FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. TIMOTHY B. RUGGIERO (CRD No. 2119642), Respondent.	Disciplinary Proceeding No. 2008011675301 Hearing Officer – MAD **EXTENDED HEARING PANEL DECISION** December 31, 2013

Respondent Timothy B. Ruggiero is barred from associating with any FINRA registered firm in any capacity for: (1) engaging in a stock price manipulation in violation of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder, and in violation of NASD Conduct Rules 2120 and 2110, as described in the First Cause of Action; (2) unlawfully trading in stock during the restricted periods for two offerings, in violation of Rule 101 of Regulation M under the Exchange Act and NASD Conduct Rule 2110, as described in the Second Cause of Action; and (3) forging initials on options order tickets to evidence supervisory review of the transactions, in violation of NASD Conduct Rules 3110(a) and 2110, as described in the Fifth Cause of Action. In addition, Ruggiero failed to: (1) retain electronic communications, in violation of NASD Conduct Rules 3110 and 2110, as described in the Third Cause of Action; and (2) supervise his firm's trading and electronic communications, in violation of NASD Conduct Rules 3010 and 2110, as described in the Fourth Cause of Action. In light of the bar, no additional sanctions are imposed for the violations of the Third and Fourth Causes of Action. Ruggiero is also ordered to pay the costs of this proceeding.

Appearances

For the Complainant: Allen D. Boyer, Ronald W. Sannicandro, Michael J. Watling, Steven F. Korostoff, and Susan Light, FINRA, DEPARTMENT OF ENFORCEMENT, New York, NY.

For Respondent Timothy B. Ruggiero, pro se.

DECISION

I. INTRODUCTION

Department of Enforcement brought this disciplinary proceeding against Respondent Timothy B. Ruggiero, the president of Brookshire Securities Corporation ("Brookshire"), a former FINRA member firm. At Brookshire, Ruggiero engaged in Private Investment in Public Equity ("PIPE")[1] offerings with two Over-the-Counter Bulletin Board ("OTCBB") securities, Visual Management Systems, Inc. ("VMSY") and MDWerks, Inc. ("MDWK"). Enforcement alleges that Ruggiero violated a federal securities law and certain NASD Conduct Rules, by engaging in stock price manipulation and unlawful trading during the restricted periods of the offerings. Enforcement also alleges that Ruggiero violated NASD Conduct Rules relating to retention of electronic communications, supervisory systems and procedures, and forgery in connection with the supervisory review of options tickets.

II. PROCEDURAL HISTORY

Enforcement filed the Complaint against Ruggiero on September 25, 2012.[2] The First and Second Causes of Action relate to trading in connection with PIPE offerings. The First Cause of Action alleges that Ruggiero bought shares and placed orders to manipulate the inside bid price of VMSY, in violation of the Securities Exchange Act of

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[1] "In a PIPE offering, investors commit to purchase a certain number of restricted shares from a company at a specified price. The company agrees, in turn, to file a resale registration statement so that the investors can resell the shares to the public." www.sec.gov/answers/pipeofferings.htm.

[2] The Complaint also named Peter S. Chung as a Respondent. Enforcement charged Chung with: (1) buying shares and placing orders to manipulate the inside bid price of VMSY, in violation of the Exchange Act, Section 10(b) and Rule 10b-5 thereunder, and NASD Conduct Rules 2120 and 2110; and (2) unlawfully trading VMSY and MDWK stock during the offerings' restricted period, in violation of Rule 101 of Regulation M under the Exchange Act and NASD Conduct Rule 2110. Chung submitted an Offer of Settlement on the first day of the hearing, which was approved by FINRA's Office of Disciplinary Affairs. Accordingly, this decision only addresses the charges against Ruggiero. The caption of this proceeding has been amended to reflect only Respondent Ruggiero.

1934 ("Exchange Act"), Section 10(b) and Rule 10b-5 thereunder, and NASD Conduct Rules 2120 and 2110. The Second Cause of Action alleges that Ruggiero unlawfully traded VMSY and MDWK stock during the offerings' restricted periods, in violation of Rule 101 of Regulation M under the Exchange Act and NASD Conduct Rule 2110. The Third Cause of Action alleges that Ruggiero failed to retain electronic communications, in violation of NASD Conduct Rules 3110 and 2110. The Fourth Cause of Action alleges that Ruggiero failed to supervise his firm's trading and electronic communications, in violation of NASD Conduct Rules 3010 and 2110. The Fifth Cause of Action alleges that Ruggiero forged initials on options order tickets to evidence supervisory review of the transactions, in violation of NASD Conduct Rules 3110(a) and 2110.[3] Ruggiero filed an answer on November 14, 2012, denying many of the allegations in the Complaint.

The Hearing Panel found Ruggiero liable for each cause of action and sanctioned him.[4] Regarding the First Cause of Action, despite Ruggiero's assertion that he did not manipulate the inside bid price of VMSY, the Panel concluded that he engaged in manipulation. He placed VMSY orders to ensure that the VMSY market price remained above the offering price. Regarding the Second Cause of Action, the Hearing Panel determined that Ruggiero unlawfully traded VMSY and MDWK during the restricted

[3] The FINRA Rules, which include NASD Procedural and Conduct Rules, are available at www.finra.org/Rules. Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, the FINRA procedural rules apply. The conduct rules that apply are those that existed at the time of the conduct at issue.

[4] The hearing was held on May 14 through May 17, 2013, in Boca Raton, Florida, before an Extended Hearing Panel composed of the Hearing Officer, a former member of FINRA's District 3 Committee, and a former member of FINRA's District 9 and District 10 Committees. The parties filed post-hearing briefs with the Office of Hearing Officers in July 2013. At the request of the Hearing Panel, Enforcement and Ruggiero filed supplemental briefs in September and October 2013.

periods. At the hearing, Ruggiero admitted violating Regulation M with regard to MDWK; however, he asserted that he did not violate Regulation M with regard to VMSY. He claimed that Brookshire was no longer acting as VMSY's placement agent, and thus he was not prohibited from trading VMSY. The Hearing Panel found that Brookshire was the exclusive placement agent for VMSY and Ruggiero's trading in VMSY during the restricted period violated Regulation M. Regarding the Third and Fourth Causes of Action, the Hearing Panel found that Ruggiero failed to (1) ensure that Brookshire retained its electronic communications and (2) supervise Brookshire's trading and electronic communications. Regarding the Fifth Cause of Action, the Panel found that Ruggiero forged initials on options order tickets to evidence supervisory review of the transactions. Ruggiero acknowledged that he placed another individual's initials on the order tickets, but he claimed to have done so with the individual's authorization. The Panel found that Ruggiero failed to prove that he was authorized to use another individual's initials on the options order tickets.

Based upon a preponderance of the evidence, the Hearing Panel makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT[5]

A. Respondent Ruggiero

Ruggiero entered the securities industry in 1990. In 1996, he co-founded Brookshire.[6] From November 1996 through March 2009, Ruggiero was registered with FINRA as a General Securities Representative, General Securities Principal, and an Equity Trader Limited Representative through his association with Brookshire.[7] Ruggiero was Brookshire's Chief Executive Officer ("CEO") and president. In addition to his roles as CEO and president, during certain periods relevant to the Complaint, Ruggiero was also Brookshire's Compliance Officer and Head Trader.

FINRA cancelled Brookshire's registration, effective March 26, 2009. Thereafter, Ruggiero filed registration applications with FINRA for other firms that he owned and controlled. He filed a Uniform Application for Broker-Dealer Registration ("Form BD") for Evora Capital, Inc. on March 23, 2011, which is currently pending before FINRA and the Securities and Exchange Commission ("SEC").[8] He also submitted several initial and amended Uniform Applications for Securities Industry Registration or Transfer ("Forms U4"), including an initial Form U4 dated March 25, 2011, seeking registration through

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[5] The facts contained herein are either undisputed or are the findings of the Hearing Panel based upon the credibility of each witness. In making credibility determinations, the Hearing Panel considered all of the circumstances under which the witness testified, including: the relationship of the witness to the parties; the interest, if any, the witness has in the outcome of the proceeding; the witness' appearance, demeanor, and manner while testifying; the witness' apparent candor and fairness, or lack thereof; the reasonableness or unreasonableness of the witness' testimony; the opportunity of the witness to observe or acquire knowledge concerning the facts to which he or she testified; the extent to which the witness was contradicted or supported by other credible evidence; and whether such contradiction related to an important detail at issue. When necessary and appropriate, the Hearing Panel comments on the credibility of a witness or the weight given to a witness' testimony.

[6] Hearing Tr. (Ruggiero) at 485. Brookshire was wholly-owned by its parent company, Brookshire Holdings, Inc., of which Ruggiero held a majority interest. Hearing Tr. (Ruggiero) at 488; CX-29c.

[7] CX-1, at 3-4.

[8] The Central Registration Depository ("CRD") records for Evora Capital reflect that Ruggiero amended the Form BD on April 18 and May 7, 2012.

his association with Evora Capital.[9] Ruggiero amended that Form U4 on several occasions, the last of which occurred on November 20, 2012.[10] By signing and submitting the Form U4, Ruggiero became subject to FINRA's jurisdiction.[11]

B. PIPE Offerings

Brookshire assisted private companies in going public by reverse mergers with publicly-held shell corporations. During 2006 and 2007, these transactions included PIPE offerings for VMSY and MDWK.

1. The VMSY Offering

a. *Terms of the Offering*

The VMSY offering was sold pursuant to a confidential Private Placement Memorandum ("PPM").[12] The offering opened on March 30, 2007, the date of the PPM, and closed on October 25, 2007.[13] The restricted period for the VMSY PIPE offering

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[9] CX-1, at 18.

[10] *Id.*

[11] *See* Notice to Members 99-95 (noting that "by signing the Form [U4], a person is subject to the jurisdiction of the NASD"). Ruggiero's pending Form U4 is in connection with Evora Capital, a firm that has not yet been approved and whose Form BD is currently pending. Several cases have found jurisdiction where a respondent files a Form U4 with FINRA. *See Dep't of Enforcement v. Berger*, No. C9B040069, 2006 NASD Discip. LEXIS 19, *18-19 (N.A.C. July 28, 2006) (finding jurisdiction where respondent filed an incomplete Form U4 and was never accepted as a registrant with a member firm); *Dep't of Enforcement v. Respondent*, No. C10010146, 2003 NASD Discip. LEXIS 1, at *9 n.4 (N.A.C. Jan. 3, 2003) (holding that respondent who signed and submitted Form U4, but whose registration was never accepted, to be within NASD's jurisdiction); *Dist. Bus. Conduct Comm. v. Maliagros*, No. C10920110, 1994 NASD Discip. LEXIS 47, at *1-2 (N.B.C.C. Jan. 10, 1994) (holding that respondent who signed and filed a Form U4, but who never worked for a member firm, was subject to NASD's jurisdiction). In each of the above cases, the respondent filed a Form U4 with a firm that was already a FINRA member. Here, both Ruggiero's Form U4 and Evora Capital's Form BD are currently pending. The Hearing Panel determined that there is jurisdiction under the circumstances presented here because Ruggiero voluntarily submitted the applications for himself and Evora Capital, and filed amendments to them on several occasions. The Complaint was filed while Ruggiero's Form U4 was pending, and charges him with misconduct that occurred while he was registered with FINRA through his association with Brookshire. The SEC has held that FINRA's jurisdictional provisions "should be construed, not strictly and technically, but flexibly to achieve their remedial purpose." *Donald M. Bickerstaff*, 52 S.E.C. 232, 234 (1995).

[12] CX-18.

[13] *Id.* at 1; CX-19, at 27, 91.

began on March 23, 2007 (five business days prior to the PPM), and ended when the offering closed.

Investors in the VMSY offering could purchase units consisting of one share of Series A convertible preferred stock and a warrant to purchase 1,000 shares of common stock.[14] The share of convertible preferred stock was initially convertible into shares of VMSY common stock at a rate of $2.50 per share.[15]

The VMSY offering was a best-efforts offering.[16] It was designed to sell a minimum of 1,000 units with a maximum of 2,000 units at $2,500 per unit convertible into 1 million shares minimum, up to 2 million shares maximum, of common stock.[17] The VMSY offering represented 22.7% of the outstanding shares[18] and 47% of the public float (i.e., the number of outstanding shares that are not held by affiliates of the issuer).[19]

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[14] CX-18, at 12.

[15] *Id.*

[16] *Id.* at 51.

[17] *Id.* at 2.

[18] The PPM reflects 8,818,000 total outstanding shares at the time of the offering. CX-18, at 30. If VMSY was able to sell all the units and therefore issue all the shares it was offering, investors would immediately own 22.7% of total outstanding shares, and 30.2% of outstanding shares after exercising their warrants (and other dilutive issuances of stock). *Id.* Even if only the minimum number of units were sold and issued, investors in the offering would immediately own 13.0% of outstanding shares and would own 18.8% after exercising their warrants. *Id.* at 29. A comparison of the 2 million shares offered, the maximum offering, to 6,825,405 shares, the number of VMSY shares outstanding as of July 17, 2007, CX-21, at 2, represents 29.3% of the outstanding shares.

[19] *See* Regulation M Final Rules Release, *Anti-manipulation Rules Concerning Securities Offerings*, Exchange Act Release No. 38067, at 32 (Apr. 1, 1997) (public float is the "aggregate amount of common equity securities held by non-affiliates" as per usage in Form 10-K filings). After issuing the common stock in connection with the offering and the merger, VMSY's directors and officers would collectively own between 48.5% and 51.8% of the outstanding common stock. CX-18, at 44. After completing the maximum offering, VMSY would have 8,818,000 common shares outstanding. *Id.* at 30 (number of outstanding shares reflects common shares pre-dilution). The PPM estimated that 51.8% (or approximately 4,567,724 shares) would be owned by affiliates. *Id.* at 44. The remaining 4,250,276 shares, approximately 47%, would represent shares issuable in connection with the VMSY offering. *Id.* at 30. Even if the offering was limited to the minimum offering, affiliates would own 48.5% of 7,718,000 outstanding shares. *Id.* at 44 (affiliate ownership); *Id.* at 29 (shares outstanding). The public float held by the non-affiliated shareholders would therefore be approximately 3,974,770 shares (51.5% of 7,718,000). Of that number, the 1 million

b. *Brookshire's Role in the Offering*

Brookshire was the exclusive placement agent for the VMSY PIPE offering.[20] Pursuant to the PPM, it was permitted to select other broker-dealers as selling agents to aid in the distribution.[21]

The offering anticipated several closings.[22] As compensation, Brookshire received 10% of the gross proceeds of the units at each closing, totaling $254,000 for the VMSY offering.[23] Brookshire also had the opportunity to receive additional shares if it sold out the offering, and even more shares if it oversold the offering.[24] In connection with the VMSY offering, Brookshire received 61,600 shares of VMSY common stock and warrants to purchase an additional 61,600 shares.[25] Prior to the offering, Brookshire already held 143,200 shares of VMSY.[26]

c. *Manipulative VMSY Orders during the Restricted Period*

On July 17, 2007, as a result of a reverse merger, VMSY began to trade on the OTCBB.[27] VMSY was a thinly-traded stock. It traded at prices set by a relatively small

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shares bought at the minimum offering level would have resulted from the offering and would represent 25.16% of the public float (1,000,000 divided by 3,974,770). *Id.* at 29.

[20] CX-18, at 12; CX-19, at 9, 27.

[21] CX-18, at 51.

[22] *Id.* at 14.

[23] *Id.* at 15-16 (8% in commissions and 2% in expenses); CX-19, at 9, 27 (representing $123,091 in commissions and $112,436 in expenses).

[24] CX-18, at 11-13, 16.

[25] CX-19, at 9, 27. The warrants had an original exercise price of $1.75 per share, adjusted to $.40. *Id.* at 27.

[26] *Id.* at 47-48.

[27] As of July 17, 2007, the date VMSY began publicly trading, the number of VMSY shares outstanding was 6,825,405. CX-21, at 2; Hearing Tr. (Johnson) at 122-24.

number of market-making firms,[28] and these market makers' inside bid[29] and ask[30] prices determined the VMSY market price.[31]

From July 17 through the closing of the offering on October 25, 2007, investors could purchase VMSY shares either in the market at the prevailing market price or via the PIPE offering at $2.50 per share.[32] If the market price for VMSY fell below $2.50, the offering would be unattractive to potential investors because the investors could purchase shares in the market for less than the offering price.[33] Conversely, if the market price rose above the PIPE conversion price of $2.50, potential investors would have an incentive to purchase via the offering.[34]

(1) Communications Regarding VMSY Trading

VMSY's CEO, AB, recognized that the market price for VMSY could impact his ability to get investors for the offering. AB communicated his concerns to Ruggiero and Chung, another registered representative at Brookshire, and they entered trades in connection with those communications.[35]

On September 7, 2007, AB e-mailed Chung: "Can you please make sure that there [are] at least 2-300 share on the bid at 3.50-3.75 for the duration of our raise, the 3.50

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[28] Hearing Tr. (Johnson) at 68, 70.

[29] The inside bid price is the best, or highest bid price posted by a market participant. The inside bid will only be displayed on the .rtf report when a market participant's quote update causes the inside bid to change. http://www.otcbb.com/tradingdata/reportkeys/MMPMRKey.pdf.

[30] The inside ask price is the best, or lowest ask price posted by a market participant. The inside ask will only be displayed on the .rtf report when a market participant's quote update causes the inside ask price to change. *Id.*

[31] Hearing Tr. (Johnson) at 69.

[32] Hearing Tr. (Johnson) at 71, 99.

[33] Hearing Tr. (Johnson) at 113, 115.

[34] Hearing Tr. (Johnson) at 113.

[35] *See generally* CX-20b; Hearing Tr. (Johnson) at 111-18.

spread is detrimental for our efforts."[36] At that point in time, the inside ask price for VMSY was $5.00.[37] The inside bid price for VMSY was $1.50, which was lower than the $2.50 price available through the VMSY offering.[38] The "$3.50 spread" reflected the $5.00 ask price minus the $1.50 bid price. Two minutes after AB's e-mail advising Chung that "the $3.50 spread" was "detrimental" to VMSY's efforts to sell shares via the offering, Chung entered a limit order to buy 1,000 VMSY shares at $3.90.[39] Following Chung's order, Brookshire's market maker raised the inside bid for VMSY from $1.50 to $3.80, an increase of 153%, moving the bid price from below the offering price to significantly above it.[40]

On September 18, at 2:25 p.m., AB e-mailed Ruggiero, "I am trying to get investors at 2.50 [the VMSY offering price] ... and there's trades at 2.25. [C]an you please help me out here????????"[41] Ruggiero replied, "I just bot at 3.5 and entered an order to purchase some more at 4."[42] The trading records revealed that Ruggiero had purchased 1,000 shares of VMSY at $3.50 per share before AB's email.[43] Six minutes later, AB responded and thanked Ruggiero.[44] Within minutes, AB sent another email notifying Ruggiero that "the spread is 2.25 x 3.50."[45] At 3:54 p.m., Ruggiero purchased an additional 100 VMSY shares at $3.50 a share, with a market order entered shortly

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[36] CX-20b, at 1.

[37] CX-15, at 1.

[38] CX-14, at 1.

[39] *Id.*

[40] *Id.*

[41] CX-20b, at 3.

[42] *Id.*

[43] CX-64, at 1; CX-17b, at 19; Hearing Tr. (Johnson) at 120-21.

[44] CX-20b, at 3.

[45] *Id.* at 4.

before the close.[46] Ruggiero's VMSY purchases on September 18 totaled 1,100 shares, all of which were bought at $3.50 per share.[47]

On September 28, 2007, AB again contacted Chung requesting price support.[48] Specifically, AB stated, "please keep us up ... I need a little bit of support at $3.00 or so. I'm still talking to [another investment banker]. If you can't fly cover I gotta start looking for some help."[49] Twenty minutes later, Chung replied, "Got it."[50] AB then responded, "thank you. let me know if I need to call around. I'm trying to discourage trading for the next two weeks so that we don't need to fly tight cover . . . . I know we can get this fixed."[51] At 3:53 p.m., Chung placed a limit order to purchase 1,000 shares of VMSY at $3.00 per share.[52] Following this order, Brookshire's market maker raised its inside bid price for VMSY shares from $2.10 to $2.75, $.25 higher than the offering price.[53]

(2) VMSY Trading at Brookshire

Between July 17 and October 25, 2007, Ruggiero, Chung, and the third Brookshire registered representative solicited 70 limit orders to purchase VMSY shares.[54] Of the 70 limit orders for VMSY, Ruggiero was responsible for 23 orders.[55] Chung

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[46] CX-64, at 1; CX-17b, at 19; Hearing Tr. (Johnson) at 120-21.

[47] CX-14, at 1.

[48] CX-20b, at 6.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] CX-14, at 1.

[53] *Id.*

[54] CX-14.

[55] *Id.* Approximately 43% of these limit orders raised the inside bid. *Id.* On three occasions, Ruggiero's order raised the inside bid by more than 50%. *Id.*

solicited 32 limit orders, and the third registered representative solicited the remaining 15 limit orders.[56]

Ruggiero's orders to purchase VMSY shares included orders in accounts that he owned or controlled. For example, on August 22, 2007, Ruggiero purchased 1,000 shares in the account of Arrowhead Consultants, an entity that Ruggiero owned and controlled.[57] And, on September 18, 2007, he entered a 1,000-share limit order and a 100-share market order in a Brookshire proprietary account.[58] He also entered solicited VMSY orders for his customers. Between July 27 and October 22, 2007, Ruggiero entered approximately 21 solicited limited orders to purchase VMSY shares in accounts belonging to approximately 11 customers.[59]

Ruggiero, Chung, and the third registered representative entered these limit orders at prices above the standing inside bid for VMSY shares.[60] In each case, they routed the purchase limit orders to Brookshire's market maker.[61] Then, on most occasions, the market maker raised its inside bid quotation for VMSY shares after receiving the Brookshire order.[62]

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[56] CX-14.

[57] CX-16, at 12. Ruggiero testified that he had no concerns regarding the fact that he placed this order while acting as the investment banker overseeing the VMSY distribution. CX-71, at 5.

[58] Hearing Tr. (Johnson) at 180-96; CX-16, at 33; CX-17b, at 19; CX-62; CX-64.

[59] CX-14; CX-16, at 4, 7, 9, 11, 17, 18, 22, 31, 36, 45, 47, 48, 49, 50, 67, 71.

[60] CX-14; CX-16, at 4, 7, 9, 11, 17, 18, 22, 31, 36, 45, 47, 48, 49, 50, 67, 71.

[61] *Compare* CX-14 *with* CX-15.

[62] CX-14; CX-15. The VMSY bid price often increased significantly. The limit order entered by Chung on September 7, 2007, responding to the request from AB, VMSY's CEO, resulted in an increase in the inside bid price for VMSY of $2.30, a rise of 153%. Four Brookshire limit orders raised the VMSY inside bid price by 70% - 79%. Six Brookshire limit orders raised the VMSY inside bid price by 50% - 67%. Ten Brookshire limit orders raised the VMSY inside bid price by 30% - 38%. Thirteen Brookshire limit orders raised the VMSY inside bid price by 20% - 29%. CX-14.

These solicited limit orders established the majority of upward movements in VMSY's inside bid from July 17 through October 25, 2007. During this period, there were approximately 81 upward movements in VMSY's inside bid price throughout the market as a whole, and Brookshire's market maker effected approximately 66 upward movements, roughly 81%, when executing Brookshire's orders.[63] Of the 66 upward movements in the inside bid price, approximately 49 were the result of Brookshire's solicited limit orders.[64] Accordingly, Brookshire's limit orders to purchase VMSY shares caused 75% of the upward movements in the inside bid price made by its market-maker (49 out of 65), and 60% of the upward inside bid movements for VMSY in the overall market (49 out of 81).[65]

2. The MDWK Offering

a. *Terms of the Offering*

The MDWK offering was also sold pursuant to a confidential PPM.[66] The offering opened on February 1, 2006, with the issuance of the PPM and closed on June 28, 2006.[67] The restricted period for the MDWK offering began on January 25, 2006 (five business days prior to the PPM) and ended on June 28, 2006.

The offering involved the sale of units; each unit contained one share of preferred stock and one warrant.[68] Each preferred share was convertible into 20,000 shares of

[63] CX-15, at 4.

[64] *Id.*

[65] *Id.*

[66] CX-22.

[67] *Id.* at 2; CX-24, at 5, 36.

[68] CX-22, at 9.

MDWK common stock.[69] The warrant offered another 20,000 shares, exercisable at $3.00 per share.[70] MDWK sought to sell a minimum of 5 units and a maximum of 50 units through this offering.[71] The MDWK offering represented 15.6% of the outstanding shares[72] and 49.9% of the public float.[73]

b. *Brookshire's Role in the Offering*

Brookshire was the placement agent for the MDWK offering.[74] As placement agent for the MDWK offering, Brookshire received $170,000 (10% of gross proceeds), 170,000 shares of common stock, and a warrant for nominal compensation allowing it to purchase up to 56,667 additional shares at an exercise price of $1.50.[75] Prior to the

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[69] *Id.* at 10.

[70] *Id.* at 2, 9, 10.

[71] *Id.* at 9.

[72] The maximum MDWK offering offered 2 million shares to investors (1 million shares of common stock, in addition to warrants equivalent to another 1 million shares). CX-22, at 63. After the maximum MDWK offering, there would be 12,839,000 outstanding MDWK shares. *Id.* The 2 million shares issuable to subscribers in the MDWK maximum offering represented 15.6% of this total. During the offering period, MDWK reported that it had 11,732,415 shares outstanding. CX-23, at 5. Dividing the 2 million shares by 11,732,415 reflects that the MDWK offering would be equivalent to approximately 17% of the actual shares outstanding. Even if total shares outstanding increased through the exercise of outstanding warrants and options, resulting in 15,703,000 total shares outstanding, the 2 million shares from the private placement would still constitute 12.7% of all outstanding shares. CX-22, at 63 ("Total Shares Outstanding, after Offering, fully diluted").

[73] Prior to the MDWK offering, the company's directors and officers owned 2,416,515 shares of MDWK, or 20.8% of the outstanding shares. CX-22, at 61. MEDwerks, LLC, an entity controlled by MDWerks' former Chairman, owned an additional 5,115,912 shares, or 44.1%. *Id.* Together, the directors, officers, and affiliates owned 7,532,427 (2,416,515 shares plus 5,115,912 shares) of 11,539,000 outstanding shares, representing 64.9% of total outstanding shares. *Id.* at 61, 63. The remaining 4,006,573 shares (11,539,000 shares minus the 7,532,427 shares owned by affiliates yields 4,006,573 shares) constituted the public float at the time of the offering. The 2 million shares issuable to investors at the maximum offering level represented the equivalent of 49.9% of the existing public float at the time of the offering.

[74] CX-22, at 2. Brookshire was permitted to sell units through other broker-dealers to assist with the distribution. *Id.* at 12, 70.

[75] CX-24, at 5, 68.

offering, Brookshire, as well as Ruggiero and Chung individually, held MDWK shares.[76]

c. *MDWK Orders During the Restricted Period*

During the restricted period, Ruggiero entered solicited orders for nine Brookshire customer accounts. On May 23, 2006, five of Ruggiero's customers purchased a total of 23,000 MDWK shares;[77] and, on June 14, 2006, four of Ruggiero's customers purchased a total of 16,000 MDWK shares.[78] Chung and the third Brookshire registered representative also purchased MDWK shares and solicited MDWK orders during the restricted period.[79]

C. Retention of Electronic Communications

FINRA Staff conducted on-site examinations of Brookshire in 2007 and 2008.[80] The Staff determined that Brookshire was not able to properly retain its emails from fall 2006 through May 2008 for two reasons. First, Ruggiero, Chung, and other Brookshire employees used external email addresses, which were not retained or reviewed.[81] Ruggiero and Chung continued to use these external email addresses on essentially a daily basis into October 2008.[82]

Second, Brookshire did not have an effective system to back up its emails. During the 2007 examination, the Staff discovered that Brookshire had no central server for its

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[76] As placement agent for an earlier 2005 private placement of MDWK, Brookshire had received 96,000 MDWK shares, a warrant to purchase up to 64,000 additional MDWK shares, and an unspecified percentage of this offering's $1.6 million gross proceeds. CX-22, at 63. For services or as participants in the capitalization of MDWerks, Ruggiero and Chung each received 330,000 MDWK shares. The MDWK PPM stated that "certain affiliates of the Placement Agent [Brookshire] own approximately 684,000 shares of [MDWK] Common Stock." CX-22, at 12.

[77] CX-26a, at 5-21, 24-31, 34-50; Hearing Tr. (Snyder) at 845-46.

[78] CX-26b, at 3-4, 27-28, 31-32, 39-40; Hearing Tr. (Snyder) at 846-47.

[79] *See, e.g.*, CX-25a, CX-25c, CX-25d, CX-25f, CX-26.

[80] CX-6, CX-31.

[81] Hearing Tr. (Johnson) at 128-29; Hearing Tr. (Snyder) at 858.

[82] *See generally* CX-39.

email systems; it had no system for assuring that email communications were retained.[83] In order to conduct the email review during the 2007 exam, the Staff had to ask Brookshire to copy email files from the storage files of individual employees' computer hard drives.[84] The Staff explained that storing emails on individual computers could result in lost or deleted emails, as well as altered emails.[85] In fact, the Staff learned that Brookshire emails were lost or deleted. Brookshire was unable to produce an email file for its operations manager; yet, the Staff had confirmed that the operations manager had used email because they had reviewed emails from other Brookshire employees who had communicated with the operations manager.[86] Brookshire had no server to back up its emails until March 2007.[87]

During the 2008 examination, the Staff concluded that Brookshire's email retention system was still inadequate.[88] After having an email server installed, Brookshire lost contact with its original technology contractor.[89] As a result, Brookshire was unable

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[83] Hearing Tr. (Snyder) at 849, 855.

[84] Hearing Tr. (Snyder) at 849, 856.

[85] Hearing Tr. (Snyder) at 856.

[86] Hearing Tr. (Snyder) at 857-58; CX-38.

[87] Hearing Tr. (Snyder) at 855. At the hearing, Ruggiero claimed that Brookshire's Financial and Operations Principal had arranged for the server's installation a year earlier, either in May or July 2006. Hearing Tr. (Ruggiero) at 997; Hearing Tr. (Pfannenstiel) at 401-02. The Panel did not find his assertion credible; it is inconsistent with the examiners' testimony, the documentary evidence, and Ruggiero's investigative testimony. *See* CX-32 (Ruggiero responds to the 2007 exam and stated that "Brookshire has made arrangements for the necessary installation of the server and software for the downloading of past emails and the maintenance of future electronic correspondence"); CX-33 (Ruggiero reiterates that the server would be installed shortly); CX-34, at 2 (Brookshire advises FINRA that "Brookshire is completing the installation of a server to provide backup of all electronic records, including Firm email.... It is anticipated that this will be completed on or before March 15, 2007."); CX-72, at 1-2 (investigative testimony) (server had been installed "when it was brought to our attention that we didn't have it," on February 5, 2007 – a date Ruggiero remembered because it was "the day after the Super Bowl").

[88] Hearing Tr. (Johnson) at 129.

[89] CX-71, at 2.

to access the server for approximately seven or eight months.[90] During that time, Brookshire employees stored emails on their personal desktops.[91] To resolve this issue, in May 2008, Brookshire contracted with a third party to retain its emails.[92]

D. Supervisory Systems and Procedures

Ruggiero held significant supervisory positions at Brookshire. He was the president and CEO, and at all times was registered as a General Securities Principal.[93] From at least June 2006 until March 2007, Ruggiero was the Head Trader.[94] As Head Trader, Ruggiero was responsible for the review and approval of "all Transactions," "all Syndicate Transactions," and "Trading activities (all encompassing)," as well as the "review of order tickets."[95] From at least August 2006, Ruggiero was Brookshire's Compliance Officer.[96] Ruggiero's duties as Compliance Officer included "[i]nitial review and approval of all Transactions."[97] In addition, under Brookshire's supervisory structure, Ruggiero was tasked with ensuring that the firm complied with Regulation M.[98]

Ruggiero failed to reasonably supervise the trading of VMSY and MDWK, as well as Brookshire's electronic communications. Each failure is addressed below.

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[90] *Id.* at 2-3.

[91] *Id.* at 3.

[92] *Id.*

[93] Hearing Tr. (Ruggiero) at 541; CX-1, at 4.

[94] CX-7; CX-27a, at 1; RX-6, at 3; RX-30, at 3; RX-48.

[95] CX-7, at 3; RX-47, at 6.

[96] CX-2, at 4; CX-27a, at 1; RX-6, at 3. After August 2006, Ruggiero was the only Compliance Officer at Brookshire. Ruggiero acknowledged that he had been the only "compliance person" at Brookshire since the former compliance officer's departure. CX-72, at 1.

[97] CX-7, at 4.

[98] RX-46, at 7.

1. Trading in VMSY and MDWK

Ruggiero failed to supervise Brookshire's trading in VMSY and MDWK to comply with Regulation M and detect manipulative trading. At the outset, although Brookshire's business included investment banking, at no time during the VMSY and MDWK offerings did Brookshire have a watch list or restricted list. Ruggiero did not establish such a list until August 2008.[99]

During the MDWK offering when Ruggiero was Brookshire's president and Head Trader, and responsible for reviewing and approving all transactions and trading activities, he allowed Brookshire registered representatives to purchase MDWK shares, or induce customers to purchase MDWK shares, via solicited orders.[100] Ruggiero acknowledged that he and other registered representatives violated Regulation M during the MDWK offering; however, he asserted that Brookshire's compliance officer at the time did not notify him of the violative activity.[101] Ruggiero admitted learning that he and his firm had violated Regulation M only when FINRA examiners brought these violations to his attention in early 2007.[102]

During the VMSY offering, after FINRA warned Ruggiero about existing Regulation M violations related to the MDWK offering, Ruggiero again violated Regulation M when he purchased shares of VMSY.[103] Ruggiero also failed to supervise VMSY trading by other Brookshire registered representatives, including Chung, who

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[99] CX-71, at 4-5.

[100] Hearing Tr. (Ruggiero) at 561-64.

[101] Hearing Tr. (Ruggiero) at 564-65. The former compliance officer resisted any compliance duties. He stated, "Tim [Ruggiero] kept pushing that on me," "but as far as compliance and chief compliance officer, I never saw an SOP. It was just implied, and I had told him that I wasn't his compliance officer. And I think at that point, that's when he got very annoyed, and I think I was gone like a week later." CX-53, at 15.

[102] Hearing Tr. (Ruggiero) at 564-65.

[103] CX-16, at 12, 33; CX-17b, at 19; CX-71, at 5; CX-62, CX-64; Hearing Tr. (Johnson) at 180-96.

violated Regulation M.[104] Ruggiero failed to detect the manipulative VMSY trading even when faced with significant red flags, such as emails from the issuer's CEO requesting price support and trading in response thereto.

2. Electronic Communications

Ruggiero, as Brookshire's Compliance Officer, was responsible for correspondence review.[105] Brookshire's written procedures regarding electronic correspondence required prior approval for electronic messages, review of incoming emails before delivery, and a principal's review and written endorsement of all correspondence of Brookshire's associated persons pertaining to securities transactions.[106] Ruggiero failed to enforce these procedures. He reviewed correspondence by conducting "spot checks" approximately every quarter.[107] Plus, he reviewed emails only after transmission or delivery.[108] The record reflected no documentation of his reviews.[109]

Brookshire's written supervisory procedures also required emails to be archived on an optical disk;[110] however, this procedure was not enforced.[111] During the 2007 examination, FINRA Staff had to review emails from the Brookshire employees' computer desktops.[112]

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[104] During the VMSY offering, Chung entered 32 solicited limit orders, and a third Brookshire registered representative entered another 15 solicited limit orders. CX-14, CX-16.

[105] CX-7, at 4. Ruggiero was responsible for approving all incoming and outgoing correspondence. *Id.*

[106] CX-41, at 2, 4.

[107] Ruggiero reviewed email after the fact, by quarterly spot-checks "when time made itself available." CX-71, at 1-2.

[108] Hearing Tr. (Ruggiero) at 546; CX-71, at 2.

[109] CX-71, at 1-2, 4.

[110] CX-41.

[111] CX-71, at 2.

[112] Hearing Tr. (Synder) at 855-56.

E. Forged Options Tickets

During 2006, Brookshire conducted an options business.[113] Ruggiero was not a Senior Registered Options Principal.[114] He evidenced the supervisory review of the options tickets using the initials of EF, an individual who co-founded Brookshire with Ruggiero and served as Brookshire's Senior Registered Options Principal until he retired in 2001.[115] From April 2006 through December 2006, Ruggiero signed approximately 230 options order tickets with EF's initials, giving the appearance that EF had reviewed them.[116] During a portion of the time that Ruggiero placed EF's initials on the options tickets, from May 28 through August 9, 2006, EF's license was inactive as a result of his failure to satisfy his continuing education requirement.[117]

Ruggiero explained that EF served as Brookshire's options principal in 2006 because EF's son was conducting business at Brookshire.[118] According to Ruggiero, EF was going to review options order tickets each month.[119] Ruggiero admitted that he signed the options order tickets with EF's initials; however, he stated that he signed the tickets

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[113] CX-29f; Hearing Tr. (Ruggiero) at 520-22.

[114] Hearing Tr. (Ruggiero) at 538.

[115] CX-47a; Hearing Tr. (Snyder) at 774-94. EF never returned to Brookshire to supervise options after his retirement. CX-47a.

[116] Hearing Tr. (Ruggiero) at 521-22; CX-29f. The Complaint alleges that Ruggiero forged EF's initials on 239 options tickets. Compl. ¶ 74. However, Ruggiero asserted that nine tickets were duplicates. Hearing Tr. (Ruggiero) at 640.

[117] Hearing Tr. (Ruggiero) at 522-23.

[118] Hearing Tr. (Ruggiero) at 521.

[119] Hearing Tr. (Ruggiero) at 519.

with EF's approval.[120] Ruggiero explained that EF gave him a "proxy" to initial the options tickets.[121]

In contrast, Enforcement presented EF's sworn affidavit in which EF stated:

> I did not provide Timothy Ruggiero or anyone else at [Brookshire] with a proxy or any other form of authorization to approve, review or sign options order tickets or other options activity for [Brookshire] in my absence related to any transactions that were conducted by [Brookshire] or its customers after 2001.[122]

IV. CONCLUSIONS OF LAW

A. Ruggiero Manipulated the Bid Price of VMSY

Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rule 2120 prohibit fraudulent and deceptive acts and practices in connection with the offer,

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[120] Hearing Tr. (Ruggiero) at 520-22.

[121] Hearing Tr. (Ruggiero) at 38 (opening statement) (Ruggiero states EF gave him a "proxy"), 520-22 (discussion of the "proxy"). Ruggiero has provided different versions of how EF gave him the "proxy." First, during Ruggiero's investigative testimony, he stated:

> I know at one point, there was a phone call I made to him. I said, [redacted] I said, I have a stack of options tickets. . . . And he had said, You know what you are doing. Have you looked at them? I said, yes. . . . He said if everything meets the standard, you can go ahead and put my initials on them.

Hearing Tr. (Ruggiero) at 682-83. At the hearing, Ruggiero did not recall that he had told FINRA staff that he had been given EF's "proxy" in a telephone conversation, and stated that EF gave him the proxy outside the Brookshire office, "after the market closed," over drinks in Max's Bar prior to April 2006. Hearing Tr. (Ruggiero) at 680-81. Another Brookshire employee provided a different date and setting for the "proxy." She recalled an in-person discussion in the Brookshire office in April 2006 during the "first week I was there" "when we all met sitting in my office and it was discussed then [how] everything was going to be surrounding [EF's] position." Hearing Tr. (Phannenstiel) at 329.

[122] CX-47a. EF's affidavit is consistent with his response to a Rule 8210 request for information from FINRA. *Compare* CX-47a *with* CX-42, CX-43, CX-44, CX-45, and CX-46. EF submitted his Rule 8210 response to Enforcement prior to the submission of his affidavit. *Compare* CX-47a *with* CX-45 and CX-46. Enforcement offered EF's affidavit into evidence because EF is no longer in the securities industry, and thus Enforcement could not compel him to appear at the hearing. Ruggiero identified EF as a witness in his pre-hearing submissions filed with the Office of Hearing Officers, but he did not present EF as a witness during the hearing.

purchase, or sale of a security.[123] Manipulation "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."[124] "A person contemplating or making a distribution has an obvious incentive to artificially influence the market price of the securities in order to facilitate the distribution or to increase its profitability."[125] The SEC has held that "where a person who has a substantial interest in the success of a distribution takes active steps to increase the price of the security, a prima facie case of manipulative purpose exists."[126]

The issue for the Hearing Panel is whether Ruggiero's solicited VMSY limit orders qualify as a fraudulent scheme because he acted with manipulative intent.[127] In other words, the Panel must determine whether Ruggiero executed the VMSY trades when he knew or was reckless in not knowing that they were for a manipulative

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[123] Exchange Act Section 10(b) makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). In addition to prohibiting nondisclosure and false and misleading statements, Exchange Act Rule 10b-5 prohibits "any device, scheme, or artifice to defraud" or any conduct "which operates or would operate as a fraud or deceit upon any person." In addition, violations of Section 10(b) and Exchange Act Rule 10b-5 must involve the use of any means or instrumentalities of transportation or communication in interstate commerce, or the mails, or any facility of any national securities exchange. *See, e.g., SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992). In this case, the requirement of interstate commerce is satisfied. NASD Rule 2120 is FINRA's antifraud rule and is similar to Exchange Act Section 10(b) and Rule 10b-5. *Mkt. Regulation Comm. v. Shaughnessy*, No. CMS950087, 1997 NASD Discip. LEXIS 46, at *24 (NASD NBCC June 5, 1997), *aff'd*, 53 S.E.C. 692 (1998).

[124] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976); *Swartwood Hesse, Inc.*, 50 S.E.C. 1301, 1307 (1992) ("Manipulation is the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand."); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977) (explaining that manipulation refers to conduct intended to mislead investors "by artificially affecting market activity").

[125] *Bruns, Nordeman & Co.*, 40 S.E.C. 652, 660 n.11 (1961).

[126] *Id.* As early as 1949, the SEC found manipulation based on the purpose behind the actions of a market participant. *Halsey, Stuart & Co.*, 30 S.E.C. 106, 124 (1949) ("purpose must be inferred when hope, belief, and motive are implemented by activity objectively resulting in market support, price raising, sales at higher prices and the protection of inventory.").

[127] *See Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135, 2009 SEC LEXIS 4168, at *57 (Dec. 10, 2009) ("[T]he Commission has consistently held that an applicant's scienter renders his interference with the market illegal....").

purpose.[128] For the reasons discussed below, the Hearing Panel finds that Ruggiero engaged in manipulation; he placed VMSY orders to ensure that the market price remained above the offering price.

Here, VMSY was a thinly-traded stock.[129] The VMSY trading activity occurred in conjunction with the VMSY offering. AB, VMSY's CEO, had an obvious incentive to artificially influence the market price of the securities in order to facilitate the distribution and increase the success of the offering.[130] And, because Brookshire was the placement agent for the offering, Ruggiero had a financial interest in ensuring the success of the offering.

Between July 17 and October 25, 2007, Ruggiero entered a total of 23 solicited VMSY limit orders. Collectively, Ruggiero, Chung, and the third registered representative entered 70 VMSY limit orders, all of which were routed to Brookshire's market maker. From July 17 through October 25, 2007, Brookshire's market maker was the most active market maker trading in VMSY, generating 81% of all upticks in the VMSY inside bid price; and, Brookshire's VMSY limit orders caused 60% of all inside bid upticks for VMSY throughout the overall market.[131]

Ruggiero communicated with AB regarding the VMSY trading in the market. On September 18, AB emailed Ruggiero requesting assistance in increasing the market price of VMSY to ensure the success of the VMSY offering. AB explained to Ruggiero that he was trying to get investors at the offering price and he expressed his displeasure with the

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[128] *See SEC v. U.S. Envtl.*, 155 F.3d 107, 111 (2d Cir. 1998).

[129] Hearing Tr. (Johnson) at 104.

[130] *See* CX-20b (reflecting AB's request for assistance from Brookshire representatives to increase the market price of VMSY).

[131] CX-15; Hearing Tr. (Johnson) at 299, 325-26.

fact that there were trades at 2.25.[132] Ruggiero reassured AB by explaining that he had "just bot at 3.5 and entered an order to purchase some more at 4."[133] The trading records confirm that Ruggiero had placed a limit order for Brookshire to purchase 1,000 shares of VMSY, which caused the VMSY inside bid price to increase from $1.50 to $3.25.[134] Consistent with Ruggiero's email to AB stating that he placed "an order to purchase more shares 'at 4'", he also caused Brookshire to purchase an additional 100 VMSY shares at 3:54 p.m., using a market order shortly before the market closed.[135] Ruggiero's purchases on September 18 totaled 1,100 shares, all of which were bought at $3.50 per share, $1.00 more than the VMSY offering price.[136]

Ruggiero claims that he was unaware of the manipulative VMSY trading by Chung and that his trading cannot be considered manipulative because he placed his VMSY order on September 18 *before* AB asked him to raise the price of VMSY.[137] The Hearing Panel does not find Ruggiero's assertion credible. AB's September 18 email clearly asked Ruggiero to raise the price of VMSY. Even if, as Ruggiero claims, he was unaware of the manipulative VMSY trading, the September 18 email should have alerted Ruggiero to AB's request to artificially influence the market price of VMSY. When Ruggiero received AB's email, he understood the request and did not refuse to help him. Instead, Ruggiero replied that he had already accomplished AB's goal. Had Ruggiero

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[132] CX-20b, at 3.

[133] *Id.*

[134] CX-17b, at 19; CX-62 (blue sheet records); CX-63 (Market Maker Price Movement Report); CX-64 (VISTA report); Hearing Tr. (Johnson) at 180-96.

[135] CX-17b, at 19; CX-62; CX-64; Hearing Tr. (Johnson) at 191-94. "Marking the close" is the practice of attempting to influence the closing price of a stock by executing orders at or near the close of the market. *See Spear, Leeds & Kellogg*, Admin. Proc. File No. 3-11189, 2003 SEC LEXIS 1685, at *14 (July 21, 2003); *Thomas C. Kocherhans*, Exchange Act Release No. 36556, 52 S.E.C. 528, 530-31 (Dec. 6, 1995).

[136] CX-16, at 33.

[137] Hearing Tr. (Johnson) at 207-11.

truly sought to obtain the best execution possible for the orders he placed on September 18, rather than to manipulate the inside bid price of VMSY, he would have entered a market order or a limit order close to the $2.25 per share level at which VMSY was trading in the market.

Even prior to AB's September 18 email, Ruggiero entered nine solicited limit orders to buy VMSY shares.[138] Three of Ruggiero's nine limit orders resulted in significant increases in the inside bid price of VMSY. His August 30 VMSY order increased the bid price by 67%; his August 31 order increased the bid price by 79%, and his September 17 order increased the bid price by 70%.[139]

The Hearing Panel has considered the factual details here, and the possible inferences to be drawn from them, and finds that Ruggiero engaged in a manipulation.[140] He placed VMSY orders to ensure that the VMSY market price remained above the offering price, when he knew, or at a minimum was reckless in not knowing, that the solicited VMSY limit orders were for a manipulative purpose. Accordingly, Ruggiero violated Exchange Act Section 10(b) and Rule 10b-5, and NASD Conduct Rules 2120 and 2110, by submitting solicited VMSY limit orders that were intended to, and did, artificially increase the inside bid price and made the competing VMSY offering appear more attractive to potential investors.

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[138] CX-14.

[139] *Id.* During this same period, Chung had entered 11 solicited limit orders for VMSY, which resulted in an increase of the inside bid price by 50% or more on seven occasions. *Id.*

[140] *See, e.g., Brooklyn Capital & Sec. Trading, Inc.*, 52 S.E.C. 1286, 1290 (1997) ("In determining whether a manipulation has occurred, we have depended on inferences drawn from a mass of factual detail including patterns of behavior, apparent irregularities, and from trading data." (internal quotations omitted)).

B. Ruggiero Engaged in Prohibited Trading During Restricted Periods for VMSY and MDWK

Regulation M is intended "to assure that distributions of securities are free of the market effects of bids, purchases, and inducements to purchase by those who have an interest in the success of a distribution."[141] Specifically, Rule 101 makes it unlawful for any distribution participant "directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security" during the distribution's restricted period.[142] Here, VMSY and MDWK are "distributions" and Brookshire was a "distribution participant." For the reasons discussed below, the Hearing Panel finds that Ruggiero violated Regulation M because he traded during the VMSY and MDWK restricted periods.

1. Regulation M applies to the VMSY and MDWK offerings because they were "distributions"

A private placement is subject to Regulation M if it meets the definition of a distribution, characterized by sufficient magnitude, and special selling efforts and selling methods.[143] "Magnitude" refers to a volume of trading distinguishable from "ordinary trading transactions."[144] "Special selling efforts and methods" include the use of "sales documents," such as a prospectus or private placement memorandum, and "greater than

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[141] *Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, Securities Exchange Act Release No. 34-51500, 2005 SEC LEXIS 793, *8 (Apr. 7, 2005).

[142] 17 CFR 242.101(a).

[143] SEC Regulation M applies to "an offering of securities, *whether or not subject to registration under the Securities Act*, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods." 17 CFR 242.100(b), "Distribution" (emphasis added); *see also* SEC Division of Market Regulation, Staff Legal Bulletin No. 9, *Frequently Asked Questions About Regulation M* (October 27, 1999, as revised September 10, 2010) (private placement of securities is a distribution under Regulation M "if the offering satisfies the 'magnitude' and 'special selling efforts and selling methods' criteria"), available at www.sec.gov/interps/legal/mrslb9.htm [hereinafter *Questions About Regulation M*].

[144] 17 CFR 242.100(b).

normal compensation arrangements pertaining to the distribution of a security," such as placement agent fees.[145] Based on the offerings' use of PPMs and compensation for Brookshire, its placement agent, and the fact that the offerings represented a significant percentage of the outstanding securities, the VMSY and MDWK offerings fell within the bounds of Regulation M.

VMSY

The VMSY private placement qualified as a distribution. First, the magnitude of the offering distinguished it from ordinary trading transactions. The VMSY offering was structured to sell a quantity of shares representing 22.75% of the outstanding VMSY shares, and represented 47% of the public float. Second, it involved special selling efforts and methods, including a PPM and substantial compensation to Brookshire as its placement agent. Brookshire received a total of $254,000 (including $123,091 in commissions and $112,436 in expenses), 61,600 shares of VMSY common stock, and additional warrants.[146]

MDWK

The MDWK private placement also qualified as a distribution. It satisfied the magnitude requirement; the offering represented 15.6% of the outstanding shares and 49.9% of the public float. It also involved special selling efforts and methods, including a PPM and substantial compensation to Brookshire as its placement agent. Brookshire received a total of $170,000 (10% of gross proceeds), 170,000 shares of common stock,

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[145] *See* Regulation M Concept Release, *Review of Antimanipulation Regulation of Securities Offerings*, Securities Exchange Act Release No. 33924, 1994 SEC LEXIS 1302, *24 (Apr. 19, 1994).

[146] CX-19, at 9, 27; *see First Albany Corp.*, Exchange Act Release No. 30515, 50 S.E.C. 890, 898-99 (Mar. 25, 1992) (noting that the use of special selling methods and sales totaling 9.5% of an issuer's outstanding shares supported the finding a distribution under former SEC Rule 10b-6, even where no offering was formally launched).

and a warrant for nominal compensation allowing it to purchase up to 56,667 additional shares at an exercise price of $1.50.[147]

2. Brookshire was a "distribution participant" in the VMSY and MDWK distributions.

Distribution participants include underwriters, prospective underwriters, brokers, dealers, or other persons who have agreed to participate or are participating in a distribution.[148] An underwriter is "a person who has agreed with an issuer...to distribute securities for or on behalf of such issuer or selling security holder; or ... to manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder."[149] As placement agent for the VMSY and MDWK offerings, Brookshire was a Regulation M underwriter. It conducted the offerings on a best-efforts basis,[150] and was required to use its best efforts to market the securities covered by the PPMs. Further, it had the authority to select other broker-dealers as selling agents to aid in the distribution.

3. Ruggiero Traded During the Restricted Periods

As an underwriter, Brookshire fell within the broadest category of restriction. The restricted periods for the VMSY and MDWK offerings continued until the offerings

[147] CX-24, at 5, 68.

[148] 17 CFR 242.100(b).

[149] 17 CFR 242.100(b), "Underwriter."

[150] CX-18, at 51; CX-22, at 9. Brookshire agreed "to use its commercially reasonable efforts as agent for VMS to sell the Units." RX-17, at 10.

ended.[151] Ruggiero personally purchased securities and entered solicited orders in his customers' accounts during the restricted periods for VMSY and MDWK.

VMSY

The VMSY restricted period began on March 23, 2007 (five business days prior to the PPM), and ended on October 25, 2007. During this period, Ruggiero purchased VMSY shares in accounts that he owned or controlled, as well as solicited VMSY orders for his customers. As discussed above, Ruggiero placed a total of 23 orders for VMSY during the restricted period.

Ruggiero argues the VMSY restricted period ended on July 17, and therefore Brookshire was not prohibited from making or soliciting purchases of VMSY shares after July 17. According to Ruggiero, Brookshire was not the placement agent for VMSY from July 18 until October 25.[152] When explaining how he determined that the restricted period had ended, he testified that the termination of the private placement offering had been

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[151] Rule 100(b) provides that "securities acquired in the distribution for investment by any person participating in a distribution . . . shall be deemed to be distributed." 17 CFR 242.100(b). The Rule generally ties the completion date of a distribution participant's participation to the point at which "such person's participation has been distributed." *Id.* However, for underwriters, Regulation M further restricts the underwriter from trading until all securities of the same class have been sold and all trading and stabilization restrictions terminated. *Id.* The SEC has further indicated that where more than one broker-dealer is involved in distributing an offering – and that, therefore, all such participants count as underwriters – each such underwriter remains restricted until all the underwriters have completed their role in the offering: "Q: When is an underwriter's participation in a distribution completed? . . . A: Generally, each syndicate member's participation in a distribution is completed when all of the shares in the offering have been distributed and after any stabilization arrangements and trading restrictions in connection with the distribution have been terminated." SEC Division of Market Regulation, Staff Legal Bulletin No, 9, *Questions About Regulation M.* As the Adopting Release stated, the purpose is "*to assure that the underwriter's selling efforts in connection with the distribution have in fact ceased before trading prohibitions are lifted.*" *Anti-manipulation Rules Concerning Securities Offerings*, Securities Exchange Act Release No. 38067, 1996 SEC LEXIS 3482, at *18 (Dec. 20, 1996) (emphasis added) [hereinafter Regulation M Adopting Release]. The Regulation M Adopting Release emphasized that the restricted period continues "until the distribution is over." *Id.* at *8, 13, 128; *see also* SEC Division of Market Regulation, Staff Legal Bulletin No. 10, *Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases* (Aug. 25, 2000) ("The provisions of Regulation M continue to apply until all of the shares have come to rest in the hands of investors."), available at http://www.sec.gov/interps/legal/slbmr10.htm.

[152] Hearing Tr. (Ruggiero) at 589-92.

decided between himself and Chung on August 2, 2007.[153] Specifically, Ruggiero stated, "That deal was done in our own mind."[154]

The Hearing Panel rejects Ruggiero's argument for two reasons. First, the VMSY documentation, the PPM and SEC filings, described an ongoing offering with several closings. The PPM advised that the offering would terminate on or before May 31, 2007; however, it contemplated that the offering could be extended.[155] The PPM also discussed the reverse merger, which would enable VMSY to trade on the OTCBB and coincide with an "initial closing" of the offering.[156] The initial closing and the reverse merger occurred on July 17.[157] The initial closing was the first of several closings during the VMSY offering. The PPM specifically stated that after the initial closing "the Company may hold *additional* closings from time to time."[158] After the reverse merger, additional closings took place in July, August, and October 2007, as VMSY management reported in its SEC filing.[159] The VMSY SEC filing also provided an October 25 ending date for the offering.[160]

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[153] Hearing Tr. (Ruggiero) at 589-92.

[154] Hearing Tr. (Ruggiero) at 589-92, 725.

[155] CX-18, at 17.

[156] *Id.* at 2.

[157] Although the PPM provided a termination date of May 31, 2007, it allowed for the offering to be extended in order to accomplish other important goals discussed in the PPM such as the initial closing and the reverse merger, which would allow VMSY to trade on the OTCBB. The reverse merger occurred on July 17, which was approximately a month and a half after the proposed termination date in the PPM.

[158] CX-18, at 14, 16 (emphasis added).

[159] CX-19, at 23.

[160] The VMSY's Form S-1A filing with the SEC sets forth "a summary of the payments made in connection with the October 2007 private placement." The date supplied for the offering data was "07/17/2007 to 10/25/2007." CX-19, at 27. Similarly, a Form 10-QSB SEC filing following the merger reported that there had been an initial closing of the March 30 placement, simultaneously with the closing of the July 17 merger, but that the private placement was continuing. CX-21, at 18, 21. Ruggiero's exhibits also showed that Brookshire accepted subscriptions after July 17. RX-1 (seven subscription agreements for the VMSY private placement dated after July 17); RX-3 (16 new investors after July 17).

Second, Ruggiero's emails reveal that he understood that the offering was ongoing. On August 29, 2007, almost six weeks after Ruggiero claims that the offering had closed, he received an email from Chung proposing to extend the offering period. Chung stated, "[We] need to speak with [AB] regarding extending the offering period. I think we should do that today. He is getting very frustrated."[161] Ruggiero promptly replied, "Yes, we should extend the offering period with [AB]."[162] These emails demonstrate that as of August 29, Ruggiero believed that the offering was still open, and should be kept open even longer.

Ruggiero also argues that pursuant to Rule 102 of Regulation M, Brookshire could trade in VMSY because, after July 17, it only acted in a "ministerial" role and received fees that were "administrative" or "flat."[163] However, Rule 102 applies to issuers of securities, not distribution participants like Brookshire. Further, SEC guidance on Regulation M describes "ministerial duties" or "fixed fees" in relation to a firm sending out notices as part of "a call for the redemption of warrants."[164] Here the record demonstrates that Brookshire was not acting in a "ministerial" capacity or receiving a "fixed fee" during the period after July 17 when it placed its VMSY trades. First, Brookshire was the exclusive placement agent for the VMSY offering, and as an underwriter, its role could end only when all of the securities in the offering had been

[161] CX-60a, at 1-2.; Hearing Tr. (Ruggiero) at 617-18.

[162] CX-60a, at 1-2; Hearing Tr. (Ruggiero) at 617-18.

[163] Hearing Tr. (Ruggiero) at 35-36; Hearing Tr. (Johnson) at 263-67; Hearing Tr. (Pfannenstiel) at 384-85.

[164] SEC Division of Market Regulation, Staff Legal Bulletin No. 9, *Questions About Regulation M.*

distributed.[165] As discussed above, the offering did not end until October 25, 2007; units were still being subscribed for and accepted into late October.[166] Second, VMSY paid Brookshire on a percentage basis along with the opportunity for bonus shares as incentive compensation, not a fixed fee.[167]

MDWK

The MDWK restricted period began on January 25, 2006 (five business days prior to the PPM), and ended on June 28, 2006. During the restricted period, nine of Ruggiero's customers purchased a total of 39,000 MDWK shares in solicited purchases. Ruggiero acknowledges liability for the Regulation M violations relating to MDWK.[168]

4. Conclusion

The Hearing Panel concludes that Ruggiero violated Rule 101 of Regulation M under the Exchange Act and NASD Conduct Rule 2110, by purchasing and soliciting customers' purchases of VMSY and MDWK during the offerings' restricted periods.

C. Ruggiero Failed to Retain Electronic Communications

A member firm's responsibility to retain electronic records such as emails relating to its business is well-established.[169] Section 17(a)(1) of the Exchange Act requires broker-dealers to "make and keep for prescribed periods" such records as the SEC

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[165] *See* 17 CFR 242.100(b), "Completion of participation in a distribution," and "Underwriter"; SEC Division of Market Regulation, Staff Legal Bulletin No, 9, *Questions About Regulation M* (underwriter's participation in distribution is generally completed "when all of the shares in the offering have been distributed" and stabilization and trading restrictions ended).

[166] *See* RX-1, at 18, 19 (final set of subscription agreements accepted by VMSY on October 19, 2007).

[167] The PPM provides that Brookshire will receive in cash 10% of the gross proceeds of units relating to that closing, and possible "additional compensation" in the form of shares of VMSY for selling out the offering. CX-18, at 15-16 (8% of gross offering proceeds and 2% expense allowance).

[168] Hearing Tr. (Ruggiero) at 966.

[169] *See* NASD NTM 03-33, at 344–45 (July 2003); *Dep't of Enforcement v. Legacy Trading Co.*, No. 2005000879302, 2009 FINRA Discip. LEXIS 12, at *54-55 (N.A.C. Mar. 12, 2009).

prescribes by rule as necessary or in the public interest. Under Exchange Act Rule 17a-4(b)(4), broker-dealers are required to "preserve for a period of not less than 3 years, the first two years in an accessible place ... [o]riginals of all communications received and copies of all communications sent ... by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such." Additionally, Rule 17a-4(f) requires that broker-dealers that employ electronic storage media must preserve these records "exclusively in a non-erasable and non-rewritable format." FINRA Rule 3110, in turn, requires its members to preserve records in accordance with the SEC's rule. Electronic communications fall within the purview of Rule 3110, and failing to preserve emails relating to a broker-dealer's business violates the rule.[170]

As discussed above, Ruggiero did not ensure that Brookshire had an effective system in place to retain electronic communications. In addition, he and others at Brookshire routinely used outside, personal email accounts, which bypassed any surveillance system Brookshire utilized.

The Hearing Panel concludes that, from the fall of 2006 through May 2008, Ruggiero failed to ensure that Brookshire emails were preserved as required pursuant to Section 17(a)(1) of the Exchange Act, Rule 17a-4(b)(4) thereunder, and therefore Ruggiero violated NASD Conduct Rules 3110 and 2110.

[170] *See Legacy Trading Co.*, 2009 FINRA Discip. LEXIS 12, at *54-55 (failure to preserve emails).

D. Ruggiero Failed to Reasonably Supervise Brookshire's Trading and Electronic Communications

"Assuring proper supervision is a critical component of broker-dealer operations."[171] NASD Conduct Rule 3110(a) requires Ruggiero to establish a "system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules."[172] The standard of "reasonableness" is determined based on the particular circumstances of each case.[173] A violation of NASD Conduct Rule 3110 is also a violation of NASD Conduct Rule 2110, which requires member firms to observe high standards of commercial honor and just and equitable principles of trade.[174]

Here, Ruggiero failed to reasonably supervise Brookshire's trading and electronic communications. First, he failed to adequately monitor the MDWK and VMSY trading during the restricted periods, which resulted in prohibited trading in violation of Regulation M and manipulative trading. Second, Ruggiero failed to follow firm policies and procedures that required prior review and approval of all emails. Instead, he conducted spot checks; however, those spot checks did not uncover the emails between AB, VMSY's CEO, and the Brookshire registered representatives. Had Ruggiero followed firm policies regarding email review, he would have discovered AB's emails to Chung requesting price support and could have prevented the trading in response thereto.

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[171] *Richard F. Kresge*, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407, at *27 (June 29, 2007).

[172] NASD Rule 3010(a).

[173] *See, e.g., Christopher Benz*, 52 S.E.C. 1280, 1284 (1997) (citing *Consol. Inv. Servs., Inc.*, 52 S.E.C. 582 (1996).

[174] *Dep't of Enforcement v. Midas Sec., LLC*, No. 2005000075703, 2011 FINRA Discip. LEXIS 62, at *21-23 (N.A.C. Mar. 3, 2011).

Third, even when Ruggiero received problematic emails, he ignored the red flags and abdicated his supervisory responsibility. For example, when Ruggiero received AB's September 18 email requesting that he take steps to increase the price of VMSY in the market in order to make the VMSY offering more attractive, he responded and reassured AB that he had already provided the requested assistance. Lastly, Ruggiero also failed to ensure that Brookshire had a proper system to retain its email and prevent the use of outside, personal email accounts.

The Hearing Panel finds that Ruggiero violated NASD Conduct Rules 3010 and 2110, by failing to supervise Brookshire's (1) trading of VMSY between July and October 2007, (2) trading of MDWK between February and June 2006, and (3) electronic communications between the fall of 2006 and May 2008.

E. Ruggiero Forged Initials on Options Tickets to Evidence Supervisory Review

NASD Conduct Rule 3110(a) requires member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of [FINRA] and as prescribed by SEC Rule 17a-3." Compliance with these recordkeeping rules is essential to the proper functioning of the regulatory process. "Indeed, the SEC has stressed the importance of the records that broker-dealers are required to maintain pursuant to the Exchange Act, describing them as the 'keystone of the surveillance of brokers and dealers by our staff and by the securities industry's self-regulatory bodies.'"[175] Entering inaccurate information in a member firm's books or

[175] *Dep't of Enforcement v. Trevisan*, 2008 FINRA Discip. LEXIS 12, at *35 (N.A.C. Apr. 30, 2008) (quoting *Edward J. Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979)).

records violates NASD Conduct Rule 3110 and also violates NASD Conduct Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business.[176]

"The Commission consistently has held that signing another person's name to documents, without authority, constitutes forgery, and that forgery is inconsistent with just and equitable principles of trade under NASD Rule 2110."[177] Here, Ruggiero admitted to signing EF's initials on the options tickets at issue. Thus, under the circumstances, the only issue for the Hearing Panel to consider was whether Ruggiero had EF's prior authorization to sign the documents. The burden of demonstrating such authorization rested with Ruggiero, and he failed to meet his burden.[178]

The record contains no documentation evidencing a grant of authority to Ruggiero to sign options tickets on behalf of EF, and Ruggiero did not place any notation on any of the documents to indicate that he had signed the documents on EF's behalf. Further, EF did not testify at the hearing or provide a sworn affidavit indicating that he had granted Ruggiero authority (whether written or oral) to sign any documents. To the contrary, EF provided a sworn affidavit to Enforcement stating that he had not granted such authority. Ruggiero's self-serving and uncorroborated testimony that he had authorization is insufficient.[179]

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[176] *See, e.g.*, *Fox & Co. Inv., Inc.*, Exchange Act Release No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005).

[177] *Dep't of Enforcement v. Claggett*, No. 2005000631501, 2007 NASD Discip. LEXIS 2 , at *10 (N.A.C. Sept. 28, 2007) (citations omitted); *see Dep't of Enforcement v. Cooper*, No. C04050014, 2007 NASD Discip. LEXIS 15 (N.A.C. May 7, 2007) (holding that a representative committed forgery in violation of Conduct Rule 2110 by signing the name of a principal of his firm on Change of Dealer forms).

[178] *Cooper*, 2007 NASD Discip. LEXIS 15, at *9.

[179] *See Dist. Bus. Conduct Comm. v. Kirschbaum*, No. C07960069, 1998 NASD Discip. LEXIS 36, at *6 (N.A.C. Aug. 25, 1998) (holding that "[w]ithout any evidence that customers had authorized Kirschbaum to sign their names, Kirschbaum has no valid defense to the complaint's allegation of forgery").

The Hearing Panel finds that Ruggiero violated NASD Conduct Rules 3110(a) and 2110, by placing EF's initials on approximately 230 options tickets without authorization from EF.[180]

V. SANCTIONS

Each of the violations is addressed below. Where appropriate, the Hearing Panel has batched certain related violations. For Ruggiero's manipulation, Regulation M, and forgery violations, the Hearing Panel determined that Ruggiero should be barred. Although the Panel determined appropriate remedial sanctions for Ruggiero's failure to retain electronic communications and his failure to supervise, it did not impose those sanctions in light of the bars for the manipulation, Regulation M, and forgery violations.

A. Manipulation and Regulation M Violations

The manipulation and Regulation M violations are related. Both causes of action address the need to prevent artificial influences that affect market activity. Here, the manipulation and a portion of the Regulation M violations relate to the same stock and time period. Accordingly, the Hearing Panel batched these two causes of actions for the purposes of the sanctions determination.

In determining an appropriate sanction, the Hearing Panel referred to the FINRA Sanction Guidelines ("Guidelines").[181] However, because the Guidelines do not contain

[180] The SEC has suggested that fraud or benefit to the forger is an element of forgery. "We have sustained NASD findings of forgery where the forged documents defrauded another person or otherwise benefited the forger." *Rooney A. Sahai*, Exchange Act Rel. No. 51549, 2005 SEC LEXIS 864, at *20-21 (Apr. 15, 2005). In this case, the issue of whether Ruggiero's conduct constituted forgery is immaterial because he clearly violated Conduct Rules 3110(a) and 2110, whether his conduct is classified as forgery or as falsification of documents.

[181] FINRA Sanction Guidelines 37 (2011), www.finra.org/Industry/Enforcement/sanctionguidelines.

specific guidelines applicable to market manipulation[182] or Regulation M, the Panel reviewed SEC precedent regarding the gravity of the violation and to the principal considerations in determining sanctions, as set forth in the Guidelines. As the SEC has emphasized, "there are few, if any, more serious offenses than manipulation. Such misconduct is a fraud perpetrated not merely on particular customers but on the entire market."[183]

The Hearing Panel utilized the principal considerations to determine an appropriate remedial sanction.[184] Upon review of the principal considerations, the Panel concludes that this case involves several aggravating factors.

First, Ruggiero's conduct was intentional.[185] When VMSY's CEO asked Ruggiero to support the price of VMSY, Ruggiero clearly understood his request and responded that he had already entered orders to achieve that goal. Not only did Ruggiero participate in the manipulative scheme, he was, as the president and CEO of Brookshire, in a position to prevent the manipulation and did not do so.

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[182] The most relevant Guideline for manipulation addresses misrepresentations or material omissions of fact. That Guideline recommends a fine of $2,500 to $50,000 and a suspension of up to 30 days in cases involving negligence; a fine of $10,000 to $100,000 and a suspension of 10 days to two years for intentional or reckless misconduct; and, in egregious cases, a bar, or, in the case of a firm, expulsion. Guidelines at 88.

[183] *Kirlin*, 2009 SEC LEXIS 4168, at *85 (quoting *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *49 (Jan. 22, 2003)).

[184] Guidelines at 1.

[185] *Id.* at 7 (Principal Consideration, No. 13).

Second, while Ruggiero accepted responsibility for the Regulation M violation relating to MDWK,[186] he refused to accept responsibility for the manipulation and Regulation M violations relating to VMSY.[187]

Third, the Panel considered the time periods for Ruggiero's misconduct.[188] Although Ruggiero's Regulation M violations relating to MDWK occurred over a short period of time, his manipulative purchase orders and Regulation M violations relating to VMSY occurred over a three-month period.

Finally, Ruggiero's misconduct resulted in the potential for monetary and other gain.[189] Brookshire was the placement agent for the VMSY and MDWK PIPE offerings. Because Ruggiero held a majority interest in Brookshire's parent company, he stood to profit from increased investments in the offerings, as well as fees and commissions.

As the National Adjudicatory Council emphasized: "The integrity of the securities markets is paramount, and those who engage in activities that manipulate markets cause great harm not only to investors who are involved in the manipulated markets, but to the overall public perception that the markets are driven by the free forces of supply and

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[186] Ruggiero stated that the MDWK Regulation M violation "was an accident and we didn't do it because we were trying to manipulate the market. We didn't try to do it because we were trying to hurt anybody. It was in large part my own ignorance and it was a learning phase .... I was the one who did it and we are very sorry." Hearing Tr. (Ruggiero) at 966. The Hearing Panel did not consider Ruggiero's ignorance of the law to be a mitigating factor. *Dep't of Enforcement v. Fox & Co. Inv., Inc.*, No. C3A030017, 2005 NASD Discip. LEXIS 5, at *45 (N.A.C. Feb. 24, 2005) (citation omitted), *aff'd*, *Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822 (Oct. 28, 2005). At all times Ruggiero was registered as a General Securities Principal. "[T]he registration requirements are intended to ensure that principals 'maintain the requisite levels of knowledge and competence.'" *Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971, at *14 n.17 (May 9, 2007).

[187] Guidelines at 6 (Principal Consideration, No. 2).

[188] *Id.* at 6 (Principal Consideration, No. 9).

[189] *Id.* at 7 (Principal Consideration, No. 17).

demand."[190] After careful consideration of Ruggiero's misconduct and the above specific considerations, the Panel determined that Ruggiero's manipulation and Regulation M violations were egregious and warrant a bar.

B. Failure to Retain Electronic Communications

For books and records violations of NASD Conduct Rules 3110 and 2110, the Guidelines recommend a fine of $1,000 to $10,000, and consideration of a suspension in any or all capacities or functions for up to 30 business days. In egregious cases, the Guidelines recommend considering a suspension for up to two years in any or all capacities or functions, or expulsion of the firm and a bar of the responsible individual, and a fine of $10,000 to $100,000.[191]

The Hearing Panel finds Ruggiero's failure to ensure that Brookshire's electronic communications were retained to be egregious. After being notified of the issue in February 2007, Ruggiero did not ensure that Brookshire had an effective email retention system until May 2008. Ruggiero and others at Brookshire also continued to use personal email accounts until May 2008. As a result of Brookshire's failure to effectively capture and retain emails, its employees could freely communicate without any concern that such communications would be monitored by the firm or its regulator. Without proper email retention, reasonable supervision of a firm's activities could not take place. For these reasons, the Hearing Panel concludes that the appropriate remedial sanctions are a $25,000 fine and a 90-day suspension in all capacities.

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[190] *Mkt. Surveillance Comm. v. Markowski*, No. CMS920091, 1998 NASD Discip. LEXIS 35, at *56-57 (N.A.C. July 13, 1998), *aff'd*, Exchange Act Release No. 43259, 2000 SEC LEXIS 1860 (Sept. 7, 2000), *aff'd*, 274 F.3d 525 (D.C. Cir. 2001).

[191] Guidelines at 29.

C. Supervisory Violations

For the separate failures to supervise, in violation of NASD Conduct Rule 3010, the Guidelines recommend a fine of $5,000 to $50,000.[192] The Guidelines set forth the following considerations when determining the appropriate sanction for a failure to supervise: (1) the quality and degree of the supervisor's implementation of the firm's supervisory procedures and controls; (2) whether respondent ignored "red flag" warnings that should have resulted in additional supervisory scrutiny; and (3) the nature, extent, size, and character of the underlying misconduct.[193]

The SEC has emphasized that "[p]roper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and NASD rules" and "is a critical component to ensuring investor protection."[194] The Hearing Panel found no evidence of any effective supervisory controls for Brookshire's trading and electronic communications.

At the outset, Brookshire's supervisory structure designated Ruggiero as the Head Trader and Compliance Officer. This supervisory structure, which amounted to self-supervision, was ineffective because it enabled Ruggiero to participate in the manipulation of the VMSY, as well as the prohibited trading of MDWK and VMSY in violation of Regulation M, without oversight.[195]

At Brookshire, the firm's supervisory system placed extensive supervisory responsibilities on Ruggiero. Ruggiero was the president, Compliance Officer, and Head

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[192] *Id.* at 103.

[193] *Id.*

[194] *Dennis S. Kaminski*, Exchange Act Rel. No. 65347, 2011 SEC LEXIS 3225, at *35 (Sept. 16, 2011) (citations omitted).

[195] Ruggiero, through Brookshire, was compensated based on the success of the offerings.

Trader; he was also responsible for ensuring compliance with Regulation M.[196] However, he did little, if anything, to oversee the trading of Chung and the other registered representative. In fact, he claimed to be unaware of Chung's manipulative trading activity. Ruggiero's failure to reasonably supervise the firm's email communications also impacted his ability to monitor the trading. Although Ruggiero claimed to have conducted "spot checks," the checks did not uncover the problematic emails and trading. According to Ruggiero, he was unaware of the emails between Chung and VMSY's CEO.[197]

The SEC has stressed that "[i]t is especially imperative that those in authority exercise particular vigilance when indications of irregularity reach their attention."[198] As president of Brookshire, Ruggiero was in a position of authority; yet, he ignored "red flag" warnings that should have resulted in additional supervisory scrutiny. The most blatant red flags were the emails from VMSY's CEO, specifically asking for support for the VMSY offering.

Ruggiero's lack of supervision facilitated egregious underlying misconduct: market manipulation and trading in violation of Regulation M. The Hearing Panel concludes that Ruggiero's failure to supervise warrants a bar in all principal capacities.

D. Forgery of Initials for Supervisory Review of Options Tickets

For forgery or falsification of records, the Guidelines recommend a suspension of up to two years in cases where mitigating factors exist, and a fine of $5,000 to $100,000. In egregious cases, a bar is recommended. The principal considerations are the nature of

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[196] *See Beerbaum*, 2007 SEC LEXIS 971, at *14 ("[R]registered principal is the person at the broker dealer to whom the NASD looks to ensure compliance with regulatory requirements.") (citation omitted).

[197] Hearing Tr. (Ruggiero) at 615.

[198] *Kaminski*, 2011 SEC LEXIS 3225, at *25-26.

the documents forged or falsified and whether the respondent had a good-faith, but mistaken, belief of express or implied authority.[199] The Hearing Panel concluded that Ruggiero's forgery violations were egregious. The records in question were important and material to FINRA's ability to evaluate the quality of Brookshire's supervisory review of options transactions. Although Ruggiero testified that EF gave him a proxy to sign his initials, the Hearing Panel did not find Ruggiero credible. Not only did EF, though his affidavit, deny having provided such authorization, but it is doubtful that he would have done so in light of the fact that his license was inactive for approximately two to three months due to his failure to satisfy his continuing education requirement. Another aggravating factor the Panel considered was the volume of documents that Ruggiero falsified over a period of months. There were approximately 230 falsified options tickets between April and December 2006.

Ruggiero's willingness to falsify important records, and to misrepresent the supervisory review of such records, evidences a serious lack of respect for the rules and regulations governing the securities industry. The Hearing Panel therefore determined that Ruggiero's misconduct warrants a bar.

VI. ORDER

Based on careful consideration of all the evidence, the Hearing Panel imposes the following sanctions:[200]

Respondent Timothy B. Ruggiero is barred from associating with any FINRA registered firm in any capacity for: (1) engaging in a stock price manipulation in violation

[199] Guidelines at 37.

[200] The Hearing Panel considered all of the parties' arguments. They are rejected or sustained to the extent that they are inconsistent with the views expressed herein.

of Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, and in violation of NASD Conduct Rules 2120 and 2110, as described in the First Cause of Action; (2) unlawfully trading in stock during the restricted periods for two offerings, in violation of Rule 101 of Regulation M under the Exchange Act and NASD Conduct Rule 2110, as described in the Second Cause of Action; and (3) forging initials on order tickets to evidence supervisory review of options transactions, in violation of NASD Conduct Rules 3110(a) and 2110, as described in the Fifth Cause of Action. In light of the bar, no additional sanctions are imposed for Ruggiero's failure to: (1) retain electronic communications, in violation of NASD Conduct Rules 3110 and 2110, as described in the Third Cause of Action: and (2) supervise his firm's trading and electronic communications, in violation of NASD Conduct Rules 3010 and 2110, as described in the Fourth Cause of Action.

In addition, Ruggiero is ordered to pay the costs of this proceeding in the total amount of $9,682.36, which includes an administrative fee of $750 and hearing transcript costs of $8,932.36.

These sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this Decision becomes the final disciplinary action of FINRA.

Maureen A. Delaney
Hearing Officer
For the Extended Hearing Panel

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