BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 8 Complainant, vs. Steven Herbert Johansen Bolingbrook, Illinois, Respondent.	DECISION Complaint No. C8A940073 (formerly No. C8A940047) District No. 8 Dated: September 18, 1997

Steven Herbert Johansen ("Johansen") has appealed the November 26, 1996 decision of the District Business Conduct Committee for District No. 8 ("DBCC") pursuant to Procedural Rule 9310. After a review of the entire record in this matter,[1] we hold that, as alleged in the complaint, Johansen interpositioned collateralized mortgage obligations ("CMOs") to evade inventory limits set by The Chicago Corporation ("TCC")[2] and to generate greater trading profits, and that this conduct was fraudulent as to TCC's retail customers in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") and SEC Rule 10b-5. We order that Johansen be censured, fined $100,000, and barred from associating with any NASD member firm in any capacity. We also order that Johansen pay costs in the amount of $1,965.

Background. Johansen entered the securities industry in August 1983, and he was registered as a general securities representative by TCC from April 1990 to December 1992. During the relevant time, Johansen was employed by TCC as a trader.

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[1] The record in this matter is comprised of the record as to Complaint Nos. C8A940047 and C8A950073.

[2] TCC is now "ABN AMRO Chicago Corporation."

Procedural History

This matter is on appeal to us following a remand proceeding before the DBCC pursuant to our Decision and Order of Partial Remand of January 6, 1996. The original complaint in this matter alleged that Johansen and/or Nevin George Bowser ("Bowser"), a registered representative employed by TCC, engaged in an interpositioning scheme in violation of Section 10(b) and SEC Rule 10b-5.[3] We reversed the DBCC's findings of violation as to Bowser and dismissed the complaint against him on the ground that there was no evidence that Bowser knowingly participated in an interpositioning scheme with Johansen. We now address the amended complaint.

Facts

Johansen and Bowser were both employed by TCC. Johansen was a trader, and Bowser was a retail salesperson whose customers were local banks. During the relevant time, Johansen had an inventory position limit of $10 million in any combination of mortgage-backed, treasury, and CMO securities. If a CMO position remained in inventory for 30 days and there had been no other trades in that security, the position would appear on a "Stale Position Report," and the trader's supervisor would question the trader regarding that position.

It is undisputed that the transactions alleged in the complaint occurred as described in the schedules to the amended complaint. According to these schedules, Johansen purchased seven CMO positions from broker/dealers into TCC's inventory in April, June, July, August, September, and November 1992. These positions ranged from approximately 2,000 to approximately 11,250 bonds. Johansen arranged with Bowser to sell these CMO positions, on the same days (on one occasion the next day) to Bowser's bank customers. Before selling the CMO positions to Bowser's bank customers, Johansen marked up the CMOs between one and 4 3/4 points. Bowser sold the CMO positions to his bank customers with the understanding that TCC would repurchase the bonds at the same price on a predetermined date. Johansen and Bowser wrote the sales tickets for these transactions on the date of the sale C one ticket to reflect the sale and one ticket to reflect the repurchase. The repurchase had an extended settlement date. During the time the bonds were in the banks' possession -- anywhere from two to 29 business days -- Johansen worked with TCC's retail sales force to develop retail interest in the bonds. On the predetermined dates, TCC repurchased the bonds from the banks at the same prices at which the banks had purchased the bonds. On occasion, the same CMO position, or a portion of the position, was sold to and repurchased from a bank more than once before the bonds were ultimately sold to public customers.

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[3] Cause two alleged that TCC, acting through James Terrance Kinsella ("Kinsella"), failed to establish and maintain reasonable supervisory procedures in violation of Section 5 of the NASD's Government Securities Rules and/or Section 15(b) of the Exchange Act. TCC and Kinsella entered into a separate Offer of Settlement; therefore, cause two is not under consideration.

The transactions with the banks resembled reverse repurchase agreements, or "reverse repos,"[4] in that although the banks actually purchased the securities, there was in effect an informal agreement between the banks and Bowser that TCC would repurchase the bonds at the same price on a specified future date.

Johansen marked up the bonds a second time, and TCC's retail salespersons sold the bonds to retail customers. These second mark-ups ranged from two to 10 points over the prices initially paid by TCC. A number of the retail sales were riskless principal transactions, i.e., the trade dates of these sales occurred while the bonds were in the possession of a bank, prior to their repurchase by TCC. Other retail sales occurred as much as five months after TCC's initial purchase of the positions in question.

Neither TCC, TCC's retail sales force nor the retail customers knew about the intervening mark-ups and sales to banks. Johansen did not advise TCC that he and Bowser were engaging in these sales/repurchases with banks, and TCC failed to discover these transactions in the normal course of its review of Johansen's trades because the trades were reflected in two separate reporting systems -- one that monitored inter-dealer trades, and another that monitored retail trades. All institutional trading cleared through one system (operated by Realtime), and retail trades cleared through a second system (operated by ADP). A retail purchase from a trading account required that the security be sold to an offset account number within the Realtime system. From there it would be "sold" to an offset account within the ADP system at the same price, and from the ADP offset account to the customer account within the ADP system. Any profit on the trade remained in the Realtime system, and the retail sales commission was allocated in the retail price. Any profit on institutional trades would be disclosed only on the Realtime system reports, because TCC's cost for the CMO was reflected only in the Realtime inventory account. The ADP reports would not show profits on a specific trade because the "sale" from Realtime to ADP was at the same cost. Each trader in the fixed income department was assigned at least two accounts on each of the two systems.

TCC began an inquiry into Johansen's trading when the firm discovered in December 1992 that a retail sale to an institutional customer had been marked up approximately nine points from its purchase price of 90.496. Kinsella, Johansen's supervisor, testified that when he asked Johansen

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[4] A repurchase agreement, or "repo," involving a security is the sale of that security at a specified price with a simultaneous agreement to repurchase the security at a specified price on a specified future date. A reverse repurchase agreement involving a security is the purchase of that security at a specified price with a simultaneous agreement to resell the security at a specified price on a specified future date. See Exchange Act Rel. No. 23602 (Sept. 4, 1986). In June 1987, the Securities and Exchange Commission ("SEC") amended its net capital, recordkeeping, and quarterly securities count rules in connection with the treatment of repurchase and reverse repurchase agreements entered into by broker/dealers, requiring, among other things, that broker/dealers maintain certain books and records in connection with these transactions, to account for securities that are the subjects of these agreements, and to require additional capital when the broker/dealer had attained a specified degree of leverage as a result of those agreements.

about this mark-up, Johansen indicated that it was an error, and that the securities should have been marked-up four points. Johansen canceled the trade, and the securities were returned to Johansen's inventory account. A few days later, the entire position was sold at 99.50.[5] TCC's Assistant Risk Manager, Eric Wells ("Wells"), believed that this price included an excessive mark-up, and he initiated an investigation into Johansen's trading account. This investigation disclosed the trading patterns at issue. TCC terminated Johansen and offered recision to the retail customers who had purchased the CMOs identified in the amended complaint.[6]

Discussion

The threshold issue is whether Johansen is responsible for the alleged trades, i.e., whether Johansen bought the CMOs, arranged the bank sales with Bowser, marked up the bonds, and worked with TCC's retail salespersons to sell the bonds to retail customers.[7]

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5 Johansen denied any involvement in this transaction and denied being in the office on the date that the trade was re-entered. Notwithstanding that TCC's investigation of this trade precipitated the investigation into the trades at issue, we do not address the issue of Johansen's involvement in this transaction, since the December 2 trade is not alleged in the complaint.

6 The results of TCC's investigation were not explicitly described in the record. The record does state that TCC, as a result of its findings, terminated Johansen in December 1992 and paid recision to the affected retail customers of approximately $2.6 million.

7 We have considered each of the procedural and evidentiary issues that Johansen has raised during the course of these proceedings, and have determined that both the initial and remand proceedings were conducted fairly.

We specifically address Johansen's requests for evidence. Johansen made a number of requests for documents from TCC, to which TCC responded that it would provide such documents only under subpoena or pursuant to a request from the NASD. Although the initial request appears to us to have been overly broad, Johansen subsequently limited the request and asked NASD Regulation staff to obtain the documents. NASD Regulation staff opposed the request on the grounds, among other things, of lack of relevance, and the DBCC refused to request the materials from TCC. NASD Regulation staff ultimately obtained copies of certain order tickets for Johansen. Johansen renewed certain of these requests on appeal. Upon review, we find that the documents requested by Johansen were not material to the issues presented. Johansen also asked that NASD Regulation staff arrange for approximately 100 witnesses to testify. Johansen made no proffer regarding the expected testimony of these witnesses or the possible relevance of their expected testimony, and made no showing that he had asked these witnesses to testify. Staff represented that it had unsuccessfully attempted to contact Trish DeSantis, one of the witnesses on Johansen's list, who was hired by TCC in June 1992 and thereafter traded CMOs. Staff objected to all other witnesses.

We have also considered the DBCC's refusal to continue the September 4, 1996 remand hearing. Johansen advised the DBCC hearing panel by facsimile on September 4 that his wife had given birth the day before, and he asked for a continuance on that basis. Staff opposed the

Johansen denied any involvement in the transactions at issue. Johansen contended that he did not write any of the tickets at issue and that other persons who had access to his registered representative number (No. 406) dealt with Bowser and the retail salespersons. Johansen maintained that the order tickets were not authentic and not his, because they did not have time stamps or initials, and he time-stamped and initialed all of his order tickets. He also maintained that the tickets were not in his handwriting. Johansen contended that after TCC hired Trish DeSantis ("DeSantis") to trade CMOs on June 1, 1992, he did very few CMO trades. Johansen contended that DeSantis, among others, used No. 406 during the relevant time to trade CMOs through his inventory accounts. Johansen further contended that he never engaged in CMO trades with Bowser and that he had no knowledge of Bowser's sales of CMOs to his bank customers.[8]

We find that Johansen was responsible for the transactions at issue. We find Bowser's testimony that Johansen devised the plan whereby Bowser sold CMO positions to his bank customers and repurchased them at the same price to be very credible. Bowser testified unequivocally that he dealt only with Johansen regarding the sales of CMOs to Bowser's bank customers even after DeSantis joined TCC. We find credible Bowser's testimony that he did not have a real working knowledge of CMOs before Johansen approached him in April 1992 with the idea of selling CMO positions to Bowser's bank customers to enable Johansen to avoid TCC's inventory position limits. Bowser testified that the bank sales enabled Johansen to buy more CMOs and, therefore, make greater profits. If Johansen could position a greater number of CMOs, Bowser testified, he could get the retail staff to sell more CMOs, thereby resulting in more profits. We further find credible Bowser's testimony that Johansen told him how to write the tickets and set the commissions. We do not find credible Johansen's claim that he never discussed CMO trades with Bowser, never participated in purchases or sales of CMOs to Bowser's customers, and was unaware of any CMO transactions by Bowser.

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request, on the ground that Johansen had not provided staff with notice that his wife was due on or about September 4, and the DBCC hearing panel held the hearing in Johansen's absence. Four witnesses testified. The hearing panel determined to send Johansen a copy of the transcript of the September 4 hearing, and they reconvened the hearing on September 23, with the four witnesses, to give Johansen the opportunity to present his defense and cross-examine the witnesses. We find that, although Johansen did not attend the September 4 hearing, he did have the opportunity to review the transcript of that proceeding and subsequently to cross-examine the witnesses and present his defense. We therefore find that the decision to hold the September 4 hearing in Johansen's absence was not reversible error.

[8] Although Bowser was involved in the bank transactions, the NBCC found in its first decision in this matter that Bowser did not knowingly participate in an interpositioning scheme with Johansen so that both he and Johansen could profit from charging retail customers prices higher than the market price. The NBCC thus dismissed Bowser from the complaint.

We have also relied on the testimony of Peter Wendell, Roger Winship, and Donald Whiteman, members of TCC's retail sales force, who testified that they believed that Johansen was marking up these CMOs based upon prevailing market prices, and that Johansen did not tell them about the intervening mark-ups. Their testimony also indicates that they would not have sold the CMOs to their customers had they known about the intervening mark-ups.

We also do not find credible Johansen's contention that none of the tickets at issue is in his handwriting. Johansen admitted that he wrote ticket No. 23449, a purchase of FHLMC bonds into trading account No. 161. This ticket memorializes the initial purchase of this CMO position into TCC inventory on August 17, 1992, as described on Schedule G to the complaint. Thus, Johansen has admitted writing one of the tickets at issue. The other 147 tickets at issue appear to be in the same handwriting. We have also considered Johansen's denial that he wrote these tickets on the basis that he has not seen the top page of the tickets which, according to him, would have his initials and be time-stamped if he wrote them. TCC employees testified, however, that the tickets are multi-paged, and that writing and stamps would carry through to all pages.

In order to determine whether DeSantis was responsible for the transactions at issue, we admitted into the record the tickets that TCC indicated were written by DeSantis. As Johansen contended, the DeSantis tickets represent wholesale purchases of CMO positions and retail sales of these positions. These tickets also establish, as Johansen contended, that other TCC registered persons executed trades using registered representative number 406 in addition to Johansen. Further, as Johansen contended, these tickets establish that DeSantis did some trades in Johansen's trading accounts, although most of the transactions occurred in DeSantis' trading accounts.

These tickets do not, however, establish that DeSantis was responsible for the transactions alleged in the complaint. One of the tickets (Number 1 of the "Trish de Santis tickets" - Johansen Appeal Exhibit 1) does relate to the transactions at issue, but this ticket appears to be in Johansen's handwriting. Further, the trading pattern with Bowser's bank customers began in April 1992, two months before DeSantis was employed at TCC. Not only could DeSantis not have been responsible for those trades, these trades indicate that someone other than DeSantis devised the interpositioning scheme with the banks before DeSantis even arrived at TCC. In testimony before the NBCC Subcommittee, Johansen acknowledged that he was responsible for CMO trading during those months. We therefore conclude that it was Johansen who devised the interpositioning scheme.

We also do not find credible Johansen's denial of any involvement with Bowser as to these transactions. We credit, as we did in our initial consideration of this matter, Bowser's version of the events. We find that Johansen introduced the concept of selling and repurchasing CMOs to Bowser's bank customers in "repo-type" transactions. Bowser testified that he had never sold CMOs to his bank customers before the transactions at issue because CMOs were too risky and volatile for banks to hold in inventory. Bowser testified that Johansen introduced the concept of selling CMOs to the banks with a guaranteed repurchase date and price. This arrangement, Bowser testified, very much resembled reverse repurchase agreements, or "reverse repos," since the banks would collect interest on the bonds for a designated period of time and then resell the bonds to TCC at the purchase price.

Bowser testified that he solicited his bank customers by telling them that the CMOs were a "riskless" alternative to depositing excess cash at the federal funds rate, in that the bank would receive the coupon rate of interest on the CMOs during the period that it held the position. Since the interest rate on the CMOs was greater than the rate the bank could earn if its money were invested in a short-term money market fund, and the banks were guaranteed a resale to TCC, Bowser's bank customers were interested in these purchases. The risk to the bank was limited to TCC's refusal or inability to repurchase the bonds at the end of the designated period. Bowser earned significant commissions on these transactions.[9] We find credible Bowser's contention that Johansen told Bowser how to write the tickets and set the mark-ups on the sales to the banks.

Having established Johansen's responsibility for the alleged transactions, we now address the issue of whether these transactions were fraudulent.[10] The DBCC based its findings of fraud on its conclusion that "[TCC's] retail clients paid substantially more for their CMOs than they would have had they purchased the CMOs from TCC before the interpositioned trades with Bowser's customers." The DBCC further concluded that Johansen would not have been able to charge retail customers "the excessive prices that he did" but for these intervening trades with Bowser's customers. The DBCC concluded that the interpositioning constituted fraudulent conduct since, as a result, the retail customers did not receive the best execution price on their transactions.

The complaint alleged that Johansen's conduct constituted fraud under Section 10(b) and SEC Rule 10b-5. Section 10(b) prohibits sellers and buyers of securities, using the mails or an instrumentality of interstate commerce or the facility of a national securities exchange, from employing "any manipulative or deceptive device or contrivance in contravention of [SEC] rules and regulations." Rule 10b-5 makes it unlawful:

> (a) To employ any device, scheme, or artifice to defraud
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> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

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[9] Bowser earned approximately $123,000 in commissions during this time, of which he claimed $100,000 was earned in connection with the transactions at issue. He agreed with TCC to repay $100,000 to TCC.

[10] Johansen's sole defense to this complaint was to deny his involvement. Therefore, we do not have the benefit of Johansen's discussion of these issues.

In order to establish liability under Section 10(b) and Rule 10b-5, it is necessary to prove that Johansen acted with scienter, i.e., intentionally made a material misrepresentation or omission, or used a fraudulent device in connection with the purchase or sale of securities. Scienter has been defined as an "intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

We find that Johansen intentionally engaged in the alleged course of conduct. We find that Johansen devised the plan to make short-term sales to Bowser's bank customers so that he could control larger amounts of inventory than permitted by TCC, thereby increasing his trading profits and, ultimately, his bonuses. We also find that Johansen intentionally marked up the bonds twice -- once before the sales to the banks and a second time before the sales to retail customers. We note that Johansen could have used the bank transactions as a mechanism to control inventory without using these transactions as an excuse for an additional mark-up. He did not.

As evidence of Johansen's intent to engage in this scheme, we observe that Johansen concealed this course of conduct from TCC, since TCC would not have permitted Johansen to use the bank transactions to avoid inventory position limits and generate greater trading profits as alleged. Johansen mischaracterized the bank transactions as purchases and sales when, in fact, they were structured as financing transactions that should have been appropriately documented as such.[11] Johansen also intentionally refrained from advising TCC's retail sales force that he had already stepped up the basis on the bonds prior to the retail mark-up. Based on the testimony of retail salespersons, it is unlikely that they would have sold the bonds at the prices suggested by Johansen had they known of the initial purchase prices and the intervening mark-ups.

We first address the question whether Johansen's intentional interjection of the bank transactions between TCC and its retail customers constituted fraudulent conduct as to the retail customers in violation of Section 10(b) and Rule 10b-5. We find that Johansen devised and engaged in an interpositioning scheme that caused TCC's retail customers to pay more than they would have had they purchased the CMOs from TCC before the sales to Bowser's customers occurred. We find that but for the interpositioned sales to the banks, the retail mark-ups on these CMOs would have been smaller. We find that Johansen engaged in this course of conduct in order to avoid TCC's inventory position limits and to generate greater profits at the expense of TCC's retail customers.

Interpositioning that results in customers' paying higher prices is inconsistent with a broker's obligation to obtain the best prices for his or her customers. In re H.C. Keister & Company, 43 S.E.C. 164, 168-169 (1966).[12] As the SEC stated almost 50 years ago in In re Duker & Duker, 6

[11] Although the banks' purchases and sales were not memorialized in repo agreements, these transactions were actually financial arrangements entered into for the purpose of allowing the banks to earn interest on the bonds during their ownership of the bonds. Had these transactions been characterized as repos, they would have been handled by TCC's "repo desk."

[12] This obligation has been referred to as one derived from the "shingle theory," on the basis that brokers who hang out a "shingle" implicitly represent to their customers that the prices they

S.E.C. 386, 389 (1939), "[A] dealer may not exploit the ignorance of his customer to exact unreasonable profits resulting from a price which bears no reasonable relation to the prevailing price." We find, as to certain of the trades more fully described below, that Johansen's interpositioning of the banks between TCC and the retail customers caused the customers to pay more for those CMOs than if the interpositioning had not occurred.

During the time at issue, an Interpretation of the NASD Board of Governors (the "Interpretation") (now Conduct Rule 2320(b)) stated:

> In any transaction for or with a customer, no member or person associated with a member shall interject a third party between the member and the best available market except in cases where the member can demonstrate that to his knowledge at the time of the transaction the total cost or proceeds of the transaction, as confirmed to the member acting for or with the customer, was better than the prevailing inter-dealer market for the security.[13]

Thus, a "prima facie" case of interpositioning is established when the record shows that a broker has interjected a third party between the firm and the best available market. See, e.g., In re Thomson & McKinnon, 43 S.E.C. 785 (1968); (interpositioning of broker/dealer between firm and market maker prevented customers from obtaining best price available for their securities); In re Delaware Management Company, Inc., 43 S.E.C. 392 (1967) (same). It then becomes the broker's obligation to show that the customer's total cost or proceeds of the transaction is the most favorable obtainable under the circumstances.

For example, in Thomson & McKinnon, the SEC found that the firm regularly interposed broker/dealers, who did not make a market in and were not otherwise a traditional source of the stocks traded, between itself and the best available market. The SEC found that on the same days that Thomson & McKinnon effected transactions with the interposed broker/dealers, those firms were able to purchase the stock in same-day, offset transactions at a profit with market makers in the stocks. This created a profit for the interposed broker/dealers, which was ultimately borne by Thomson & McKinnon's customers. The SEC found that, in virtually all cases, Thomson & McKinnon was in a position to have dealt directly with the market makers on as favorable a basis as the interposed broker/dealers. The SEC found that the quid pro quo of this arrangement was that the

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are charging in securities transactions are reasonably related to the prices charged in an open and competitive market. See, e.g., S.E.C. v. First Jersey Securities, Inc., 101 F.3d 1450, 1469 (2d Cir. 1996).

[13] See, e.g., In re Voss & Co., Inc., Exchange Act Rel. No. 21301 (Sept. 10, 1984); In re Thomson & McKinnon, 43 S.E.C. 785, 789 (1968) (interpositioning constitutes the interjection of a third party between the broker/dealer and the best available market price for a customer).

interposed broker/dealers directed business to Thomson & McKinnon. The SEC found that Thomson & McKinnon had thereby "enrich[ed] themselves at the expense of their customers."[14]

We find that the record establishes, as to each of the seven CMO positions at issue, that Johansen interpositioned Bowser's bank customers between the retail customers of TCC and the best available market. We find that Johansen's interpositioning operated to increase the prices paid by TCC's customers for these CMOs compared to the prices they would have paid had they purchased the bonds from TCC's inventory prior to the interjected bank transactions. By engaging in the interpositioning, Johansen generated greater trading profits for TCC and, in turn, generated a greater bonus for himself. Under the Interpretation, where interpositioning has occurred, the burden is on the member to demonstrate that his action resulted in the customer's being charged a lower price than that prevailing in the inter-dealer market. Johansen has presented no such evidence. We therefore find that by engaging in the interpositioning alleged in the complaint, Johansen violated Section 10(b) and Rule 10b-5.

We further find that Johansen's failure to disclose the interpositioning constituted an intentional omission of a material fact. A fact is considered material within the meaning of Section 10(b) and Rule 10b-5 "if there is <a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total" mix of information available.'" <u>In re Time Warner Inc. Securities Litigation</u>, 9 F.3d 259, 267-68 (2d Cir. 1993) (quoting <u>TSC Industries, Inc. v. Northway, Inc.</u>, 426 U.S. 438, 439 (1976)). We find that these mark-ups, which were not disclosed either to TCC's retail salespersons or to the retail purchasers, would have been material to the retail investors and should have been disclosed. <u>See</u> <u>Robert L. Ridenour</u>, Exchange Act Rel. No. 29184 (May 9, 1991) (facts concerning interpositioning considered by SEC to be material to reasonable trader). We note, however, that even if Johansen had caused this information to be disclosed, it would not have changed the fraudulent nature of the sales. <u>In re Edward Sinclair</u>, 44 S.E.C. 523 (1971) (disclosure of the interpositioning would not, however, have obviated its fraudulent character).

We do not, however, find that Johansen defrauded the banks. Because these transactions were structured as repos that guaranteed that the banks would recoup their full purchase price when TCC repurchased the bonds, notwithstanding the length of time that the banks held the bonds or any changes in the market during that time, the prices paid by the banks were not relevant to the value of the bonds to the banks. The banks purchased the bonds, not on the basis of price, but for the purpose of collecting short-term interest on the bonds, which they perceived to be economically advantageous.

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[14] <u>See</u> <u>also</u> <u>In re Milton M. Star</u>, 47 S.E.C. 58 (1979) (respondent who filled customer orders with securities that he sold short for his wife's account at a profit failed to meet burden of demonstrating that interpositioning resulted in customer being charged a lower price than that prevailing in the inter-dealer market).

Sanctions

Based on our review of the record, we affirm the censure, $100,000 fine, and bar in any capacity against Johansen.[15] It is vital to the operation of a fair market that a broker fulfill his or her fiduciary obligation to get the best price for his or her customers. In the case before us, Johansen used his knowledge of the CMO market to the detriment of TCC and TCC's retail customers.

Johansen has continued to deny all involvement in the face of overwhelming evidence that he was responsible for a deliberate and systematic plan that involved millions of dollars of securities and resulted in approximately 100 fraudulent retail sales over an eight-month period. We have also considered that Johansen intentionally routed the bank trades through his accounts without advising the repo desk or his supervisor, and intentionally took advantage of the two clearing systems employed by TCC to evade scrutiny. Finally, he intentionally failed to tell TCC's retail sales force just how much the CMOs had been marked up, thereby depriving TCC's retail customers of this information.

Accordingly, we affirm the censure, bar in any capacity, $100,000 fine, and the costs of the remand hearing in the amount of $1,965. We have concluded that it is not appropriate to charge Johansen the cost of the first DBCC hearing ($2,423.50). The bar in all capacities is effective as of the date of this decision.[16]

On Behalf of the National Business Conduct Committee,

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Joan C. Conley, Corporate Secretary

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[15] We do not address the issue of restitution on the basis that TCC has previously offered recision to the affected customers. We also do not address the issue of disgorgement on the basis that Johansen did not receive a bonus from TCC based on the alleged trades.

[16] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will be summarily suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will be summarily revoked for non-payment.