SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55988 / June 29, 2007

Admin. Proc. File No. 3-12402

In the Matter of the Application of

RICHARD F. KRESGE
c/o Lawrence R. Gelber, Esq.
The Vanderbilt Plaza
34 Plaza Street - Suite 1107
Brooklyn, NY 11238

for Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - - REVIEW OF DISCIPLINARY PROCEEDINGS

Violations of Conduct and Membership and Registration Rules

Failure to Supervise

Failure to Report Customer Complaints

Failure to Comply with Membership and Registration Requirements

Conduct and Alleged Conduct Inconsistent with Just and Equitable Principles of Trade

Alleged Antifraud and Suitability Violations

President of former member firm of registered securities association failed to establish and maintain a system of supervision that was reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable association rules; failed to report customer complaints; and failed to comply with membership and registration requirements. Held, association's findings of violations are sustained in part, sanctions are vacated, and proceedings are remanded for redetermination of sanctions.

APPEARANCES:

Lawrence R. Gelber, Esq., for Richard F. Kresge.

Marc Menchel, Alan Lawhead, and Michael J. Garawski, for NASD.

Appeal filed: August 29, 2006
Last brief received: November 29, 2006

I.

Richard F. Kresge, formerly the president of Yankee Financial Group, Inc. ("Yankee Financial" or the "Firm"), a former NASD member firm, appeals from NASD disciplinary action. NASD found that Kresge violated NASD Conduct Rules 3010 and 2110 by failing to supervise a branch office and failing to establish or enforce a supervisory system. 1/

NASD also found that Kresge violated NASD Conduct Rules 3070(c) 2/ and 2110 by failing to report to NASD eleven customer complaints. NASD further found that Kresge violated NASD Membership and Registration Rules 1021(a), 1031(a), and IM-1000-3, and Conduct Rule 2110 by failing to register Joseph Ferragamo as a representative and principal of Yankee Financial, and NASD Membership and Registration Rule IM-1000-1 and Conduct Rule 2110 by failing to disclose on the Firm's Uniform Application for Broker-Dealer Registration ("Form BD") Ferragamo's financial support of a branch office of the Firm. 3/ NASD also found that Kresge was liable for violations by certain Yankee Financial registered representatives of

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1/ Conduct Rule 3010 provides, among other things, that an NASD member shall establish, maintain, and enforce "a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with the rules of [NASD]." NASD Manual at 4831-36 (2000). Conduct Rule 2110 requires NASD members to observe high standards of commercial honor and just and equitable principles of trade. Id. at 4111.

2/ Conduct Rule 3070(c) requires member firms to report to NASD on a quarterly basis statistical and summary information regarding customer complaints. Id. at 4863.

3/ Membership and Registration Rules 1021(a) and 1031(a) require that individuals who function as principals and/or representatives be registered as such. Id. at 3171, 3201. IM-1000-3 provides that failure to register an employee who should be so registered may be deemed conduct inconsistent with just and equitable principles of trade. Id. at 3111. IM-1000-1 prohibits the filing of misleading information as to membership or registration. Id. at 3111.

Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5, 4/ and NASD Conduct Rules 2120, 2310, IM-2310-2, and 2110. 5/

NASD barred Kresge in all capacities, ordered restitution to the customers at issue in the amount of $3,866,426, plus interest, 6/ and assessed costs of $9,519.61. We base our findings on an independent review of the record.

II.

Failure to Supervise

A. Kresge entered the securities industry in 1978 and formed Yankee Financial in 1986. Throughout the Firm's existence, Kresge was its president, chief executive officer, limited principal–financial and operations, and ninety-five percent owner. Kresge also was the Firm's compliance director through January 2002, resuming that position in July 2002. Until January 2001, Yankee Financial primarily engaged in transactions in bonds, mutual funds, and listed equities. The Firm employed approximately ten individuals, who operated out of the Firm's headquarters in Bay Shore, New York.

Yankee Financial Opens an Office in Melville, New York.

In January 2001, Yankee Financial acquired a branch office of Glenn Michael Financial, Inc. ("Glenn Michael") that operated out of Melville, New York. As of the acquisition date, Glenn Michael employed approximately fifty registered representatives. Its business activity generally mirrored Yankee Financial's, although Glenn Michael effected a few transactions in penny stocks. In connection with obtaining NASD's approval of Melville as an office of supervisory jurisdiction ("OSJ"), Kresge provided to NASD a set of written supervisory

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4/ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

5/ Conduct Rule 2120 prohibits NASD members from effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance. NASD Manual at 4141. Conduct Rule 2310 requires that, "[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer." Id. at 4261. Conduct Rule IM-2310-2 imposes on members and registered representatives the responsibility for fair dealing with customers. Id. at 4261-62.

6/ In its decision in this proceeding, NASD also expelled Yankee Financial and ordered it to pay restitution jointly and severally with Kresge. Yankee Financial has not appealed the NASD decision.

procedures ("January 2001 Written Procedures"). 7/ Kresge testified that he created the January 2001 Written Procedures by substituting Yankee Financial's name on Glenn Michael's existing written procedures and reducing the section dealing with options transactions. 8/

Kresge assigned Kenneth Gliwa, a former Glenn Michael principal, the responsibility for handling the Firm's trading, technology, and operations. 9/ Gliwa continued to service his own clients. Kresge supervised Gliwa and Robert Stelz, the Melville branch manager, although initially Kresge continued to operate out of the Bay Shore office. In March 2002, Kresge moved into the Melville branch office on a full-time basis.

Yankee Financial Opens an Office in Brooklyn, New York.

In August 2001, Gliwa told Kresge that Joseph Masone, a client, knew "some reps that [we]re looking for a new home." Masone introduced Kresge to Joseph Ferragamo, among others. 10/ Kresge testified at the hearing that Ferragamo represented to Kresge "that he was the spokesperson for a group of brokers [who wanted to relocate], that he was the person that organized this attempt to move, [and] that he would be the contact person, . . . the chief as far as these five or six people." Kresge also testified that Ferragamo told him that he was licensed at, and owned, a branch office of Valley Forge Securities, Inc., which, according to Ferragamo, engaged primarily in listed equities transactions.

There was no written agreement memorializing the arrangements between Yankee Financial and the Brooklyn branch office. Kresge and Ferragamo agreed upon the site for the Brooklyn branch office and that the Brooklyn branch office would pay all of its own expenses.

7/ Under Conduct Rule 3010(g), an OSJ means "any office of a member at which any one or more of the following functions take place," including order execution and/or market making; structuring of public offerings or private placements; maintaining custody of customers' funds and/or securities; final acceptance (approval) of new accounts on behalf of the member; review and endorsement of customer orders; final approval of advertising or sales literature for use by persons association with the member; or responsibility for supervising the activities of persons associated with the member at one or more other branch offices of the member.

8/ The record does not contain a copy of the January 2001 Written Procedures.

9/ On June 30, 2003, in connection with the events at issue in this proceeding, Gliwa consented to NASD's entry of findings that he violated Membership and Registration Rules IM-1000-3, 1021(a), and 1031(a), and Conduct Rules 3010(a), 3010(b), and 2110. NASD barred Gliwa in all capacities from association with any NASD member.

10/ On April 22, 2003, NASD barred Ferragamo in all capacities from association with any NASD member following a default decision. Ferragamo failed to respond to an NASD request, pursuant to Investigations Rule 8210, to appear for an on-the-record interview.

Ferragamo further represented that he would make up any shortfall if the branch office could not generate enough revenue to cover expenses. The Brooklyn branch office would pay to Yankee Financial $25 per order ticket plus a fifteen percent override on all gross commissions generated by the Brooklyn branch office. Kresge and Ferragamo further agreed that the Firm would issue a monthly check payable to the Brooklyn branch office's manager for the branch's share of the commissions it generated. Kresge admitted that he did not know how or in what amounts the branch manager would pay the registered representatives in the Brooklyn branch office from Yankee Financial's monthly check. Ferragamo and Kresge also agreed that the Brooklyn branch office would be permitted to direct trades with certain third-party broker-dealers that did not routinely do business with the Firm.

Staffing and Training in the Brooklyn Branch Office.

In September 2001, Kresge hired Gary Giordano 11/ to be the Brooklyn branch office manager at Ferragamo's recommendation. Giordano had worked for six firms in the five years before joining Yankee Financial. Kresge had not heard of any of Giordano's former employers, and there is no evidence that he contacted any of them. Giordano had passed his general securities principal examination only six months before being hired as the Brooklyn branch manager. Kresge interviewed Giordano, reviewed his Form U-4, and "felt he was adequate to be in the branch manager position" if Giordano were monitored by Gliwa.

Kresge never provided Giordano with a compliance manual, and the record does not indicate that Giordano ever received any training of any kind. Kresge assigned Giordano responsibility for supervising all aspects of the Brooklyn branch office, including the review and approval of new accounts, review of all order tickets, confirmation with customers regarding all aspects of their orders, including suitability review, and placement of orders to the Melville branch office.

Kresge testified that he believed that a securities representative who changed firms frequently within a short period of time was a red flag for potential compliance issues. However, at Giordano's recommendation, Kresge hired David Anderson, Eric Cenname, and Lawrence Dugo to be general securities representatives in the Brooklyn branch office. Anderson had worked for four different firms during the eighteen months before he joined Yankee

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11/ On January 6, 2004, in connection with the events at issue in this proceeding, Giordano consented to NASD's entry of findings that he violated Exchange Act Section 10(b) and Rule 10b-5 thereunder and Conduct Rules 2110, 2120, 2130, IM-2310-2, and 3010. NASD barred Giordano in all capacities from association with any NASD member.

Financial. 12/ Cenname had worked for ten different firms in the eight years before joining Yankee Financial. Dugo had worked for eight different firms in the seven years before joining Yankee Financial and was the subject of a pending arbitration action alleging a mishandling of an account. Kresge testified that he did not know whether he interviewed Dugo, that he was aware that Dugo may have had "disclosure" information related to a felony conviction for cocaine possession, and that Giordano "convinced" him to hire Dugo. Kresge also hired Adam Klein, who had worked for seven different firms in the six years before joining Yankee Financial, and Cesar Ramos, who had worked for four different firms in the four years before joining Yankee Financial. 13/

Kresge testified that none of the Brooklyn branch office registered representatives received a compliance manual. Kresge stated that he did not know whether any of those registered representatives received training on sales practices or suitability.

12/ Kresge complains that NASD inappropriately criticized him for not discovering that Anderson was a party to an arbitration proceeding. We agree with Kresge that the arbitration was initiated after the facts at issue and have not considered that allegation in our resolution of this proceeding.

13/ NASD found that Klein, Cenname, Dugo, Anderson, and Ferragamo previously worked for firms that, as of September 2001, either were (1) "disciplined firms" that had been expelled or had their broker-dealer registrations revoked for violations of sales practice rules, or (2) were subject to the Taping Rule, which requires members to establish special supervisory procedures, including the tape recording of conversations, when they have hired more than a specified percentage of registered persons from disciplined firms.

NASD submitted a printout of firms subject to the Taping Rule dated July 14, 2004. There is no indication, however, that that information was the same or available when Kresge was considering hiring those individuals in 2001. NASD further cites printouts, dated August 7, 2001 and September 6, 2001, of firms that had been disciplined within the last three years. According to the Forms U-4 of Klein, Cenname, Dugo, Anderson, and Ferragamo that are in the record, only Cenname and Dugo worked for firms that appear on those lists. However, Cenname's and Dugo's tenure with those firms preceded the time periods covered by the printouts submitted by NASD. We therefore do not consider these documents or the resulting allegations.

Supervisory System in the Brooklyn Branch Office.

The Brooklyn branch office opened in October 2001. 14/ At that time, hundreds of accounts were transferred to Yankee Financial's Brooklyn branch office from L.H. Ross, the previous employer of Anderson and Cenname, as well as Valley Forge Securities, Inc. Although Ferragamo had represented to Kresge that Ferragamo and his associates engaged primarily in transactions in listed equities, the Brooklyn branch office immediately began to sell speculative penny stocks.

Until February 2002, Kresge remained the Firm's compliance director. Kresge admitted that he was "ultimately" responsible for overall supervision. Beyond having a few casual conversations about the financial progress of the Brooklyn branch office with Gliwa and Giordano, Kresge did nothing to monitor Gliwa's or Giordano's supervision.

Kresge testified at the hearing that he visited the Brooklyn branch office only six times to conduct presentations on potential business lines, such as bonds. While in Brooklyn, Kresge did not ask Giordano about his performance of his supervisory duties. Kresge did not review any of the Brooklyn branch office records, such as customer complaints, customer accounts, or order tickets. Kresge admitted that the information available in these records would have raised serious questions about the propriety of certain of the penny stock sales activity.

Kresge claimed that Gliwa was responsible for supervising Giordano. However, Kresge also acknowledged in his investigatory testimony that Gliwa "was overwhelmed." Gliwa already had responsibility for the Firm's trading, technology, and operations, as well as servicing his own customers. Kresge testified at the hearing that he knew that Gliwa "almost never" visited the Brooklyn branch office (perhaps two or three times in total). Kresge admitted that he never specifically asked Gliwa about compliance matters in that office, such as whether Gliwa

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14/ Kresge never sought approval to operate the Brooklyn branch office as an OSJ, although he knew that Giordano would be approving new accounts on behalf of the Firm. Under Conduct Rule 3010(g), an OSJ includes any office of a member at which "final acceptance (approval) of new accounts on behalf of the member" occurs.

While the record is somewhat unclear, it appears that the Brooklyn branch office had between six to ten registered representatives.

performed his review of Brooklyn branch office order tickets. 15/ Kresge knew that Gliwa did not assess the suitability of customer trades from the Brooklyn branch office.

Revision of the Firm's Written Procedures.

In January 2002, Kresge hired Joseph Korwasky as a compliance consultant and subsequently made Korwasky the Firm's Director of Compliance in February 2002. Kresge admitted in NASD investigative testimony that he hired Korwasky 16/ because "Brooklyn was becoming overwhelming." Among other things, Kresge assigned Korwasky responsibility for revising the Firm's written supervisory procedures. Kresge recognized that the January 2001 Written Procedures were not sufficiently tailored to the Firm's then-current activities. Although the January 2001 Written Procedures are not in the record, Kresge concedes that these procedures did not establish a supervisory chain of command.

Korwasky determined that the January 2001 Written Procedures were so deficient that he had to start from scratch. Korwasky provided Kresge, Gliwa, and Stelz with a draft of new written procedures on March 15, 2002 ("March 2002 Written Procedures"). Although Korwasky considered the document to be a "work in progress," he was given clearance by Kresge to distribute the draft. Korwasky testified that he provided Giordano with the March 2002 Written Procedures "sometime in April."

The March 2002 Written Procedures covered business activity related to mutual funds, but not to penny stocks or bonds. The March 2002 Written Procedures contained a list of prohibited activities, but they did not provide procedures to detect violations or ensure compliance. For example, the March 2002 Written Procedures provided that "[n]o person shall effect any transaction in, or induce the purchase or sale of, any security by means of any

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15/ At the hearing, Kresge refuted his on-the-record testimony before NASD that, among other things, he had not asked Gliwa about compliance matters in the Brooklyn branch office and that he knew Gliwa was already overwhelmed when Kresge assigned Giordano to Gliwa. The Hearing Panel found Kresge's hearing testimony not credible given that his earlier contradictory statements, including Gliwa's lack of supervisory involvement, were supported by record evidence. As we have held, "credibility determinations of an initial fact finder are entitled to considerable weight." Joseph Abbondante, Securities Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 209 & n.21, petition denied, 2006 WL 3623490 (2d Cir. 2006) (unpublished); Laurie Jones Canady, 54 S.E.C. 65, 78 n.23 (1999) (citing Anthony Tricarico, 51 S.E.C. 457, 460 (1993)), petition denied, 230 F.3d 362 (D.C. Cir. 2000). We find no reason to reject NASD's credibility determination.

16/ On December 10, 2004, NASD's Hearing Panel found that Korwasky violated Conduct Rules 3070(c) and 2110 by failing to file one customer complaint and issued him a Letter of Caution.

manipulative, deceptive, or other fraudulent device or contrivance," but they did not set forth any specific procedures that a supervisor could use to detect or prevent those practices. Moreover, the March 2002 Written Procedures did not set forth a detailed supervisory chain of command or describe the division of duties and responsibilities amongst the supervisors.

It appears that none of the registered representatives in the Brooklyn branch office received the January 2001 Written Procedures. Korwasky testified that he provided Dugo with the March 2002 Written Procedures "sometime in April." There is no evidence that anyone with supervisory authority ever implemented either set of written procedures.

Korwasky's Recommendations About Brooklyn's Operations.

Based on the testimony of Kresge, Gliwa, Korwasky, and Giordano, no one had a clear understanding of Korwasky's responsibility. Korwasky did not have hiring or firing authority. Korwasky also repeatedly told Kresge that he had inadequate office space and no access to back office operations or the Central Registration Depository ("CRD") system.

Korwasky first visited the Brooklyn branch office in February 2002, and less than ten times thereafter until he resigned from the Firm in June 2002. Following his first visit, Korwasky recommended that Kresge install a telephone monitoring system for the Brooklyn branch office, but that installation never occurred. Korwasky also recommended banning sales scripts and "rebuttal books" and use of customer activity letters. Kresge ignored these suggestions. In March 2002, NASD staff began an investigation of Yankee Financial. By April 1, 2002, Kresge knew that Yankee Financial had received an NASD request for information.

In April 2002, Kresge was informed of the possibility that Dugo and another Brooklyn branch office registered representative, previously "unbeknownst to anyone," were operating out of an unauthorized office in Staten Island, New York. 17/ Kresge immediately instructed Korwasky to conduct an investigation. It is unclear how long the two registered representatives operated from the Staten Island office. Kresge testified that it could have been for four to six weeks, and Korwasky testified that it probably was "only a couple of weeks" because he had seen the two registered representatives in the Brooklyn branch office shortly before the investigation. Upon Korwasky's recommendation, Kresge closed the office and ordered the two registered representatives to return to the Brooklyn branch office because it "was an unauthorized hybrid of Brooklyn." In May 2002, Kresge accepted Korwasky's recommendation that Kresge place Dugo and Anderson on heightened supervision after determining that customers had made written complaints about their sales practices. Korwasky resigned in June 2002.

17/ The record does not explain how Kresge learned about the Staten Island office.

Fraudulent and Unsuitable Recommendations in the Brooklyn Branch Office.

Between October 2001 (when the Brooklyn branch office opened) and April 2002 (a few months before it closed in September 2002), Anderson, Cenname, and Dugo engaged in serious sales practice violations in connection with sales to customers of penny stocks of Silver Star Foods, Inc. ("Silver Star"), Western Media Group, Corp. ("Western Media"), and Golden Chief Resources, Inc. ("Golden Chief"). 18/

Silver Star was a distributor of pre-packaged frozen pasta products. Its Form 10-QSB filed with the Commission for the period ended June 30, 2001 reported no revenues, total current assets of $100,883, total current liabilities of $974,480, and a net loss of $67,890. The filing also disclosed a "going-concern" opinion issued by Silver Star's independent accountants that expressed concerns about the continued viability of the company. Silver Star disclosed that it essentially had ceased doing business and that its survival depended upon a "contemplated offering." Silver Star also disclosed two outstanding legal judgements against it totaling $372,924 owed to vendors. Subsequent filings showed no improvement in Silver Star's financial condition.

Western Media operated through three diverse, wholly-owned subsidiaries. Its quarterly filing for the period ended September 30, 2001 reported total current assets of $46,284, of which $3,494 was cash. It had liabilities of $6,452. The Form 10-QSB also noted that Western Media had relied almost exclusively on one customer for its revenue. The filing disclosed a "going-concern" opinion issued by Western Media's independent accountants. The independent accountants projected that Western Media had only enough revenue to continue operating for twelve months, unless it obtained additional capital or could acquire and integrate another technology service company. Western Media reported no improvement in its financial condition in subsequent Commission filings.

Golden Chief held gas and oil interests in Texas and Louisiana. On its Form 10-QSB for the period ended June 30, 2001, Golden Chief reported that it had no operations from 1986 to 1999, re-entered the development stage, and was entirely dependent on raising new capital, which it doubted being able to do. The company reported total current assets of $23,802, including $102 in cash, total current liabilities of $717,316, and a net operating loss of $994, 678. In that filing, Golden Chief's independent accountants expressed doubt as to the company's

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18/ In connection with the events at issue in this proceeding, Anderson and Cenname each consented, on October 25, 2002 and January 30, 2003, respectively, to NASD's entry of findings that they failed to appear and provide testimony pursuant to Procedural Rule 8210. On July 24, 2003, in connection with the events at issue in this proceeding, Dugo consented to NASD's entry of findings that he violated Exchange Act Section 10(b) and Rule 10b-5 thereunder and Conduct Rules 2110, 2120, and 2310. NASD barred Anderson, Cenname, and Dugo in all capacities from association with any NASD member.

ability to continue as a going concern. Subsequent Commission filings showed no improvement in the company's financial condition.

From October 2001 through April 2002, at least Anderson, Cenname, and Dugo solicited Yankee Financial customers to purchase over eight million shares of Silver Star, Western Media, and Golden Chief worth $6.3 million, $1.6 million, and $500,000, respectively, for a total of $8,377,270. During that time, Anderson, Cenname, and Dugo enthusiastically recommended the purchase of these companies to at least ten Yankee Financial customers, who testified before NASD. Anderson, Cenname, and Dugo made unfounded claims about the merits of the investments and predicted rising stock prices without disclosing the poor financial condition of the companies. Many of the customers were retirees, and none expressed an interest in, or had a history of, investing in speculative stocks.

For example, one customer, who was eighty years old and caring for an ailing wife (who subsequently died during the period at issue), purchased $757,576.58 worth of Golden Chief after Anderson told him that his purchase price of $0.88 "would go up in the neighborhood of from $8 to $15," and that Anderson was "conservative, and . . . putting [the estimation] on the low side." Another customer, who had three teenage children and wanted a "steady" portfolio in order to save for impending college expenses and retirement, purchased $228,000 worth of Silver Star after Cenname told him that "he was putting all the money he could put his hands on and his parents' money into it, and he felt it would be losing the opportunity of a lifetime not to do it." A third customer, who was fifty-three years old, self-employed after being laid off from his job of twenty-two years, and saving for retirement, purchased $10,000 worth of Western Media after Dugo "was very forceful in telling [him that he] needed to . . . invest in this because [the stock price] was going to double or triple, and [he] could make some decent money."

Before NASD, Kresge did not dispute that registered representatives in the Brooklyn branch office violated antifraud and suitability requirements in connection with sales of Silver Star, Western Media, and Golden Chief. Before us, Kresge claims that the "stories" of the customers "were never truly tested by meaningful cross-examination" because none "ever brought any action against Yankee or against Kresge to recover their alleged losses." 19/

19/ On appeal, Kresge claims that one customer witness, James Cassanos, falsely testified "that Anderson never advised him of the risks in Silver Star." Kresge asserts that Cassanos "settled all his litigated claims with Yankee." Kresge seeks to adduce additional evidence in the form of a "Penny Stock Acknowledgment Form" and a confirmation statement dated January 31, 2002, in the amount of $32,861.50. Kresge has not shown that these documents are material or that there are reasonable grounds for his failure to adduce the evidence previously, as required by Commission Rule of Practice 452. 17 C.F.R. § 201.452. The acknowledgment form, which has not been authenticated, is dated after Cassanos' transactions in Silver Star. The confirmation statement merely reports the purchase of 2,000 shares of a security labeled "EMC" at $16.35 per share.

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However, each of the customers testified at the hearing, and Kresge had ample opportunity to cross-examine, and did cross-examine, them. 20/ We conclude that the record supports NASD's findings that the representatives violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Conduct Rules 2110, 2120, 2310, and IM-2310-2.

Kresge stated in investigative testimony before NASD that he knew that the Brooklyn branch office was selling penny stocks. Kresge testified at the hearing that he received commission reports from a clearing firm every couple of days and that the reports specified the transactions effected for each registered representative of the Firm. 21/ From October 2001 to January 2002, while Kresge was the Firm's compliance director, the Brooklyn branch office sold $3 million in Silver Star stock. Kresge also testified that the Firm did not regularly conduct any sort of analysis to determine whether the Firm was in compliance with any requirements related to penny stock activity. 22/

B. Assuring proper supervision is a critical component of broker-dealer operations. 23/ Conduct Rule 3010(a) requires a member to "establish and maintain a system for supervising the activities of each registered and associated person that is reasonably designed to achieve compliance with applicable laws and regulations, and with applicable NASD Rules." Conduct Rule 3010(b) further requires that a member "establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives and associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of NASD." Whether a

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19/ (...continued)
We therefore will not accept these documents.

20/ Below, Kresge complained that the registered representatives never testified. However, NASD introduced the customers' testimony, and Kresge was free to call the representatives. Kresge did not do so.

21/ Kresge also testified that he was unaware of the level of penny stock activity conducted in the Brooklyn branch office. Given the evidence above, however, we are not persuaded by this statement.

22/ See, e.g., 17 C.F.R. §§ 240.15g-2 - 240.15g-100 (rules with respect to penny stock transactions). Kresge admitted that neither he nor anyone else in the Firm had any real understanding of any of the requirements related to penny stock activity and that the Firm had violated certain penny stock rules as a result.

23/ See Rita H. Malm, 52 S.E.C. 64, 68 n.13 (1994) (citing Gary E. Bryant, 51 S.E.C. 463, 470-71 (1993)).

particular supervisory system or set of written procedures is in fact "reasonably designed to achieve compliance" depends on the facts and circumstances of each case. 24/

Until January 2001, Yankee Financial operated out of one office that employed approximately ten registered representatives who engaged primarily in bond, mutual fund, and listed equities transactions. In 2001, the Firm experienced a major change to its organizational structure and business. The Firm added two new branch offices and acquired a substantial number of new personnel, including supervisory personnel, in those offices. The Brooklyn branch office engaged in a new line of business, penny stocks, and had permission to direct trades to third-party broker-dealers. 25/

We have frequently emphasized that the president of a brokerage firm is responsible for the firm's compliance with all applicable requirements unless and until he or she reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his or her duties. 26/ Kresge, as the Firm's president, chief executive officer, financial and operations principal, and, at least until February 2002, the compliance director, admittedly had ultimate responsibility for the Firm's operations. 27/ Kresge argues that he reasonably delegated supervisory responsibility to Gliwa, Giordano, and Korwasky, and that he had no reason to doubt their supervisory skills. We reject these contentions for the reasons set forth below.

We have often stressed "the obvious need to keep [a] new office with . . . untried personnel under close surveillance." 28/ The Brooklyn personnel were new to the Firm, and

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24/ La Jolla Capital Corp., 54 S.E.C. 275, 281 & n.15 (1999), (citing Christopher J. Benz, 52 S.E.C. 1280, 1284 & n.19 (1997) (citing cases), aff'd, 168 F.3d 478 (3d Cir. 1998) (Table)). "Regardless of its size and complexity, each member must adopt and implement a supervisory system that is tailored specifically to the member's business and must address the activities of all its registered representatives and associated persons." NASD Notice to Members 99-45 at 294 (June 1999).

25/ Courts have recognized that directed trades may be evidence of manipulation. Sharon M. Graham, 53 S.E.C. 1072, 1082 & n.29 (citing United States v. Corr, 543 F.2d 1042, 1046 (2d Cir. 1976); United States v. Cohen, 518 F.2d 727, 734-35 (2d Cir.).

26/ Rita H. Malm, 52 S.E.C. at 69 & n.15 (citing Universal Heritage Invs. Corp., 47 S.E.C. 839, 845 (1982); Gary E. Bryant, 51 S.E.C. at 471); Consol. Inv. Servs., Inc., 52 S.E.C. 582, 590 & n.30 (1996) (citations omitted).

27/ See Rita H. Malm, 52 S.E.C. at 69.

28/ La Jolla Capital Corp., 54 S.E.C. at 282 & n.18 (citing SECO Secs., Inc., 49 S.E.C. 873, 876 (1988)); see also Consol. Inv. Servs., Inc., 52 S.E.C. at 586 (recognizing "obvious

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their Forms U-4 suggested particular compliance issues. Kresge admitted that changing firms frequently within a short period of time was a red flag for potential compliance issues. At least five of the registered representatives Giordano was to supervise in the Brooklyn branch office had worked at numerous firms within a short period of time. One registered representative had less than two years of experience in the securities industry. Another representative had a prior felony conviction and a pending arbitration. Kresge did not direct that this registered representative be subject to heightened supervision in the Brooklyn branch office. Kresge testified that none of the Brooklyn branch office registered representatives received a compliance manual and that he did not know whether any of those registered representatives received training on sales practices or suitability.

Kresge hired Giordano to be the Brooklyn branch office manager on Ferragamo's recommendation. However, Giordano had passed his principal's examination only six months earlier. Giordano also had repeatedly changed firms in the five years before joining Yankee Financial. The record does not indicate that Kresge spoke with any of Giordano's previous employers to discuss Giordano's qualifications. Conduct Rule 3010(a)(6) provides that, as part of its supervisory system, each member shall make "reasonable efforts to determine that all supervisory personnel are qualified by virtue of experience or training to carry out their assigned responsibilities." Under the circumstances, Kresge did not make "reasonable efforts" to determine that Giordano was qualified.

Nonetheless, Kresge assigned to Giordano responsibility for supervising all aspects of the Brooklyn branch office, including the review and approval of new accounts, review of all order tickets, confirmation with customers regarding all aspects of their orders, including suitability review, and placement of orders to the Melville branch office. 29/ Kresge also gave Giordano unfettered discretion on the amounts of commissions paid to Brooklyn branch office representatives. Kresge never provided Giordano with a compliance manual, and the record does not indicate that Giordano ever received any training of any kind. While Kresge visited the Brooklyn branch office a few times, he did not review Giordano's performance of his supervisory duties or review any of the Brooklyn branch office records.

28/ (...continued)
need" to keep untried personnel under close surveillance); Conrad C. Lysiak, 51 S.E.C. 841, 845 (1993) (quoting SECO Secs., Inc., 49 S.E.C. at 876), aff'd, 47 F.3d 1175 (9th Cir. 1995) (Table).

29/ Because Giordano had authority for approving new accounts, Kresge was required to seek approval to operate the Brooklyn branch office as an OSJ under Conduct Rule 3010(a)(3). Under Conduct Rule 3010(g), an OSJ includes any office of a member at which "final acceptance (approval) of new accounts on behalf of the member" occurs. Kresge failed to obtain this approval.

Kresge notes that Gliwa was Giordano's direct supervisor. However, Gliwa had worked at the Firm for approximately six months when he was assigned responsibility for Giordano and the Brooklyn branch office. At that time, Gliwa already had a wide range of duties, as well as his own customers. Kresge knew that Gliwa was "overwhelmed" with his other responsibilities and "almost never" visited the Brooklyn branch office (perhaps two or three times in total). Kresge did not ask Gliwa how he performed his review of order tickets placed by Brooklyn. Moreover, Kresge knew that Gliwa did not conduct suitability reviews for the Brooklyn customer accounts. 30/

Based on the testimony of Kresge, Gliwa, Korwasky, and Giordano, no one had a clear understanding of Korwasky's responsibilities. Korwasky had no hiring or firing authority. Thus, it is unclear whether Korwasky was a supervisor. 31/ Korwasky first visited the Brooklyn branch office in February 2002, and less than ten times thereafter until he resigned from the Firm in June 2002. He repeatedly told Kresge that he had inadequate office space and no access to back office operations or the CRD system. Following his first visit, Korwasky recommended that Kresge install a telephone monitoring system for the Brooklyn branch office, but that installation never occurred.

Kresge argues that Gliwa, Giordano, and Korwasky were "NASD approved supervisory personnel." NASD has stated that even if an individual has passed the principal's examination, that fact "does not in and of itself qualify a supervisor. Members should determine that supervisors understand and can effectively conduct their requisite responsibilities." 32/

30/ Kresge claims that Gliwa and Giordano deliberately concealed evidence of misconduct from him that prevented him from taking action sooner. Kresge maintains that he received constant reassurances from Gliwa and Giordano that the Brooklyn branch office "was operating appropriately." Even if Kresge's statements about Gliwa and Giordano are true, his passive reliance on their general reassurances was not reasonable under the circumstances. Kresge knew that the Brooklyn branch office was active in penny stocks because he received commission reports from a clearing firm every couple of days. However, as described above, he did nothing to monitor the office's operations.

31/ See Arthur James Huff, 50 S.E.C. 524, 535 (1991) (finding that respondent was not a supervisor because he neither was "in the line of authority . . . to hire, fire, reward or punish" the salesperson who engaged in misconduct, nor "knew or should have known that he had the authority and responsibility within the administrative structure of [the Firm] to exercise such control over [the salesperson's] activities that he could have prevented [the salesperson's] violations").

32/ NASD Notice to Members 99-45 at 297.

Morever, we have repeatedly held that members and their associated persons "cannot shift their burden of compliance to the NASD." 33/

Even if Giordano, Gliwa, and Korwasky were highly qualified, "[i]t is not sufficient for the person with overarching supervisory responsibilities to delegate supervisory responsibility to a subordinate, even a capable one, and then simply wash his hands of the matter until a problem is brought to his attention. . . Implicit is the additional duty to follow up and review that delegated authority to ensure that it is being properly exercised." 34/ Kresge did not discharge that duty. As discussed above, beyond having a few casual conversations about the financial progress of the Brooklyn branch office with Giordano and Gliwa, Kresge did nothing to follow up and review their performances.

Kresge argues that he "diligently enforced the [Firm's supervisory] system." In support of his argument, he contends that (1) when he became aware of Korwasky's concern about the conduct of Anderson and Dugo, he instructed Korwasky to place them on heightened supervision and required Giordano to document it; when Kresge later became aware of customer complaints against Dugo, Kresge caused the Firm to fire him; (2) when Kresge became aware of the possibility of the operation of an unauthorized office in Staten Island, he dispatched Korwasky to investigate and, following Korwasky's recommendation, ordered the registered representatives to return to the Brooklyn branch office; (3) Kresge "banned" Ferragamo from the Brooklyn branch office on Korwasky's recommendation; and (4) Kresge also banned Masone from the Melville office after Korwasky told him that Masone had been answering telephones and carrying documents between the Melville and Brooklyn offices. However, Kresge's actions occurred months after the misconduct at issue already had transpired and after NASD had begun its investigation.

Kresge argues that no type of supervisory system could have prevented the vast misconduct carried out in the Brooklyn branch office because he was "duped and victimized by Ferragamo," who, he claims, "contrived and planned secretive actions, by which he alone controlled and supervised the wrongful activities . . . unbeknownst to Kresge." 35/ While it is

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33/ B.R. Stickle & Co., 51 S.E.C. 1022, 1025 (1994); see also Michael G. Keselica, 52 S.E.C. 33, 37 (1994) ("attempts to blame others for his misconduct . . . demonstrate that [respondent] fails to understand the seriousness of . . . violations").

34/ Rita H. Malm, 52 S.E.C. at 73 (quoting Stuart K. Patrick, 51 S.E.C. 419, 422 (1993) (footnote omitted), aff'd, 19 F.3d 66 (2d Cir. 1994)); Castle Secs. Corp., 53 S.E.C. 406, 412 (1998) (citations omitted); La Jolla Capital Corp., 54 S.E.C. at 284 & n.24 (citations omitted); Harry Gliksman, 54 S.E.C. 471, 485 & n.30 (1999), aff'd, 24 Fed. Appx. 702 (9th Cir. 2001) (unpublished).

35/ In support of this contention, Kresge seeks to adduce additional evidence in the form of (continued...)

possible for serious misconduct to occur despite the existence of a reasonably designed supervisory system, for the reasons discussed above, Yankee Financial's supervisory system was not reasonably designed to achieve compliance with applicable federal securities laws and regulations and NASD rules. The record indicates instead that Kresge turned a blind eye to the activity that occurred.

Kresge argues that the Firm's supervisory procedures, including the January 2001 Written Procedures and the March 2002 Written Procedures, met the standards set forth in Conduct Rule 3010(a) and (b). However, we find the Firm's written procedures deficient. Kresge created the January 2001 Written Procedures by substituting Yankee Financial's name on Glenn Michael's existing written procedures, with minor amendments. Conduct Rule 3010(b)(4) provides that "[e]ach member shall amend its written supervisory procedures as appropriate within a reasonable time . . . as changes occur in its supervisory system, and each member shall be responsible for communicating amendments through its organization." When the Brooklyn branch office opened, Yankee Financial's activity in penny stocks increased dramatically. As noted above, the January 2001 Written Procedures are not in the record. However, Kresge offered no evidence that he amended the January 2001 Written Procedures to cover the addition of the Brooklyn branch office or the increased penny stock activity. There is no dispute that the January 2001 Written Procedures did not set forth a supervisory chain of command or describe the division of supervisory duties at each office.

Kresge argues that NASD's approval of the January 2001 Written Procedures demonstrates their adequacy. However, Kresge received NASD approval of the January 2001 Written Procedures well before opening the Brooklyn branch office. 36/ Kresge conceded that it was critical for Korwasky to update the January 2001 Written Procedures because they did not cover sufficiently the Firm's activities. In turn, Korwasky concluded the January 2001 Written Procedures were so inadequate that he had to start from "scratch."

In March 2002, Kresge approved Korwasky's distribution of the draft 2002 March Written Procedures. Even though Korwasky considered the document to be a "work in

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35/ (...continued)
(1) a criminal indictment against Ferragamo filed by the United States Attorney in the United States District Court for the Southern District of New York on December 30, 2004 regarding an alleged scheme to defraud Yankee Financial customers through the sale of certain penny stocks, and (2) Ferragamo's related plea agreement in which he admits to being the "manager or supervisor of the relevant criminal activity." We take official notice of these documents pursuant to Rule of Practice 323, 17 C.F.R. § 201.323.

36/ As we already have made clear, Kresge cannot shift his burden of compliance to NASD. See Kirk A. Knapp, 50 S.E.C. 858, 862 n.15 (1992) (applicant "cannot shift his responsibility for compliance with regulatory requirements to . . . NASD)" (internal citations omitted).

progress," the March 2002 Written Procedures were far from adequate. They addressed business activity related to mutual funds, but not to penny stocks (the chief business of the Brooklyn office) or bonds (a traditional line of Yankee Financial's business). The March 2002 Written Procedures contained a list of certain prohibited activities (e.g., fraudulent representations, but not unsuitable recommendations). However, they did not identify procedures for detecting and preventing such activities. Moreover, the March 2002 Written Procedures did not adequately set forth a supervisory chain of command or describe the division of duties and responsibilities among the Firm's supervisors.

Kresge admitted that none of the registered representatives received any compliance manual. Korwasky testified that he provided Dugo with the March 2002 Written Procedures "sometime in April." There is no evidence that anyone at the Firm ever implemented either set of written procedures. 37/

We conclude that neither the January 2001 Written Procedures nor the March 2002 Written Procedures met the Conduct Rule 3010(b) standard. Accordingly, we find that Kresge failed to maintain and enforce written procedures that were reasonably designed to achieve compliance with applicable federal securities laws and regulations and NASD rules. It is well settled that a violation of a rule promulgated by the Commission or by NASD also violates Conduct Rule 2110. 38/ We accordingly sustain NASD's findings that Kresge violated Conduct Rules 3010 and 2110.

III.

Failure to Report Customer Complaints

A. In response to a request to the Firm for information under NASD Investigations Rule 8210, Giordano provided NASD with eighteen customer complaints. Yankee Financial was required to report these complaints by January 15, 2002, April 15, 2002, and July 15, 2002, which would have covered the complaints received during the quarters ending December 31, 2001, March 31, 2002, and June 30, 2002, respectively. 39/ There is no dispute that the Firm received these complaints and that Yankee Financial did not report them to NASD.

37/ Even if the Firm's written procedures were adequate, "the presence of procedures alone is not enough. Without sufficient implementation, guidelines and strictures do not assure compliance." Rita H. Malm, 52 S.E.C. at 69 & n.17.

38/ See, e.g., Joseph Abbondante, 87 SEC Docket at 219 & n.54; Chris Dinh Hartley, Exchange Act Rel. No. 50031 (July 16, 2004), 83 SEC Docket 1239, 1244; Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999). See also Gerald James Stoiber, 53 S.E.C. 171, 180 n.22 (1997), petition denied, 161 F.3d 745 (D.C. Cir. 1998).

39/ Conduct Rule 3070(c).

Kresge was the Firm's compliance director, except between February 19, 2002 and June 30, 2002 when Korwasky was the Firm's compliance director. While compliance director, Kresge was responsible for reporting customer complaints, but did not review any customer complaint files or discuss with Giordano whether customer complaints were received.

B. Conduct Rule 3070(c) requires a member firm to report to NASD on a quarterly basis statistical and summary information regarding customer complaints. 40/ The requirement that member firms file reports on customer complaints is intended to protect public investors by helping to identify potential sales practice violations in a timely manner. 41/ That protection is undermined when member firms do not file such reports.

Kresge, as the Firm's compliance director, was responsible for filing the reports due on January 15, 2002 (Korwasky was not yet the Firm's compliance director) and July 15, 2002 (Korwasky resigned on June 30, 2002), covering eleven of those complaints. 42/ Kresge claims that he did not receive any customer complaints between October 2001 and February 2002. There is no dispute, however, that the Firm received those complaints. Kresge's lack of awareness of the complaints evidences the inadequacy of the Firm's supervisory system and his

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40/ A "complaint" includes "any written grievance by a customer involving the member or person associated with a member." Conduct Rule 3070(c).

41/ See Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to the Proposed Rule Change by the Nat'l Assoc. of Secs. Dealers, Inc. Relating to Supervision and Record Retention Rules, Exchange Act Rel. No. 39510 (Dec. 31, 1997), 66 SEC Docket 663, 665 ("[P]roviding for the reporting of customer complaints in compliance with NASD Rule 3070(c) may help firms to identify potential sales practice problems."); Notice of Filing of Proposed Rule Change and by the National Association of Secs. Dealers, Inc. Amending NASD Rule 3070 Concerning the Reporting of Criminal Offenses by Members and Persons Associated with a Member to the NASD, Exchange Act Rel. No. 45493 (Mar. 1, 2002), 77 SEC Docket 99, 100 (" . . . NASD Rule 3070 assists the NASD in the timely identification and investigation of problem members, branch offices, and registered representatives that may pose heightened risks to public investors.").

42/ As we have already stated, the president of a brokerage firm is responsible for the firm's compliance with all applicable requirements unless and until he or she reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his or her duties. Rita H. Malm, 52 S.E.C. at 69 & n.15 (citing Universal Heritage Invs. Corp., 47 S.E.C. at 845; Gary E. Bryant, 51 S.E.C. at 471); Consolidated Inv. Services, Inc., 52 S.E.C. at 590 & n.30 (citations omitted). NASD found that Kresge reasonably delegated the responsibility to Korwasky to file the April 15, 2002 report and had no reason to know that Korwasky was not fulfilling this obligation.

abdication of his supervisory responsibilities. 43/ Accordingly, we sustain NASD's finding that Kresge violated Conduct Rules 3070(c) and 2110.

IV.

Failure to Register Ferragamo

A. As described above, Ferragamo initiated contact with Kresge and Yankee Financial about opening the Brooklyn branch office. Kresge negotiated the terms under which the Brooklyn branch office was opened solely with Ferragamo. Ferragamo appeared on the list of "Brokers Who Will Be Receiving Calls for the New York Office" that he provided to Kresge prior to the opening of the Brooklyn branch office. Ferragamo also received an office tracking number, "B01," for his anticipated role as a registered representative of the Firm.

Once the office opened, Ferragamo often was present there. He attended Kresge's introduction of Korwasky to office staff as the new compliance director in February 2002. Ferragamo was again present in the Brooklyn branch office when Korwasky made his second visit approximately two weeks later. When Korwasky inquired about Ferragamo's role in the Firm, Kresge said that Ferragamo was "somehow involved in the organization" and had funded the Brooklyn branch office. Kresge also disclosed that he agreed to postpone Ferragamo's registration with the Firm because Ferragamo wanted to avoid being financially responsible for a pending arbitration at his former firm. When Korwasky met with Dugo in March 2002, Ferragamo "burst in and just hung out," which Korwasky found very unusual. On the day that Korwasky visited the Staten Island office, Ferragamo again was present.

Kresge admits that he should have, but did not, amend the Firm's Form BD to disclose that Ferragamo was financing the operation of the Brooklyn branch office. Kresge also admits that he "was after Mr. Ferragamo to get licensed, to get registered," and that Ferragamo's unregistered status "became very weird." Kresge further admits that he never registered Ferragamo with the Firm based on Ferragamo's request that his registration be postponed.

B. Membership and Registration Rules 1021(a) and 1031(a) require that all persons who act as a principal or as a representative of an NASD member firm be properly registered as a principal or representative, respectively, with NASD. Rule 1021(b) defines a "principal" as a sole proprietor, officer, partner, branch manager, or director of an NASD member firm who is "actively engaged in the management of the [member firm's] investment banking or securities business," including supervision, solicitation, conduct of business, or training of associated persons. Rule 1031(b) defines "representative" as any person associated with an NASD member firm who is "engaged in the investment banking or securities business for the [member firm],"

43/ Kresge argues that Giordano "deliberately hid" from Kresge the complaints received after Korwasky's resignation. Kresge does not offer any evidence to substantiate his claim.

including supervision, solicitation, conduct of business, or training of associated persons. Kresge never registered Ferragamo as either a principal or a representative of the Firm. Kresge failed to register Ferragamo in any capacity.

Kresge argues that he was told that Ferragamo would not engage in any securities business activities and that Ferragamo was neither functioning as a Firm representative nor supervising the Brooklyn branch office. While other individuals were present during discussions about opening the Brooklyn branch office, Kresge negotiated solely with Ferragamo. Kresge testified that Ferragamo represented that he was licensed at, and owned, a branch office of Valley Forge Securities, Inc. Ferragamo also told Kresge "that he was the spokesperson for a group of brokers [who wanted to relocate], that he was the person that organized this attempt to move, that he would be the contact person, he was the chief as far as these five or six people."

The agreement between Kresge and Ferragamo covered the site for the Brooklyn branch office, the division of revenue and expenses, the power to direct trades to third-party broker-dealers, and payment of a monthly check payable to the branch manager of the Brooklyn branch office for the commissions generated by the Brooklyn branch office. Ferragamo undertook to pay for any expenses that were not covered by the Brooklyn branch office revenues.

Moreover, Kresge hired Giordano, the branch manager of the Brooklyn branch office, and two registered representatives who had worked with Ferragamo at Valley Forge Securities, Inc. on Ferragamo's recommendation. Ferragamo often was present in the Brooklyn branch office and made himself present during compliance meetings with the office's registered representatives. Under the circumstances, Ferragamo actively engaged in the management of the Firm's securities business. 44/ He provided financial support to the office, played a substantial role in the finances of the office, was actively involved in hiring, participated in meetings, and acted as the leader of the personnel initially opening the office. Accordingly, we sustain NASD's finding that Kresge violated Membership and Registration Rule 1021(a) by permitting Ferragamo to act as a principal of the Firm without being so registered.

We also find that Kresge violated Membership and Registration Rule 1031(a) by permitting Ferragamo to act as a representative of the Firm without being so registered. By

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44/ Cf. Vladislav Steven Zubkis, 53 S.E.C. 794, 799-800 (1998) (finding that applicant was an "associated person" and "engaged in the [firm's] securities business" based, in part, on his financial support of a branch office); Kirk A. Knapp, 50 S.E.C. 858, 860-861 (1992) (finding that applicant actively engaged in the management of the firm's securities business based on, among other things, his participation in firm meetings and hiring firm personnel); Samuel A. Sardinia, 46 S.E.C. 337, 343 (1976) (finding that applicant was a principal based, in part, on his having "spent a substantial amount of time in connection with the affairs of the firm").

acting as a principal, Ferragamo also acted as a representative. 45/ Ferragamo also was assigned a sales number and was authorized to receive calls for the office. Kresge described Ferragamo's unregistered status as "very weird," and Kresge admits that he never registered Ferragamo with the Firm at Ferragamo's request. Kresge further admits that he should have, but did not, amend the Firm's Form BD to disclose that Ferragamo was financing the operation of the Brooklyn branch office.

As the president of the Firm, Kresge was responsible for ensuring that the Firm registered Ferragamo as a registered representative pursuant to Membership and Registration Rule IM-1000-3 and disclosing on the Firm's Form BD Ferragamo's financial support of the Brooklyn branch office pursuant to Membership and Registration Rule IM-1000-1. 46/ Kresge did not fulfill his responsibilities. Accordingly, we sustain NASD's finding that Kresge also violated Membership and Registration Rules IM-1000-3 and IM-1000-1, as well as Conduct Rule 2110.

V.

Secondary Liability

A. NASD found that Kresge was liable, under Exchange Act Section 20(a), 47/ for violations by certain registered representatives of Yankee Financial of Exchange Act Section 10(b) and Rule 10b-5 thereunder. We conclude that the record does not support a finding of liability under Exchange Act Section 20(a). Accordingly, we set aside NASD's finding.

B. With respect to Kresge's liability for the registered representatives' violations of Conduct Rules 2120, 2310, IM-2310-2, and 2110, NASD determined not to "address whether a president of a broker-dealer may be held responsible pursuant to Section 20(a) for firm representatives' violations of NASD rules alone." We concur with this decision. We have held

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45/ See Membership and Registration Rule 1022(a) (requiring that, in order to be registered as a general securities principal, one must first be registered as a general securities representative.); L.H. Alton & Co., 53 S.E.C. 1118, 1125-26 (1998) (finding that individual who acted as a principal also acted as a representative).

46/ See Rita H. Malm, 52 S.E.C. at 69. Kresge does not claim to have delegated these responsibilities.

47/ 15 U.S.C. § 78t(a). Exchange Act Section 20(a) provides that:

> Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

that Section 20(a)'s coverage "is limited to persons 'who . . . control [ ] any person liable under any provision of [the Exchange Act] or of any rule or regulation thereunder . . . ." 48/

C. NASD found Kresge liable for the registered representatives' violations of NASD's rules on the basis that "Kresge was president of his firm and accordingly ha[d] an overarching responsibility for his firm's regulatory obligations. It is axiomatic that 'the president of a brokerage firm is responsible for his firm's compliance with all applicable requirements unless and until he reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his or her duties.' (citing Kirk A. Knapp, 51 S.E.C. 115 (1992) and William H. Gerhauser, Sr., 53 S.E.C. 933 (1998)."

However, in Gerhauser, we found that the president made misrepresentations to the firm's limited principal–financial and operations that resulted in the firm's net capital violation. In Knapp, the president orchestrated transactions to circumvent the financial responsibility rules. Accordingly, we found that each president directly violated Conduct Rule 2110 as a result of his participation in the underlying violation. The record does not demonstrate Kresge's participation in the conduct that led to NASD's finding that the registered representatives violated NASD's antifraud and suitability provisions or the requirement that the representatives observe high standards of commercial honor and "just and equitable principles of trade." Consistent with Knapp and Gerhauser, we set aside NASD's findings of violation.

VI.

Kresge claims that the Hearing Panel inappropriately discredited his testimony about his conversation with the compliance officer at Valley Forge Securities, Inc., Robert Montani. Kresge had testified that Montani had said that Ferragamo had "no issues." However, Montani testified that he had been silent as to whether Ferragamo had any disciplinary issues, during his conversation with Kresge. Kresge states that NASD should not have credited Montani's testimony because Montani was then under criminal investigation. Kresge also complains that the Hearing Panel discredited Kresge's own testimony that he did not know that "federal prosecutors had issued an indictment alleging that Valley Forge's New York City office was controlled by organized crime figures," because "[t]here was no evidence of such indictment," or that he failed to discover a second pending arbitration against Ferragamo. NASD's National Adjudicatory Council ("NAC") made clear that it did not rely on this portion of the Hearing Panel's conclusions. Nor have we considered them. 49/

48/ SIG Specialists, Inc., Exchange Act Rel. No. 51867 (June 17, 2005), 85 SEC Docket 2679, 2695.

49/ Even if Kresge's claims that these Hearing Panel findings somehow tainted the NAC opinion were true, our de novo review of NASD's findings ensures that Kresge has been

(continued...)

Kresge also claims that a dismissal is warranted based on a "conflict of interest" that applies to the chairman of the NAC panel that heard Kresge's appeal below because he also authored NASD's opposition brief on appeal to the Commission. We have approved the rule that permits NASD staff to sit on the NAC. We do not see a conflict in the fact that staff works on a brief defending its earlier decision.

VII.

Exchange Act Section 19(e)(2) 50/ provides that we will sustain NASD's sanctions unless 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 or inappropriate burden on competition. 51/

NASD barred Kresge in all capacities, ordered restitution to the customers at issue in the amount of $3,866,426, plus interest, and assessed costs of $9,519.61. NASD stated, "[W]e aggregate respondents' misconduct for purposes of imposing sanctions because such misconduct emanated from a single, underlying problem: respondents' addition of, and failure to monitor, the Brooklyn office." We have sustained NASD's findings that Kresge violated Conduct Rules 2110, 3010, and 3070(c) and Membership and Registration Rules 1021(a), 1031(a), IM-1000-1, and IM-1000-3. However, we have set aside NASD's findings that Kresge was liable for

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49/ (...continued)
treated fairly. See Cathy Jean Krause Kirkpatrick, 53 S.E.C. 918, 930 & n.20 (1998) (citations omitted) (finding that the Commission's de novo review of NASD's findings ensured fair treatment of applicant in addition to finding that NASD's cross examination of applicant's history regarding a misdemeanor charge for stolen property, employment termination, and customer complaints was appropriate).

50/ 15 U.S.C. § 78s(e)(2).

51/ Id. Kresge does not claim, and the record does not show, that NASD's action imposed an undue burden on competition.

violations by certain registered representatives of Yankee Financial of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Conduct Rules 2120, 2310, and IM-2310-2. Under the circumstances, we deem it appropriate to remand this proceeding to NASD for a redetermination of the sanctions to be imposed upon Kresge. We do not intend to suggest any view as to a particular outcome.

An appropriate order will issue. 52/

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

Nancy M. Morris
Secretary

52/ We have considered all of the arguments advanced by the parties. 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. 55988 / June 29, 2007

Admin. Proc. File No. 3-12402

In the Matter of the Application of

RICHARD F. KRESGE
c/o Lawrence R. Gelber, Esq.
The Vanderbilt Plaza
34 Plaza Street - Suite 1107
Brooklyn, NY 11238
for Review of Disciplinary Action Taken by

NASD

ORDER REMANDING DISCIPLINARY PROCEEDING

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

ORDERED that the findings by NASD that Richard F. Kresge violated NASD Conduct Rules 3010, 3070(c), and 2110 and Membership and Registration Rules 1021(a), 1031(a), IM-1000-3, and IM-1000-1 be, and they hereby are, sustained; and it is further

ORDERED that the findings by NASD that Kresge was liable for violations by certain registered representatives of Yankee Financial Group, Inc. of Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and NASD Conduct Rules 2110, 2120, 2310, and IM-2310-2 be, and they hereby are, set aside; and it is further

ORDERED that the sanctions and costs imposed by NASD on Kresge in this proceeding be, and they hereby are, vacated; and it is further

ORDERED that this proceeding be, and it hereby is, remanded to NASD for further proceedings in accordance with that opinion.

By the Commission.

Nancy M. Morris
Secretary