SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No.48618 / October 9, 2003

Admin. Proc. File No. 3-10916

In the Matter of the Application of ANTHONY A. ADONNINO and THOMAS CANNIZZARO

For Review of Disciplinary Action Taken by the NEW YORK STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Conduct Inconsistent with Just and Equitable Principles of Trade
Acts Detrimental to Interest or Welfare of Exchange
Trading for Account in Which Members Had an Interest
Making Material Misstatements to Exchange
Failure to Adhere to Principles of Good Business Practice
Causing Firm to Do Business with Public Customer Without Complying with Regulatory Requirements
Recordkeeping Violations
Failure Reasonably to Supervise and Control Firm Business Activities

Members of national securities exchange effected trades for an account in which they had an interest and made material misstatements about their conduct to the exchange; one member additionally caused the firm that employed him to do business with a public customer without complying with exchange rules and federal securities laws and rules, failed to keep and preserve required records, and failed reasonably to supervise and control the business activities of the firm that employed him and that firm's employees. Held, exchange disciplinary action sustained.

APPEARANCES:
George Brunelle and Suzanne E. Auletta, of Brunelle & Hadjikow, P.C., for Anthony A. Adonnino and Thomas Cannizzaro.
Susan Light, Joy A. Weber, Kathleen M. Toner, and John C. Saxton, Jr., for the New York Stock Exchange, Inc.

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Last brief received: March 6, 2003

I.

Anthony A. Adonnino and Thomas Cannizzaro ("Applicants"), lessee members of the New York Stock Exchange ("NYSE" or "Exchange"), appeal from the NYSE's disciplinary action against them. The NYSE determined that, between spring 1995 and mid-summer 1997, Adonnino and Cannizzaro engaged in conduct inconsistent with just and equitable principles of trade in violation of NYSE Rule 476(a)(6) and engaged in acts detrimental to the interest or welfare of the Exchange in violation of NYSE Rule 476(a)(7). The NYSE determined that Adonnino and Cannizzaro had an interest in an account traded by Sanford Burwick, a trader for Generic Trading, for which they effected transactions on the floor of the Exchange, and found that they thereby violated Section 11(a) of the Securities Exchange Act of 19341 and Exchange Act Rule 11a-1,2 as well as Exchange Rules 476(a)(6) and (a)(7). The NYSE also determined that Adonnino and Cannizzaro violated Exchange Rule 476(a)(4) by making material misstatements to the Exchange about their conduct with respect to Burwick's account.

The Exchange further determined that Adonnino, acting on behalf of AFC Partners, LLC ("AFC" or the "firm"), his and Cannizzaro's employer, failed to adhere to principles of good business practice in the

conduct of his business affairs, in violation of Exchange Rule 401,3 and that he caused AFC to do business with a public customer without complying with the requirements of Exchange rules and federal securities laws and rules in violation of Exchange Rule 476(a). The Exchange based these conclusions on its findings that, between December 1995 and May 1996, Adonnino and AFC conducted business with Carlos M. Gonzalez, a public customer, without meeting the requirements of certain Exchange rules, and that Adonnino failed to create and maintain accurate books and records, including commission bills, and facilitated the creation of inaccurate order tickets, thus causing AFC to violate Exchange Rule 440 and Exchange Act Rules 17a-3 and 17a-4.4 The NYSE based these determinations in part on Adonnino's failure to provide enough time-stamp machines and other resources to assure accurate recordkeeping by AFC's clerks. Finally, the NYSE determined that Adonnino violated Exchange Rule 342 by failing reasonably to supervise and control the business activities of AFC and its employees; to provide for appropriate procedures to supervise and control the business activities of AFC and its employees; and to establish a system of follow-up and review to assure compliance with applicable Exchange rules and federal securities laws and regulations, and to detect and prevent the other violations found.5

The Exchange Hearing Panel censured both Adonnino and Cannizzaro and suspended Adonnino for eighteen months and Cannizzaro for six months from membership, allied membership, approved member status, and from employment or association in any capacity with any member or member organization. The Hearing Panel also fined Adonnino $200,000. On appeal, the Exchange's Board of Directors affirmed the Hearing Panel's decision. Adonnino and Cannizzaro now appeal the NYSE's findings as well as the sanctions against them. We base our findings on an independent review of the record.

II.

Adonnino entered the securities industry in about 1981. At all relevant times, Adonnino was a principal of AFC, and was employed by AFC as a floor broker. Adonnino had responsibility for internal supervision and control of AFC's activities and its employees, including AFC's floor brokers and other employees, floor operations, books and records, and billing matters, and for compliance with securities laws and regulations.

Cannizzaro entered the securities industry in 1977. At all relevant times, he was employed by AFC, first as a floor clerk and then, beginning in 1995, as a floor broker.

A. The Burwick Trades

In 1995, Sanford Burwick, a trader for Generic Trading, approached Cannizzaro about becoming a customer of AFC.6 Cannizzaro lacked the authority to enter into the relationship on behalf of AFC, so he introduced Burwick to Adonnino. Adonnino and Burwick reached an agreement, and, thereafter, AFC's bookkeeper recorded that Burwick would be billed at the rate of $1.00 per 100 shares executed. Because Cannizzaro was responsible for introducing Burwick to AFC in 1995, AFC paid Cannizzaro a portion of the payments it received for executing Burwick's orders.

AFC proceeded to execute orders for Burwick. Some of the floor order tickets for the trades executed for Burwick were time-stamped inaccurately. Trading records show executions occurring before the order tickets were time-stamped. While AFC billed Burwick at the rate of $1.00 per 100 shares executed, the amount he in fact paid to AFC bore no apparent relationship to the amount billed. At times, AFC was paid sizeable overages, including on one occasion in November 1995 a payment in excess of four times the amount billed.7 At other times, months passed in which Burwick paid nothing to AFC, even though AFC was billing Burwick thousands of dollars for executions.8

Trading and payment records show that Burwick paid AFC approximately 50-60% of the net profits realized in the account. In months where there were losses in the account, or where the account had cumulative losses, Burwick paid nothing, and continued to pay nothing until profits had made up the losses. For example, in March 1995, the account showed a cumulative loss of $6,395.09.9 In April and May 1995, trading activity in the account resulted in profits of $91.00 and $5,747.00 respectively, offsetting much of the previous loss, but still leaving the account with a cumulative loss of $557.09. Burwick paid AFC nothing for executing the April and May trades. Although Adonnino ordinarily monitored aging bills closely, AFC continued to do business with Burwick, notwithstanding his

nonpayment. In June 1995, trading activity in the account yielded $21,186.00 in profits, enough to wipe out the previous losses and result in a cumulative profit of $20,628.91. Burwick then paid AFC $10,314.00, about 50% of the cumulative profits.

Burwick testified that he had discussed with Adonnino and Cannizzaro his intent to pay AFC on a profit-sharing basis, paying about 60% of trading profits in months where there were profits, and nothing in months where there were no profits. Losses would be carried ahead until there were cumulative net profits, at which time payments would resume, again based on a percentage of net profits.10

Both Cannizzaro and Adonnino denied any knowledge that Burwick was paying them on a profit-sharing basis. Cannizzaro testified that he had no authority to negotiate billing rates with AFC customers. Both Applicants also testified that customers of two-dollar brokers generally paid what they wanted to without regard to what they were billed.

Both Applicants characterized Burwick as a demanding customer and explained the overpayments as gestures of appreciation for the excellent service he received from AFC. Cannizzaro and Adonnino testified that, when AFC received the first significant overpayment, Cannizzaro contacted Burwick to make sure the money was intended for AFC. Cannizzaro further testified that, after Burwick confirmed that the overpayment was intentional and was a way of thanking the firm for good service, Cannizzaro relayed the conversation to Adonnino. Thereafter, they testified, they accepted the overpayments without question. Adonnino testified that he allowed the business relationship with Burwick to continue despite periods of nonpayment because he did not want to deprive Cannizzaro of the extra money Cannizzaro received for having brought the Burwick account to AFC in 1995.

Burwick testified that in approximately July 1997, Adonnino informed him that they would have to change the compensation arrangements to $1.00 per 100 shares and begin "clocking tickets correctly" because Adonnino "was under some scrutiny." Thereafter, Burwick testified, he stopped paying Adonnino on a profit-sharing basis and began paying at the rate of $1.00 per 100 shares executed. Adonnino denied having had such a conversation with Burwick.

B. The Gonzalez Trades

Carlos M. Gonzalez was a close personal friend of Adonnino. Between December 1995 and May 1996, Gonzalez was employed as a trader, first by Interacciones Global ("IG"), then by CS First Boston ("CSFB"). Both firms were customers of AFC. Gonzalez maintained a personal account at Bear, Stearns.

During the period in question, Gonzalez and Christopher Pardo, a friend of Gonzalez who worked as a trader at Valores Finamex ("VF"), called in numerous trades in American Depository Receipts ("ADRs") of Telefonos de Mexico ("Telmex") to AFC. On 39 trade dates during this period, floor tickets for some of the trades Gonzalez and Pardo called in were changed in certain respects after they were written. In some instances, "Attention Judy" was added. The "Judy" referred to Judy Fehlig, who handled Gonzalez's personal account at Bear, Stearns. On other tickets, the "give up" indicating which firm would be clearing the trades was changed, so that trades that would otherwise have been cleared by Ernst & Co., IG's clearing firm, were instead directed to Bear, Stearns, which cleared for Gonzalez's personal account.11 The effect of the changes was to redirect trades that would otherwise have been for IG or VF to Gonzalez's personal account. Every Telmex trade in Gonzalez's personal account that AFC executed during the period in question was profitable, yielding a total profit to Gonzalez of $316,477.16.

Recordings of telephone conversations reveal that Adoninno knew that Gonzalez maintained a personal account and that he was trading in that account. The recordings also establish that Adoninno knew that "give ups" on tickets for trades ordered by Gonzalez were being changed, and that Adoninno was concerned with the regulatory implications of these changes in "give ups."12 Additionally, the recordings show that Adoninno knew that the representative handling Gonzalez's personal account was named Judy.

Adonnino testified that he was unaware that Gonzalez was trading Telmex for his own account through AFC, although he admitted that Gonzalez told him that he would be trading for his personal account through AFC, and that Adonnino believed Gonzalez would do so. Adonnino stated that the size of Gonzalez's Telmex orders was consistent with that of institutional orders and that he had no reason to

believe that Gonzalez could afford such trades. Adonnino pointed out that all the orders for Gonzalez's personal account came in over institutional telephone lines, which was also consistent with the orders being institutional orders. Finally, Adonnino testified that, in view of the huge volume of Telmex transactions that AFC executed every day, the number of trades redirected to Gonzalez's personal account was too small to draw attention to any pattern.

In May 1995, before the Gonzalez trading at issue, the Exchange's Division of Member Firm Regulation ("MFR") examined AFC's books and records and concluded that AFC had engaged in business with public customers and had failed to meet the requirements for doing so.13 Adonnino was advised of these findings orally and by written report. In correspondence signed by Adonnino, AFC responded that it had discontinued doing business with those customers that AFC determined to be non-broker-dealers, and assured the NYSE that it would make every effort to prevent the recurrence of the situation. In March 1996, during the period of Gonzalez's trading, but not in response to surveillance of that trading, MFR issued a cautionary letter to AFC. The letter referred to the May 1995 examination; stated that in conducting a public customer business without satisfying regulatory requirements, AFC fell short of its responsibilities as a member organization; and cautioned AFC that "any repetition of such violation" could subject AFC and/or responsible personnel to formal disciplinary proceedings by the NYSE.

III.

A. Interest in a Customer Account

Section 11(a) of the Exchange Act and Exchange Act Rule 11a-1 prohibit a floor broker from trading for an account in which the broker has an interest.14 In this case, there can be no doubt that Applicants had an interest in the Burwick account, since the record evidence shows that there was de facto participation in the account's profits.15

Applicants do not dispute that an agreement to share profits and losses in a customer account was recognized as prohibited conduct at the time of the events in question. Applicants posit, however, that the record does not show that there was a profit-sharing arrangement between them and Burwick. First, Applicants contend, compensation was not on a profit-sharing basis. Second, they argue, even if Burwick did pay AFC a share of the profits in the account, this was a unilateral decision by Burwick, one that Applicants did not acquiesce in knowingly (although they acknowledge accepting the funds). We reject both parts of Applicants' argument because they are belied by the record evidence.

The payments by Burwick exemplify a profit-sharing arrangement: payments of approximately 50-60% of profits, with no payments during periods when the account was operating at a net loss. Minor variances from the target percentages do not detract from the pattern established.16

Applicants make much of the fact that the Exchange did not produce documents -- correspondence related to profits and losses, for instance, or sharing of profitability data --establishing the existence of a profit-sharing arrangement. Since having an interest in a customer account was prohibited conduct, it would not be unexpected for such an arrangement to be oral and for parties to avoid creation of a paper trail to the extent possible.17

The Exchange rejected as a "story" that could not be "credit[ed]" the claim that Burwick "unilaterally determined to pay [AFC] half of its profits and more, and never mentioned it to them." It similarly rejected, as "beyond credence," the claim that Burwick chose, on his own initiative, to pay well beyond the amount billed by AFC as a reward for special attention. In the judgment of the hearing panelists, the payments were "well in excess of any conceivable voluntary reward payments." Further, the Exchange did not credit Applicants' testimony that Burwick explained the overpayments as tokens of appreciation and that Burwick never told them that he was calculating the payments as a percentage of profits. We defer to these business judgments and credibility determinations of the Exchange, as the record fully supports them.18

Applicants continue to assert that Burwick's patterns of nonpayment and overpayment did not put them on notice that he was calculating payments based on profits in the account. They contend that Adonnino was willing to tolerate late payments by Burwick because there was relatively little activity in the account during periods of nonpayment; Burwick assured AFC that payment was forthcoming; and the

account provided extra money to Cannizzaro, whom Adonnino wanted to help. Moreover, they argue, AFC's computer system was not set up to track overpayments, so the amounts by which Burwick was overpaying were not readily evident.

We reject these explanations, as did the Exchange. The record shows that Adonnino paid close attention to AFC's receivables and had little patience for late-paying customers. His tolerance of Burwick's failure to pay is inconsistent with the business practices he otherwise employed, and the reasons cited do not satisfactorily explain the inconsistency. Moreover, any deficiencies in the computer system did not, in fact, render Applicants unaware of the overpayments, since Cannizzaro testified that he questioned Burwick about the significant overpayment.

We find irrelevant Applicants' protestation that there was no incentive for AFC to enter into a profit-sharing arrangement with Burwick because the amount of net profit Burwick allegedly shared with them was a small fraction of AFC's gross revenues and net profits.19 Applicants' contention that Burwick had no incentive to share his profits with AFC, an executing broker, is equally irrelevant. The Exchange established that Burwick and Applicants arranged to share trading profits and losses; it was not required to prove the parties' respective motivations for the arrangement. The existence of the arrangement established the violation.

We accordingly find that Applicants knowingly shared the profits and losses in Burwick's account and therefore had an interest in the account. By trading in this account, Applicants violated Section 11(a) and Rule 11a-1, as well as Exchange Rules 476(a)(6) and (a)(7).20

B. Misstatements to the Exchange

Both Adonnino and Cannizzaro were charged with having violated Exchange Rule 476(a)(4) by making material misstatements to the Exchange. To support this charge, NYSE Enforcement introduced transcripts of testimony taken during the investigation into this matter. In his investigative testimony, Adonnino stated that he was never aware that Burwick paid AFC based on the profitability of the account. In his investigative testimony, Cannizzaro stated that Burwick never told him that he had paid more because his trading in a given month had been profitable. As is evident from our conclusions here, these statements made to the Exchange during its investigation were false. We further find that these were material misstatements because they went to the essence of the Section 11(a) and Rule 11a-1 charges. We therefore find that Applicants violated Exchange Rule 476(a)(4).

Applicants assert that they are being punished duplicative-ly, once for a series of alleged violations and again for refusing to state to the Exchange that they were guilty of those violations. We disagree. Applicants' liability under Rule 476(a)(4) is based on particular statements Applicants made to Exchange representatives pertaining to the facts at issue. While Applicants were free to dispute vigorously claims against them, they were not free to testify falsely to the Exchange.

C. Books and Records

Exchange Act Rule 17a-3 requires, among other things, the keeping of accurate records regarding the times at which orders are transmitted and transactions executed.21 Exchange Act Rule 17a-4(a) requires, among other things, that every member subject to Rule 17a-3 preserve records required to be made pursuant to Rule 17a-3 and bills relating to the member's business for a period of three years. Exchange Rule 440 requires brokers and dealers to make and preserve books and records prescribed by the NYSE and by Exchange Act Rules 17a-3 and 17a-4. The requirement that records be kept embodies the requirement that those records be true and accurate.22

The record shows that AFC's order tickets contained inaccurate information regarding the time that orders were transmitted for execution. Commission bills for Burwick's trades were also inaccurate, in that they reflected a rate of $1.00 per 100 shares, rather than the profit-sharing formula that was actually in use. Adonnino admits that he had responsibility for AFC's books and records and billing matters. Based on these instances of inaccuracy and falsity, we find that Adonnino caused violations of Exchange Rule 440 and Exchange Act Rules 17a-3 and 17a-4.

D. Causing AFC to Do Business With a Public Customer

It is uncontested that, by executing the trades for Gonzalez's personal account, AFC engaged in business with a public customer. It is also uncontested that AFC did not comply with Exchange rules and federal securities requirements applicable when firms do business with public customers. Adonnino contends, however, that he cannot be held responsible for AFC's noncompliance because he had no reason to suspect that Gonzalez was trading for his personal account through AFC.

We reject Adonnino's argument. Adonnino acknowledged before the NYSE that Gonzalez told him that he would be trading for his personal account through AFC, and that Adonnino believed that this, in fact, would occur. Adonnino, however, was well aware, especially after the Exchange's 1995 examination of AFC, that AFC was required to avoid doing business with public customers, given that the firm was set up exclusively to do business with broker-dealers. Adonnino's awareness that AFC did a very large volume of trades in Telmex, that Gonzalez was trading Telmex ADRs in his personal account, and that give-ups on some of the floor tickets for trades called in by Gonzalez to AFC were being changed put him on notice that Gonzalez may have been placing his personal trades through AFC. Had Adonnino considered Gonzalez's trading in light of AFC's inability to do business with public customers and looked further into the matter, he would have discovered that the changes in give-ups and added notations directing the trades to the attention of "Judy" (who handled Gonzalez's personal account at Bear, Stearns) caused numerous Telmex trades to be redirected to Gonzalez's personal account, and that Gonzalez's trading caused AFC's violation of applicable Exchange rules.23

Neither the size of the trades nor the fact that they were called in on dedicated lines established their institutional character, which would have precluded the need for further inquiry. In failing to pursue the matter, given his position at AFC and all that he knew, Adonnino engaged in conduct inconsistent with just and equitable principles of trade.24

E. Failure Personally to Supervise and Control Firm Business

Adonnino acknowledges that during the period at issue, he was the individual within AFC who had overall authority and responsibility for internal supervision and control of AFC's activities and employees, and for compliance with securities laws and regulations. He contends, however, that his supervision and control of the business activities of AFC was reasonable.

While entrusted with supervisory responsibility at AFC, Adonnino himself played a role, with his subordinates, in both the Burwick compensation arrangements and Gonzalez's personal trading through AFC.25 We agree with the NYSE that, accordingly, Adonnino's supervision was unreasonable and that he failed to control business activities at AFC as required by the NYSE. We therefore sustain the NYSE's finding that Adonnino violated Exchange Rule 342.

F. Procedural Issues

1. Applicants argue that the NYSE unfairly deprived them of their right under NYSE Rule 476(c) to obtain exculpatory evidence and other evidence material to the preparation of their defense by failing to record a witness interview26and by not informing Applicants' counsel of the fact and substance of the interview. Applicants argue that, in the interview, the witness directly contradicted assertions made by Burwick, and that the conduct of NYSE Enforcement deprived Applicants of their opportunity to use this evidence in their defense.

On its face, Rule 476(c) pertains only to documents or records that the Exchange has in its possession. The rule is not a basis for attacking an NYSE disciplinary proceeding because Exchange staff did not create a document or record and did not inform Applicants' counsel of a witness interview. Moreover, the witness at issue appeared at the hearing and was questioned by Applicants at that time, so the witness's testimony was considered by the hearing panel. Indeed, the hearing panel's decision expressly notes that this witness "disclaimed knowledge of any special billing arrangement with" Burwick.

2. Applicants contend that they were prejudiced by the Exchange hearing officer's willingness to allow Burwick "to avoid providing responsive answers on cross-examination, and to reply instead with rambling, unresponsive rhetoric." Applicants do not point to particular instances in which they claim to have been deprived of their right to elicit answers to their questions. We find no prejudice. The hearing

officer generally allowed witnesses to testify expansively. He also permitted exhaustive cross-examination. It was within the discretion of the hearing officer to permit Burwick to testify as he did.27

3. Applicants assert that they were prejudiced by unfair and unreasonable delays in the investigation and initiation of the NYSE proceedings against them. The delay, they contend, resulted in the "intervening death or disability of key potential witnesses," as well as the loss or material impairment of the recollections of available witnesses.

The two main courses of conduct at issue in these proceedings -- Burwick's payment to AFC on a profit-sharing basis and AFC's execution of trades in Gonzalez's personal account -- ended in May 1996 and July 1997 respectively. NYSE Enforcement issued the charges that initiated this proceeding in September 1999. Applicants do not identify "key potential witnesses" who died or became unavailable as a result of that delay, nor do they point to specific instances of material memory lapses. Under all the circumstances, we see no unfair prejudice in the delay.

4. Applicants assert that the NYSE's review process was tainted by "overt bias" against them exhibited by a member of

the NYSE Board of Directors who served on its Committee for Review.28 After Applicants filed a Motion for Recusal or Disqualification, and before the Committee for Review held its hearing in this matter, the member in question recused himself. Applicants argue, however, that the NYSE should have attempted to determine whether that member "might have contacted, and influenced, other Review Committee members in making their decision on this case."

In addition to seeking recusal, or alternatively, disqualification, Applicants' motion asked that the identified individual be directed to refrain from discussing the case with other members of the Committee for Review or the Board of Directors and that the Committee take action to determine whether other Committee or Board members had similarly prejudged the matter, and if so, to take appropriate corrective action. The same letter that notified Applicants of the Board member's recusal stated that, as a result of the recusal, the Committee did not need to take action on the motion. Applicants made no objection at the time to this resolution of the matter.

Since the Board member alleged to have prejudged the case recused himself, and Applicants did not object to this resolution of the matter, Applicants effectively abandoned their motion. Moreover, Applicants point to nothing that would indicate that the recused member did anything to influence the case's outcome or that suggests bias or prejudgment on the part of any member of the Committee for Review that considered his appeal, and Applicants' claim of taint thus lacks support. In any event, we note that the Exchange's Board of Directors affirmed the hearing panel's decision in all respects, that Applicants do not contend that that hearing panel decision was tainted by bias or prejudgment, and that our de novo review is a further safeguard against any bias or prejudgment.29

IV.

Applicants contend that the sanctions imposed by the Exchange are excessive and oppressive. They note that the Exchange hearing panel explicitly recognized that the conduct at issue was not as serious as that in certain other Exchange cases involving profit-sharing in customer accounts and argue that, given this acknowledgment, the sanctions imposed should have been commensurately lower.

We review sanctions imposed by the NYSE to determine whether those sanctions are excessive or oppressive, or whether they impose an unnecessary or inappropriate burden on competition.30 Applying this standard, we see no basis for reducing the sanctions. As for Applicants' argument that the sanctions are unduly severe compared to those imposed in other NYSE cases, we have consistently held that the appropriate sanction depends on the facts and circumstances of each case and cannot be precisely determined by comparison with action taken in other proceedings.31 This is especially true with regard to settled cases, where, as we have frequently pointed out, pragmatic factors may result in lesser sanctions.32 Applicants point to a number of such settled cases in support of their claim for reduced sanctions.

The profit-sharing scheme here lasted for more than two years. Adonnino, further, engaged in additional

misconduct. He caused AFC to do business with Gonzalez without satisfying important regulatory requirements. He failed to create and preserve accurate commission bills, and facilitated the creation of inaccurately stamped order tickets. He also failed to provide reasonable supervision and control of business activities at AFC.

These are serious violations. In light of the misconduct found, we conclude that the sanctions imposed by the Exchange on the two Applicants -- a censure and six-month suspension of Cannizzaro and a censure, an eighteen-month suspension, and $200,000 fine for Adonnino -- are lenient in light of their respective violations. An appropriate order will issue.33

By the Commission (Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS); Chairman DONALDSON, not participating.

Jonathan G. Katz
Secretary

Footnotes

1 15 U.S.C. § 78k(a). Section 11(a), subject to certain exemptions not relevant here, makes it "unlawful for any member of a national securities exchange to effect any transaction on such exchange for its own account, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion."

2 17 C.F.R. § 240.11a-1. Rule 11a-1, with certain exceptions not relevant here, prohibits an exchange member, while on the trading floor, from initiating any transaction in any security traded on the exchange for any account "in which such member has an interest, or for any such account with respect to which such member has discretion."

3 As construed by the Commission and the courts, NYSE Rule 401 requires brokers and dealers to conduct their business consistent with high standards of commercial honor and just and equitable principles of trade. Keith Springer, Exchange Act Rel. No. 45439 (Feb. 13, 2002), 76 SEC Docket 2726, 2727 n.2 (citing Sacks v. Reynolds Sec., 593 F.2d 1234, 1242 (D.C. Cir. 1978)).

4 NYSE Rule 440 requires brokers and dealers to make and preserve books and records prescribed by the NYSE and by Exchange Act Rules 17a-3 and 17a-4.

Exchange Act Rules 17a-3 and 17a-4, 17 C.F.R. §§ 240.17a-3 and 240.17a-4, require brokers and dealers to make and preserve certain books and records regarding executed securities transactions and customer accounts.

5 NYSE Rule 342(a), in relevant part, requires that "[a] person in charge of a group of employees shall reasonably discharge his duties and obligations in connection with supervision and control of the activities of those employees related to the business of their employer and compliance with securities laws and regulations." NYSE Rule 342(b), in relevant part, requires that the person at a member organization who is designated to assume overall responsibility for internal supervision and compliance with securities laws and regulations shall (1) "delegate to qualified principals or employees responsibility and authority for supervision and control of each office, department or business activity, and provide for appropriate procedures of supervision and control," and (2) "establish a separate system of follow-up and review to assure that the delegated authority and responsibility [are] being appropriately exercised."

6 Burwick had done business with AFC in 1993-94, when he was employed as a trader by Oakford Corporation. At that time, his dealings with AFC were through a different representative. Burwick testified that he ended the relationship with that representative because Burwick was annoyed that his account was running a $13,000 deficit. Applicants' conduct during that period is not at issue in this proceeding.

7 In November 1995, AFC billed Burwick $5,698, and was paid$22,840.

8 Between April and August 1996, for example, AFC billed Burwick more than $7,000. Burwick paid nothing.

9 As noted above, see supra n.6, Burwick's account was showing a deficit of approximately $13,000 at the end of 1994. Burwick testified that Cannizzaro agreed that AFC would "cut the deficit in half" if Burwick would resume his business relationship with AFC.

10 Burwick testified that he was "quite sure" that he discussed compensation arrangements with Cannizzaro at about the time Burwick began doing business with AFC in1995. Burwick explained that this discussion was in connection with the proposal that AFC reduce the deficit in Burwick's account by half as a condition of resuming the business relationship. See supra n.9. Although Burwick could not remember a specific conversation in which he discussed establishing the profit-sharing relationship with Adonnino, he testified that, during the period at issue, "[W]henever I would do business with anybody on the floor, . . . they were told that I compensated people with a percentage of the profits. . . . I had an agreement with everybody that was doing business for me and the agreement was that they were getting paid a percentage of the profits."

Burwick testified that the percentage of profits paid to AFC started at 50% in 1993, when he first began doing business with AFC, see supra n. 6, then increased by "about another 10%." Based on AFC's floor work, Burwick's account statements, and check stubs, among other evidence, the Exchange showed payments ranging from 50.0 to 63.7% of profits for the period from June 1995 (when the account emerged from the net loss position it had been operating at since Cannizzaro reintroduced the account to AFC) to May 1997.

11 Joseph Adoninno, a floor clerk with AFC and Applicant Adonnino's brother, testified that IG also sometimes cleared through Bear, Stearns. Jerome Reda, a manager in the NYSE's Market Surveillance Division who appeared as an expert witness, testified that IG cleared only through Ernst & Co.

12 In a December 1995 telephone conversation, Adonnino complained to Gonzalez that the changes were "killing" him because "I have regulations that I have to comply [with] . . . I have to give up the names that I'm going to be giving up beforehand."

13 These rules and regulations include, among others, obtaining fidelity bond coverage pursuant to Exchange Rule 319 and filing certain reports pursuant to Exchange Act Rule 17a-5. See generally NYSE Information Memo No. 91-25 (July 8, 1991), 1991 NYSE Info. Memo LEXIS 39 (discussing regulatory requirements for NYSE members and firms conducting a public business).

14 See generally John R. D'Alessio, Exchange Act Rel. No. 47627 (April 3, 2003), 79 SEC Docket 3627, 3630-31, appeal pending, No. 03-4883 (2d Cir.)(explaining regulatory background for Section 11(a) and Rule 11a-1).

15 We have previously stated that a compensation arrangement that results in an Exchange member sharing in the performance of an account, regardless of how it is structured, constitutes an "interest" in the account. John R. D'Alessio, 79 SEC Docket at 3637 (quoting New York Stock Exchange, Inc., Exchange Act Rel. No. 41574 (June 29, 1999), 70 SEC Docket 153, 156 (Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Ordering Compliance With Undertakings)).

16 As noted above, see supra n. 10, Burwick's payments to AFC between June 1995 and May 1997 ranged from 50.0 to 63.7% of profits. These percentages are much more consistent with the testimony that there was an agreement than those in Matter of X, relied on by Applicants as a basis for their claim that the profit-sharing arrangement alleged was not established. In that matter, the Exchange found that evidence of payments ranging from 25.3 to 257.4% of profits was inconsistent with an alleged agreement to pay 70% of profits. Matter of X, New York Stock Exchange Panel Hearing Decision 02-114 (July 29, 2002), www.nyse.com/pdfs/02-114x.pdf.

Applicants argue that Burwick's testimony as to the profit-sharing arrangement was not convincing because he did not demonstrate an independent recollection of the percentages of profits to be shared,

either during his investigative testimony or at the hearing, but instead agreed, in both instances, to percentages suggested by NYSE Enforcement. As noted, see supra n. 10 and accompanying text, Burwick testified directly about the profit-sharing arrangement with AFC. The hearing panel found the testimony convincing, as do we, particularly given its consistency with the documentary evidence.

17 The desire to keep prohibited conduct secret is consistent with AFC sending Burwick bills based on a rate of $1.00 per 100 shares executed, and with the testimony of AFC's bookkeeper that no one ever suggested to her that Burwick was paying commissions based on profit sharing.

18 E.g., Kenneth R. Ward, Securities Act Rel. No. 8210 (Mar. 19, 2003), 79 SEC Docket 3035, 3055-56, aff'd, No. 03-60437 (5th Cir. Sept. 25, 2003); Daniel D. Manoff, Exchange Act Rel. No. 46708 (Oct. 23, 2002), 78 SEC Docket 2359, 2363; Joseph S. Barbera, Exchange Act Rel. No. 43528 (Nov. 7, 2000), 73 SEC Docket 2271, 2281 n.30; Cathy Jean Krause Kirkpatrick, 53 S.E.C. 918, 927 (1998).

Also irrelevant is Applicants' argument that disciplining them for violations of Section 11(a) and Rule 11a-1 based on a profit-sharing result rather than an agreement to share profits and losses would constitute an unfair and unconstitutional application of regulatory prohibitions and interpretations that were promulgated after the events in question. Here we find that the profit sharing was by arrangement, not based on a unilateral decision by Burwick; Applicants do not assert lack of notice that trading in a customer account in which the member shares in profits and losses was prohibited.

19 While the net profit in the account may have made a minor impact on AFC's bottom line, it provided additional income to Cannizzaro.

20 Applicants note that the hearing panel dismissed charges that Peter Cammalleri, the floor broker who executed most of Burwick's orders, had an interest in Burwick's account. They assert that this dismissal is inconsistent with the Exchange's findings of violation by Applicants. We disagree. As we read the hearing panel's decision, Cammalleri's role differed from that of Applicants, as did the evidence pertaining to his knowledge of the profit sharing.

21 See, e.g., Baikie & Alcantara Inc., 47 S.E.C. 851, 853 (1983); James E. Ryan, 47 S.E.C. 759, 763-65 (1982).

22 E.g., LSCO Sec., Inc., 49 S.E.C. 1126, 1130 n.16 (1989); David R. Williams, 48 S.E.C. 122, 123 (1985).

23 Adonnino contends that AFC's involvement with public customers at the time of the NYSE examination was completely different from its involvement with Gonzalez. While the specifics are different, the underlying problem -- improperly doing public customer business -- is the same. The 1995 examination should have heightened Adoninno's sensitivity to the problem, in whatever form it appeared.

Adonnino argues that the Exchange's findings that Adonnino caused AFC to do business with a public customer cannot be reconciled with the hearing panel's finding, in a separate opinion, that Adonnino's brother, Joseph Adonnino, a floor clerk with AFC, was not guilty of charges against him in connection with his handling of Gonzalez's orders and execution reports. We have not reviewed the record in that matter. Based on the hearing panel's decision, however, we note that the charges based on allocations of trades were dismissed as not established as to both Adonnino and Joseph Adonnino. Thus, it appears that the opinions are not inconsistent in that respect. Moreover, although the hearing panel found the evidence insufficient to establish that Joseph Adonnino and the other clerks had any special knowledge of the existence of Gonzalez's personal account, that finding does not apply to Adonnino, who was an AFC principal, not a clerk, and who knew that Gonzalez had a personal account.

24 In his defense, Adonnino points to various sources of potential evidence that he asserts would support a charge of this nature and emphasizes that the NYSE did not introduce such evidence. The argument is unavailing, as the NYSE presented sufficient evidence of its choosing.

25 As we have previously held, a supervisor's participation in the misconduct of subordinates is itself a supervisory failure. John Montelbano, Exchange Act Rel. No. 47227 (Jan. 22, 2003), 79 SEC Docket

1474, 1487.

26 In relevant part, Rule 476(c) allows hearing officers to require the Exchange to permit applicants "to inspect and copy documents or records in the possession of the Exchange which are material to the preparation of the defense or are intended for use by the Division or Department of the Exchange initiating the proceeding as evidence in chief at the proceeding." Applicants concede that NYSE Enforcement did not memorialize the witness interview in writing or by recording it.

27 Compare Rita H. Malm, 52 S.E.C. 64, 75 n.37 (1994) (disciplinary proceedings conducted by self-regulatory organizations are informal in comparison to proceedings in state and federal courts, and hearing panels have "great latitude" in determining what testimony to allow).

Applicants also contend that they were prejudiced by what they characterize as "the biased and improper shaping of witness testimony" before the hearing. They argue that NYSE Enforcement counsel repeatedly interrupted Burwick's testimony during a deposition for "off the record" discussions with Burwick and that counsel did not, after Burwick's testimony resumed, either state that the off-the-record discussion was non-substantive or indicate what the substance had been. Applicants characterize counsel's actions as "an improper creation of evidence."

While it is better practice for counsel to clarify, after an off-the-record colloquy, whether the colloquy was non-substantive or, if not, what its substance was, we do not conclude on this record that any impropriety occurred. Applicants have not established their claim of prejudice. Further, Burwick's testimony before the hearing panel was subject to Applicants' cross-examination and to critical assessment as to credibility and reliability by the hearing officer and panelists.

28 Under the NYSE's Rules, appeals from hearing panel decisions are to the NYSE's Board of Directors. NYSE Rule 476(f). Oral argument in this proceeding was held before the Board's Committee for Review, which also reviewed the record and the parties' briefs. The Board as a whole, by majority vote, determines the outcome of the proceeding. See NYSE Rule 476(f).

29 Applicants contend that NYSE Enforcement's characterization in the briefs submitted to the Committee for Review of Gonzalez's trading for his own account as "a cherry-picking scheme" is misleading and improper. They argue that Gonzalez was not found to have participated in such a scheme and that the use of this term influenced the NYSE to sustain the sanctions against Adoninno.

Gonzalez's conduct was not under review by the NYSE in this proceeding, nor is it the subject of our review. We see no reason to believe that the NYSE was influenced by counsel's use of the term "cherry picking" to characterize Gonzalez's conduct, and, again, our de novo review provides an additional safeguard against any such influence.

30 Section 19(e)(2) of the Exchange Act, 15 U.S.C. § 78s(e)(2). Applicants do not assert, and the record does not show, that the NYSE's action imposes an undue burden on competition.

31 See, e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); see also, e.g., John R. D'Alessio, 79 SEC Docket at 3627; Jonathan Feins, Exchange Act Rel. No. 41943 (Sept. 29, 1999), 70 SEC Docket 2116, 2131 n.36.

32 E.g., Howard Perles, Exchange Act Rel. No. 45691 (April 4, 2002), 77 SEC Docket 896, 914; Richard J. Puccio, 52 S.E.C. 1041, 1045 (1996).

33 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.48618 / October 9, 2003

Admin. Proc. File No. 3-10916

In the Matter of the Application of ANTHONY A. ADONNINO and THOMAS CANNIZZARO

For Review of Disciplinary Action Taken by the NEW YORK STOCK EXCHANGE, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NATIONAL SECURITIES EXCHANGE

On the basis of the Commission's opinion issued this day it is ORDERED that the disciplinary action taken by the New York Stock Exchange, Inc. against Anthony A. Adonnino and Thomas Cannizzaro be, and it hereby is, sustained.

By the Commission.

Jonathan G. Katz
Secretary