ADMINISTRATIVE PROCEEDING
FILE NO. 3-8166

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)
BC FINANCIAL CORP.	)
STUART M. COHEN	)
DAVID DISNER	)
JAMES SNELGROVE	)

INITIAL DECISION

Washington, D.C.
June 30, 1994

Edward J.Kuhlmann
Administrative Law Judge

ADMINISTRATIVE PROCEEDING
File No. 3-8166

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
	)	
BC FINANCIAL CORP.	)	
STUART M. COHEN	)	INITIAL DECISION
DAVID DISNER	)	
JAMES SNELGROVE	)	
	)	

APPEARANCES: William P. Hicks and Penny J. Morgan for the Division of Enforcement

David A. Zisser for the Respondent James Snelgrove and David Disner, pro se

BEFORE: Edward J. Kuhlmann, Administrative Law Judge

This proceeding was instituted by order of the Commission on September 29, 1993, pursuant to Section 8A of the Securities Act of 1933, 15 U.S.C. §77h-1, and Sections 15(b), 19(h) and 21C of the Securities Exchange Act of 1934, 15 U.S.C. §§78o(b), 78s(h), and 78u-3. In the order, the Division alleged that from June 1989 through November 1989, David Disner and James Snelgrove violated and aided and abetted violations of the anti-fraud provisions of the federal securities laws by charging undisclosed excessive markups and markdowns to customers in connection with the purchase and sale of penny stocks. The case against the other respondents, Stuart M. Cohen and BC Financial Corp., were resolved prior to the hearing.

A hearing was held on February 8 and 9, 1994 in Atlanta, Georgia. The Division of Enforcement, David Disner, and James Snelgrove filed proposed findings and conclusions and brief on April 4, 1994 and replies on May 3, 1994.

FINDINGS OF FACT

Respondents

Respondent David Disner has worked in the securities industry since December 1980; he has been registered with the National Association of Securities Dealers, Inc. (NASD) as a general securities principal since May 1984. Stipulation (Stip.) ¶ 2. He holds Series 7, 24 and 63 licenses. Ex. 20 at 15. From 1981 to 1988, Disner worked at Blinder Robinson & Co., a registered securities broker. He began as an order taker, was promoted first to a branch manager and then to division manager in charge of five branch offices. Tr. 140-41.

In August 1988, Disner became vice president of sales and national sales manager with BC Financial Corp. (BC), a registered securities broker-dealer. Stip. ¶¶ 1,3; Tr. 142-43. While serving as vice president of sales, he was supervised by Stuart Cohen. Ex. 20 at 38. Cohen founded BC in August 1988 and hired Disner.

During the period relevant to this proceeding, June 21, 1989 through November 20, 1989, BC conducted a general securities business as a registered broker-dealer. Ex. 19 at 11-12, 16. Cohen owned BC's holding company, Resources Corp. Tr. 253-54. During the relevant period, BC had 120-150 representatives in eight branch offices located in eight states. Tr. 144. Disner, at Cohen's request, became President of BC in May 1989 and remained in that office until May 1990. Stip. ¶ 5, Tr. 143-44. Roy Dunning replaced Disner as national sales manager. Tr. 144. Disner's compensation included a monthly salary, a commission on any trades he generated and a portion of the profits of the firm above a certain level. Stip. ¶ 4. After Cohen resigned in April 1989, Disner became, along with BC's compliance officer, Ricky Hartness, and BC's attorney, Richard Vincent, part of a voting trust that controlled BC. Tr. 98, 146. Disner maintains that he relied on Hartness to advise him whether the pricing procedures were legal. Tr.128-29.

As president, Disner was in charge of monitoring the trading department and the trading tickets submitted by the registered representatives. Stip. ¶ 6. Each day, he saw the trading runs which reflected what BC had paid for the stock and what BC's customer

paid. Tr. 147. He also checked the order tickets each day which indicated what each customer was charged. Tr. 166.

The other remaining respondent, James Snelgrove, has been a registered securities representative since 1983. Stip ¶ 7. Snelgrove holds Series 7, 24 and 63 licenses. Tr. 96. He began as a registered representative at Blinder Robinson in August 1983. Tr. 95. After six months, Snelgrove transferred to the trading room where he handled agency trades. Tr. 95. In September 1988, Snelgrove began working at BC as an assistant trader. Stip. ¶ 8. He assisted with the paper work and the agency trades. During this time, Snelgrove reported to Tony Beshara. Tr. 97. His salary then was $2,000.00 per month plus commissions on any trades he generated. Stip. ¶ 9.

Beginning in April 1989 and continuing until May 1990, Snelgrove was the firm's head or chief trader. Stip. ¶ 10; Tr. 99-100. As director of trading for BC, Snelgrove was paid $3,000.00 per month, commission on trades he generated and a percentage of the trading profits above a certain level. Stip. ¶ 11. He was then supervised directly by the president of the firm, Disner. Stip. ¶ 12. His job was to execute trades, obtain quotes from market makers, determine markups and markdowns charged BC customers for trades, and oversee the trading department employees. Stip. ¶ 14; Tr. 102. He was responsible for the accuracy of the order tickets and for insuring the accuracy of the volumes reported. Tr. 100-101.

The BC Markup and Markdown Policy

During the period from June 21, 1989 through November 20, 1989, BC's markup policy required that transactions be marked up, or marked down, in the case of a purchase by the firm, no more than five percent from a "bona fide representative market price." Stip. ¶ 15. In order to determine the "bona fide representative market price," for markup purposes, Snelgrove was to telephone no fewer than three market makers to obtain current quotes. Id. The lowest offer quote was the "bona fide representative market price" from which the stock would be marked up to five percent, regardless of BC's actual cost in obtaining the stock. Similarly, on purchases by BC from customers, stocks were marked down up to five percent below the highest bid price. Id.

The same policy was employed by the firm to calculate markups and markdowns on all pink sheet stocks sold to, and purchased from, its customers on a principal basis. Stip. ¶ 16; Tr. 148. BC's markups and markdowns were computed using this method regardless of BC's actual cost in obtaining the stock. Tr. 104-105.

During the period from June 1989 through November 1989, BC consistently purchased Catalyst Communications Corp. (Catalyst), Universal Capital, Inc. (Universal) and Regional Air Group, Corp. (Regional Air) stock for prices substantially lower than the market maker quotations on which it relied. Tr. 134, 156-157.

Disner states that the NASD representatives informed him that BC's policy was permissible. But Sandy Seymour and James Angelos, the NASD representatives Disner claims were the source of the

advice, maintain that they never advised BC or any of its representatives that markups for non-market maker, principal trades in pink sheet stocks could be calculated from a market price based on market maker quotations regardless of what BC actually paid for the stock. Tr. 173, 188-89.

During the period from June 1989 through November 1989, BC sold to, and purchased from, its customers shares of Catalyst, Universal and Regional Air stock. Stip. ¶¶ 19, 22, 25. These stocks traded as pink sheet stocks in the over-the-counter market and were sold and purchased by BC on a principal basis. Stip. ¶¶ 21, 24, 27; Tr. 109. BC was not a market maker in Catalyst, Universal or Regional Air. Stip. ¶¶ 20, 23, 26; Tr. 69-70; Ex. 20 at 88; Ex. 19 at 72, 111.

Snelgrove was responsible for calculating the markups and markdowns and reviewing all transactions to insure that securities were priced consistently with the BC markup and markdown policy. Stip. ¶ 13; Tr. 100-02, 111, 113. Disner was responsible for a final review and he would insure that the policy was followed on all pink sheet stocks BC sold to, and purchased from, its customers. Stip. ¶ 17. Snelgrove was responsible for setting the maximum allowable price a stock could be marked up or marked down by a registered representative to a customer. Tr. 102, 104. He also set the lowest allowable price that a registered representative could pay a customer for a stock. Tr. 103. He provided the information to Disner or the branch managers. Tr. 110.

Snelgrove carried out his role by determining the market prices charged or paid for a stock by ascertaining quotations from no less than three market makers to determine the best inside bid or ask quotation. Stocks would then be marked up or down from these quotations. Tr. 103.

During the period from June 1989 through November 1989, Disner was provided with and randomly reviewed copies of all order tickets in connection with the purchase or sale of shares of Catalyst, Universal and Regional Air stock. Stip. ¶ 30.

Commission Examination of BC's Markups and Markdowns

In November 1989, a Commission senior securities compliance examiner reviewed trading by BC in Catalyst, Universal and Regional Air stock. Tr. 46-7. The Commission's staff calculated the markups for each of the stocks. In order to determine BC's cost for each sale transaction, the Commission determined the highest purchase price paid to another broker-dealer by BC for the same security on the day of the sale. If there was no purchase from a dealer, the Commission used the highest purchase price for the security on the preceding business day. The Commission went back three days to find such a transaction, if none existed, then it looked forward up to three days. If there were no sales within the six day period, the Commission in its analysis used the highest purchase price paid to a customer as the prevailing market price. The analysis of the markdowns used the same system of looking first backward as many as three days and then, if no transaction took place, forward as

many as three days or relying the lowest price paid to a customer during the same time. Tr. 56-57, 64.

There were four times when the Commission did not follow this method in it analysis of BC's pricing of Catalyst: On August 1, 1989, BC sold 1000 shares of Catalyst stock at $.875 per share. The Division's analysis in this case went forward two days and determined that the markup was 70 percent. If the generally used method of analysis had been applied in searching for the highest purchase price, the markup would have been 59 percent. On November 1, 1989, BC sold 3,000 shares of Catalyst. The Commission's analysis calculated the markup at 94 percent. If the generally used method of analysis had been applied the markup would have been 88 percent. On August 22, 1989, BC sold 2,500 shares of Catalyst. The markup calculated was 30 percent, while the generally used method would have shown a 38 percent markup. On October 4, 1989, Catalyst sales were made to 14 customers and markups were calculated at 91 percent. When the generally used method is applied the markups were 180 percent. Tr. 60-63; Ex. 1.

From June 21, 1989 through November 20, 1989, BC charged markups in excess of 10% in 182 trades and markdowns in excess of 10% in 13 trades with its customers in connection with the purchase and sale of Catalyst shares. In the Catalyst transactions, the markups and markdowns ranged from 16% to 188% and generated profits above 10 percent, or excess profits, to BC of $320,572. In the trades involving markups, BC's cost for the securities ranged from $.26 to $.675. BC sold these securities to customers at prices

ranging from $.75 to $1.05. In the trades involving markdowns, BC's cost, if it had purchased the stocks from other dealers, would have ranged from $.50 to $.55. Nevertheless, BC paid its own customers $.28 for them. Tr. 66; Ex. 1.

From September 13, 1989 through November 20, 1989, BC charged more than 10 percent markups in 156 sales of Universal stock to its customers. The markups ranged from 23 percent to 163 percent and generated excess profits to BC of $146,152. BC's cost for those securities ranged from $.40 to $.635. The firm sold those securities to its customers at prices ranging from $.78 to $1.05. Tr. 66; Ex. 3.

From August 24, 1989 through August 25, 1989, BC charged more than 10 percent markups to its customers in eight sales of Regional Air stock. The average markup on the trades was 88.9 percent and generated excess profits to BC of $4,651. BC's cost for those securities was $.045 per share. BC sold the stock to its customers for $.085. Tr. 66; Ex. 2.

The excessive markups and markdowns were not disclosed to BC's customers. According to Disner, BC's customers were not told what BC paid for its stocks. Tr. 150, 204. When Disner was questioned by the staff during sworn testimony as to whether he disclosed a markup to his customers, he responded, "You were supposed to?" (Ex. 20 at 77-78) BC's registered representatives never disclosed to their customers what price BC paid for these stocks nor what the firm's gross compensation was. Tr. 204, 207, 222, 281.

Disner and Snelgrove never advised the registered representatives what BC paid for its stocks. Tr. 204, 280-281.

Confirmations sent to BC's customers in connection with the sale of Catalyst, Universal and Regional Air stock did not disclose the cost to BC of the stock sold to its customers, nor did they disclose any markups or markdowns charged. Stip. ¶ 28.

CONCLUSIONS

Primary Violations

Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 15(c) of the Exchange Act and Rule 15c1-2 prohibit misrepresentations or omissions of material facts in connection with the offer, purchase or sale of equity securities. Alstead, Dempsey & Company, Inc., 47 S.E.C. 1034, 1038-39 (1984). Disner and Snelgrove violated the Securities Act and the Exchange Act and the rules of the Commission by implementing a scheme which charged BC's customers retail prices which included undisclosed, excessive markups and markdowns. Duker & Duker, 6 S.E.C. 386, 388-89 (1939).

Undisclosed markups and markdowns of more than 10 percent from the prevailing market price of an equity security is per se fraudulent. Alstead, 47 S.E.C. 1034, 1035; See Charles Michael West, 47 S.E.C. 39, 42 n. 12 (1979); see also e.g. Adams Securities, Inc., 53 SEC Docket 2379, 2384 (March 9, 1993); Powell & Associates, Inc., 47 S.E.C. 746, 748 (1982); First Pittsburgh Securities Corp., 47 S.E.C. 299, 307 (1980). In its sales and purchases of Catalyst, Universal, and Regional Air stock, BC's

markups and markdowns to customers ranged from 16 percent to 188 percent.

BC set the price for its customers by establishing a "bona fide representative price" which was not related to BC's contemporaneous cost. Absent special circumstances, the Commission's policy has been that contemporaneous cost to the firm is the best evidence of the prevailing market price in determining whether the markup or markdown violates the anti-fraud provisions in retail sales by a dealer not acting as a market maker. Alstead, Dempsey & Co., 47 S.E.C. 1034, 1035 (1984); Barnett v. United States, 319 F.2d 340, 344 (8th Cir. 1963).1/

BC based their markups on quotations instead of actual market transactions, although there were contemporaneous purchases by BC from other dealers it could have relied on. Because quotations only propose a sale, they do not reflect the actual result of a completed arms-length transaction and, therefore, are not the most reliable gauge of the market price. Alstead, Dempsey, 47 S.E.C. 1034, 1036. Quotations for obscure, thinly-traded securities are subject to particular scrutiny. See Strathmore Securities Inc, 42 S.E.C. 993, 997 (1966); H. R. Rep. 617, 101st Cong., 2d Sess. 30

1/ Prevailing market price is determined by looking at the wholesale price the dealer contemporaneously paid a market maker when the stock was acquired. Such transactions are ordinarily a "highly reliable indication of prevailing market price." Alstead, 47 S.E.C. 1034, 1035. The transaction is contemporaneous if it occurred within five days of the retail sale. LSCO Securities, Inc., 48 SEC Docket 759, 761 (March 21, 1991). The burden is on the dealer to establish that contemporaneous cost between dealers does not represent the current market price. Powell and Assoc., Inc., 47 S.E.C. 746, 747 (1982).

(reporting Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. 101-429, 104 Stat. 931: "[Q]uotations are not, absent a further showing of their probative value, the appropriate basis for computing penny stock markups."). The record demonstrates that BC always purchased the stock for prices substantially lower than the quotes on which it relied. This alone indicates that the quotes were an unreliable method of determining the contemporaneous price. James E. Ryan, 47 S.E.C. 759, 762 (1982), aff'd 709 F.2d 1518 (9th Cir. 1983).

BC's Unrevealed Markup and Markdown Practice Was Material to Its Customer's Transactions

BC's customers for Catalyst, Universal and Regional Air stock were not informed by BC's registered representatives about what BC had paid for the stock they were selling. The registered representatives were not told by Disner or Snelgrove what the markup or markdown was at the firm. They also did not disclose the markup or the markdown to the customers. Disner testified that he was not aware that he needed to do so.

Snelgrove did not ordinarily communicate with customers in his position as trader but he did set the prices at which the stocks were to be sold or bought. Without his role the fraudulent scheme could not have been carried out.

BC's withheld a material fact from it customers when it did not tell them the market price of the stocks they were purchasing. There was a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made

available. Information about prevailing market prices is material to a determination of whether the transaction should be entered into or completed. Trost & Co., Inc., 12 S.E.C. 531, 536 (1942). It "is the most important basis upon which a dealer's customer may determine whether he is being fairly treated." Id. BC charged its customers between 16 and 188 percent over the market price.

Snelgrove argues that the Commission has not sufficiently defined what amounts to adequate disclosure about markups. Quite the opposite is the case. The Commission has stated that broker-dealers are to provide customers "with sufficient information to make an informed decision about whether to buy or sell securities at the dealer's price." Meyer Binder, 52 SEC Docket 1436, 1460 (August 26, 1992). Where the markup or markdown is a significant part of the price, as it was with regard to Catalyst, Universal and Regional Air stocks, it is disingenuous to argue that it was not known that facts so material to the price had to be revealed.

In fact, all dealers or brokers have known for over 50 years that pricing stocks far above the market price is fraudulent unless the customer is told. BC was obligated to tell its customers that the prices it was charging were far in excess of the market price of the shares. "[T]he failure to reveal the markup pocketed by the firm was both an omission to state a material fact and a fraudulent device. When nothing was said about market price, the natural implication in the untutored minds of the purchasers was that the price asked was close to the market." Charles Hughes & Co., Inc. v. SEC, 139 F. 2d 434, 437 (2d Cir. 1943), cert. denied, 321 U.S.

786 (1944). The court there noted that the Commission has consistently held that a dealer cannot charge prices not reasonably related to the prevailing market price without disclosing that fact. Id.

The respondents cite no circumstance under which a customer might assume he or she was paying or receiving the excessive markups or markdowns which BC set. Neither standard practice of the industry nor any decision of this Commission would have led the respondents to the conclusion that the markup and markdown system used by BC was reasonably related to the market price. BC did not control the market for the stocks at issue, the offers it relied on to set the prices were wholly illusory, and they were not evidence of the prevailing market. Alstead, 47 S.E.C. 1034, 1037 (1984).2/

2/ Snelgrove argues that the practice of markups and markdowns was not regulated by rule and that, therefore, the Commission cannot now hold him accountable. He urges that without a rule he had no notice and was treated unfairly and that the need for notice is required both by the Constitution and the Administrative Procedure Act. Snelgrove, as Commission decisions for well over 50 years indicate, did have notice about how to determine what is a reasonable markup or markdown. He simply failed to pay any attention to those decisions. There is no requirement that those entities or persons the Commission regulates must be told what is right or wrong only by rule. Snelgrove on a daily basis maintained a scheme of pricing where a customer paid in great excess of the market price for shares purchased, or received greatly less than the market price for shares sold, all of which was done without the customer's knowledge. Snelgrove has not shown that the Commission's policy is not reasonably related to the statutory sections prohibiting fraud in the marketplace. In addition, Snelgrove and Disner argue that the Commission should have held this proceeding at an earlier time and that the delay has been to their prejudice. Prejudice must be demonstrated, however, and neither one of the respondents has

(continued...)

Scienter

Both Snelgrove and Disner exhibited knowing misconduct or severe recklessness in effectuating and maintaining the markup and markdown scheme. In part this is based on the inference that arises because the markups often exceeded 20 percent. The record shows that both Disner and Snelgrove knew what they were doing and knew the consequences of their actions. Disner received the trading runs which provided him with a list of what BC had paid for its stocks and what the customers had been charged. Disner also knew that the markups and markdowns were not being told to the customers. As BC's president Disner knew or should have known the proper basis for calculating markups. At the time, he had over ten years experience in the securities industry.

While Disner claims that NASD personnel told him that BC's scheme for pricing stocks was acceptable practice, there is no evidence that corroborates that claim. The testimony from NASD personnel, with whom Disner claims he spoke about BC's pricing, indicates that they did not tell him or anyone else at BC that the scheme used was acceptable. Disner, moreover, told Snelgrove to calculate markups using the policy and knew that Snelgrove was following the policy.

2/(...continued)
shown how the delay hindered them in defending their actions. Each made only a cursory attempt to do so. Both Disner and Snelgrove are currently employed at the same brokerage firm and engaged in the trading and selling of stocks. It is apparent that, assuming there was a delay, it has not had an affect on their ability to earn a living.

Disner argues that unless he knew that what he was doing was illegal and he set out to act illegally, he cannot be held to have acted intentionally or willfully. That is not the standard. Willful means that the act which violated the securities laws was intentionally committed. Disner need not have been aware that his action was illegal. Tager v. SEC, 344 F.2d 171, 180 (2d Cir. 1965). Nor was it necessary that he was motivated by a bad purpose. Robert J. Check, 42 SEC Docket 760, 762 (December 16, 1988). Disner had knowledge of what he was doing. He knew that BC's policy on markups and markdowns commonly resulted in markups and markdowns of over 20 percent from the acquired price and that they were not disclosed to the firm's customers. He conceded that he did not even disclose them to his own customers.

Snelgrove actually calculated the excessive markups and markdowns. He claims that he role was that of a functionary and that he should not be held accountable since he did not deal directly with BC's customers. He also makes much of the fact that he told Cohen when he promoted him to trader that he was not prepared for the job. Nevertheless, he had six years experience in the securities industry. He began as a registered representative in August of 1983 and within six months he was working in the trading room of the firm. By 1989, when he was promoted to BC's head trader position, he had many years of experience effectuating trades for brokerage firms. Snelgrove never articulated for the record just exactly why his inexperience left him without any understanding of his role in executing the markup

and markdown policy. His background at the time he became head of trading at BC leads to the opposite conclusion. At no time did his salary indicate that his role in the firm was clerical. His job was to execute trades, obtain quotes from market makers, determine markups and markdowns charged BC customers for the trade, and oversee the trading department employees. He was responsible for the accuracy of the order tickets and for insuring the accuracy of the volumes reported. He holds Series 7, 24 and 63 licenses.

Snelgrove argues that he had no role in the failure to disclose the excessive markups since he did not directly sell stocks to or buy stocks from customers. That begs the question. Snelgrove set the prices and he knew that the registered representatives were not revealing the markups because he was not revealing it to them. His deceit caused the fraud. In any event, Snelgrove cannot hide behind his managerial role which did not require that he have direct relations with the customer. Nor can he say that it is not his concern what was told to the registered representatives. He was a principal party to the fraud and stood to benefit from the scheme he was carrying out. Without him the scheme could not have been effectuated.

Snelgrove and Disner Aided and Abetted BC in Its Illegal Pricing Scheme

Snelgrove and Disner aided and abetted BC in violating § 15(c) of the Exchange Act and Rule 15c1-2 thereunder when they carried out BC's markup and markdown scheme. Disner was responsible for overseeing the trading department, maintaining the markup policy and ensuring that customers were treated fairly. He knew about the

policy and he knew what his role was in implementing and maintaining the policy. Snelgrove actually determined and calculated the markups and markdowns. Snelgrove and Disner were wholly responsible for maintaining the system of excessive prices for Catalyst, Universal, and Regional Air stock.

It is no answer to say as Snelgrove does that he had no role in effectuating every aspect of the scheme and therefore he cannot be held liable for the result. In order to be held liable for the violations involved here, there is no requirement that each of the respondents had complete responsibility for carrying out each part of the scheme. If that were the case, all a wrongdoer would need to do to escape liability for his or her action would be to divide the scheme into parts and assign a different part to each participant. Snelgrove and Disner aided and abetted BC in its scheme to charge excessive markups and markdowns.

The Public Interest

This is an appropriate case to protect the public interest from future harm. In assessing the public interest the Commission takes into account "the egregiousness of the [respondents'] actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the [respondents'] assurances against future violations, the [respondents'] recognition of the wrongful nature of [their] conduct, and the likelihood that [their] occupations will present opportunities for future violations." Steadman v. SEC, 603 F.2d 126, 1140 (5th Cir. 1979), aff'd on other grounds 450 U.S. 91 (1981).

Disner began as BC's vice president of sales and was promoted to president. As president, he supervised the trading department. It was his responsibility to insure that the markups and markdowns were fair. In that position, he should have known about all the applicable regulatory requirements. He enforced BC's excessive markup and markdown policy. Disner is currently working as a registered representative for another broker-dealer with the expectation of remaining in the securities industry.

Disner points out in his own behalf that the violations ended in 1989, that the policy with regard to markups was uncertain, that the period of time it took to bring this case to hearing was excessive, and that the NASD has already sanctioned him for "essentially the same" conduct. Disner also maintains that he exhibited good faith in implementing the markup policy by consulting the NASD on the markup policy. He claims that he has always had a spotless record until this case.

Disner's most material claims are not supported by the record. There is no evidence that the Commission's policy about markups and markdowns was uncertain. To the contrary, the policy about excessive markups and markdowns is well established and of long standing. Furthermore, there is no corroborating evidence which substantiates Disner's claim that he consulted the NASD and that the NASD told him BC's markup and markdown policy was acceptable pricing practice. If that were the case, why would the NASD have sanctioned him for what was in his mind "essentially the same" conduct? It appears that while this case was pending, Disner did

not engage in additional illegal activity. There is also evidence that he has, since leaving BC Financial, sought to resolve questions he had by consulting the appropriate regulatory body.

The Division requests that Disner be ordered to permanently cease and desist from committing or causing any violation or future violation Section 17(a) of the Securities Act and Sections 10(b) and 15(c) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder. It also requests that Disner be permanently barred from association with any broker, dealer, municipal securities dealer, investment adviser or investment company, and from participating in an offering of penny stock.

Because Disner was president of BC and worked in the securities industry for a long time as a supervisor, there was every reason to expect that he would have understood the unfairness to BC's customers of its pricing policies. It is not credible that Disner believed that markups and markdowns of as much 188 percent were reasonable or fair, or that such markups and markdowns were not material facts which should have been revealed to BC's customers.

He still maintains that he never had any doubt about BC's pricing policy. During the hearing he attempted to shift the blame to the NASD or other less responsible employees at BC as justification for his actions. Moreover, his present occupation does present the risk that similar schemes could be presented and, if his past is prologue to the future, he would willingly implement them. While there is no evidence that he has violated the

securities laws since 1989, that is what might be expected of an experienced broker who is under scrutiny by the Commission and an order of the NASD. BC's markup and markdown policy existed for five months and involved hundreds of transactions and hundreds of thousands of dollars.

Snelgrove was BC's chief trader during the period reviewed in this proceeding. He calculated the markups and markdowns and was aware of how excessive they were. There is no evidence that he took sufficient steps to determine what was a fair pricing system when he had doubts or to advise the registered representatives or the customers about the size of the markups and markdowns.

Snelgrove is still employed as a trader. He is with the same firm as Disner. The Division maintains that because Snelgrove still performs the same function, there is still a risk that he might violate the markup and markdown policy. The Division requests that Snelgrove be ordered to permanently cease and desist from committing or causing any violation or future violation of Section 17(a) of the Securities Act and Sections 10(b) and 15(c) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder, that he permanently be barred from association with any broker, dealer, municipal securities dealer, investment adviser or investment company and that he permanently be barred from participating in an offering of penny stock.

Snelgrove argues that he should not be sanctioned because the statutory violations took place when he was under supervision, no other violations have marred his record in the industry, the NASD

did not bring an action against him, he never tried to hide the method he used to compute the markups and markdowns, the issue of markups is complex, he was inexperienced as a head trader, and he sought advice from the compliance officer about the markup and markdown policy.

Snelgrove was not as he suggests a neophyte in the trading room or in the securities business. He has been a registered securities representative since 1983. He holds Series 7, 24 and 63 licenses. He began in the trading room six months after he began working in the industry. In September 1988, he began working at BC as an assistant trader. In April 1989 and continuing until May 1990, he was the firm's head trader. He was supervised only by BC's president. While he maintains that he was not well equipped to take the position, his salary was increased by 33 percent when he became chief trader. He also could have received a percentage of the trading profits above a certain level. It was in his interest to maximize the income of the firm.

Snelgrove maintains that he consulted with BC's compliance officer, Ricky Hartness, about the legality of the pricing scheme. Hartness had great difficulty remembering in his testimony what he told Snelgrove, if anything. In fact, he could not even remember BC's method for pricing stocks, even though he wrote the manual. Assuming Snelgrove did consult Hartness about the legality of BC's pricing scheme, that inquiry does not absolve him. Snelgrove knew something was wrong with BC's pricing system for penny stocks. And no matter what he claims he was told, it is not credible that a

trader with his experience would not have realized that markups of 188 percent were excessive and that such information would be material to an investor's decision to buy or sell.

Snelgrove also argues that no sanction is warranted against him by the Commission since the NASD took no action against him. There is no evidence that the NASD found Snelgrove to be without fault and there is no reason to make such an inference. The record does not establish that the illegality of the markup and markdown policy used here was in doubt, nor is there any question about Snelgrove's role.

In any event, Snelgrove urges that his actions do not warrant sanctions as severe as those advocated by the Division. To support his claim he points to sanctions imposed in other cases. The appropriate sanction in this case depends not on other cases, however, each of which has its own peculiar facts, but it must be based on all the circumstances as they are presented in this case. While Snelgrove argues that past decisions of the Commission permit only a minor sanction, another conclusion might be that the lesser sanctions have not protected the public interest because Snelgrove and Disner were not deterred. If the purpose of sanctions is to deter future conduct by others in the industry and protect the public from harm when they invest in the marketplace, then a greater sanction than imposed in the past is called for here.

Under the circumstances of this case, Snelgrove and Disner will be ordered permanently to cease and desist from committing or causing any violation or future violation of Section 17(a) of the

Securities Act and Sections 10(b) and 15(c) of Exchange Act and Rules 10b-5 and 15c1-2 thereunder. In some cases this might not be necessary where following the wrongdoing it is apparent that the respondents have not violated the statutes again and they are no longer employed in the securties industry. But in this case the respondents have been under scrutiny following their statutory violations and the remedy imposed on past violators obviously was not enough to deter either of them. The path of legality was evident here and yet for five months at great financial benefit to the firm and the respondents the law was violated.

Because the record demonstrates that neither one of the respondents was able to stop what they knew to be a highly questionable practice of substantial markups and markdowns of penny stock until the NASD and the Commission began their investigations, both respondents should be barred from participating in any offering of penny stock. The magnitude of the respondents overcharges refutes any claim of good faith. There are no circumstances that would justify markups as high as 188 percent. At no time did the respondents stop their practices voluntarily; it was only the threat of regulatory sanction that brought their scheme to an end.

Since this proceeding was initiated, neither of the respondents has been involved with penny stocks and there is no evidence that they have acted similarly with regard to other securities. This, might, without any other evidence, lead to the conclusion that the need to bar them from association with a

broker-dealer involving other kinds of transactions is not so great. Nevertheless, both of the respondents held important supervisory positions at BC in which they were responsible for the honesty of the pricing system of the firm. In order to deter others and to insure that once the regulatory eye of the Commission is averted there is no further wrongdoing, Disner will be suspended from association with a broker-dealer for ninety days because of his overall supervisory role as president of BC, which included Snelgrove, and Snelgrove will be suspended from association with a broker-dealer for sixty days because of his key role as head trader. These sanctions are necessary because of the vulnerability of the pricing mechanism when those in charge fail to exhibit good faith in carrying out their responsibilities to the firm's clients.

ACCORDINGLY, the respondents, David Disner and James Snelgrove, are ordered permanently to cease and desist from committing or causing any violation or future violation of Section 17(a) of the Securities Act and Sections 10(b) and 15(c) of Exchange Act and Rules 10b-5 and 15c1-2 thereunder;

IT IS FURTHER ORDERED, that David Disner and James Snelgrove are permanently barred from any offering of penny stock;

IT IS FURTHER ORDERED, that David Disner is suspended for ninety days and James Snelgrove for sixty days from association with any broker-dealer.

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision will become the final decision of the Commission as to any party who has not, within fifteen days after service of this

initial decision, filed a petition for review pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review the decision. If the respondent timely files a petition for review, or the Commission takes action to review, the initial decision will not become final. 3/

Edward J. Kuhlmann
Administrative Law Judge

Washington, D.C.
June 30, 1994

3/ The respondent raises various other arguments which have been considered and rejected. All proposed findings and conclusions submitted by the parties have been considered, as have their arguments. To the extent such proposals and contentions are consistent with this initial decision, they are accepted. In all cases where applicable, the demeanor of the witnesses has been considered in assessing their testimony. The conclusions reached are based upon a preponderance of the evidence.