bates's initials on trade tickets evidences that Bates performed the required suitability determination for each transaction. From the record, it appears that Bates either did not perform suitability determinations or performed those determinations inadequately.

71/ The Division also claims that Rouse failed to supervise Bates, who, in turn, failed to supervise Muth. However, we have previously held that an individual cannot be disciplined for failing to supervise another individual who was, in turn, a deficient supervisor. Arthur James Huff, 50 S.E.C. 524 (1991).

C. *Rouse's Other Arguments* 1. Rouse asserts that the law judge denied him the ability to call customer witnesses as his witnesses. In his witness list, Rouse identified two witnesses by name and then added that he wanted to call all the witnesses listed by the Division. The law judge permitted Rouse to cross-examine the witnesses called by the Division, but did not permit him to recall those witnesses on direct. Rouse argues that, on direct examination, he would have elicited information from the customers about their prior investment experience, which would have demonstrated that margin trading in Bonso and Creative Host was suitable for these customers. 72/

Rule of Practice 111 authorizes a law judge "to do all things necessary and appropriate to discharge his or her duties," including, among other things, "regulating the course of a proceeding" and the scope of witness testimony. 73/ Under Rule of Practice 320, the law judge has the authority to exclude irrelevant, immaterial, and unduly repetitious evidence. 74/

We believe the law judge acted within her authority. Muth's cross-examination elicited information on the customers' prior experience. Although Rouse cross-examined the customers, he generally did not ask questions in this area. We agree with the law judge that further evidence on the customer's experience was duplicative and not probative of whether Muth's actions at Schneider evidenced misrepresentations, unauthorized, or unsuitable trades.

2. Rouse also complains that he was not permitted to call Driver and Bates as his witnesses. Both Driver and Bates were listed on the Division's witness list, but not on Rouse's list. When the Division called Driver as a witness, the law judge permitted Rouse both to waive cross-examination and to examine Driver on direct. Rouse did not attempt to question Bates when Bates was called by the Division. The next day, Rouse complained that he had not been permitted to call Bates as his witness. The law judge noted that she had not prevented Rouse from asking any questions when Bates had testified. After a lengthy discussion, she said "When I turn to you to put on your case, whoever you've got here, we'll put them on the stand." Rouse made no further mention of Bates, and Bates did not appear again in the proceeding. At the end of the proceeding, Rouse informed the law judge that he had been permitted to call all the witnesses and ask all the questions that he wanted. 75/ We conclude that Rouse waived his

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72/ The law judge allowed Muth to ask the customers questions about these issues. There is ample evidence that most of the customers previously had bought Bonso and/or Creative Host from Muth on margin. However, there is also ample evidence that Muth repeatedly told those customers that Bonso and Creative Host were about to experience significant price increases and that they would be subject to no risk as to margin. Rouse had undertaken to review all new accounts for suitability, but he failed to contact any of the customers to determine the accuracy of their financial situation or risk tolerance. As discussed above, most of the customers were unsophisticated and trusted Muth.

73/ 17 C.F.R. § 201.111(c),(d).

74/ 17 C.F.R. § 201.320.

75/ The following colloquy occurred:

objection. 76/

3. Rouse contends that he wanted to cross-examine Muth after Muth gave his direct testimony. Because the law judge determined that Muth had rested, Rouse claims that he was deprived of this opportunity. However, Muth testified at length when he was called as the Division's witness, and Rouse cross-examined him. The broad scope of the testimony on direct examination provided Rouse with ample opportunity to cross-examine Muth on his "customer activity and supervision," and Rouse questioned Muth on these topics. When the law judge ruled that Muth had rested, Rouse did not object. We find no evidence that this decision prejudiced Rouse.

V.

The Commission has broad discretion to set sanctions in administrative proceedings. 77/ In determining the need to impose sanctions, in general, we are guided by the following factors:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendants' assurances against future violations, the defendants' recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations. 78/

In assessing whether a cease-and-desist order is an appropriate sanction based on the entire record, we consider, in addition to these traditional factors, the standard set forth in KPMG that, in the ordinary case and absent evidence to the contrary, a finding of past violation raises a risk

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> Law Judge: Let me just say, Mr. Rouse, does that conclude? You've called all the witnesses that you wanted to call, you've given the testimony that you wanted to give, and you've introduced the exhibits you wanted to produce? Does that conclude your direct presentation?
>
> Mr. Rouse: Yes, Your Honor.

76/ The Rules of Practice do not include a specific prohibition against one party incorporating another party's witness list by reference. In the future, we believe that generally it would be the better procedure to permit respondents who give sufficient notice of their wish to conduct direct examination of Division witnesses to follow the procedure that the law judge followed with Driver.

77/ See, e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 188-189 (1973) ("The fashioning of an appropriate and reasonable remedy is for the Secretary [of Agriculture], not the court. The court may decide only whether under the pertinent statute and relevant facts, the secretary made 'an allowable judgement in [his] choice of the remedy.'") (quoting Jacob Siegel Co. v. FTC, 327 U.S.608, 612 (1946)).

78/ Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

of future violation sufficient to support our ordering a respondent to cease and desist. 79/ We also consider whether the violation is recent, the degree of harm to the investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceeding. 80/ We may consider the function a cease-and-desist order serves in alerting the public that a respondent has violated the securities laws. 81/

A. Muth defrauded multiple customers over several months causing significant losses to them. He repeatedly put his interests ahead of those of his customers, in contravention of our nation's securities laws and the obligations owed by a securities professional to his customers.

Muth's misconduct demonstrated a high degree of scienter. He abused the trust that his customers placed in him when he misled them about information related to the stocks he recommended, persuaded them not to sell securities, engaged in unauthorized trading, and made unsuitable recommendations. Muth has not offered any persuasive assurances against future violation, nor has he acknowledged the wrongful nature of his conduct. Rather, Muth continues to deny any wrongdoing and attempts to shift responsibility to his supervisors, both at Schneider and other firms, who, he claims, did not object to the transactions, and to the customers themselves. Although Muth claims that he no longer is active in the securities industry, his involvement in a company whose business he described as "public relations or corporate finance" raises questions about his potential to commit future violations. These factors coupled with Muth's disciplinary history establish that he poses a substantial, continuing risk of harm to investors. 82/ We therefore consider it to be in the public interest to impose a

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79/ KPMG Peat Marwick LLP, 54 S.E.C. 1135 (2001), rehearing denied, Exchange Act Rel. No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, pet. denied, 289 F.3d 109 (D.C.Cir. 2002).

80/ Id.

81/ Id. at 1192 n.138.

82/ In August 2004, Muth consented, without admitting or denying the findings, to the entry of a bar from association with any broker or dealer for conduct occurring while at KPSP. See Steven E. Muth, Exchange Act Rel. No. 50223 (Aug. 20, 2004), 83 SEC Docket 2179.

The 2004 administrative proceeding was based on a civil action also arising from Muth's conduct at KPSP. The U.S. District Court for the Southern District of California entered a final judgment by consent against Muth, permanently enjoining him from future violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5. See SEC v. Muth, (03-CV-2178 WQH (JFS) Aug. 9, 2004). The complaint alleged that Muth, among others, manipulated the price of Creative Host between November 1999 and June 2000.

Muth also was the subject of a disciplinary action in 1991. There, NASD censured Muth, fined him $2,500, suspended him from association with any NASD member for

cease-and-desist order here. We also find it appropriate to require Muth to disgorge his ill-gotten profits in the amount of $14,204.75, plus prejudgment interest. 83/

In determining whether civil money penalties are in the public interest, "we examine whether the illegal activities involved, among other acts, deliberate or reckless disregard of a regulatory requirement; the harm caused to another person; the extent to which any person was unjustly enriched; the respondent's prior disciplinary history; deterrence; and other matters as justice may require." 84/ Under Exchange Act Section 21B, we are authorized to impose a third-tier civil penalty of $110,000 per violation where we find "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and the misconduct resulted in or created a significant risk of "substantial losses . . . to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission[s]." 85/

The law judge determined that Muth's misconduct merited a third-tier penalty because his violations "involved fraud and resulted in substantial losses to his customers and substantial gains to himself." Muth's misrepresentations to his clients, many of whom were elderly and unsophisticated, amply demonstrate his failure to deal fairly with these customers and his disregard for their interests. We agree with the law judge and determine to impose a third-tier civil money penalty.

The law judge granted the Division's request to order Muth to pay a civil monetary penalty of $2,090,000 "based on fourteen purchases of Bonso or Creative Host in the accounts of the customers who testified and his failure to timely execute sell orders for five of these customers." While the law judge found a series of misrepresentations, we believe that Muth's representations with respect to creating a hedge fund or controlling Schneider's research were related to and thus part of his unwarranted price predictions. We further did not find that one of the transactions was unauthorized and that the recommendations to two of Muth's customers were unsuitable. With respect to the unauthorized trade, we believe the customer's testimony indicates he, in fact, did not object to the trade. 86/

Regarding the unsuitability determinations, we believe the record does support a

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ten business days, and suspended him from association with any NASD member in any principal or ownership capacity for one year.

83/ The Division presented evidence that Muth earned $14,204.75 in commissions resulting from purchases and sales in Bonso and Creative Host stock from November 2000 through May 2001 in the accounts of the seven customers who testified. Muth presented no evidence in opposition.

84/ Simpson, 77 SEC Docket at 2010 n.58 (citing 15 U.S.C. § 78u-2(c)).

85/ 15 U.S.C. § 78u-2(b).

86/ We believe that DeHerrera's testimony demonstrates that he did not object to the first margin purchase (10,000 shares of Creative Host made on November 10, 2000), because, although he thought it unlikely that he had sufficient funds in his account to make the purchase, he thought Muth would provide the money to make the purchase.

finding of suitability with respect to Acker, and that there is insufficient evidence to make a suitability determination with respect to Saltzman. We also do not believe the record supports a finding of five instances of "failure to timely execute sell orders." The customers at issue testified that Muth convinced them not to sell and that, as a result, they were aware the sales would not occur.

As a result, we find a lesser number of violations by Muth than was found by the law judge. In addition while, Muth's conduct clearly involved fraud and deceit and was against the interests, and in many instances, express wishes, of his customers, Muth's unjust enrichment of $14,204.75 is relatively small and will be disgorged. As noted above, Muth has already been barred in connection with other conduct. Thus, we believe a lesser penalty than the $2,090,000 ordered by the law judge is warranted.

Based upon the facts and circumstances of this matter, we believe that a civil money penalty based on the number of customers that Muth defrauded, as opposed to the number of purchases made by those customers, is appropriate. Accordingly, we have determined it it in the public interest to assess a third-tier penalty of $110,000 for each of the seven customers that Muth defrauded, for a total of $770,000 that will be added to the disgorgement amount to establish a fair fund for the wronged investors. We conclude that imposing an aggregate third-tier penalty of $770,000 more accurately balances Muth's relatively small unjust enrichment and the sanctions already imposed against him with the egregiousness of his conduct, yet still sends an appropriate deterrence message against future violations.

Muth asserts he cannot pay the sanctions imposed by the law judge. It is well settled that an applicant bears the burden of demonstrating the inability to pay. 87/ However, Muth has offered no support for this claim. Other than stating, "I have no money," and referring to personal difficulties as well as having entered into a settlement related to a separate administrative proceeding adjudicated in August 2004, Muth has not submitted any financial documentation detailing his situation. We conclude that Muth has not satisfied his burden of demonstrating his inability to pay.

Section 308(a) of the Sarbanes-Oxley Act permits the Commission to direct that a civil money penalty be added to a disgorgement fund for the benefit of the victims of violations of the securities laws. 88/ We deem it appropriate that the funds paid to satisfy the civil money penalty be added to the disgorgement fund to be distributed to victims of Muth's fraud, pursuant to Section 308 (Fair Fund for Investors) of the Sarbanes-Oxley Act of 2002.

B. We agree with the law judge that Rouse should be suspended from association with any broker-dealer for nine months and barred from association with any broker-dealer in a

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87/ Brian A. Schmidt, Exchange Act Rel. No. 45330 (Jan. 24, 2002), 76 SEC Docket 2255, 2273. Cf. Rule of Practice 630(e), 17 C.F.R. § 201.630(e) (Respondent in Commission administrative action who fails to file required financial information will be deemed to have waived the claim of inability to pay).

88/ 15 U.S.C. § 7246.

supervisory capacity, with the right to reapply after one year. Rouse, an experienced securities professional and supervisor, should have recognized from many red flags that Muth required intensive supervision and was engaging in fraudulent misconduct. Instead, Rouse abdicated his supervisory responsibility by repeatedly failing to discharge his own duties.

Rouse complains that the sanctions imposed by the law judge are "egregious." Rouse's continuing disregard of specific supervisory responsibilities that he had undertaken permitted Muth to engage in widespread fraudulent misconduct. Rouse knew of Muth's history, Bates' inexperience and conflicts of interest in supervising Muth, and the representations made to the State of Colorado. Rouse has failed to appreciate his obligations as a supervisor. A suspension and bar will impress upon Rouse the seriousness of his lapse in supervision and reduce the likelihood of any recurrence. While Rouse was unemployed at the time of his appeal, we believe it likely that he will seek reemployment in the securities industry. Given his long history of employment in that industry, we believe a supervisory bar will permit the Commission staff and the self-regulatory organizations to monitor and require conditions under which any such association will occur in the future.

Rouse argues that he is unable to pay the civil penalty. There is no dispute as to the accuracy of the financial information submitted by Rouse, which calls into question his ability to pay. We find that the suspension and bar are sufficient sanctions to protect the public interest. On that basis, we have determined not to assess a civil money penalty against Rouse.

An appropriate order will issue. 89/

By the Commission (Commissioners GLASSMAN, ATKINS, and CAMPOS); Chairman COX and Commissioner NAZARETH not participating.

Jonathan G. Katz
Secretary

89/ We have considered all of the arguments advanced by the parties. 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 ACT OF 1933
Rel. No. 8622 / October 3, 2005

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 52551 / October 3, 2005

Admin. Proc. File No. 3-11346

In the Matter of

STEVEN E. MUTH
and
RICHARD J. ROUSE

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Steven E. Muth cease and desist from committing or causing any violation and committing or causing any future violation of Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 thereunder; and it is further

ORDERED that Steven E. Muth disgorge $14,204.75, plus interest determined in conformity with 26 U.S.C. § 6621(a)(2) and compounded quarterly to a fair fund; and it is further

ORDERED that Steven E. Muth pay to a fair fund a civil money penalty of $770,000, pursuant to Section 21B of the Securities Exchange Act of 1934, within 21 days of the issuance of this Order. Such payment shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) delivered by hand or courier to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312; and (iv) submitted under cover letter which identifies the respondent in these proceedings, and the file number of these proceedings. A copy of this cover letter and check shall be sent to Robert M. Fusfeld, Counsel for the Division of Enforcement; and it is further

ORDERED that Richard J. Rouse be, and he hereby is, barred from association with

any broker or dealer in any supervisory capacity with the right to reapply for association after one year; and it is further

ORDERED that Richard J. Rouse be, and he hereby is, suspended from association with any broker or dealer in any capacity for nine months effective fourteen days from the date of this order.

By the Commission.

Jonathan G. Katz
Secretary