

2. The Instant Message Review Actually Conducted During August 2004 Did Not Follow Newbridge's Written Supervisory Procedures.

As to the period when Kantrowitz traded Concorde, Amico and Goldstein maintain that Newbridge had a written instant message review policy, but that Bush, the firm's trading compliance officer, conducted a random review that "unfortunately" missed the instant messages between Oehmke and Kantrowitz that are at issue in this proceeding.

Newbridge's June and August 2004 Manuals represented that the firm's information technology department would provide hard copies of all instant messages to the trading compliance officer (DX 118 at 66, DX 119 at 74). The 2004 Manuals also required the trading compliance officer to review all instant messages on a weekly basis; to date, initial, and retain the hard copies; and to note any corrective action taken (DX 118 at 66, DX 119 at 74).⁴⁴ The Trading Compliance Manager Monthly Supervisory Checklist, adopted in August 2004, represented the first time that Newbridge required the trading compliance officer to attest in writing that he was reviewing instant messages (Tr. 973-74; DX 103).

On July 21, 2004, Brown circulated an e-mail, reminding his subordinates in the compliance department to read the relevant section of the newly-revised Manual (Tr. 2306-07, 2345-46; DX 102). The e-mail also told the recipients that they should "ensure this is done effective this week" (DX 102). Brown further directed Wells and Barbara Hoops (Hoops) to "follow up" (DX 102). I infer that the language "effective this week" signals a change in Newbridge's policy regarding instant message review.

The written supervisory procedure set forth in the 2004 Manuals was not followed in practice. There is no evidence that anyone at Newbridge reviewed hard copies of all instant messages on a weekly basis during July and August 2004, while Kantrowitz was trading Concorde. Amico testified that Wells and Hoops were responsible for such a review after Perich resigned (Tr. 1274). There is no evidence as to what review, if any, Wells and Hoops actually performed between late May 2004, when Perich left the firm, and early August 2004, when Bush rejoined the firm. Bush was responsible for reviewing instant messages during and after August 2004 (Tr. 2877). However, Bush reviewed only a random sample of electronic versions of instant messages during the weeks of August 2-6 and 9-13, 2004 (Tr. 2384-85, 2436).⁴⁵

⁴⁴ The delegation of responsibility for instant message retention and review that is reflected in the June and August 2004 Manuals is consistent with the spreadsheet a Newbridge staff member prepared for Amico and Goldstein on May 21, 2004 (Tr. 1251-56; RX 66). The spreadsheet was prepared well after Kantrowitz had stopped trading in Roanoke, and it was contemporaneous with Perich's resignation (Tr. 1269-70, 1272, 1936). Its probative value is limited to the period when Kantrowitz traded Concorde.

⁴⁵ August 2-6, 2004, was Bush's first week on the job. During that week, he also helped Newbridge to switch clearing firms (Tr. 2385, 2428-29). Amico changed Wells' duties to DSCO effective July 30, 2004—six months later than Newbridge told the Commission's staff the DSCO position would be filled (DX 106, DX 116 at 5). However, there is no evidence as to why

Based on his other observations, Bush quickly realized that the Concorde transactions were likely to draw scrutiny from regulators (Tr. 2402-03). However, even then, there is no evidence that he pulled the Kantrowitz-Oehmke instant message traffic for analysis. As Bush settled into his job, he later spent four to five hours a month reviewing a random sample of instant messages (Tr. 2391). He did not review all the instant messages, and the information technology department did not provide him with hard copies to initial and retain (Tr. 2391-92, 2436, 2464-65).

There is a significant disparity between what Newbridge's information technology department was capable of delivering and what Breitbart and Brown, the drafters of Newbridge's 2004 Manuals, assumed it was delivering. The Division established that Newbridge's information technology department never printed hard copies of all instant messages, even as late as August 2004 (Tr. 2392). When Newbridge again revised its Manual in March 2005, the 2005 Manual retained the same wording as the June and August 2004 Manuals, stating that the information technology department was responsible for delivering hard copies of all instant messages to the trading compliance officer (DX 133, § 5.14.2).

During the Commission investigation leading to this proceeding, Amico and Goldstein learned that no one at Newbridge had reviewed any instant messages before August 2004 (Tr. 1275, 1642). Amico and Goldstein responded by shutting down instant message capabilities for everyone at the firm in 2005 (Tr. 1275, 1642-43, 2876-78).

IV. WITNESS CREDIBILITY

Oehmke, Bush, Breitbart, and Buddie were generally credible witnesses. With the reservations previously noted, see supra notes 13 & 41, Bojadzjev and LeGaye were also credible witnesses.

Kantrowitz was not credible when he testified that he was unable to remember why the NASD disciplined him in 1996, why he was subject to a registration agreement at Newbridge, and whether he knew that Kos was involved with Concorde. Equally incredible were his claims that he believed Bojadzjev to be a mathematician with a short term trading strategy; that no insider trading occurs if a registered representative executes a transaction for a customer possessing non-public information, as long as the registered representative does not execute a similar transaction in his own account; and that "I am away" means "I am out of town." Like Kantrowitz, Amico, Goldstein, Vallejo, Perich, and Brown were credible only in part.

The Division engaged John E. Pinto (Pinto) to provide expert testimony about whether Kantrowitz manipulated the market for Roanoke and Concorde (Tr. 773-835; DX 124). Pinto has almost forty years of regulatory and compliance experience in the securities industry. From

Amico, Goldstein, or Brown did not assign Wells and Hoops, the junior compliance officers singled out in Brown's July 21 e-mail, to review the instant messages during the August 2004 transition period, if Bush was occupied with other matters.

1989 to 1997, he was Executive Vice President for Regulation at the NASD, and was responsible for all of the NASD's examination, surveillance, and enforcement programs. He is now managing director of Renaissance Regulatory Services, which provides regulatory and compliance consulting services to brokers and dealers. I find Pinto well qualified to offer expert opinion testimony.

Pinto opined that Kantrowitz knowingly participated in fraudulent schemes to manipulate the prices for Roanoke and Concorde at the direction of Bojadzjev and Oehmke, respectively (Tr. 774-75; DX 124 at 3). In Pinto's view, Kantrowitz did so to facilitate the liquidation by Bojadzjev and Oehmke of large blocks of stock in Roanoke and Concorde, respectively (Tr. 775; DX 124 at 3).

I have disregarded those portions of Pinto's presentation that relied on facts not in evidence and/or expressed opinions on issues not covered by the OIP (Tr. 827-34; DX 124 ¶¶ 8, 11, 12, 15, 18, 19). These include Pinto's testimony that: (1) Newbridge and Kantrowitz promoted themselves as specializing in liquidating large blocks of illiquid stocks and as being one of the largest firms in the country when it came to liquidating Bulletin Board and Pink Sheet stocks; (2) Kantrowitz won many awards for his productivity at Newbridge; (3) 300 million shares represented "virtually" half the public float of Roanoke stock; (4) with respect to Roanoke, "the parties" enlisted "at least" one other market maker to facilitate the manipulative scheme, and Kantrowitz acted "possibly in collusion" with "at least" one other broker-dealer; (5) with respect to Concorde, "it appears highly likely (and Kantrowitz was aware)" that Oehmke had accounts "at more than just one other broker-dealer;" and (6) with respect to Concorde, "multiple parties," not merely Kantrowitz and Hansen, acted in collusion. Assertions (1)-(3) reflect matters that may find support in the investigative record, but that the Division elected, for whatever reason, not to present during the hearing (Tr. 832). Assertions (4)-(6) are different: they stray well beyond any allegation in the OIP and any evidence presented at the hearing.

It was surprising that Respondents' counsel asked Pinto questions that all but invited him to evaluate the credibility of a prior witness's testimony (Tr. 796, 824). I have disregarded both the questions and the responses. See United States v. Scop, 846 F.2d 135, 142 (2d Cir. 1988).

Pinto described Kantrowitz as "aggressively bidding up the shares of [Roanoke]" and as "consistently leading bids [for Roanoke] higher and higher" (DX 124 ¶¶ 20-21). This was hyperbole. Newbridge made 615 bid changes in Roanoke during the relevant period: 315 bid changes up and 300 bid changes down (DX 47, last page). It is true that Kantrowitz's bids on behalf of Bojadzjev increased in price during the period before November 28, 2003, and between December 10 and 12, 2003 (DX 65). However, the upward movement was measured in tenths of a penny and hundredths of a penny. Audit trail data show Roanoke transaction prices falling at other times (DX 46, trades ## 15-21, 41-56).

John R. Smith (J. Smith) testified as an expert witness for the Division on supervisory issues (Tr. 2476-2596; DX 123). J. Smith has approximately forty years of experience in the securities industry. He has been a registered representative, branch manager, president, and owner of a brokerage firm and an investment adviser, and he has created and supervised compliance departments and written or revised compliance and supervisory manuals. J. Smith

has also served as a consultant for customers of securities firms, companies within the securities industry, and regulators (DX 123, Ex. B). I find J. Smith well qualified to offer expert opinion testimony.

J. Smith opined that Amico and Goldstein failed to discharge their supervisory obligations (DX 123 at 8-22). In J. Smith's judgment, Amico and Goldstein: (1) possessed ultimate joint supervisory responsibility for compliance at Newbridge; (2) failed reasonably and effectively to delegate their supervisory duties; and (3) were on notice that their delegation was not reasonable and effective (DX 123 at 8-22).

David E. Paulukaitis (Paulukaitis) testified as an expert witness for Amico and Goldstein on supervisory issues (Tr. 2693-2773, 2781-2838; RX 154). Paulukaitis is managing director of Mainstay Capital Markets Consultants, Inc. (Mainstay), a firm that provides compliance consulting services to brokers, dealers, and registered investment advisers. Mainstay entered into a consulting agreement with Newbridge in August 2006, and has provided general compliance consulting services to the firm since then. Before Paulukaitis joined Mainstay in 2005, he was employed for twenty-three years in the Atlanta District Office of the NASD. Paulukaitis has also served, and is currently serving, as an expert witness on behalf of the Division in conjunction with other administrative proceedings (RX 154 at 4-5). I find Paulukaitis well qualified to offer expert opinion testimony.

Paulukaitis did not offer an opinion about market manipulation, nor did he evaluate the adequacy of Newbridge's written supervisory procedures (Tr. 2705, 2710-11, 2714, 2783). He opined that the delegation of supervisory authority by Amico and Goldstein was reasonable because: (1) the individuals to whom supervisory responsibility was granted were qualified, experienced, and knowledgeable; (2) Amico and Goldstein established mechanisms for routine follow-up; and (3) when questions or concerns came to their attention, Amico and Goldstein took reasonable steps to address those matters (RX 154 at 35).

In preparing his direct written testimony, Paulukaitis interviewed several Newbridge employees, each for an hour or more (Tr. 2703-04). He then based his opinions, in part, on what these employees told him (Tr. 2704). Two such interviewees, Robin Bush and James Acevedo, did not testify during the hearing. Other interviews produced material that, on balance, was harmful to Respondents. For example, Vallejo admitted that he occasionally procrastinated in reviewing trade blotters and Brown volunteered his belief that Vallejo just occasionally did not want to review trade blotters (RX 154 at 16-17). Perhaps the most damaging interview statement came from Amico, who told Paulukaitis that he had a "distinct recollection" of discussing instant message review with Perich "on more than one occasion" after July 1, 2003 (RX 154 at 30). As previously discussed, Amico testified quite differently during the Commission's investigation, and quite differently again at the hearing. See supra note 43.

The Division moves to strike all references to these extra-record interviews from Paulukaitis's direct written testimony (Tr. 2838-39). I deny the Division's motion. Paulukaitis conducted these interviews because he was looking for inconsistencies with prior investigative testimony (Tr. 2704). In Amico's statement about his "distinct recollection," Paulukaitis struck

the mother lode of inconsistencies. I have not given any weight to Paulukaitis's other extra-record interviews.

DISCUSSION AND CONCLUSIONS

I. KANTROWITZ VIOLATED THE REGISTRATION REQUIREMENTS.

OIP ¶ I.58 alleges that Kantrowitz willfully violated Sections 5(a) and 5(c) of the Securities Act because he sold Roanoke shares that were not the subject of an effective registration statement.

A. Kantrowitz Participated in an Unregistered Distribution of Roanoke Stock.

Section 5(a) of the Securities Act prohibits any person, directly or indirectly, from selling a security in interstate commerce unless a registration statement is in effect as to the offer and sale of that security or there is an applicable exemption from the registration requirements. Section 5(c) of the Securities Act prohibits the offer or sale of a security unless a registration statement as to such security has been filed with the Commission or an exemption is available. The purpose of the registration requirements is to “protect investors by promoting full disclosure of information thought necessary to informed investment decisions.” SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953); SEC v. Murphy, 626 F.2d 633, 642-43 (9th Cir. 1980).

The elements of a prima facie violation of Section 5 are that (1) no registration statement was filed or in effect as to the security; (2) the respondent, directly or indirectly, sold or offered to sell the security; and (3) interstate transportation or communication or the mails were used in connection with the offer or sale. SEC v. Cont'l Tobacco Co., 463 F.2d 137, 155 (5th Cir. 1972). Section 5 imposes strict liability on offerors and sellers of unregistered securities, regardless of any degree of fault on the seller's part. Swenson v. Engelstad, 626 F.2d 421, 424 (5th Cir. 1980).

The prohibitions in Section 5 extend not only to those who engage in the actual sale of securities, but also to those who engage in significant steps in the distribution process. A respondent may be held primarily liable for a securities registration violation if he or she was a “necessary participant” and a “substantial factor” in the unlawful transaction. See SEC v. Calvo, 378 F.3d 1211, 1215 (11th Cir. 2004); Murphy, 626 F.2d at 649-52.

Willfulness is shown where a person intends to commit an act that constitutes a violation. There is no requirement that the actor also be aware that he is violating any statutes or regulations. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 & n.5 (2d Cir. 1976).

The parties agree that Bojadzijeve received 300 million shares from Roanoke under the Form S-8 registration statement dated November 21, 2003, and then resold more than 233 million of these shares through his Newbridge account within six weeks. Kantrowitz and Bojadzijeve communicated by facsimile, telephone, and instant message (Tr. 188, 471, 477; DX 44, DX 65). Kantrowitz also traded Roanoke through the electronic capabilities of the OTCBB.

With Kantrowitz's prodding, Newbridge authorized Bojadzjev to remove some of the proceeds from these sales by wire. The resale transactions therefore used the instruments of interstate commerce.

No registration statement was in effect as to the 233 million shares of Roanoke stock that Bojadzjev resold to the general public through Kantrowitz. A registration statement permits an issuer, or other persons, to make only the offers and sales described in the registration statement. SEC v. Cavanagh, 155 F.3d 129, 133 (2d Cir. 1998). Form S-8 provides, in certain situations, for the resale of shares pursuant to a reoffer prospectus or a post-effective amendment to the Form. In the alternative, an issuer may register the reoffer or resale of such shares by means of a separate registration statement. The Commission's official public records (EDGAR) do not contain such a filing with respect to the Roanoke shares at issue (official notice) (Order of April 13, 2009). Respondents might still argue that the resale transactions were exempt from registration, but they must sustain their burden of showing that Bojadzjev was a person other than an issuer, an underwriter, or a dealer. As discussed infra, they have not done so.

Kantrowitz's liability need not turn on whether Roanoke's initial grant of shares to Bojadzjev was properly registered.⁴⁶ Assuming arguendo that Roanoke's Form S-8 was effective as of November 21, 2003, because Roanoke intended to compensate Bojadzjev for

⁴⁶ Amico and Goldstein urge me to place great weight on the fact that Bojadzjev lied to Kantrowitz and others at Newbridge. I decline to do so. Kantrowitz easily could have determined from the Commission's web site that there was no reoffer prospectus, no post-effective amendment, and no separate registration statement covering the resale of these Roanoke shares. Kantrowitz did not need to speak to Bojadzjev to obtain this information. Kantrowitz also could have determined from reading Bojadzjev's account opening documents that Bojadzjev was twenty-three years of age, with a limited formal education. He then could have reached his own conclusions as to whether such a person would be able to perform the full range of duties described in the consulting agreement.

Amico and Goldstein also argue that there is no evidence that Newbridge's compliance department did not eventually review Roanoke's November 21, 2003, Form S-8 and the attachments thereto. This claim is dubious, at best. Breitbart never even read the Form S-8 when he met with Bojadzjev and recommended closing his account (Tr. 2676-80). Brown never even ensured that the questionnaires were completed (Tr. 2242-44). Any competent compliance official reading Roanoke's Form S-8 would immediately have been struck by two discrepancies that are apparent on the face of the document. On page 1 of the Form S-8, there is the statement: "Approximate date of commencement of proposed sale to the public: Upon the effective date of this Registration Statement." In Part II, Item 8, of the Form S-8, the description of the exhibits refers to a November 7, 2003, consulting agreement between Barry Clark and Roanoke, not the November 19, 2003, consulting agreement between Bojadzjev and Roanoke.

Respondents' arguments are unpersuasive for the additional reason that they focus on Roanoke's original grant of shares to Bojadzjev, but ignore Bojadzjev's resale of shares to the general public.

bona fide consulting services, the S-8 registration ceased to be effective once Bojadzijeve wired some of the sale proceeds to Roanoke. Kantrowitz knew of this by November 28, 2003, at the latest. He also knew that Bojadzijeve had a history of pushing for the early release of the proceeds from other penny stock sales. Under this analysis, the initial legitimacy of Roanoke's Form S-8 is irrelevant to Kantrowitz's liability under Section 5 of the Securities Act, because Bojadzijeve resold his shares through Kantrowitz to raise capital for Roanoke at Roanoke's request. See Phan, 500 F.3d at 902-06; SEC v. Aqua Vie Bev. Corp., 2007 U.S. Dist. LEXIS 35249, *41-50 (D. Idaho May 14, 2007) (Magistrate Judge).

The record supports a conclusion that Kantrowitz participated in the sale of Bojadzijeve's Roanoke securities in violation of the registration requirements of Section 5 of the Securities Act. Kantrowitz played a crucial role as the dominant trader who made a market in Roanoke stock. This evidence easily satisfies the "necessary participant" and "substantial factor" elements of the participant liability test.

B. Bojadzijeve Was an Underwriter.

Exemptions from registration are affirmative defenses that must be established by the person claiming the exemptions. Engelstad, 626 F.2d at 425; Lively v. Hirschfeld, 440 F.2d 631, 632 (10th Cir. 1971). Further, exemptions from the general policy of the Securities Act requiring registration are strictly construed against the claimant. See Murphy, 626 F.2d at 641. "Evidence in support of an exemption must be explicit, exact, and not built on mere conclusory statements." Robert G. Weeks, 56 S.E.C. 1297, 1322 & n.35 (2003).

Section 4(1) of the Securities Act exempts from the registration requirement "transactions by any person other than an issuer, underwriter, or dealer." Section 2(a)(11) of the Securities Act defines the term "underwriter" to include "any person who . . . offers or sells for an issuer in connection with the distribution of any security, or participates . . . in any such undertaking. . . ." The term "distribution" is not defined in the Securities Act, but refers to "the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hands of the investing public." Jacob Wonsover, 54 S.E.C. 1, 12 & n.25 (1999), pet. denied, 205 F.3d 408 (D.C. Cir. 2000). Section 4(1) is intended to exempt routine trading transactions between individual investors with respect to securities already issued and not to exempt distributions by issuers or acts of other individuals who engage in steps necessary to such distributions. See Preliminary Note to Rule 144, 17 C.F.R. § 230.144; Owen V. Kane, 48 S.E.C. 617, 619 (1986), aff'd, 842 F.2d 194 (8th Cir. 1988). Individual investors may be deemed "underwriters" within the statutory meaning of that term if they act as links in a chain of securities transactions from issuers or control persons to the public. Id. A sale by the intermediary in such a distribution is a transaction by an underwriter and thus not exempt from registration under Section 4(1).

The strongest indicators of Bojadzijeve's "underwriter" status are his acknowledgement that he wanted to unload a lot of shares quickly and the short time period between his acquisition of Roanoke shares and his resale of those shares through Kantrowitz. The large number of shares involved is also significant. Finally, the fact that Bojadzijeve pressured Kantrowitz for the early release of the sales proceeds so that he could remit some of the funds to D. Smith is

persuasive evidence that Roanoke, not Bojadzijeve, controlled the timing and amount of the sales. Accordingly, Bojadzijeve acted as a conduit for the distribution to the public of the S-8 shares. He functioned as a statutory underwriter for the distribution, and any sales in connection therewith were not exempt from registration under Section 4(1) of the Securities Act.⁴⁷ See Ira Haupt & Co., 23 S.E.C. 589, 597 (1946).

C. The Broker's Exemption in Securities Act Section 4(4) Does Not Apply.

To defend against the charge that Kantrowitz participated in the unregistered distribution of Roanoke securities, Amico and Goldstein belatedly invoke the broker's exemption in Section 4(4) of the Securities Act.⁴⁸ That provision exempts "brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market" from the registration requirements of Section 5. However, this exemption is not available to a broker who knows or has reasonable grounds to believe that the selling customer's part of the transaction is not exempt from Section 5. In that event, the broker violates Section 5 of the Securities Act because it participates in a non-exempt transaction. See United States v. Wolfson, 405 F.2d 779, 782-83 (2d Cir. 1968); John A. Carley, 92 SEC Docket 1693, 1708 (Jan. 31, 2008), pet. for review pending sub nom. Zacharias v. SEC, D.C. Cir., No. 08-1134; Wonsover, 54 S.E.C. at 13 & n.27; Robert G. Leigh, 50 S.E.C. 189, 193 (1990).

The amount of inquiry required of a broker or dealer necessarily varies with the circumstances of each case; however, "when a dealer is offered a substantial block of a little-known security . . . or where the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then searching inquiry is called for." Distribution by Broker-Dealers of Unregistered Securities, Securities Act Rel. No. 4445 (Feb. 2, 1962), 27 Fed. Reg. 1251 (Feb. 10, 1962); see also Kane v. SEC, 842 F.2d 194, 199 (8th Cir. 1988); Wonsover, 54 S.E.C. at 14; Leigh, 50 S.E.C. at 193.

The duty of inquiry extends beyond brokers and dealers to their registered representatives. First Pittsburgh Secs. Corp., 47 S.E.C. 299, 302 (1980) ("While salesmen have a lesser responsibility for compliance with registration requirements than their superiors, . . . salesmen cannot absolve themselves of all responsibility simply by relying on senior officials of their firm."); Paul L. Rice, 45 S.E.C. 959, 961 (1975) (while salesmen need not be "finished scholars in the metaphysics of the Securities Act, . . . familiarity with the rudiments is essential.").

⁴⁷ Because Bojadzijeve was an underwriter, it is unnecessary to consider Amico's and Goldstein's claim that Bojadzijeve was not an affiliate of the issuer. Because Kantrowitz was a participant, it is unnecessary to consider the Division's argument that Kantrowitz was also an underwriter.

⁴⁸ Under Rule 220(c) of the Commission's Rules of Practice, affirmative defenses must be raised in an Answer. Amico and Goldstein did not raise the Section 4(4) affirmative defense until their posthearing reply brief.

“Brokers and securities salesmen are under a duty to investigate, and a violation of that duty brings them within the term ‘willful’ of the Securities Act.” Quinn & Co., Inc., v. SEC, 452 F.2d 943, 947 (10th Cir. 1971). “[W]illfulness can be found if a broker or dealer who is aware of several facts suggesting a suspicious transaction proceeds to facilitate the sale with reckless indifference to such facts, and ignores the obvious need for further inquiry and the duty to disclose all relevant information to his superiors.” Kane, 842 F.2d at 200.

Kantrowitz, an experienced trader and registered representative, did not make a “searching inquiry,” even though Bojadzijevev asked him to liquidate several large blocks of a thinly-traded penny stock. He did not question Bojadzijevev closely about the nature of Bojadzijevev’s consulting work or the origin of the Roanoke certificates Bojadzijevev brought to Newbridge. Kantrowitz did not complete the stock certificate deposit questionnaires “immediately,” as required by Newbridge policy, but instead delayed for weeks. In two instances, he allowed another trading desk employee to obtain the relevant information from Bojadzijevev and signed documents that the trading desk employee put in front of him, despite obvious discrepancies as to the origin of the shares in question. Kantrowitz knew that Bojadzijevev was wiring some of the proceeds of his stock sales back to Roanoke. He also knew that Roanoke had issued shares in fifty million share increments to keep Bojadzijevev under the so-called 10% rule, but he never followed up on this suspicious statement. At most, Kantrowitz made a minimal effort to determine if Roanoke’s grant of shares to Bojadzijevev was properly registered on Form S-8. He made no effort to determine if Bojadzijevev’s resale of those shares to the general public was registered.

The reason for Kantrowitz’s lack of curiosity is obvious: he had developed a lucrative business liquidating penny stock certificates for consultants and promoters, and he was not about to kill the goose that was laying golden eggs. As one Newbridge compliance official acknowledged, such penny stock customers are likely to take their business elsewhere if a brokerage firm asks them too many questions (Tr. 2396-97) (“the hassle factor”). In sum, Kantrowitz was indifferent to the registration status of the Roanoke stock Bojadzijevev asked him to resell, and he cannot rely on the brokers’ exemption in Section 4(4) of the Securities Act.

D. Miscellaneous Defenses

Amico and Goldstein point to Kantrowitz’s purported reliance on the transfer agent, Bojadzijevev, and his own supervisors. These contentions also lack merit. See, e.g., Quinn, 452 F.2d at 947 (petitioners “were not entitled to rely on the lack of cautionary legends on the stock certificates”); Kane, 842 F.2d at 200 (rejecting petitioner’s “reliance on the self-serving statements of his seller”); Feeney v. SEC, 564 F.2d 260, 262 (8th Cir. 1977) (rejecting petitioners’ “claim that they were entitled to rely on the assurances of the other company officers that registration was not required”); Stead v. SEC, 444 F.2d 713, 716 (10th Cir. 1971) (broker’s call to transfer agent not sufficient inquiry).

In light of his failure to discharge his duty as a registered representative conducting a searching inquiry to determine whether the resales of Bojadzijevev’s Roanoke shares were part of

an illegal unregistered distribution, I conclude that Kantrowitz willfully violated Sections 5(a) and 5(c) of the Securities Act.

II. KANTROWITZ ALSO VIOLATED THE ANTIFRAUD PROVISIONS.

OIP ¶ I.57 alleges that Kantrowitz willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5 by participating in schemes with Bojadzijeve and Oehmke to manipulate Roanoke and Concorde stock, respectively.

Amico and Goldstein do not dispute that Bojadzijeve and Oehmke engaged in market manipulation. They also acknowledge that much of the evidence with respect to Kantrowitz's interaction with these two customers is troubling. Nonetheless, they contend that the weight of the evidence shows that Kantrowitz acted only negligently, and not with manipulative intent.

A. The Applicable Law

The Commission has characterized manipulation as “the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand.” Swartwood, Hesse, Inc., 50 S.E.C. 1301, 1307 & n.16 (1992).

The basic aim of the antifraud provisions of the securities laws is to “prevent rigging of the market and to permit operation of the natural law of supply and demand.” SEC v. First Jersey Secs., Inc., 101 F.3d 1450, 1466 (2d Cir. 1996) (quoting United States v. Stein, 436 F.2d 844, 850 (2d Cir. 1972)). In Section 2 of the Exchange Act, Congress explained that one of the primary objectives of the statute was to “insure the maintenance of fair and honest markets.” The manipulation of securities prices, which constitutes “intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities,” Hochfelder, 425 U.S. at 199, runs directly counter to that objective.

Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit the use of “any manipulative or deceptive device or contrivance” in connection with the purchase or sale of any security. Section 10(b) encompasses “(1) using any deceptive device (2) in connection with the purchase or sale of securities, in contravention of rules prescribed by the Commission.” United States v. O’Hagan, 521 U.S. 642, 651 (1997). Rule 10b-5 contains “flat prohibitions of deceitful practices and market manipulations.” United States v. Charnay, 537 F.2d 341, 350 (9th Cir. 1976). Conduct falling within the purview of Rule 10b-5 includes “every device ‘used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage.’” SEC v. Resch-Cassin & Co., 362 F. Supp. 964, 975 (S.D.N.Y. 1973) (quoting 3 Loss, Securities Regulation 1549-55 (2d ed. 1961)).

Section 17(a)(1) of the Securities Act makes it unlawful, in the offer and sale of securities, to employ devices, schemes or artifices to defraud. Section 17(a)(2) of the Securities Act prohibits material misstatements or omissions of material facts, and Section 17(a)(3) of the Securities Act prohibits transactions, practices, or courses of business that operate as a fraud or deceit upon the purchaser.

Recognizing that Section 10(b) outlaws but does not define a “manipulative or deceptive device or contrivance,” it is appropriate to turn to Section 9(a)(2) of the Exchange Act to determine the elements of the offense of manipulation. See Resch-Cassin, 362 F. Supp. at 975.

Section 9(a)(2) of the Exchange Act makes it unlawful, with respect to a security listed on a national securities exchange, to effect: (1) a series of security transactions, alone or with one or more persons; (2) which create actual or apparent active trading in such security or which raise or depress the price of such security; (3) for the purpose of inducing others to buy or sell the security. Manipulative activities of the type prohibited by Section 9(a)(2) of the Exchange Act are also violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. See id. In addition, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act are deemed to prohibit manipulative activities with respect to securities that are not traded on a national securities exchange. See id.; Halsey, Stuart & Co., 30 S.E.C. 106, 110-11 (1949). However, when the basis of liability rests on Section 10(b) and Rule 10b-5, it is not necessary to show a manipulative purpose in inducing others to trade. See Charnay, 537 F.2d at 350-51. Instead, it is sufficient to show that the person engaged in a fraud or deceit as to the nature of the market for the security. See id.

Proof of manipulation almost always depends on inferences drawn from a mass of factual detail, including patterns of behavior, apparent irregularities, and trading data. Pagel, Inc., 48 S.E.C. 223, 226 (1985), aff’d, 803 F.2d 942 (8th Cir. 1986).

To prevail under Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, the Division must show that a respondent acted with scienter. See Hochfelder, 425 U.S. at 193 n.12; Aaron v. SEC, 446 U.S. 680, 701-02 (1980); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir. 1986). No scienter requirement exists for violations of Sections 17(a)(2) or 17(a)(3) of the Securities Act; rather, negligence alone is sufficient. Aaron, 446 U.S. at 702; Pagel, 803 F.2d at 946.

Scienter is defined as “a mental state embracing intent to deceive, manipulate, or defraud.” Hochfelder, 425 U.S. at 193 n.12. It may be established by a showing that the accused party acted intentionally or with severe recklessness. SEC v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992); Hackbart v. Holmes, 675 F.2d 1114, 1117 (10th Cir. 1982). Recklessness is defined as “not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it.” Sunstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977).

A trader can be primarily liable under Section 10(b) of the Exchange Act for following a principal’s directions to execute stock trades that the trader knew, or was reckless in not knowing, were manipulative, even if the trader did not share the principal’s specific overall purpose to manipulate the market for that stock. SEC v. U.S. Envtl., Inc., 155 F.3d 107, 108, 110-12 (2d Cir. 1998).

Most of the courts addressing the issue have held that Congress envisioned liability for market manipulation where the actor’s conduct was entirely legal, but the actor’s intent was

manipulative. See Markowski v. SEC, 274 F.3d 525, 528-29 (D.C. Cir. 2001); SEC v. Masri, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007). Other courts have suggested that liability for manipulation also requires proof that the actor injected inaccurate information into the market or created a false impression of market activity. See GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 205 (3d Cir. 2001). Amico and Goldstein claim that there is a species of “open market manipulations” that can be distinguished from other types of manipulations and that require a higher standard of proof or intent. The more persuasive cases reject this argument. See In re Initial Public Offering Secs. Litig., 241 F. Supp. 2d 281, 391 (S.D.N.Y. 2003) (holding that so-called “open market manipulations” are merely “those cases involving conduct that stands near the line between illegal and legal activity because their resolution turns less on conduct and more on the intent of the defendants.”).

B. Kantrowitz Manipulated Roanoke.

Newbridge exercised price leadership by frequently raising its bid for Roanoke stock and by holding the inside bid in the stock for a significant amount of the total trading hours during the relevant period. To the extent that Kantrowitz posted these bids for Bojadzijevev, see supra note 13, he created the false appearance that the bid side of the market for Roanoke was more active than it was in reality.⁴⁹ By doing so, Kantrowitz made the stock more attractive to prospective buyers, and he created liquidity for Bojadzijevev to sell several large blocks of Roanoke stock.

Division expert Pinto found it highly significant that Bojadzijevev was a large seller who had no legitimate interest in purchasing Roanoke stock (Tr. 791; DX 124 ¶¶ 9, 21-22). Amico and Goldstein argue the opposite. They contend that Kantrowitz believed that Bojadzijevev was sometimes a buyer and sometimes a seller, so that Bojadzijevev’s bids to purchase Roanoke stock raised no red flag for Kantrowitz. I agree with Pinto’s analysis. Bojadzijevev, like almost all of Kantrowitz’s retail customers, opened a Newbridge account in order to liquidate quickly certificates for low priced securities. Kantrowitz had already liquidated several penny stock certificates for Bojadzijevev before the trading in Roanoke commenced. As to Roanoke, Kantrowitz knew that Bojadzijevev’s primary objective was to sell his 300 million shares. Kantrowitz also knew from the small size of Bojadzijevev’s bids (usually, the 5,000 share minimum) that Bojadzijevev was risking only about \$15 to \$25 if his bids were accepted (Tr. 140-41, 204-07). He must have known that Bojadzijevev was a high school dropout and that Bojadzijevev’s claim to being a mathematician with a short-term trading strategy was bogus. By December 2, 2003, Kantrowitz further knew that Bojadzijevev would like to move up the price of Roanoke, because Bojadzijevev told him so. In these circumstances, Bojadzijevev’s bids were not bona fide, and Kantrowitz should have refused to post them. See Graham v. SEC, 222 F.3d 994,

⁴⁹ Amico and Goldstein cannot rely on GFL Advantage Fund because the weight of the evidence demonstrates that Kantrowitz created the false impression of market activity. Nor may they fairly compare the present case to Masri, where a registered representative won summary judgment because the circumstantial evidence concerning the execution of a single transaction was deemed insufficient to establish the registered representative’s knowledge of any manipulative intent of his principal.

1004 (D.C. Cir. 2000) (“A registered representative can always refuse to execute a trade [he] knows may constitute a securities violation. . . . Of course, doing so might [make the registered representative’s] career . . . more difficult, but fear of such consequences does not excuse a violation of the securities laws.”).

Kantrowitz acted with scienter. His own words, actions, and failure to act show that he not only knew of Bojadzijeve’s scheme to “buoy” Roanoke’s price (in the wording of the OIP), but that he actively participated in the scheme. On November 20, 2003, when Bojadzijeve could not legitimately post an offer because he did not have any Roanoke shares to sell, Kantrowitz volunteered to test the market for Bojadzijeve, using Newbridge’s proprietary account. On November 25, December 10, and December 12, 2003, when Bojadzijeve told Kantrowitz he had advance news about Roanoke, Kantrowitz never asked Bojadzijeve how he knew these facts. Kantrowitz also failed to alert his supervisors to the possibility of insider trading. On December 12, 2003, when market participants commented in a chat room that Newbridge was simultaneously posting both small bids and large offers in Roanoke, Kantrowitz told Bojadzijeve: “I think it’s pretty amusing. . . . doesn’t any of them have a brain? Or a clue?”

The evidence does not support the OIP’s claim that Bojadzijeve controlled almost half of the floating supply of Roanoke stock. See supra note 4. But that is not fatal to the Division’s case. The Commission has held that a finding of manipulation does not depend on the presence or absence of any particular device usually associated with a manipulative scheme. See Swartwood, Hesse, 50 S.E.C. at 1307. Nor does it matter that Roanoke’s price did not move very high during the manipulative period. Cf. SEC v. Kwak, 2008 U.S. Dist. LEXIS 10201, *7-8 n.4 (D. Conn. Feb. 12, 2008) (“By artificially creating demand, [a manipulator] can prevent or slow price decreases, even if [the manipulator] is unable to create price increases.”). Whether an accused has adequate market power successfully to manipulate a market is not dispositive of whether the accused engaged in a manipulative scheme, because success is not a prerequisite for a finding of manipulation. See Kuehnert v. Texstar Corp., 412 F.2d 700, 704 (5th Cir. 1969); SEC v. Mandici, 2004 U.S. Dist. LEXIS 19143, *33 (S.D.N.Y. Sept. 27, 2004); Amr Elgindy, 57 S.E.C. 431, 440 & n.21 (2004); cf. SEC v. Martino, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003) (“an attempted manipulation is as actionable as a successful one”), aff’d and remanded on other grounds, 94 Fed. Appx. 871 (2d Cir. 2004).

Amico and Goldstein observe that Kantrowitz entered only unsolicited bids for Bojadzijeve, that Bojadzijeve never explicitly told Kantrowitz he intended to manipulate the market for Roanoke, and that Kantrowitz was very busy making markets in hundreds of other stocks during the relevant time period. I reject these defenses. Whether the bids were unsolicited has no bearing on Kantrowitz’s knowledge of the manipulation. The manipulative purpose of the trading was clear from the trading patterns, even without a direct admission by the customer. Being busy is not an excuse for violating the federal securities laws.

C. Kantrowitz Manipulated Concorde.

The Division has presented a strong case that Kantrowitz schemed with Oehmke to manipulate the market for Concorde between June 30 and August 13, 2004. Kantrowitz knew that Oehmke was a seller, not a buyer, for the same reasons he knew that Bojadzijeve was a seller,

not a buyer. Under the circumstances, Kantrowitz had an obligation to confront Oehmke about why Oehmke placed escalating bids for Concorde when his primary goal was to liquidate 1,000,000 shares of Concorde stock in Barranquilla's account. Kantrowitz never did so.

Kantrowitz repeatedly raised the bid prices he posted for Oehmke between June 30 and July 26, 2004, at a time when he knew that there were no available shares in the market (Tr. 798-99, 801, 806, 817-18, 821). The market depends on participants behaving rationally: buyers trying to buy as low as they can and sellers trying to sell as high as they can. Whenever a prospective buyer intentionally offers to pay more than he has to for the purpose of causing the quoted price to be higher than it would otherwise have been, the resulting price is an artificial price, not determined by the free forces of supply and demand. Oehmke's increasing bids during this period were economically irrational, and Kantrowitz must have known it. Kantrowitz also bought heavily at the opening on August 11, 2004, and posted escalating bids on August 13, 2004, knowing that Oehmke wanted only to cause pain for the shorts (Tr. 397-400, 815; DX 93). See Vladlen "Larry" Vindman, 87 SEC Docket 2626, 2639 (Apr. 14, 2006) ("Manipulation violates the antifraud provisions even when it is employed in an attempt to bring the stock price artificially to a level where the manipulator believes it should rightfully be."). On the afternoon of August 13, 2004, Kantrowitz continued to post Oehmke's bids for 100,000 shares of Concorde at escalating prices above \$5.65 per share, despite the fact that Oehmke had objected vehemently when he had to purchase 100,000 shares at \$5.48 per share that morning (DX 94 at 413-18).

Kantrowitz also engaged in manipulative conduct when he repeatedly collaborated with Hansen at Sunstate. He did so between June 30 and July 26, 2004, by acting in tandem with Hansen to increase the inside bid for Concorde from \$0.01 per share to \$3.00 per share. He did so again on July 27, 2004, by accommodating Oehmke's desire to have two offers showing up on everybody's Level II screens. Kantrowitz must have known he was creating the false impression that there were two offers when in fact there was only one seller in the market at that time. I infer that Kantrowitz knew the only purpose of Oehmke's request was to generate market interest in Concorde trading. Finally, Kantrowitz collaborated with Hansen on August 13, 2004, when he honored Oehmke's instructions to follow Hansen's increasing bids and maintain a penny spread between the inside bid and inside offer.

These acts involved manipulative conduct because they created the false impression that the bid market for Concorde was more active, competitive, and independent than it was in fact. See Edward J. Mawod & Co., 46 S.E.C. 865, 871 (1977) ("When investors and prospective investors see activity, they are entitled to assume that it is real activity"), aff'd, 591 F.2d 588 (10th Cir. 1979). Kantrowitz may not have known precisely how many shares of Concorde Oehmke controlled away from Newbridge, but he knew that Oehmke controlled a significant number of shares. I conclude that Kantrowitz was well aware of what Oehmke was doing and that he was a willing and active participant in Oehmke's scheme. I infer that Oehmke and Kos outlined the manipulative scheme for Kantrowitz at the June 22, 2004, restaurant meeting. Kantrowitz acted with scienter.

The Division's inability to prove that Oehmke directed Kantrowitz to execute wash trades was surprising, because that charge was specifically alleged in the OIP. Nonetheless, the

absence of proof of wash trades is not fatal to the Division's case. See Swartwood, Hesse, 50 S.E.C. at 1307; Halsey, 30 S.E.C. at 112.

Amico and Goldstein argue that Kantrowitz was too busy making markets in other stocks to appreciate what Oehmke was doing with Concorde. I reject this defense. The record shows that Oehmke was a major customer of Kantrowitz's, that Kantrowitz was willing to spend as much time as necessary with Oehmke, and that, for concentrated periods in July and August 2004, Kantrowitz did little else but trade Concorde for Oehmke (Tr. 789, 801-02, 804-05; DX 94 at 373 ("full time job this stock is")).

Amico and Goldstein also contend that, because no trades were executed between June 30 and July 26, 2004, Kantrowitz's effort to raise the bid price from \$0.01 to \$3.00 per share during that period "may" not have occurred "in connection with the purchase or sale" of Concorde securities, as required by the antifraud provisions of the federal securities laws. I reject this argument, as well. See SEC v. Zandford, 535 U.S. 813, 820 (2002); Orlando Joseph Jett, 57 S.E.C. 350, 391-95 (2004).

Finally, Amico and Goldstein maintain that stock promotion activity by Kos, Spreadbury, and Hansen may have been the "real" cause of Concorde's increasing price, irrespective of Kantrowitz's trading activities. Because the evidence is overwhelming that Oehmke and Kos were working together in furtherance of the same manipulative scheme, I find no merit to this argument.

I conclude that Kantrowitz willfully violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Section 17(a) of the Securities Act through the trading activity he conducted in Roanoke and Concorde.⁵⁰

III. AMICO AND GOLDSTEIN FAILED TO SUPERVISE KANTROWITZ.

OIP ¶¶ G.43-G.47 allege that Amico and Goldstein were on notice that any delegation of supervisory authority to the chief compliance officer to develop supervisory policies and procedures was unreasonable. As a result, the OIP charges that Amico and Goldstein were responsible for Newbridge's failure to develop policies, procedures, and systems reasonably designed to prevent and detect Kantrowitz's violations of the federal securities laws. The OIP

⁵⁰ Kantrowitz is not liable for antifraud violations involving material misrepresentations or omissions in Spreadbury's July 28, 2004, press release (DX 80). First, the OIP did not allege such a theory of liability, and the Division did not argue the matter in its pleadings. Kantrowitz testified that he did not research companies, and Oehmke confirmed that traders generally are not interested in that sort of information (Tr. 70, 665-66). Second, Kantrowitz may not be held liable for any such misrepresentations or omissions on some sort of "scheme liability" theory. Cf. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769-72 (2008). Third, not even SEC v. Tambone, 550 F.3d 106, 127-28, 130-36 (1st Cir. 2008), pet. for rehearing en banc pending, at its broadest, would render Kantrowitz negligently liable for any such misrepresentations or omissions in violation of Section 17(a)(2) of the Securities Act.

also claims that Amico and Goldstein were on notice that any delegation of their supervisory authority over Kantrowitz to the chief compliance officer, the head trader, and the trading compliance officer was ineffective. As a result, the OIP maintains that Amico and Goldstein retained the responsibility for reasonable day-to-day supervision over Kantrowitz.

A. The Applicable Law

To demonstrate deficient supervision by Amico and Goldstein, the Division must prove that: (1) Kantrowitz willfully violated the federal securities laws; (2) Kantrowitz was subject to their supervision; and (3) they failed reasonably to supervise him with a view to preventing or detecting his violations.

The Exchange Act does not make a supervisor a guarantor against violation. “No finding of a breach of the duty to supervise can be made absent a concrete showing that the particular supervisor in question failed to conduct himself as a reasonable supervisor would have done in the circumstances.” Frank J. Crimmins, 46 S.E.C. 459, 459 (1976).

“The president of a corporate broker-dealer is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person’s performance is deficient.” Consol. Inv. Servs., Inc., 52 S.E.C. 582, 590 & n.30 (1996) (collecting cases).

Section 15(b)(6) of the Exchange Act, in conjunction with Section 15(b)(4), provides that the Commission may sanction a supervisor for failure reasonably to supervise a person subject to his supervision, with a view to preventing violations of the federal securities laws or the Commission’s implementing rules and regulations. Scienter is not an element of failure to supervise liability under the Exchange Act. See Clarence Z. Wurts, 54 S.E.C. 1121, 1132 (2001).

The relevant part of Section 15(b)(4)(E) of the Exchange Act provides that no person may be deemed to have failed reasonably to supervise any other person if:

- (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and
- (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

Amico and Goldstein contend that so-called “red flags” are essential in a failure to supervise case, and argue that no such “red flags” were apparent to them. This misstates the law. While the presence of “red flags” warning of possible irregularities may often be an aggravating factor in a failure-to-supervise case, the absence of such warning signs is not a defense where the gravamen of the supervisory deficiency is a failure to have reasonable procedures. NationsSecurities, 53 S.E.C. 556, 572 & n.17 (1998).

B. Amico and Goldstein Were Responsible for Newbridge's Failure to Develop Reasonable Policies, Procedures, and Systems to Prevent and Detect Kantrowitz's Violations.

Written supervisory procedures are not adequate if they contain only a list of prohibited activities, but do not specify guidelines for supervisors to detect and prevent such activities (Tr. 2707-08, 2711-12). Richard F. Kresge, 90 SEC Docket 3072, 3089 (June 29, 2007); Gary E. Bryant, 51 S.E.C. 463, 471 (1993); Kochcapital, Inc., 51 S.E.C. 241, 247-48 (1992).

Amico and Goldstein were responsible for ensuring that Newbridge had adequate written supervisory procedures (Tr. 2714-15; DX 123 at 6-7). However, they did not take reasonable steps to do so. Both Respondents acknowledged that, during the relevant period, Newbridge did not have any written supervisory procedures directed toward detecting and preventing market manipulation or improper quoting activity. Newbridge did not have a written supervisory procedure to review instant messages until mid-2004. I disagree with J. Smith's opinion that the firm's 2004 Manuals were acceptable and that the problem was merely one of execution (DX 123 at 8). That may have been true as to instant message review in the 2004 Manual, but not as to the written review procedures for other prohibited practices.

I doubt that Respondents were as detached as they claim from the firm's decision to employ Kantrowitz. However, if Respondents' testimony is accepted as truthful, they were inexcusably uninvolved in Newbridge's decision to hire Kantrowitz and unaware of the fact that he would be subject to strict supervision. Others at Newbridge who might have played a role in enforcing the registration agreement with the State of Florida, including Breitbart, Brown, Bush, and Perich, were equally unaware of the registration agreement or its terms. If Newbridge had implemented reasonable written supervisory procedures for reviewing the background of prospective employees with disciplinary histories before 2002, Amico and Goldstein would have been aware of Kantrowitz's prior discipline. See supra pp. 28-29.

Once the State of Florida required strict supervision of Kantrowitz, there is no evidence that Newbridge had rules and procedures in place to guide Vallejo, who was responsible for such supervision. See James Harvey Thornton, 53 S.E.C. 1210, 1216 (1999), aff'd, 199 F.3d 440 (5th Cir. 1999). The record makes clear that Kantrowitz was never subjected to strict supervision during the twenty-one months the registration agreement was in force. Vallejo did not do anything to supervise Kantrowitz beyond what he normally did to supervise others at the trading desk. He fell behind on reviewing Kantrowitz's trade blotters. Amico and Goldstein both knew it, yet took no effective corrective action. But see Wurts, 54 S.E.C. at 1130 ("Supervisors who know of an employee's past disciplinary history must ensure not only that rules and procedures are in place to supervise the employee properly, but also that those rules and procedures are enforced."); Consol. Inv. Servs., Inc., 52 S.E.C. at 588-89 ("A registered representative who has previously evidenced misconduct can be retained only if he subsequently is subjected to a commensurately higher level of supervision.").

Even if a brokerage firm's written supervisory procedures are adequate, "[t]he presence of procedures alone is not enough. Without sufficient implementation, guidelines and strictures

do not assure compliance.” Rita H. Malm, 52 S.E.C. 64, 69 & n.17 (1994). “It is not sufficient for the person with overarching supervisory responsibilities to delegate supervisory responsibility to a subordinate, even a capable one, and then simply wash his hands of the matter until a problem is brought to his attention. . . . Implicit is the additional duty to follow-up and review that delegated authority to ensure that it is being properly exercised.” Castle Secs. Corp., 53 S.E.C. 406, 412 & n.19 (1998) (collecting cases).

Amico and Goldstein never conducted the necessary follow-up. The written supervisory procedures Newbridge submitted to the NASD in 2001 represented that the firm’s supervisory staff would complete weekly checklists. There were no checklists. See supra note 29. Newbridge developed its stock certificate deposit questionnaire in response to the 2002 deficiency letter from the Commission’s staff. However, Newbridge never put in place any effective supervisory review procedures to ensure that registered representatives completed the questionnaires on a timely basis, or to ensure that any compliance officials conducted a meaningful review of the completed questionnaires. By approving many of Kantrowitz’s requests for the advance release of funds to his customers, Amico and Goldstein effectively ensured that the questionnaires could not serve their intended purpose.⁵¹

Amico and Goldstein acknowledge that there was an institutional breakdown at Newbridge so that no written supervisory procedures covered the review of instant messages between July 2003 and mid-2004. However, they do not recognize that it was their failure to designate supervisory responsibility for the review of instant messages that led to this institutional breakdown. Amico’s purported verbal follow-up(s) with Vallejo and Perich, if indeed they occurred, see supra note 43, were inadequate to meet his duty independently to verify that his delegation of supervisory authority over instant message review was effective. Even after mid-2004, once Newbridge had a written supervisory procedure governing review of instant messages, the supervisory review actually conducted was considerably more limited than the review protocol described in the firm’s 2004 Manuals.

Finally, the Commission’s examination staff put Amico on notice, through the 2002 deficiency letter, that Newbridge’s written supervisory procedures covering possible manipulative devices in the area of low-priced securities were deficient. Amico and Goldstein assigned Breitbart and Brown to take the lead in revising the firm’s compliance manual during 2004. However, neither Breitbart nor Brown had the experience or qualifications to review the trading-related aspects of the revised manual. The weight of the evidence does not show that Vallejo, Perich, or anyone else with a trading background provided any input into the compliance manual review process during 2004.

⁵¹ Respondents stress that there was nothing illegal about their decisions to authorize the early release of funds to Kantrowitz’s customers. While that is true, it misses the point. The questionnaires were the principal tool Newbridge developed in response to the staff’s criticism that the firm was not monitoring the receipt and delivery of large blocks of low-priced securities. Once the questionnaires were rendered useless, Newbridge had no other supervisory tool to replace them.

C. Amico and Goldstein Knew that Their Delegation of Supervisory Authority over Kantrowitz was Ineffective.

I agree with the Division that Amico and Goldstein did not reasonably and effectively delegate their supervisory responsibility over the firm's trading desk or Kantrowitz. Brown disavowed any ability or responsibility with respect to trading compliance. Vallejo had little understanding of how to detect or prevent market manipulation or other prohibited practices at the trading desk. Moreover, Vallejo was busy with the firm's proprietary trading, which limited the time he could devote to supervising the other traders. The record is also clear that there was widespread confusion among the firm's line supervisors and compliance personnel about the scope of their duties and reporting responsibilities.

Amico and Goldstein emphasize that they knew little about trading issues when Newbridge applied for market making authority in 2001. Division expert J. Smith opined that, "if the owners of a firm decide they want to get into an area of business [with which] they're not particularly well acquainted . . . , they had better get acquainted with it because they're going to have to supervise it" (Tr. 2587). According to J. Smith, even if the persons with ultimate supervisory authority delegate responsibility, they must "check to be sure that [the delegated supervisors] know what they're doing, that they've done what [the persons with ultimate supervisory authority] asked them to do, and that they've done it adequately" (Tr. 2588). I agree with J. Smith and conclude that Amico's and Goldstein's personal lack of trading expertise is not a defense to any of the charges in the OIP.

Amico and Goldstein repeatedly attempt to shift blame for their supervisory failures to the NASD and the Commission. As illustrations, they consider it significant that the NASD knew in 2001 that they did not have Series 55 trading licenses or trading experience, but nevertheless granted Newbridge market making authority. They also observe that the Commission's staff did not tell them that the staff considered Newbridge's response to the 2002 deficiency letter to be inadequate for one year. In these circumstances, Respondents argue that it was reasonable for them to assume that the procedures adopted in response to the 2002 deficiency letter were adequate. However, it is well settled that respondents cannot shift responsibility for compliance to the NASD or the Commission. See William H. Gerhauser, 53 S.E.C. 933, 940 & n.17 (1998) (collecting cases). "A regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation." Id.; see also Steven C. Pruette, 46 S.E.C. 1138, 1141 & n.17 (1978) (collecting cases). Under this precedent, it was unreasonable for Amico and Goldstein to equate NASD or Commission staff "inaction" with tacit approval of Newbridge's procedures.

Amico and Goldstein also defend on the grounds that none of their subordinates ever walked through their "open door" and informed them that Kantrowitz was collaborating with Bojadzijevev and Oehmke to manipulate the markets for Roanoke and Concorde. This demonstrates far too narrow an understanding of their ultimate supervisory responsibility. Several Newbridge employees informed Amico and Goldstein that Kantrowitz was engaging or potentially engaging in unlawful conduct and was proving difficult to supervise. In January 2003, Amico and Goldstein knew that Vallejo's "daily" supervisory review of Kantrowitz's trade blotters was ineffective. In February 2003, Amico and Goldstein knew that Brown and

Weissman were concerned that Kantrowitz had sold 1,000 shares of a restricted stock in violation of Securities Act Rule 144. In July 2003, Goldstein knew that Brown was having difficulty obtaining information from Kantrowitz about trades in Blue Moon penny stock. Despite Brown's direct request for help, Goldstein waited ten days before providing token assistance. In August and September 2003, Amico and Goldstein knew that Brown and Perich were having trouble obtaining penny stock disclosure documents and non-solicitation letters from Kantrowitz. In November 2003, Goldstein knew that Kantrowitz was repeatedly selling stock before he had completed the stock certificate deposit questionnaires. Many of these issues arose while Kantrowitz was still subject to the registration agreement with the State of Florida. All of them occurred before Kantrowitz traded Roanoke and Concorde. "Decisive action is necessary whenever supervisors are made aware of suspicious circumstances, particularly those that have an obvious potential for violations." George J. Kolar, 55 S.E.C. 1009, 1016 (2002); Quest Capital Strategies, Inc., 55 S.E.C. 362, 371 (2001) (same); Consol. Inv. Servs., 52 S.E.C. at 588 & n.27 (same) (collecting cases).

Amico and Goldstein cannot claim that they reasonably believed that Newbridge's supervisory systems were working well. Regulators were repeatedly telling them otherwise. See supra pp. 34-37. Nor may Respondents defend on the grounds that each warning from a regulator should be viewed in isolation and given the narrowest possible interpretation.

Amico was repeatedly put on notice that Kantrowitz was violating or potentially violating the federal securities laws. The 2002 deficiency letter from the Commission's staff identified questionable transactions in low-priced securities and expressly pointed to two accounts managed by Kantrowitz. The 2003 deficiency letter from the Commission's staff alerted Amico to the fact that five of Kantrowitz's customers were involved in the distribution of unregistered securities. The Kantrowitz customers identified in the 2002 and 2003 deficiency letters are precisely the same penny stock promoters and consultants for whom Kantrowitz requested and received approval for early release of sales proceeds.⁵²

D. Amico and Goldstein Are Equally Responsible for Failing to Supervise Kantrowitz.

Amico and Goldstein both shared ultimate supervisory responsibility for the trading desk and Kantrowitz throughout the relevant period. The firm's organizational charts reflect that, from at least August 2003 until December 2004, the chief compliance officer and head trader reported directly to both of them. Both Respondents were routinely addressed or copied on e-mails and memoranda relating to compliance issues or problems about the trading desk and

⁵² DX 131 grants approval to wire funds to Bojadzijeve, Michael Muzio (president of Blue Moon), Keel Enterprises and Chiang Ze Capital (two more Kos-Jaynes offshore entities whose accounts were traded by Oehmke), Jeffrey H. Galpern (Galpern), and JHG Enterprises (a Galpern company). DX 131 also approves wires and journal entries for Galpern on January 16 and February 13, 2004. Amico claimed that Newbridge closed Galpern's accounts after the firm received the 2003 deficiency letter (Tr. 1327). After two warnings from the Commission's staff, Newbridge still did not move very quickly to cut its ties with Galpern.

Kantrowitz. Both Respondents were equally involved in reviewing and shaping the firm's compliance policies and procedures, granting exceptions to those policies, hiring compliance officers, and attending compliance meetings.

Amico had a background in developing and implementing trading compliance and supervisory procedures before acquiring Newbridge. He was sometimes more involved than Goldstein in compliance issues relating to the trading desk. For example, he was deeply involved in the application process with the NASD in 2001 to obtain market making capabilities and was listed as the firm's contact person. Amico also responded to the 2002 deficiency letter from the Commission's staff on behalf of Newbridge. When Goldstein was on his NASD-mandated supervisory suspension from December 17, 2003, through January 16, 2004, during one of the critical periods at issue in this proceeding, Amico had sole ultimate supervisory responsibility at Newbridge.

The fact that Newbridge and Vallejo have been held liable for supervisory failures with respect to Kantrowitz does not preclude additional supervisory failure charges against Amico and Goldstein. If supervisory responsibility is shared among firm executives, each individual supervisor may be held liable for supervisory failures. See Robert E. Strong, 92 SEC Docket 2875, 2883-84 & n.21 (Mar. 4, 2008); Steven E. Muth, 86 SEC Docket 1217, 1241-42 & n.67 (Oct. 3, 2005); Steven P. Sanders, 53 S.E.C. 889, 904 & n.30 (1998).

I conclude that Kantrowitz was subject to Respondents' supervision. I also conclude that Amico and Goldstein failed reasonably to supervise Kantrowitz, with a view to preventing and detecting his willful violations of the securities registration provisions of the Securities Act, and the antifraud provisions of the Securities Act and the Exchange Act.

SANCTIONS

The Division urges me to bar Amico and Goldstein from association with any broker or dealer in a supervisory capacity, with a right to reapply after five years. It also seeks civil monetary penalties of \$120,000 against both Respondents.

Amico and Goldstein argue that no sanctions are warranted. They contend that it has been several years since the trading activity at the heart of the case, and they maintain that they have caused Newbridge to undertake meaningful remedial measures. These corrective actions include closing Bojadzijeve's and Oehmke's accounts, eliminating instant messaging, cutting back on Newbridge's penny stock business, hiring an outside consultant, and causing Kantrowitz to resign. Amico and Goldstein do not argue that one of them should receive lighter sanctions than the other. I consider the opportunity to make this argument as waived.

The Division points to a pattern of ongoing violations at Newbridge as an aggravating factor. It argues that Amico and Goldstein have repeatedly assured regulators that Newbridge would take corrective action, but never followed through to ensure that the corrective action was effective. In addition to the five episodes discussed above, see supra pp. 34-37, the Division identifies six other disciplinary actions as evidence that Amico and Goldstein have proven incapable of supervising a brokerage firm with a clean compliance record:

- On March 10, 2005, the NASD censured and fined Newbridge \$57,500 for, among other things, trade reporting violations and supervisory deficiencies, based on a review of trading on April 23-24, 2003 (DX 5).
- On January 26, 2006, the NASD censured and fined Newbridge \$35,000 for limit order display, order audit trail system, and trade reporting violations, based on a review of various periods from October 2002 through June 2004 (DX 6).
- On April 10, 2007, the NASD censured and fined Newbridge \$70,000 for best execution, trade reporting, short sale, and recordkeeping violations, based on a review of transactions during the period July 1 through September 30, 2004, and August 4-5, 2005 (DX 7).
- On January 25, 2008, FINRA fined Newbridge \$5,000 for engaging in corporate bond transactions with customers and failing to conduct such transactions at a fair price for the periods April 1 through June 30, 2004, and July 1, 2004, through March 31, 2005 (DX 8).
- On March 14, 2008, FINRA fined Newbridge \$177,500 and ordered the firm to pay more than \$61,000 in restitution to customers for, among other things, charging excessive markups and markdowns, failing to develop and implement a written anti-money laundering program, and for supervisory deficiencies, based on a review of various months from April 1, 2002, through August 15, 2003 (DX 9). Brown and Vallejo were each fined \$10,000 (as part of the \$177,500) for their supervisory failures and suspended for fifteen days (DX 9).
- On October 21, 2008, FINRA censured and fined Newbridge \$27,500, and ordered the firm to pay restitution to customers of \$17,345, based on a review of trades on August 15-16, 2006 (DX 10).

I agree with the Division that a pattern of misconduct like this creates a significant risk for the investing public. When Newbridge, under the supervision of Amico and Goldstein, has taken corrective action, it has done so slowly and only in response to prodding from regulators. This is plainly an aggravating factor, even though Amico and Goldstein were not named as respondents in these six disciplinary actions, and even though the matters were settled without admitting or denying liability.

Amico and Goldstein argue that the sanctions imposed against supervisory officials in prior settled cases have been milder than the sanctions sought against them and that the sanctions imposed against settling supervisors Newbridge and Vallejo in this proceeding are also milder than the sanctions sought against them. However, it is well established that respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on pragmatic considerations such as the avoidance of time-and-manpower consuming adversary proceedings. Leslie A. Arouh, 57 S.E.C. 1099, 1123 & n.56 (2004); Stonegate Sec., Inc., 55 S.E.C. 346, 355 & n.21 (2001).

Amico and Goldstein contend that the misconduct alleged in the OIP was confined to one employee involved in a small part of Newbridge's business over a limited period of time. They also assert that the OIP identified no manipulative transactions occurring outside the period from November 2003 to August 2004. Both claims are literally true, but highly misleading. The Division offered several exhibits to demonstrate that misconduct at Newbridge has continued until the present. The suggestion that Kantrowitz was the only market manipulator at Newbridge ignores Arthur Redler (Redler), another Newbridge trader (Tr. 979). Cf. Arthur S. Redler, Exchange Act Release No. 59649, 2009 SEC LEXIS 995 (Mar. 30, 2009) (settled proceeding) (barring Redler from associating with any broker or dealer and from participating in any penny stock offering, based on his guilty plea to criminal charges of securities fraud for manipulating a penny stock between October 2004 and November 2005).⁵³

A. Supervisory Bars

Sections 15(b)(4)(E) and 15(b)(6)(A)(i) of the Exchange Act authorize the Commission to censure, place limitations on, suspend, or bar a person associated with a broker or dealer if it finds that such person failed reasonably to supervise, with a view to preventing violations of the federal securities laws and rules and regulations thereunder, another person who commits such violations, if the other person is subject to the person's supervision. The Commission must also find that such a censure, placing of limitations, suspension, or bar is in the public interest.

In determining the public interest, the Commission considers the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. See Carley, 92 SEC Docket at 1730, 1732 (imposing a permanent supervisory bar); Stephen J. Horning, 92 SEC Docket 207, 224-25 (Dec. 3, 2007) (imposing a permanent supervisory bar), pet. for review pending, D.C. Cir., No. 08-1038; Muth, 86 SEC Docket at 1250 (imposing a supervisory bar with the right to reapply after one year). The Commission's inquiry into the appropriate sanction to protect the public interest is flexible, and no one factor is dispositive. David Henry Disraeli, 92 SEC Docket 852, 875 & n.85 (Dec. 21, 2007).

Kantrowitz's underlying violations were egregious, as were Respondents' failures to supervise him. Kantrowitz's violations were not isolated, and Respondents' supervisory failures that allowed them to occur were evident before 2003 and have continued well after 2004. Kantrowitz's underlying violations involved a high degree of scienter, and Respondents' failure to supervise involved repeated instances of negligent conduct.⁵⁴ Respondents offer assurances

⁵³ I have not considered Redler's criminal conduct as evidence of Amico's and Goldstein's failure to supervise. I cite Redler to refute the implication that Newbridge employed only one rogue trader whose misconduct was confined to a small window of time in the distant past.

⁵⁴ In recent cases involving Sections 15(b)(4)(E) and 15(b)(6) of the Exchange Act, the Commission has gone beyond the statutory requirement of finding negligent supervision, and has instead characterized certain deficient supervision as reckless. See, e.g., Horning, 92 SEC

against future supervisory lapses, but their assurances are not credible, given the number of times they have made similar, hollow promises in the past. Consistent with their vigorous defense, Respondents do not acknowledge the wrongful nature of their supervisory conduct. In the absence of supervisory bars, it is highly likely that future supervisory failures will occur.

Respondents' conduct demonstrates a fundamental lack of comprehension regarding what constitutes reasonable supervision. I conclude that supervisory bars are warranted by the facts and circumstances and are necessary to protect the investing public from dealing with securities professionals who are not adequately supervised. However, the Division's request to preclude applications for reinstatement sooner than five years involves overreaching, particularly in light of the fact that Newbridge will continue in business. Respondents may seek reinstatement after two years from the date the supervisory bars take effect.

The Division has never explained how it expects the supervisory bars to work in practical terms. Amico and Goldstein both hold Series 7 licenses and, together, they control Newbridge by ownership of 54% of its stock. When the supervisory bars take effect, Amico and Goldstein may continue to work at Newbridge as non-supervisory registered representatives or in other areas of the Newbridge financial empire that do not require registration as a broker-dealer supervisor.⁵⁵ The difficulty arises from the fact that the supervisory bars may require the installation of a "figurehead" manager for Newbridge's broker-dealer business and that

Docket at 225-26 (holding that Horning "acted recklessly by failing to implement basic supervisory procedures when confronted with previous misconduct"); cf. Wurts, 54 S.E.C. at 1132 (characterizing Wurts's lapses of judgment as "extraordinary, almost to the point of recklessness"). Neither the Commission nor the reviewing courts have held that negligent supervision can support only token sanctions. To the contrary, the Commission has imposed meaningful sanctions on deficient supervisors without characterizing the supervision as reckless. See Thornton, 53 S.E.C. at 1217; Consol. Inv. Servs., 52 S.E.C. at 590-91.

The OIP alleges that Kantrowitz was reckless. It does not allege that Amico and Goldstein were reckless supervisors. Moreover, the Settlement Orders already issued in this proceeding do not characterize either Newbridge or Vallejo as reckless supervisors. I seriously doubt that the Division "pulled its punches"—*i.e.*, downgraded what it believed to be reckless supervisory conduct to negligent supervisory conduct—merely to induce Newbridge and Vallejo to settle. These considerations counsel against a determination that Amico and Goldstein were reckless supervisors. In any event, given the Commission's view that no one of the relevant factors, by itself, is dispositive, see Disraeli, 92 SEC Docket at 875 & n.85, then it should not be necessary to exceed the statutory requirement of negligence to justify a supervisory bar.

⁵⁵ There are no collateral bars in litigated enforcement proceedings. See Teicher v. SEC, 177 F.3d 1016, 1019-22 (D.C. Cir. 1999). As a result, when the Commission orders a supervisory suspension or a supervisory bar under the Exchange Act, the employing firm can soften the sting of that sanction by finding a new supervisory home for the suspended or barred individual in its investment adviser arm. Newbridge Financial Services Group, Inc., is registered with the Commission as an investment adviser. I have kept this prospect in mind when evaluating Respondents' claim that the Division's proposed sanctions are "draconian."

Respondents may still wish to flex their muscles as controlling stockholders. It is hard to understand how the Division believes this could be in the public interest, when the Commission has previously criticized such arrangements. See Victor Teicher, 91 SEC Docket 3068, 3071 (Nov. 5, 2007); Kirk A. Knapp, 50 S.E.C. 858, 862-63 (1992) (“a difficult supervisory situation”). Moreover, as the Division is well aware, inattention to the particulars of such temporary “figurehead” arrangements may lead to mischief and more litigation. Cf. SEC v. Yu, 231 F. Supp. 2d 16, 19-22 (D.D.C. 2002) (granting a preliminary injunction where the president of a brokerage firm continued to supervise despite a supervisory bar). However, such unintended consequences are for the Division to address in the first instance. Cf. Delta Equity Servs. Corp., 76 SEC Docket 2841, 2850-51 (Feb. 21, 2002) (settled proceeding) (allowing the Division to approve the temporary supervisory structure).

Amico and Goldstein assert that suspending or barring both of them from acting in a supervisory capacity for any length of time would unnecessarily weaken Newbridge’s management and operations. This argument finds support in the Commission’s jurisprudence. Cf. Wurts, 54 S.E.C. at 1133 (“[B]ecause [the president and sole owner] is so closely involved with [the registered broker-dealer], suspending [him] or barring him from a supervisory or proprietary role for a lengthy period could cause the closing of [the firm], with serious consequences for its employees and customers.”). However, Respondents have not developed the record on this issue, and they may not attempt to use the theoretical prospect of harm to their employees and customers as bargaining chips to save themselves. Two of the five Newbridge employees who testified are sanctioned supervisors. Perhaps Newbridge’s customers are primarily widows and orphans, but the customers who appeared at the hearing were market manipulators and convicted criminals. The present case is easily distinguished from Wurts on that basis. I have considered the possibility that Amico, Goldstein, and Newbridge might benefit from the type of courtesies the Department of Justice extended to Andrew and Lea Fastow during the Enron Corporation criminal case.⁵⁶ However, nothing that Respondents presented at the hearing warrants such relief in this Initial Decision.

B. Civil Monetary Penalties

Under Section 21B(a)(4) of the Exchange Act, the Commission may assess a civil penalty if a respondent has failed reasonably to supervise another person who has willfully violated the Securities Act, the Exchange Act, or the rules or regulations thereunder.

Section 21B(b) of the Exchange Act specifies a three-tier system identifying the maximum amount of a civil penalty. For each “act or omission” by a natural person, the adjusted maximum amount of a penalty in the first tier is \$6,500; in the second tier, it is \$60,000; in the third tier, it is \$120,000.⁵⁷ For a second-tier penalty, the act or omission must have “involved

⁵⁶ “Plea Deal for Kids in Enron Case Draws Fire,” DENVER POST, Jan. 22, 2004, at F-1 (“As part of a carefully orchestrated deal, the government agreed that the couple’s sentences will be timed so their young sons would not be without a parent while the other does time.”).

⁵⁷ As required by the Debt Collection Improvement Act of 1996, the Commission has periodically increased the maximum penalty amounts for violations. See 17 C.F.R. §§ 201.1001,

fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.” A third-tier penalty not only must meet the requirements for a second-tier penalty, but the act or omission also must have “directly or indirectly resulted in substantial losses 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.”

The Commission also must find that a monetary penalty is in the public interest. Six factors are relevant to the public interest determination: (1) fraud, deceit, manipulation, or the deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other factors as justice may require. See Section 21B(c) of the Exchange Act. In its discretion, the Commission may consider evidence of a respondent’s ability to pay. See Section 21B(d) of the Exchange Act.

The Division treats the entire course of conduct in the OIP as a single act or omission and not as a series of acts and omissions as to which multiple penalties would be appropriate. Amico and Goldstein do not argue that they lack the ability to pay the maximum \$120,000 penalties the Division seeks (Order of Nov. 20, 2008). The proceeding was litigated on that basis, and it is too late for either side to shift theories now.

The Division has not quantified the harm to others and it has not shown that Amico and Goldstein were unjustly enriched. Goldstein has a prior disciplinary record, but Amico does not.

To determine the tier of civil monetary penalty that is appropriate against a deficient supervisor, the Commission first looks at the act or omission of the supervised person. Supervisory failures “involve fraud” where they allow and are responsible in part for the success and duration of fraudulent misconduct by the person supervised. See Kolar, 55 S.E.C. at 1022 (imposing a tier-two penalty against a supervisor); Consol. Inv. Servs., 52 S.E.C. at 590 (same). Kantrowitz’s underlying misconduct involved both manipulation and reckless disregard of Exchange Act Rule 10b-5. At a minimum, tier-two penalties are appropriate on that basis against Amico and Goldstein.

The Division did not demonstrate that Kantrowitz’s acts and omissions resulted in substantial losses to other persons. Nor did it show that Kantrowitz’s acts and omissions created a significant risk of substantial losses to other persons.⁵⁸ However, the Division did establish

.1002, .1003, .1004. Because Kantrowitz’s underlying misconduct occurred between November 2003 and August 2004, the adjusted maximum penalty amounts in 17 C.F.R. § 201.1002 govern here.

⁵⁸ In Rockies Fund, Inc. v. SEC, 428 F.3d 1088, 1099 (D.C. Cir. 2005), the court of appeals deemed the Commission’s explanation for third-tier civil penalties to be insufficient. It vacated the penalties and remanded the proceeding to the agency for further consideration. On remand, the Commission imposed tier-two penalties, instead of tier-three penalties. See Rockies Fund, Inc., 89 SEC Docket 1517, 1528-29 (Dec. 7, 2006) (Remand Opinion), recons. denied, 91 SEC Docket 1418 (Aug. 31, 2007).

that Kantrowitz's acts and omissions "resulted in substantial pecuniary gains" to Kantrowitz. The Division estimated that the gross amount of commission income accruing to Kantrowitz as a result of trading Roanoke and Concorde was \$258,389 (Div. Prehear. Br. at 50; DX 129, second page, 50% payout).⁵⁹ I conclude that Kantrowitz's pecuniary gains were \$258,389.⁶⁰ I further conclude that gains of this magnitude are "substantial." Third-tier penalties against Amico and Goldstein are statutorily permissible on that basis.⁶¹

The Remand Opinion stated that some misconduct "by its nature" creates "a significant risk of substantial loss," even where no actual losses have been proven. See 89 SEC Docket at 1528 n.43. Upon further judicial review, the court of appeals affirmed the tier-two penalties, but it treated the language in note 43 of the Remand Opinion as dictum. See Rockies Fund, Inc. v. SEC, 298 Fed. Appx. 4, *5 (D.C. Cir. Oct. 21, 2008) ("Because the Commission imposed second-tier rather than third-tier penalties, it did not need to explain how the violations 'created a significant risk of substantial losses.'").

In this proceeding, the Division has not argued that Kantrowitz's misconduct "by its nature" created a significant risk of substantial loss. The Division has waived the opportunity to make this argument.

⁵⁹ I place considerably more weight on DX 129, the Division's summary exhibit, than I do on Kantrowitz's off-the-cuff estimates at the hearing (Tr. 216-17, 315).

⁶⁰ A calculation of pecuniary gain may include prejudgment interest. See SEC v. Koenig, 557 F.3d 736, 744-45 (7th Cir. 2009). Here, however, the Division did not argue that Kantrowitz's commission income of \$258,389 should be increased by a specific amount of prejudgment interest to determine his total pecuniary gain as a predicate for Amico's and Goldstein's civil penalties. It has waived the opportunity to make this argument.

⁶¹ Kantrowitz protested that the Division's estimate was too high. He also submitted a sworn financial statement in support of an inability-to-pay defense (Prehear. Conference of Dec. 3, 2008, at 18-21). However, Kantrowitz never adjudicated these issues and ultimately settled. The Commission's Settlement Order required Kantrowitz to disgorge \$217,000, plus prejudgment interest of \$3,996, a total of \$220,996. There is no way to tell from the Settlement Order if the Division's estimate was too high, if the final disgorgement figure was reduced in view of Kantrowitz's financial circumstances, or both. For these reasons, Amico and Goldstein may not benefit from the fact that Kantrowitz negotiated a lesser amount of disgorgement through settlement.

Once the Division showed that its disgorgement figure of \$258,389 reasonably approximated the amount of unjust enrichment to Kantrowitz, the burden of going forward shifted to Amico and Goldstein to demonstrate clearly that the Division's disgorgement figure was not a reasonable approximation. See SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995). Amico and Goldstein did not attempt to show that Kantrowitz's pecuniary gains were less than \$258,389.

The need for deterrence is not fully satisfied by the supervisory bars. The Commission has imposed or sustained both supervisory bars and substantial civil penalties/fines in prior cases.⁶² See, e.g., Carley, 92 SEC Docket at 1732, 1740; Robert J. Prager, 85 SEC Docket 3413, 3436-38 (July 6, 2005); Quest, 55 S.E.C. at 380-81; Consol. Inv. Servs., 52 S.E.C. at 590-91. Substantial civil penalties will help to deter future supervisory lapses by others with ultimate supervisory authority.

The parties did not identify any contested cases in which the Commission has penalized deficient supervisors in amounts that exceed the primary wrongdoer's pecuniary gains. This is a factor that justice requires me to consider. In separate settlement orders, the Commission has already imposed civil penalties against Newbridge (\$80,000) and Vallejo (\$20,000) for failing to supervise Kantrowitz. Accordingly, I impose civil penalties of \$79,000 each against Amico and Goldstein. Collectively, these four supervisory civil penalties equal \$258,000, an amount nearly equal to Kantrowitz's substantial pecuniary gains. Civil penalties in a higher amount are not consistent with the public interest.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on March 20, 2009.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Guy S. Amico and Scott H. Goldstein shall each be barred from associating with any broker or dealer in a supervisory capacity. Respondents may file petitions for reinstatement after two years from the effective date of the supervisory bars; and

IT IS FURTHER ORDERED THAT, pursuant to Section 21B of the Securities Exchange Act of 1934, Guy S. Amico and Scott H. Goldstein shall each pay a civil monetary penalty of \$79,000.

Payment of the civil penalties shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by wire transfer, certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the Securities and Exchange Commission. The payments, and a cover letter identifying the Respondents and the proceeding designation, shall be delivered to the Comptroller, Securities and Exchange

⁶² In Thomas C. Bridge, 92 SEC Docket 3374, 3413 (Mar. 10, 2008) (Initial Decision), an Administrative Law Judge imposed permanent supervisory bars, as well as third-tier penalties. The supervisors petitioned for review, and the Commission heard oral argument on May 13, 2009. As of this date, the Bridge proceeding is still pending before the Commission.

Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter and the instruments of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision pursuant to Rule 111 of the Commission's Rules of Practice. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

James T. Kelly
Administrative Law Judge