

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 53731 / April 26, 2006

Admin. Proc. File No. 3-12057

In the Matter of the Application of

TERRANCE YOSHIKAWA
3417 West Commodore Way
Seattle, WA 98199

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - REVIEW OF DISCIPLINARY
PROCEEDING

Violations of Securities Laws and Conduct Rules

Manipulation

Registered representative, president, sole owner, and head trader of former member firm of registered securities association engaged in a manipulative trading scheme, by fraudulently entering orders designed to improve the price of certain securities and then rapidly placing larger orders on the opposite side of the market from that of his initial order in order to take advantage of the price change he had caused. Held, association's findings of violations and the sanctions imposed are sustained.

APPEARANCES:

Terrance Yoshikawa, pro se.

Marc Menchel, Alan Lawhead, James S. Wrona, and Brant K. Brown, for NASD.

Appeal filed: September 26, 2005
Last brief received: December 29, 2005

I.

Terrance Yoshikawa, formerly a registered representative, president, sole owner, and head trader of Ko Securities, Inc. ("the Firm"), a former NASD member firm, 1/ appeals from NASD disciplinary action. NASD found that, from February through May 1999, Yoshikawa violated antifraud provisions of the federal securities laws, as well as NASD Conduct Rules, by engaging in nineteen instances of manipulation of the prices of the publicly-traded securities of three different companies. 2/ NASD found that Yoshikawa's manipulative trading activities resulted in profits of \$5,375.00 that otherwise would not have been available to him. NASD barred Yoshikawa from association with NASD member firms in any capacity. 3/ Our findings are based on an independent review of the record.

II.

NASD found that Yoshikawa had engaged in a practice called "auto-execution manipulation" on nineteen occasions from February through May 1999. The central facts concerning the placement of orders by Yoshikawa and the trades at issue are not in dispute; Yoshikawa challenges NASD's conclusion that these facts evidence market manipulation.

In the nineteen instances at issue here, Yoshikawa placed initial limit orders for 100 shares of the stock of three different securities listed on the Nasdaq Market: Anadigics, Inc. ("ANAD"), VSIO Corporation ("VSIO"), and Advanced Digital Information Corp. ("ADIC"). 4/ Yoshikawa personally entered all of the 100-share limit orders through Instinet Corporation, an

1/ Ko Securities withdrew its NASD membership in August 2002. Yoshikawa also submitted his Form U-5, Uniform Termination Notice for Securities Industry Registration, to NASD in August 2002, and he has not worked in the securities industry since then. Yoshikawa testified that the reasons for the Firm's withdrawal from NASD membership and his submission of his Form U-5 were "the cancellation of [the Firm's] clearing arrangement by PaineWebber and the continual barrage of investigations and harassment by the NASD."

2/ NASD found that Yoshikawa violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder (prohibiting fraud in the offer and sale of securities), and NASD Conduct Rules 2110 (requiring adherence to just and equitable principles of trade) and 2120 (prohibiting fraud in the offer and sale of securities).

3/ NASD also assessed costs against Yoshikawa in the amount of \$1,456.92.

4/ The nineteen instances at issue here involved trades made in a personal IRA account of Yoshikawa, a personal trading account of Yoshikawa, and the proprietary trading account of the Firm. Yoshikawa acknowledges that he was solely responsible for and made all trading decisions for all relevant accounts.

electronic communications network ("ECN"). ^{5/} Under Exchange Act Rule 11Ac1-4, ^{6/} exchange specialists and over-the-counter market makers generally are required, subject to certain exceptions, to display as a bid or offer for a security the price and full size of any limit order that improves the bid or offer currently displayed by the specialist or market maker (the "display price"). Paragraph (c)(6) of Rule 11Ac1-4 provides an exception for a limit order that is delivered immediately upon receipt to an ECN that complies with Exchange Act Rule 11Ac1-1(c)(5)(ii), ^{7/} which requires an ECN to provide the best bids and offers provided by a specialist or market maker to a self-regulatory organization ("SRO") for display in the consolidated quotation system. During the period in question, Instinet met this requirement. Consequently, the best bid or offer provided by Instinet to an SRO became the national best bid or offer ("NBBO") when it was the highest bid or lowest offer for any security displayed in the consolidated quotation stream. ^{8/}

Yoshikawa entered the 100-share limit orders on Instinet at a price between the then-current highest bid price and the lowest offer (or "ask") price in the consolidated quotation stream. Yoshikawa's price then became the new NBBO. Yoshikawa testified that he understood that the price of his 100-share limit orders in these nineteen instances would create a new NBBO for these securities.

In each of these nineteen instances, within seconds after placing the 100-share limit orders, Yoshikawa directed Maxine Yakushijin to place limit orders, ranging in size from 1,000 to 2,500 shares, to buy or sell the same securities on the opposite side of the market at the NBBO

^{5/} Yoshikawa and Maxine Yakushijin, an employee of Ko Securities at the time, both testified that Yoshikawa almost always personally entered all orders that the Firm placed on Instinet.

^{6/} 17 C.F.R. § 240.11Ac1-4. Subsequent to the events at issue in this proceeding, Rule 11Ac1-4, and all other rules adopted under Section 11A of the Exchange Act, were re-designated as part of new Regulation NMS. See Securities Exchange Act Rel. No. 51808 (Jun. 9, 2005), 70 Fed. Reg. 37,496 (Jun. 29, 2005) (adopting Regulation NMS). This opinion will refer to the Section 11A rules by their old designations.

^{7/} 17 C.F.R. § 240.11Ac1-1(c)(5)(ii).

^{8/} Under Exchange Act Rule 11Ac1-2, 17 C.F.R. § 240.11Ac1-2, for reported securities, "best bid" or "best offer" are defined as "the highest bid or lowest offer for that security made available by any reporting market center pursuant to [Exchange Act Rule 11Ac1-1]."

Yoshikawa's Instinet order had established. 9/ Yakushijin entered these larger limit orders into the order system of PaineWebber Incorporated ("PaineWebber"). 10/ Ko Securities had an arrangement with Correspondent Services Corporation ("CSC"), a subsidiary of PaineWebber, under which CSC provided clearing services to Ko Securities. Under the clearing arrangement, Ko Securities had access to a PaineWebber terminal that routed orders to buy or sell less than 5,000 shares (including all of the larger limit orders entered by Yakushijin in the nineteen instances at issue here) to market makers in the given securities. 11/ Yoshikawa testified that he would have told Yakushijin of his intent to enter these subsequent larger limit orders into the PaineWebber system prior to his entry of the initial small limit orders into the Instinet system, so that Yakushijin would be ready to enter them promptly upon receiving his instructions.

The PaineWebber terminal routed the trades for the larger limit orders entered by Yakushijin in these nineteen instances to market makers Knight Securities, L.P. or Bear Sterns & Co., Inc. Although PaineWebber did not have automatic execution agreements with Knight Securities or Bear Sterns during the period in question, 12/ both Knight Securities and Bear Sterns provided automatic execution for all the trades in question, at the NBBO established by Yoshikawa's 100-share Instinet orders. Joseph Sorge, an associate director at UBS (the successor entity to PaineWebber), testified that it was common industry practice for market makers to execute automatically, at the NBBO, orders in share amounts greater than the share amounts in the order that set the NBBO, even in the absence of any formal automatic execution agreement between the market maker and the broker, based on what Sorge termed a "business

9/ For example, if Yoshikawa's initial 100-share limit order was a buy order, he would then follow up, seconds later, with a larger sell order for the same security at the newly-established NBBO, and vice versa. Yoshikawa testified, "If I want to sell something, I put in a buy order. If I want to buy something, I put in a sell order."

10/ After the time of the transactions at issue here, UBS AG acquired PaineWebber, and PaineWebber no longer exists. However, because PaineWebber was the name of the relevant entity at the time of the transactions at issue here, and because the parties have referred to the entity as PaineWebber throughout the entirety of this proceeding, we refer to the entity as "PaineWebber."

Yakushijin testified that, although she almost never entered any of the Firm's Instinet orders, she frequently entered the Firm's orders made through PaineWebber's clearing system, at Yoshikawa's direction.

11/ PaineWebber itself was not a market maker in any of the three relevant securities at the time.

12/ Under an automatic execution agreement, the market maker would guarantee that it would execute orders immediately in the given security at the NBBO, even if the orders were for larger quantities of shares than the order that set the NBBO.

understanding." 13/ Sorge further testified that PaineWebber routed its orders to particular market makers, including Knight Securities and Bear Sterns, in large part because those market makers would provide automatic execution of the transactions. In his investigative testimony prior to the NASD hearing, Yoshikawa stated that he chose to place the larger limit orders through PaineWebber because PaineWebber provided him with better execution "when they give you automatics." 14/ Yoshikawa also acknowledged, in his investigative testimony, that, because his original Instinet orders had moved the NBBO, he had been able to get a better price on the subsequent larger orders. Within seconds of the execution of the larger limit orders by the market makers, Yoshikawa cancelled the initial 100-share limit orders placed through Instinet. 15/ The NBBO then reverted to the price it had been before Yoshikawa made his initial 100-share order.

Yoshikawa's trading activity in the stock of VSIO on April 20, 1999, is illustrative of the pattern followed in the nineteen instances at issue here. At 2:21:23 p.m., the NBBO for VSIO was \$23.0625 bid and \$23.25 offer. At 2:25:25 p.m., Yoshikawa sent a limit order to Instinet to buy 100 shares of VSIO at \$23.1875 for Yoshikawa's Roth IRA account, which changed the NBBO for VSIO to \$23.1875 bid and \$23.25 offer. Three seconds later, at 2:25:28 p.m.,

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- 13/ Sorge agreed with Yoshikawa that this common practice of market makers automatically executing larger orders at the NBBO was not legally required. Under Exchange Act Rule 11Ac1-1(c), market makers are only obligated to execute orders at a price and size at least as favorable as that market maker's published bid or offer.
- 14/ Yoshikawa was not immediately forthcoming with this information. When questioned about how he determined where to route his orders, Yoshikawa first answered, "I don't know. You just decide what you think is the best one." He later testified that his decision was a "blind guess" about whether PaineWebber, Instinet, or a market maker would provide best execution. Only after these initial answers did Yoshikawa explain that PaineWebber's ability to provide automatic executions served as the basis for his determination to route the larger limit orders through PaineWebber's system.
- 15/ The NASD Department of Market Regulation's initial complaint against Yoshikawa involved twenty instances of alleged manipulation, including one instance in which the initial small limit order was executed and was not cancelled by Yoshikawa. NASD did not make findings as to this instance and limited its findings of violations to the nineteen instances at issue here, in which Yoshikawa cancelled the initial small limit order.

Sixteen of Yoshikawa's nineteen cancellations occurred within fifteen seconds of the time that the initial small limit orders were entered into Instinet. The other three cancelled orders were cancelled within forty-three seconds of the time that the initial small limit orders were entered into Instinet. The one order of the original twenty that was not cancelled was executed seventeen seconds after its entry into Instinet, and after the execution, at the NBBO, of Yoshikawa's larger order on the opposite side of the market.

Yakushijin sent a limit order to PaineWebber to sell 1,000 shares of VSIO at \$23.1875, with 500 of the shares coming from Yoshikawa's personal account and 500 shares coming from Yoshikawa's Roth IRA account. At 2:25:28 p.m., Bear Sterns executed the sell order at a price of \$23.1875. Eight seconds after the sell order was executed, at 2:25:36 p.m., Yoshikawa cancelled the Instinet 100-share limit order, which resulted in the NBBO for VSIO returning to \$23.0625 bid and \$23.25 offer. This trading pattern allowed Yoshikawa to receive a price advantage of \$0.125 per share in the eight seconds during which the NBBO moved as a result of his activity in VSIO stock. This series of transactions is representative of the pattern and timing of transactions for the other eighteen instances at issue here.

Yoshikawa acknowledges that all of the relevant trades occurred in accounts that he controlled. He further acknowledges that he was responsible for directing each transaction involved in this proceeding. Yakushijin did not enter any trades into the PaineWebber system without receiving instructions from Yoshikawa to do so, and Yoshikawa personally entered all of the small initial limit orders into Instinet, as well as their later cancellations.

David Chapman, a team leader in NASD's Department of Market Regulation, testified that Yoshikawa's cancellation of his small limit orders after the execution of the larger limit orders concluded a fairly typical pattern of "auto-execution manipulation." Chapman testified that NASD's complaint against Yoshikawa originated when an NASD Department of Market Regulation trading surveillance computer program, designed to detect instances of "auto-execution manipulation," was triggered by the Firm's trading activities.

Throughout the course of the investigation and the disciplinary proceeding, Yoshikawa's explanations of his trading pattern have been inconsistent. During his investigative testimony, Yoshikawa at first stated that he could not recall the specific transactions in question, noting that he had made thousands of transactions during the period from February through May 1999. ^{16/} Yoshikawa stated that it was very common for him to buy and sell shares of the same security during the same trading day. Yoshikawa explained why he would buy and sell shares of the same security within seconds by saying, "I just think it's okay. I don't know. I mean sometimes you buy and sell . . . Sometimes you change your mind. Maybe you didn't like [the security] again."

^{16/} The Firm's internal compliance procedures stated that, when orders were cancelled, the cancelled order tickets were to be filed along with a written explanation for the cancellation. None of the nineteen instances at issue here included such a written explanation with the cancelled order tickets in the Firm's records. Yakushijin testified that the Firm did not follow the practice of including written explanations of cancellations in its records. Yoshikawa explained that he had simply copied the compliance manual from that of another firm and did not realize that this requirement was included, and he stated, ". . . if there wasn't a note on those tickets, it's because I cancelled them and I think that's the – was the best thing to do."

He also suggested that it was possible that the initial small limit orders were entered in error. ^{17/} When asked specifically whether he entered the initial small limit orders in order to move the NBBO, so that he could then buy or sell at a more advantageous price, Yoshikawa responded, "I don't know. I don't remember." At the same time, Yoshikawa acknowledged that his Instinet orders caused the price of the relevant securities to change and allowed him to obtain better prices for his trades on the opposite side of the market.

At his NASD hearing, however, Yoshikawa asserted that the reason why he entered the small limit orders was to test for what he termed "hidden orders." ^{18/} Yoshikawa stated that he would enter 100-share limit orders at prices between the then-current best bid and offer prices, to test for the existence of "hidden orders." Yoshikawa claimed that, if these 100-share orders executed, he would know that there were "hidden orders" in that security, and this information would impact his decision-making about how to trade in the security going forward.

Yoshikawa's only support for this basis for his actions was his claim that he had spoken to two representatives at Instinet, both of whom, he claims, confirmed his understanding of "hidden orders." However, Yoshikawa never identified these individuals by name or position, and he did not call either of them as a witness at the hearing.

III.

Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 generally make it unlawful for any person to use any manipulative or fraudulent device in connection with the purchase or sale of any security. This includes trading designed to affect artificially the market

^{17/} Yoshikawa also asserted, without evidence to support the assertion, that certain of the timing information cited by NASD to illustrate the length of time between the initial small limit orders and the larger limit orders and between the execution of the larger limit orders by the market makers and Yoshikawa's cancellation of the small limit orders was incorrect. NASD compiled the timing information after requesting the quotation and transaction data for the relevant securities directly from Instinet, PaineWebber, Knight Securities, and Bear Sterns.

^{18/} Yoshikawa explained that what he meant by "hidden orders" was the ability, when entering an order on Instinet, to specify that the order should not be posted. As noted above, Rule 11Ac1-4 includes certain exceptions from the requirement to display customer limit orders, for example, for large block orders. Rule 11Ac1-4 also includes an exception from the display rule when the customer entering the order requests, either at the time that the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders, that the order not be displayed.

price of a security. 19/ Manipulation of the market for a security traded in the over-the-counter market is encompassed within the proscriptions of Rule 10b-5. 20/ NASD Conduct Rule 2120 contains similar prohibitions against engaging in fraudulent acts for NASD members and persons associated with NASD members. 21/

Manipulation is "intentional interference with the free forces of supply and demand." 22/ "Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces." 23/ A showing that Yoshikawa engaged in fraud or deceit as to the nature of the market for the security, in connection with the purchase or sale of securities, suffices to establish manipulation under Rule 10b-5. 24/ It is not relevant for purposes of a disciplinary proceeding whether investors sustained losses as a result of the manipulative activity. 25/

In order to establish that the manipulative conduct at issue constitutes a violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5, we must find that Yoshikawa acted with scienter, defined as "a mental state embracing intent to deceive, manipulate, or defraud." 26/ Proof of scienter may be inferred from circumstantial evidence. 27/

19/ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976).

20/ See Swartwood, Hesse, Inc., 50 S.E.C. 1301, 1307 n.14 (1992) (and cases cited therein).

21/ NASD also charged Yoshikawa with violating NASD Conduct Rule 2110, which directs registered representatives of NASD member firms to conduct their business in accordance with just and equitable principles of trade.

22/ Pagel, Inc., 48 S.E.C. 223, 226 (1985), aff'd, 803 F.2d 942 (8th Cir. 1986).

23/ Id.

24/ See United States v. Charnay, 537 F.2d 341, 349-50 (9th Cir. 1976).

25/ Edward J. Mawod & Co., 46 S.E.C. 865, 871 (1977) ("The evil sought to be remedied is not victimization but deception. When investors and prospective investors see activity, they are entitled to assume that it is real activity"), aff'd, 591 F.2d 588 (10th Cir. 1979).

26/ Ernst & Ernst, 425 U.S. at 193 n.12.

27/ See, e.g. Herman & MacLean v. Huddleston, 459 U.S. 375, 390-91 n.30 (1983); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir. 1986).

We find that the record contains persuasive evidence that Yoshikawa manipulated the market for the relevant securities by entering his initial small limit orders to bring about an artificial change in the NBBO. On nineteen separate occasions, Yoshikawa engaged in a pattern of trading by which he altered the NBBO in the specified securities by entering small limit orders at prices between the then-current best bid and offer prices, took advantage of that price change by trading in larger quantities of shares on the opposite side of the market, and then cancelled the initial NBBO-changing order.

Yoshikawa's testimony shows that he understood before he entered the 100-share limit orders that they would alter the NBBO, as indeed they did, and that the orders were placed without any desire that those trades be executed. ^{28/} Yakushijin was able to enter the larger limit orders on the opposite side of the market within a matter of seconds after his entry of the initial small limit orders because Yoshikawa informed her before he had entered the small limit orders on Instinet of his intention subsequently to enter the larger limit orders through PaineWebber. This conclusion is supported by the fact that these larger limit orders were entered within seconds after the entry of the small limit orders. Given the length of time it would take for Yoshikawa to communicate the terms of the order to Yakushijin, and the length of time it would have taken Yakushijin to enter the name of the security, the price, and the terms of the order and to check its accuracy, it would have been nearly impossible for the second orders to be entered so soon after the first orders unless preparation of the larger limit orders had occurred prior to the entry of the small limit orders. The repetition of the pattern by Yoshikawa and the short time period in which each set of three transactions (small limit order, larger limit order, cancellation of small limit order) took place leads us to conclude that Yoshikawa's conduct was intentional and coordinated.

Yoshikawa also acknowledged that he routed the larger limit orders through PaineWebber, rather than Instinet or another market maker, because he believed it was likely he would obtain automatic execution of the transactions. Yoshikawa's desire to obtain automatic execution is significant because the automatic execution would occur immediately, within seconds of his initial order, at the new NBBO that his 100-share limit orders had established. Without automatic execution, the 100-share limit order might have been executed, and the NBBO might have moved back to its original level prior to the execution of Yoshikawa's larger limit orders, in which case he would not have been able to benefit from the NBBO change caused by his 100-share limit orders.

Yoshikawa argues that the lack of a formal agreement obligating the market makers to provide PaineWebber with automatic execution or to execute orders in amounts greater than the share amounts at the NBBO shows that any decision by the market makers to execute his larger limit orders automatically was a business decision of the market maker, over which Yoshikawa

^{28/} This testimony belies his claim on appeal that his trades cannot constitute manipulation, because they were relatively small trades in securities that were liquid and traded in high volumes, making it impossible for him to influence the market for the securities.

had no influence or control. 29/ Yoshikawa's own testimony, however, as well as that of Sorge and Chapman, indicates that it is common practice for market makers to provide such automatic execution. Yoshikawa's own testimony also made clear that, even though he did not know with absolute certainty the market makers to which PaineWebber would route the larger limit orders, his intent and expectation were that PaineWebber would route the orders to a market maker that would provide automatic execution, allowing him to take immediate advantage of the more advantageous NBBO his initial orders had established. 30/

Yoshikawa contends that there is nothing inherently manipulative or fraudulent in entering orders and cancelling them shortly thereafter. Similarly, he contends that there was nothing inherently fraudulent in the placing of any of his larger orders. He suggests that, because each individual transaction in his scheme, when looked at in isolation, is a legitimate transaction, that NASD has not proved that he was engaged in fraudulent manipulation. However, isolated instances of seemingly innocent conduct can, when viewed as a whole, constitute circumstantial

29/ The fact that the market makers may have agreed to execute the trades voluntarily does not lessen Yoshikawa's culpability in falsely altering the NBBOs of the relevant securities.

30/ As noted above, Yoshikawa testified that he chose to route the larger orders through the PaineWebber system because he believed that PaineWebber provided best execution "when they give you automatics."

In addition, Yoshikawa repeatedly stated throughout this proceeding his belief that the market makers executed these orders automatically because they sought order flow. This assertion alone contradicts Yoshikawa's contention that he had no way of knowing whether the larger limit orders would receive automatic execution; it indicates that he expected the market makers to behave exactly as they did in automatically executing his larger limit orders, allowing his trading scheme to function properly.

Yoshikawa also explained that he entered the larger limit orders through PaineWebber, rather than through Instinet, because he sought to avoid crossing his trades against each other. This statement evidences an expectation that the PaineWebber-routed orders would execute automatically. If PaineWebber had executed directly against the ECN (in this case Instinet) displaying the NBBO, rather than through market makers providing automatic execution, his orders would have crossed, and Yoshikawa would not have made as much profit as he did.

If nothing else, the repeated automatic execution of the larger limit orders in each of the nineteen instances at issue here over the course of several months of following this trading pattern would have given Yoshikawa a basis for expecting that automatic executions would continue to occur each time he repeated the pattern.

evidence of manipulative activity. 31/ Here, the "mass of factual details" establishes Yoshikawa's coordinated pattern of placing small orders, knowing that they would move the NBBO, and pairing them with larger trades on the opposite side of the market that were advantaged by the change in the NBBO. This repeated pattern leads to the conclusion that Yoshikawa engaged in a manipulative scheme by artificially moving the NBBO in the specified securities and thereby fraudulently affected the nature of the market for these securities. 32/

This evidence also establishes that Yoshikawa acted with the requisite scienter. The timing of the transactions and their repeated occurrence permits us to infer that the transactions were intentionally coordinated. Yoshikawa's testimony makes clear that he knew at the time of the trading that his initial limit order, entered to facilitate his larger transactions on the opposite side of the market, enabled him to buy at a lower price or sell at a higher price than otherwise would have been available. Yoshikawa conceded that he could cancel the initial small limit order once the larger limit order executed because he had accomplished what he wanted to accomplish, which was the execution of a trade on the opposite of the side of the market from that on which the small limit order was entered. We find that Yoshikawa intentionally placed the small limit orders to affect artificially the market price of the securities of ANAD, VSIO, and ADIC.

Yoshikawa's argument that he was not attempting to manipulate the market but merely testing for "hidden orders" is unavailing. The NASD Hearing Panel specifically found that Yoshikawa's explanation that he entered the small limit orders to test for the existence of "hidden orders" lacked credibility. 33/ This credibility determination is supported by the record evidence that, in the early stages of the investigation, Yoshikawa failed to raise his "hidden order" explanation, claiming instead that the orders may have been entered in error, or alternatively that he may have changed his mind about the securities in the few seconds between the initial entry of

31/ Cf. Keith Springer, Exchange Act Rel. No. 45439 (Feb. 13, 2002), 76 SEC Docket 2726, 2737 (rejecting respondent's argument that pattern of fraudulent post-execution allocation of trades were "isolated instances" with legitimate explanations where record evidence established a pronounced pattern of illegal trades).

32/ Yoshikawa also argues that NASD has selectively crafted its argument based on these nineteen instances without looking at the larger context of his thousands of trades during this period. Yoshikawa, however, does not explain in what context these trades, on these facts, would not be manipulative, other than with his "hidden orders" theory, addressed infra.

33/ As we have held, "credibility determinations of an initial fact finder are entitled to considerable weight." Laurie Jones Canady, 54 S.E.C. 65, 78 n.23 (1999) (citing Anthony Tricarico, 51 S.E.C. 457, 460 (1993)), pet. denied, 230 F.3d 362 (D.C. Cir. 2000); see also Universal Camera v. NLRB, 340 U.S. 474 (1950); Keith L. DeSanto, 52 S.E.C. 316, 319 (1995), aff'd, 101 F.3d 108 (2d Cir. 1996) (table format).

the small orders and their cancellation. It was not until the NASD hearing that Yoshikawa proffered the theory that he was testing for "hidden orders." Moreover, while Rule 11Ac1-4 does include exceptions, discussed in note 17 above, that would permit the non-display of certain orders, Yoshikawa does not explain why there were not other methods by which he could have tested for "hidden orders," without altering the NBBO in the relevant securities. For example, a more efficacious way of testing for "hidden orders" would have been entering the initial small orders with an "immediate or cancel" ("IOC") instruction. ^{34/} Entering the orders IOC would have removed any risk that Yoshikawa's orders would be executed prior to their cancellation if there were no "hidden orders." However, an IOC order would not have changed the NBBO in the relevant securities because the order would have either executed immediately, leaving the NBBO where it had been, or it would have been cancelled immediately if there were no "hidden orders." Additionally, Yoshikawa does not explain why he would not have avoided any purported harm from the existence of "hidden orders" by his use of limit orders for the second, larger orders on the opposite side of the market.

Even Yoshikawa's asserted purpose of testing for "hidden orders" evidences that his small limit orders were not entered for the purpose of having the transactions executed, but for the purpose of facilitating his larger limit orders. Yoshikawa stated that he would enter a small limit order to buy shares if his intent was to place a larger limit order to sell soon thereafter "for testing purposes," to see if there were "hidden orders." ^{35/} Yoshikawa testified, "I'm placing the order and then, to see whether I should continue with whatever I was thinking [on the opposite side of the market]." He also agreed that the initial order was put up "for testing purposes." Thus, even under his own explanation of the orders, they were placed only because of Yoshikawa's interest on the opposite side of the market (Yoshikawa's second, larger orders).

In a number of settled matters, we have found activity very similar to Yoshikawa's trading activity here to have violated Exchange Act Section 10(b) and Rule 10b-5 thereunder. ^{36/} The

^{34/} When a customer enters an order IOC, the order will either be executed immediately or cancelled immediately.

^{35/} Throughout this proceeding, Yoshikawa has repeatedly questioned the propriety of the large block order exception to the display rule under Rule 11Ac1-4, discussed above. While Yoshikawa may believe that the Rule, with its exception for large block orders, distorts the transparency of the market in favor of large institutions, this belief does not render his market manipulation any less egregious.

^{36/} "Auto-execution manipulation" is also commonly referred to as "spoofing" in these settled matters. See, e.g. Ian Fishman and Laurence Fishman, Exchange Act Rel. No. 40115 (June 24, 1998), 67 SEC Docket 1107 (order accepting offer of settlement and finding violations of Section 10(b) and Rule 10b-5 where respondents entered 100-share limit orders to alter the NBBO, followed with larger limit orders at the new NBBO, then

(continued...)

conduct at issue in these settled matters differed slightly from Yoshikawa's conduct, in that it appears that the settled matters involved situations in which the brokers or market makers that executed the larger limit orders had previously guaranteed that they would execute orders at the NBBO regardless of order size, so that the respondents knew with certainty that the larger limit orders on the opposite side of the market would be executed after the initial 100-share limit orders altered the NBBO. However, as discussed above, in this case, the market makers themselves described their execution of the orders as having been automatic, and testimony at the hearing confirms that such an arrangement, while informal, was quite common at the time.

Yoshikawa argues in his brief that "[his] firm had been targeted by [NASD] Market Surveillance for special scrutiny and . . . [that] NASD was trying to put [his] firm out of business." He also claims that he has been "singled out for prosecution by arbitrary or unjust considerations." Yoshikawa asserted during his testimony, "Mr. Chapman states that this is the first complaint he filed of this type, despite thousands of potential violative trades that have been investigated since 1996. . . The fact is that I am being prosecuted for supposed violations that no one ever else has been. Also, people working in the NASD have told me that the NASD targets firms to put them out of business."

To the extent that Yoshikawa argues that he is the victim of "selective prosecution," he must establish that the action against him was motivated by an unjust motive. ^{37/} A party seeking to assert such a claim must demonstrate that he or she was singled out for enforcement, while others who were similarly situated were not, and that the prosecution was motivated by arbitrary or unjust considerations such as race, religion, or the desire to prevent the exercise of a

^{36/} (...continued)

entered a new 100-share limit order to change the NBBO again, following again with a larger limit order taking advantage of the second new NBBO respondents had created); Robert J. Monski, Exchange Act Rel. No. 44250 (May 3, 2001), 74 SEC Docket 2494 (order accepting offer of settlement and finding violations of Section 10(b) and Rule 10b-5 where respondent used small limit orders to alter the NBBO and then took advantage of market makers' guarantees to execute larger limit orders at the newly-created NBBO); Israel M. Shenker, Exchange Act Rel. No. 45017 (Nov. 5, 2001), 76 SEC Docket 661 (same); Joseph R. Blackwell, Exchange Act Rel. No. 45018 (Nov. 5, 2001), 76 SEC Docket 665 (same); Jason T. Frazee, Exchange Act Rel. No. 47522 (Mar. 18, 2003), 79 SEC Docket 3310 (same); Leonard Sheehan, Exchange Act Rel. No. 47521 (Mar. 18, 2003), 79 SEC Docket 3310 (same); Cary R. Kahn, Exchange Act Rel. No. 50046 (July 20, 2004), 83 SEC Docket 1270 (same). Although these are settled cases that have limited precedential value, they are consistent with our determination to hold Yoshikawa liable for the misconduct at issue here. See, e.g. SIG Specialists, Inc., Exchange Act Rel. No. 51867 (June 17, 2005), 85 SEC Docket 2679, 2693 n.36.

^{37/} See, e.g. Barry C. Wilson, 52 S.E.C. 1070, 1074 (1996); United States v. Huff, 959 F.2d 731, 735 (8th Cir. 1992).

constitutionally protected right. 38/ Yoshikawa's claims are unsubstantiated. As noted above, Chapman testified that NASD initiated this proceeding against Yoshikawa when its market surveillance computer program detected trading activity that led to suspicion of an "auto-execution manipulation" scheme. Chapman testified that, while this matter was the first proceeding initiated by an alert from the surveillance computer system to go to a formal hearing, NASD had settled several other such proceedings before they went to a hearing and had made thirty to forty referrals to the Commission where the person involved was an individual investor not registered with NASD in any capacity.

We conclude that Yoshikawa engaged in a repeated and intentional pattern of market manipulation by entering orders intended to alter the NBBO of the relevant securities and then entering larger limit orders on the opposite side of the market in the same securities, taking advantage of the newly-established NBBO. Accordingly, Yoshikawa violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as NASD Conduct Rule 2120. 39/

IV.

Under Exchange Act Section 19(e)(2), we may reduce or set aside sanctions imposed by NASD if we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary burden on competition. 40/ NASD's decision noted that the NASD Sanction Guidelines do not provide specific guidance for violations involving market manipulation. NASD based its imposition of a bar from association with NASD member firms in all capacities on discussions in Commission precedent regarding the gravity of market manipulation as a violation of the antifraud provisions and general considerations in determining sanctions, as set forth in NASD's Sanction Guidelines. 41/

38/ Ralph W. LeBlanc, Exchange Act Rel. No. 48254 (July 30, 2003), 80 SEC Docket 2750, 2760; Russo Sec., Inc., Exchange Act Rel. No. 44186 (Apr. 17, 2001), 75 SEC Docket 1124A, 1124P; Michael Markowski, 51 S.E.C. 553, 559 n. 23 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994).

39/ Yoshikawa also violated NASD Conduct Rule 2110. It is well-established that a violation of another Commission or NASD requirement, including Exchange Act Section 10(b), Rule 10b-5 thereunder, and NASD Conduct Rule 2120, also violates NASD Conduct Rule 2110. See, e.g. Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999).

40/ 15 U.S.C. § 78s(e)(2). Yoshikawa does not claim, and the record does not show, that NASD's action imposed an undue burden on competition.

41/ NASD cited a number of Commission precedents in its sanctions discussion. John Montelbano et al., Exchange Act Rel. No. 47227 (Jan. 22, 2003), 79 SEC Docket 1474, 1497 ("there are few, if any, more serious offenses than manipulation"); Michael J.

(continued...)

Based on these authorities, NASD noted a number of factors in finding that Yoshikawa's conduct was egregious enough that it warranted the imposition of a bar. For example, Yoshikawa's manipulation directly impacted the integrity of the market in the relevant securities. The investing public and other market participants, including broker-dealers who rely on the integrity of the NBBO, were unaware that the NBBO quotes altered as a result of Yoshikawa's orders reflected not genuine market activity, but Yoshikawa's pre-meditated trading pattern. His conduct throughout this proceeding indicates that, if not barred from the securities industry, he might engage in similar conduct in the future. ^{42/} On at least nineteen occasions within a three month period, Yoshikawa purposely altered the NBBO of the three securities at issue here. Manipulation "attacks the very foundation and integrity of the free market system" and "runs counter to the basic objectives of the securities laws." ^{43/} It is true that Yoshikawa's manipulation in these nineteen instances netted him a relatively small amount of profits, \$5,375.00, but the harm of undermining the authority and trustworthiness of the NBBO and the free forces of supply and demand in the securities markets could be considerably greater than this dollar amount. Furthermore, although NASD's Sanction Guidelines do not specifically address manipulation, they do include a provision for violations of NASD Conduct Rule 2120 for Misrepresentations or Material Omissions of Fact. As noted above, we find that Yoshikawa violated NASD Conduct Rule 2120. The Guidelines specify that, for intentional violations, as we have found here, in egregious cases, it is appropriate to consider barring the individual.

Under these circumstances, where Yoshikawa repeatedly entered small limit orders in order to alter the NBBO in the relevant securities, followed within seconds by entering larger limit orders through the PaineWebber system in order to receive automatic execution at the new NBBO he created, and then cancelled the initial small limit orders, we find that the conduct is

^{41/} (...continued)
Markowski, 54 S.E.C. 830, 839 (2000) (citation omitted) (holding that deliberate manipulation of the market is "serious" misconduct that "strikes at the heart of the pricing process on which all investors rely. It attacks the very foundation and integrity of the free market system. Thus it runs counter to the basic objectives of the securities laws."), aff'd, 274 F.3d 525 (D.C. Cir. 2001); Michael B. Jawitz, Exchange Act Rel. No. 44357 (May 29, 2001), 75 SEC Docket 280, 293 ("Market participants, in making investment decisions, rely on the market as an independent pricing mechanism").

^{42/} Although Yoshikawa terminated the registration of Ko Securities in 2002 and has not worked in the securities industry since then, without a bar, there would be nothing to stop him from re-entering the industry.

^{43/} Pagel, 48 S.E.C. at 231-32.

sufficiently egregious to warrant a bar against Yoshikawa. We therefore find that the bar NASD imposed against Yoshikawa is neither excessive nor oppressive, and we sustain NASD's findings of violations and its imposition of a bar from association with NASD member firms in all capacities. 44/

An appropriate order will issue.

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

Nancy M. Morris
Secretary

44/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
SECURITIES EXCHANGE ACT OF 1934
Rel. No. 53731 / April 26, 2006

Admin. Proc. File No. 3-12057

In the Matter of the Application of

TERRANCE YOSHIKAWA
3417 West Commodore Way
Seattle, WA 98199

For Review of Disciplinary Action Taken By

NASD

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the findings of violation and imposition of sanctions by NASD against Terrance Yoshikawa be, and NASD's assessment of costs be, and they hereby are, sustained.

By the Commission.

Nancy M. Morris
Secretary