FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. BRIAN COLIN DOHERTY (CRD No. 2647950), Respondent.	Disciplinary Proceeding No. 2015047005801 Hearing Officer–CC **HEARING PANEL DECISION** June 14, 2019

Respondent, a registered representative at an interdealer broker, intentionally engaged in a fraudulent, prearranged trading scheme to enable his customer, the trader of a proprietary account at another member firm, to evade that firm's aged inventory policy. For this misconduct, Respondent is suspended from associating with any member firm in any capacity for two years and ordered to pay restitution of $56,093 plus interest.

Appearances

For the Complainant: David Monachino, Esq., Daniel Hibshoosh, Esq., Eric Hansen, Esq., Financial Industry Regulatory Authority

For the Respondent: Brian Colin Doherty appeared pro se

DECISION

I. Introduction

In May and June 2015, Respondent Brian Colin Doherty ("Doherty"), a registered person on the corporate bond desk of FINRA member firm BGC Financial LLP ("BGC"), executed 19 prearranged sets of purchases and sales of corporate bonds. He intentionally engaged in these transactions at the behest of TS, an individual associated with FINRA member firm Scotia Capital USA, Inc. ("Scotia") who managed a proprietary account for Scotia and was Doherty's customer. The purpose of Doherty's and TS's scheme was to evade Scotia's internal policies. Doherty contends that he discussed the trades in advance with his desk manager and BGC's compliance department. FINRA's Department of Enforcement ("Enforcement") argues that Doherty did not fully disclose the nature of the trading scheme and he concealed pertinent facts.

Enforcement further argues that, regardless of Doherty's discussions with BGC's compliance department, he and TS engaged in a fraudulent, prearranged trading scheme.

II. Procedural History

On August 2, 2018, Enforcement filed a three-cause Complaint. Cause one alleges that Doherty willfully violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010 by engaging in a fraudulent, prearranged trading scheme in May and June 2015. As an alternative to cause one, cause two alleges that Doherty violated FINRA Rule 2010 by negligently engaging in a prearranged trading scheme in violation of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 ("Securities Act").[1] As an alternative to causes one and two, cause three alleges that Doherty violated FINRA Rule 2010 by aiding and abetting TS's fraudulent, prearranged trading scheme.

On August 30, 2018, Doherty filed an Answer in which he admits that he executed the trades at issue on behalf of TS. He claims that because he was unsure of the legality of the trades, he first discussed them with his desk manager and individuals in BGC's compliance department. According to Doherty, they told him the trades were acceptable as long as there was market risk, and they suggested there would be market risk if BGC held the bonds for four hours. Doherty denies that he violated the securities laws or FINRA's rules.

The parties participated in a three-day hearing in March 2019.

III. Findings of Fact

A. Background

Doherty entered the securities industry after graduating from college in 1993.[2] Most of Doherty's securities industry experience is with interdealer brokers like BGC. He was associated with BGC from November 2004 through August 2015[3] and worked on BGC's corporate bond desk.[4] He is currently associated with another FINRA member firm as a corporate bond broker.[5]

BGC's chief compliance officer, Michael Sulfaro ("Sulfaro"), testified that BGC is an interdealer broker and, as such, BGC trades only dealer to dealer.[6] The firm's brokers, he stated,

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[1] The allegations under cause one require a finding of scienter. The allegations under cause two do not require a finding of scienter.

[2] Transcript of March 11–13, 2019 hearing ("Tr.") 117-19; Feb. 11, 2019 Stipulations ("Stip.") ¶ 1.

[3] Tr. 119; Stip. ¶¶ 4-5.

[4] Tr. 122.

[5] Tr. 118-19; Stip. ¶¶ 6-7.

[6] Tr. 707-08.

deal only with large banks, institutions, and other dealers, not individual members of the public.[7] Thus, in May and June 2015, the period relevant to the Complaint, BGC generally did not take positions in any securities and it executed trades in a matched principal capacity.[8] As such, on most trades, the firm generally split its standard one-basis-point commission with another firm.[9]

The counter-party in the prearranged trades at issue was a Scotia proprietary account managed by TS, and TS was Doherty's customer.[10] Doherty's brother had introduced him to TS in or around 2008.[11] Doherty denied socializing with TS, but admitted to seeing him for business purposes in social settings two to three times per year.[12] Doherty and TS commuted from New Jersey to Manhattan on the same commuter ferry and encountered each other there one or more times per month.[13] TS was associated with Scotia from 2014 through July 2015.[14]

B. Doherty's Association with BGC

During Doherty's roughly 11 years at BGC, the number of traders on the corporate bond desk varied from a high of 30 to a low of about 12 in 2015.[15] BGC compensated Doherty solely through commissions.[16]

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[7] Tr. 707-08. Doherty similarly described BGC as a broker that matches trades between other firms and does not have public customers. Tr. 120, 537-38, 708.

[8] Tr. 120-21, 200-01, 708. Doherty stated that, prior to the trades at issue, he had never taken a position in a security at BGC. Tr. 121. David Shields ("Shields"), chief compliance officer for BGC Partners in the Americas ("BGC Partners"), a parent of BGC, testified that BGC's business model did not enable Doherty to execute trades on a proprietary basis, take positions, or execute short sales. Tr. 543-44, 556-57.

[9] Tr. 219.

[10] Stip. ¶ 8.

[11] Tr. 123. Doherty's brother and TS both lived in a New Jersey town neighboring Doherty's. Tr. 123.

[12] Tr. 124-26. For instance, Doherty has been to TS's home and has met his wife "a few times." Tr. 126.

[13] Tr. 126-27.

[14] Tr. 68-69.

[15] Tr. 122-23.

[16] Tr. 132. Doherty's February 2009 employment agreement stated that Doherty received a payout of 55 percent of net revenues less costs and expenses. Tr. 136; Complainant's Exhibit ("CX-") 7, at 2. Doherty testified that, after deducting expenses, his payout was reduced to approximately one-third of the commissions he generated. The firm deferred payment on portions of his payout and paid it as stock at a later time. Tr. 134, 136-38, 402-04.

Jon Eckert ("Eckert") was the head of Doherty's desk at BGC.[17] Eckert lived near Doherty in New Jersey, and he also commuted on the same ferry as Doherty and TS.[18] Eckert assigned TS's Scotia account to Doherty in early 2012.[19] It was well known at that time that TS was a difficult client.[20]

In 2015, TS's Scotia account was Doherty's second-largest account.[21] During May and June 2015, the relevant period, Scotia's account was responsible for around one-fourth of Doherty's revenues or approximately $41,360 in those two months.[22] BGC's revenue report for Doherty for January 2008 through August 2015 reveals that Doherty generated a high of more than two million dollars in 2009, but his revenue decreased every year after that.[23]

In October 2012, 2013, and 2014, Doherty certified his understanding of and agreed to comply with BGC's policies and procedures, including its compliance and supervisory manuals.[24] BGC's February 19, 2015 Written Supervisory Procedures ("WSP") manual enumerated specific rules of conduct that each registered representative must observe, including the following:

> I will not warrant or guarantee the present or future value or price of any security or that any issuer of securities will meet its promises or obligations.
>
> I will not agree to hold securities for another party in order to conceal ownership or agree to "purchase" securities from a customer and then "resell" them to the customer under arrangements which pose no economic risk to the customer.[25]

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[17] Tr. 127. Eckert was manager of BGC's corporate bond desk from 2006 to 2016. Tr. 583-84. Eckert has since given up his position as desk manager and is now "[j]ust a broker." Tr. 583. He has never held a principal (Series 24) license. Tr. 584. In July 2015, when Eckert was desk manager, his main responsibility was to build the business and generate as much revenue as possible. Tr. 583-84. He also hired staff, determined which brokers handled which accounts, and reviewed expenses. Tr. 584.

[18] Tr. 127-28, 585-86. Doherty and Eckert coached a children's sports team and sometimes socialized together. Tr. 128, 585-86. Eckert described their relationship as friendly. Tr. 585.

[19] Tr. 128-29.

[20] Tr. 129, 586-87. Doherty testified that TS was demanding and unpleasant and sometimes threatened to pull his business from Doherty if he was displeased. Tr. 130-31. Eckert agreed that TS was not pleasant and that BGC's relationship with TS had never been very good. Tr. 587.

[21] Tr. 133-35. Between January and August 2015, Doherty generated approximately $430,390 in commissions for BGC. Tr. 132-34; CX-36. His largest account generated $254,256. CX-36. Scotia, his next-largest account, generated $67,672. Tr. 133; CX-36.

[22] Tr. 134-37; CX-37.

[23] Tr. 139, 592-93; CX-37.

[24] Tr. 173-78; Stip. ¶¶ 9-10; CX-40; CX-41; CX-42.

[25] Tr. 179-86; Stip. ¶ 9; CX-38, at 1-3.

BGC's WSP manual also stated:

> An offer to sell coupled with an offer to buy back at the same or a higher price, or the reverse, is a prearranged trade and is prohibited. Options or written agreements such as repurchase agreements are not included in this prohibition.
>
> While it is impossible to discuss all of the types of transactions that may raise issues about off market and linked trades, any time a customer requests that we execute a purchase or sale or enter into a repurchase or reverse repurchase transaction at other than prevailing market prices, you should discuss the proposed transaction with your supervisor prior to accepting the order.[26]

C. TS's Association with Scotia

Anthony Scrivanich ("Scrivanich"), the Director of Fixed Income Compliance for Scotia, was TS's compliance officer.[27] Scrivanich testified that TS was a producing manager on Scotia's corporate bond trading desk.[28]

In May and June 2015, Scotia maintained written procedures applicable to TS's trading that stated the firm would require a capital reserve for certain bond positions that aged more than 180 days (the "Aged Inventory Policy").[29] Scotia charged the cash reserve against the trader's inventory book.[30] Aged inventory cash reserves would affect the profit and loss calculations in TS's proprietary account and, as a result, reduce his compensation.[31]

Scrivanich testified that in June 2015, Scotia's product control department discovered problematic trades in TS's proprietary account.[32] Scotia determined that TS was selling bonds early in the morning and buying back the same bonds later in the day with small price differentials.[33] Scotia identified this as prearranged trading because there was no market risk, no true change in beneficial ownership, and the trades occurred with the same counter-party (BGC) close to the 180-day holding period.[34] During Scotia's investigation, Scrivanich listened to the

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[26] Tr. 179-86, 192-93; Joint Exhibit ("JX-") 2, at 124-25; CX-38, at 4. Sulfaro testified that BGC also conducted annual compliance meetings and ethics training with all of its registered representatives. Tr. 752-54.

[27] Tr. 67, 69.

[28] Tr. 68-69.

[29] Tr. 70-72; CX-23.

[30] Tr. 71-73; CX-23, at 2.

[31] Tr. 73-74.

[32] Tr. 75.

[33] Tr. 75-76.

[34] Tr. 76-78, 83-84; CX-24, at 3-5.

firm's recordings of TS's telephone conversations with Doherty.[35] Scrivanich testified that in most of the telephone conversations, TS mentioned "project Melissa," which Scrivanich came to understand was Doherty's wife's name.[36] In all the trades at issue, TS "reset the clock" to avoid aged inventory reductions in the calculation of profits in his proprietary account at Scotia and therefore avoided payout reductions.[37] Scotia lost approximately $56,000 from the prearranged trading scheme.[38]

On July 9, 2015, Scotia terminated TS for his misconduct.[39]

D. Doherty's Interactions with TS

Sometime in April 2015, Doherty encountered TS on the ferry during his commute. TS told Doherty that Scotia was charging him for aged positions he held more than six months in his proprietary account.[40] TS basically told Doherty that he wanted to reset the clock on aged positions, so that he would not be penalized.[41] Doherty testified that TS wanted to sell bonds from old positions with the "option" of buying them back on the same day and at the same price plus a commission.[42]

TS told Doherty that he would identify the prearranged transactions (i.e., sales of bonds in which he intended to repurchase the same bonds on the same day at the same price plus a commission) by using the word "Melissa."[43] TS used the word "Melissa" to trigger 15 of the 19

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[35] Tr. 79.

[36] Tr. 79-80.

[37] Tr. 86-87.

[38] Tr. 87-88; CX-44. Scrivanich testified that Scotia calculated its losses by determining the difference between the amount Scotia received on TS's sales of the bonds and the amount it paid when TS repurchased the bonds. Tr. 87-88. Doherty argued that this amount was a standard commission that Scotia ordinarily paid on sales. Tr. 95-96. Regardless of whether the commission amounts were standard, these trades did not involve market risk, the beneficial owner never changed, and the trades did not occur in the ordinary course of business. Tr. 97-98. Scrivanich testified that Scotia would not have executed them if not for TS's scheme because there was no economic purpose for the trades. Tr. 90, 97-98.

[39] Tr. 91, 299. In June 2017, FINRA accepted TS's Letter of Acceptance, Waiver, and Consent ("AWC"). TS consented to, without admitting or denying, FINRA's findings that he violated FINRA Rules 8210 and 2010 by failing to appear and provide testimony as requested by FINRA staff in connection with an investigation into the matters at issue in this case. RX-1. In the AWC, TS agreed to a bar from associating with any FINRA member firm in any capacity. RX-1, at 3. TS is no longer subject to FINRA's jurisdiction. Doherty had sought to call TS as a witness at the hearing, but represented that TS was unwilling to appear. Tr. 795-96.

[40] Tr. 141-43.

[41] Tr. 145-48.

[42] Tr. 149-50, 170-71, 185-86.

[43] Tr. 152. Doherty could not recall if he and TS reached their initial understanding as to prearranged trading during one or two conversations on the ferry. Tr. 159-61.

prearranged sales and repurchases.[44] In two additional instances, TS referred to an earlier "Melissa" trade without using the word "Melissa."[45]

E. Doherty's Interactions with Eckert and Sulfaro

Below we address Doherty's claims chronologically and individually discuss each of our credibility findings. While we do not find Doherty's individual claims credible for the reasons articulated below, we also find that Doherty's claims are not credible when examined collectively and that his statements are inconsistent or contradictory when considered as a whole.

1. Their Interactions Before the Prearranged Trading

Doherty realized that, by engaging in these prearranged trades, TS would be evading Scotia's internal policies,[46] so he sought guidance.[47] A few days after speaking with TS on the ferry, Doherty approached Eckert, his desk manager, about his conversation with TS.[48] Eckert recommended that they talk with the compliance department, so they went together.[49] While en route, they encountered Steven DuChene ("DuChene"), a vice president in compliance, and the three went to Sulfaro's office.[50]

Sulfaro sat behind his desk, DuChene sat off to the side, and Doherty and Eckert stood. Eckert did most of the talking.[51] Doherty faulted Eckert, DuChene, and Sulfaro for failing to warn him during that meeting that buying from a customer then reselling the same quantity of the same security at the same price on the same day back to the same customer sounded like prearranged trading. He argued that they should have flagged the issue for him.[52]

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[44] Tr. 444-45.

[45] CX-17, at 42-47.

[46] Tr. 165-67, 362-63.

[47] Tr. 165, 171-73. Doherty also testified that he asked for permission because he realized it was unusual for BGC to facilitate Scotia's trading with itself. Tr. 226.

[48] Tr. 194-95. Eckert testified that Doherty said, "I have a customer that wants to buy securities in the morning, sell them in the afternoon and pay me a [commission] on a trade." Tr. 596.

[49] Tr. 196-97. Eckert suggested that they go to compliance because "[i]t just seemed out of the ordinary for [Doherty]." Tr. 597. He testified that it was not unusual for a customer to buy and sell the same security in the same day, but it was unusual for the customer to indicate in advance that he planned to do it. Tr. 597-98, 646-47, 663-64, 666-67. He wanted to get more detail from Doherty, so he suggested they speak to people in the firm's compliance department. Tr. 597.

[50] Tr. 197-98, 598-99.

[51] Tr. 198-99, 599, 711. Sulfaro recalled that Doherty did not speak during the meeting and remained in the doorway to listen "to whatever trading was going on down the hall" at his trading desk. Tr. 711-12. Eckert testified that Doherty said very little. Tr. 600-01.

[52] Tr. 209-10.

Doherty, Eckert, and Sulfaro agree that they spoke briefly. Otherwise, Doherty's recollection of the conversation varies from Eckert's and Sulfaro's.[53] Doherty did not document this conversation.[54] Nor did Eckert or Sulfaro.[55]

Sulfaro recalled that the meeting was less than five minutes.[56] Doherty testified that the meeting lasted ten to 15 minutes.[57] Doherty claimed that Eckert identified the customer as TS.[58] Doherty testified that he told Sulfaro and Eckert that TS would buy and sell the same security for the same price and that the purpose of the trades was to help TS evade Scotia's Aged Inventory Policy.[59] Doherty also testified that Eckert told Sulfaro that Doherty had a customer who "wanted to buy and sell a security, the same security on the same day at the same price. He wanted the option to buy it back."[60]

Sulfaro testified that, without mentioning TS's or any customer's name, Eckert asked if there would be an issue if a customer buys and sells the same security in the same day.[61] Sulfaro recalled that Doherty never mentioned that his client was trying to avoid Scotia's Aged Inventory Policy.[62]

Eckert testified that he told Sulfaro that Doherty had a customer who wanted to "buy or sell in the morning, vice versa in the afternoon . . . ."[63] Eckert also testified that Doherty did not mention TS, Scotia's Aged Inventory Policy, TS's interest in resetting the clock on securities in his proprietary account, or the prices at which these trades would occur.[64] The three agreed that Doherty also failed to mention the plan to use a code word to identify the prearranged trades.[65]

We do not find Doherty's version of these events credible. Eckert's and Sulfaro's recollections contradict Doherty's claims in key areas. We acknowledge Eckert's and Sulfaro's regulatory self-interest in denying that Doherty fully disclosed the details of his fraudulent

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[53] Neither party called DuChene to testify.

[54] Tr. 213.

[55] Tr. 762.

[56] Tr. 711-12.

[57] Tr. 906.

[58] Tr. 280, 906.

[59] Tr. 908.

[60] Tr. 199.

[61] Tr. 712-13.

[62] Tr. 721.

[63] Tr. 599. *See also* Tr. 645 (Eckert testifying, "All I said to them he wants to buy in the morning and sell back in the afternoon.").

[64] Tr. 600-01, 611-12, 633.

[65] Tr. 601, 723, 909.

scheme. We nonetheless find their testimony more credible than Doherty's. Doherty acquiesced to TS's suggestion to identify the prearranged trades by using the word "Melissa," yet he admittedly omitted this fact when talking to Eckert and Sulfaro. Had he mentioned his plan to use a code word, Eckert and Sulfaro would have had a more realistic understanding of Doherty's plan. Doherty's choice not to disclose the code word suggests to us that Doherty only partially explained the scheme. And, Doherty engaged in other efforts to conceal his trading. In addition to using a code word, he split return tickets and switched the order of sales and purchases.[66] If Doherty believed he had Sulfaro's permission to proceed with prearranged trading, concealment would not have been necessary.

Doherty, Eckert, and Sulfaro agree that Sulfaro advised Doherty that there would be no issues with a customer buying and selling the same security on the same day, provided the customer assumed market risk.[67] Doherty testified about his understanding of what Sulfaro meant by "market risk":

> It was my understanding that he didn't want me to buy the security and sell it right back. So he wanted there to be a few hours, three or four hours he said and that would constitute market risk.[68]

Sulfaro denied that he explained market risk to Doherty as holding the stock for four hours.[69] Eckert also testified that Sulfaro said nothing about holding a position for three or four hours.[70]

Although Doherty testified that Sulfaro also indicated that these trades would be acceptable so long as BGC didn't hold the positions overnight,[71] Sulfaro denied this. He testified that he never talked about holding positions overnight, largely because BGC virtually never held positions overnight, so it was not an option.[72] Sulfaro stated, "Yes, you cannot hold a position

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[66] Tr. 205. Doherty split return tickets by buying an amount of securities from TS in the morning in one transaction and then selling the same securities back to TS later in the day in two transactions. Doherty's two sales transactions were usually at slightly different times and in unequal amounts that added up to the total that TS originally sold. Doherty reversed the order of the prearranged trades by selling short to TS early in the day and then repurchasing the same securities later in the same day. Both helped Doherty conceal his prearranged trading. Tr. 277, 281-84.

[67] Tr. 203-04, 599, 654-55, 713. Sulfaro testified that he expected a registered person to understand that market risk means the risk that the market price will change between the sale and repurchase. Tr. 714-15.

[68] Tr. 203. *Cf.* Tr. 204 (Doherty's testimony that Sulfaro "didn't say, you know, in so many, exactly that . . . He said there needs to be, you know, sometime in-between to make sure there is market risk."); Tr. 204-06 (Doherty's testimony that Sulfaro "didn't go out of his way to explain [market risk]," but he gave Doherty four hours as an example); Tr. 212 (Doherty's testimony that "[i]t was not like a line in the sand where it had to be four hours. There was more of it had to be some time to constitute market risk.").

[69] Tr. 717-18.

[70] Tr. 604, 612, 672.

[71] Tr. 155-56, 205-06; JX-2, at 140.

[72] Tr. 717-18.

overnight. You should not hold a position at all. I would not even be authorized to state that as an interdealer broker."[73] Sulfaro continued, "We could not hold positions intraday either. As an interdealer broker, we only source liquidity. We don't provide liquidity to the market participants. We have to be in and out. A buyer for every seller. A seller for every buyer."[74] Eckert echoed Sulfaro's recollection. He stated that he did not recall discussing overnight positions and that the firm virtually never held positions overnight.[75]

Doherty testified that he made it clear in his discussions with Eckert and Sulfaro that no third party would be involved in these trades; so Doherty suggested that BGC sell the positions to Mint Brokers, a broker-dealer affiliated with BGC. Doherty testified:

> It was very clear, [TS] wanted to buy and sell it back to himself. There was not going to be a third party. That is why I said maybe we should sell it to Mint, which is the broker-dealer in BGC. So there would have been a third party.[76]

Doherty testified that, "Rather than do that, it was suggested that we just keep it right there and we would not have to split commissions with Mint."[77] Sulfaro denied that he had any idea that BGC would not have a customer in between the firm's purchases from and sales back to Scotia or that the prices would stay the same.[78] Eckert also denied that Doherty mentioned Mint Brokers or discussed not having a third party involved in these trades.[79]

On all of these issues—whether Sulfaro defined market risk as holding a position for four hours, whether they discussed holding positions overnight, and whether Doherty said there would be no third party involved in the trades and suggested Mint Brokers—we do not find Doherty's testimony credible. First, Doherty's testimony waivered on exactly what Sulfaro said about market risk. Doherty claimed Sulfaro said that holding the stock for four hours sufficed, but he also said Sulfaro told him that "some time" would be sufficient and that four hours was not a hard rule. But even if Doherty believed that Sulfaro directed him to hold securities for four hours to establish market risk, he didn't comply. In 13 of the 19 prearranged round-trip transactions, Doherty held the securities for less than four hours.[80]

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[73] Tr. 718.

[74] Tr. 720.

[75] Tr. 604, 612-13.

[76] Tr. 907.

[77] Tr. 907-08.

[78] Tr. 723-24. Sulfaro testified that he assumed there was a third party in all of Doherty's trades. He stated, "BGC is not a counterparty to the transaction. The only reason BGC is a counterparty is to preserve anonymity to our customers. So if BGC buys from [a firm], BGC sells to [another firm], neither side knows who the other side is." Tr. 764-65.

[79] Tr. 604, 612-13, 630.

[80] *See* CX-46.

Sulfaro's testimony casts further doubt on Doherty's claim that he discussed using Mint Brokers with Eckert and Sulfaro.[81] Sulfaro testified that the possible use of Mint Brokers never came up because Scotia is itself a dealer.[82] He testified that BGC used Mint Brokers only when, for example, an asset manager wants to liquidate a long position. He stated, "BGC cannot take the order from [the asset manager] because they are not a dealer. So what [BGC] would do is refer the trade to Mint Brokers," and BGC would then "face off" against Mint Brokers.[83] Sulfaro noted that because Scotia is a dealer, BGC did not need an intermediary.[84] Additionally, as an interdealer broker, BGC virtually never holds positions overnight, and it is not equipped to do so. It therefore strains credulity for Doherty to suggest that Sulfaro approved prearranged trading as long as BGC did not hold positions overnight. Furthermore, because we do not believe that Eckert and Sulfaro understood the true nature of Doherty's plan from the outset, we cannot find Doherty's additional claims credible in the face of countervailing evidence.

We also note that Doherty stood in the doorway of Sulfaro's office, said very little, and did not reduce to writing the purported "permission" he believed he had received. He did not elaborate on Eckert's statements, take notes, or follow up with a confirmatory email. These facts suggest to us that the meeting was brief and somewhat inconsequential. We find that, had Doherty believed he disclosed all relevant facts and received permission to proceed, he would have confirmed his understanding in writing or, at a minimum, taken detailed notes. He might have conducted a confirmatory conversation. But he did not. Our conclusion is bolstered by Sulfaro's determination as compliance officer that his brief conversation with Doherty did not warrant taking notes or following up with written instructions. In all, we do not find credible Doherty's description of the details of his disclosures to Eckert and Sulfaro.

2. Their Interactions During the Prearranged Trading

In addition to claiming to have provided prior notice to Eckert and Sulfaro, Doherty also testified that when he executed a prearranged trade for TS, he often mentioned to Eckert that he "did another one of these trades."[85] According to Doherty, Eckert directed him to "just tell"

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[81] Tr. 718. Doherty also claimed, without support from Eckert or Sulfaro, that after the first "Melissa" trade (on May 14, 2015), he walked into Sulfaro's office with the ticket in hand, and Sulfaro told him to book the trade to BGC London. Tr. 262-64. Doherty claimed that he reported the interaction to Eckert. Tr. 264. Eckert testified that he never heard anything about booking trades to BGC London and that their desk had never booked a trade that way. Tr. 609-10. Sulfaro denied he had authority to make such a pronouncement for BGC London. Tr. 729-31. Shields, BGC Partners' chief compliance officer, testified that, during a post-termination meeting with Doherty and his attorney, Doherty never claimed that Sulfaro directed him to book trades to BGC London. Tr. 541. Furthermore, Shields testified that BGC London followed a business plan similar to that of BGC in New York and generally did not hold positions in securities. Tr. 541-42. For these reasons, we do not credit Doherty's claim.

[82] Tr. 719.

[83] Tr. 719.

[84] Tr. 719.

[85] Tr. 247. Doherty claimed to have discussed at least half of the prearranged trades with Sulfaro and more than half with Eckert while he was executing them. Tr. 317-18, 320-23.

Sulfaro about each individual prearranged trade.[86] Eckert flatly denied ever discussing the matter with Doherty after the initial meeting.[87] He testified that they did not discuss the matter again.[88] Eckert testified that he and Doherty sat about 20 feet apart on the same desk, and he never saw Doherty speak to Sulfaro after the first meeting.[89] Sulfaro also denied that he ever discussed these or any other trades with Doherty between the initial May 2015 conversation with Eckert and Doherty and August 2015, when he learned that Scotia had fired TS.[90]

We do not find Doherty's claims about trade-specific conversations with Eckert and Sulfaro credible. Eckert and Sulfaro deny that Doherty mentioned each prearranged trade to them. And Doherty's descriptions of his prior interactions with Sulfaro suggest that the two were not familiar with each other.[91] If Doherty was truly concerned about compliance, he could have had more complete discussions with Eckert and Sulfaro and confirmed his understanding in writing. Instead, he suggested that he sometimes casually mentioned that he "did another one."[92] We do not find this claim credible. We do not find that Doherty provided Eckert or Sulfaro with a comprehensive explanation of the prearranged trading scheme before, during, or after its completion.

F. Doherty's Prearranged Trading

On about 19 occasions in May and June 2015, Doherty and TS executed multiple series of same-day transactions involving offsetting sales and purchases of bonds. Appendix 1 to the Complaint lists these transactions.[93]

Because BGC's business model did not allow for the firm to take market risk, the firm facilitated trades with other brokers.[94] In Doherty's series of prearranged trades, however, BGC facilitated Scotia's trading with itself.[95] Doherty testified that, from his conversations with BGC's compliance personnel, he understood that the 19 series of prearranged trades would comply with BGC's policies and FINRA's rules if he held the positions for about four hours.[96] In

[86] Tr. 248-49; JX-2, at 148.

[87] Tr. 609.

[88] Tr. 600.

[89] Tr. 606-09, 652-53, 656.

[90] Tr. 728-30.

[91] *See* Tr. 909 (Doherty's testimony that he had *never* been in the compliance department before).

[92] Tr. 247.

[93] Stip. ¶ 11; CX-14; CX-43; CX-44.

[94] Tr. 225, 454-55; JX-2, at 78. Enforcement examiner Ray Segarra ("Segarra") noted, however, that in the prearranged trades, BGC held a long position and there was no counter-party to any of the trades. Tr. 455-56; CX-43.

[95] Tr. 224-25; JX-2, at 78; CX-43; CX-44; CX-46.

[96] Tr. 203-06; JX-2, at 140.

reality, however, Doherty held 13 of the 19 securities for less than four hours.[97] Additionally, as Eckert testified, market risk is not established by how long a party holds a position. Rather, there was no market risk because Doherty never sold Scotia's positions to another firm before selling them back to TS. Beneficial ownership never changed and market risk was unaffected by the length of time between the first and second legs of the prearranged trades.[98]

Doherty and TS discussed approximately 17 of the 19 series of trades on the telephone rather than by instant message or another written format.[99] In approximately 15 of Doherty's telephone conversations with TS, TS used the word "Melissa" to signal to Doherty that he intended to engage in prearranged trading.[100] In the two remaining recorded calls, TS triggered prearranged trading by referring to earlier "Melissa" trades by, for example, saying, "Let's bang [out] another one here too, okay?"[101]

Five days after Doherty's and TS's first "Melissa" trade on May 19, 2015, they entered their fifth prearranged purchase and sale. TS called Doherty and stated, "I want to try and do a Melissa here."[102] This time, when Doherty agreed, TS stated, "Um, the one thing I want is on the, on the comeback, can you split the ticket in half?"[103] TS stated "It'll, It'll look a little better."[104] Doherty admitted that the purpose of splitting the ticket on the return leg was to make it harder for Scotia to detect that the trades were prearranged.[105] In all, Doherty and TS "split the ticket" in 11 of the 19 series of prearranged trades.[106]

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[97] Tr. 211-12, 452-54; CX-46.

[98] Tr. 630-31, 647-48, 672.

[99] Tr. 532 (Shields's testimony that Doherty advised BGC that all of his trades with TS were accomplished on BGC's recorded telephone lines); CX-17 (transcriptions of telephone conversations between TS and Doherty); CX-45.

[100] CX-17, at 2, 4-6, 8, 10, 18, 22-23, 25, 28, 30-31, 40, 48.

[101] CX-17, at 44. *See also* CX-16. On May 14, 2015, TS referred to the initial prearranged trading as "Project Melissa." CX-17, at 2. On other days, he called it "Operation Melissa" or asked to "do a Melissa." *See, e.g.*, CX-17, at 2-6, 8, 10, 18-19, 22-23, 25, 27-28, 30-31, 40, 42, 48, 52.

[102] CX-17, at 8.

[103] CX-17, at 8.

[104] Tr. 266-67; CX-17, at 8. TS asked to split the ticket in half. Rather than split the second leg in half, Doherty suggested an uneven split. Tr. 274-75; CX-17, at 9.

[105] Tr. 267-68. Doherty claimed that he told Eckert that TS asked him to split some return tickets. He testified that Eckert told him to run it by Sulfaro, and Sulfaro approved as long as the firm didn't hold any positions overnight. Tr. 269-71. Eckert and Sulfaro denied that they ever discussed splitting tickets. Tr. 603, 613, 642, 731, 732. We do not credit Doherty's assertion that Sulfaro and Eckert understood that he intended to split return tickets to conceal prearranged trading. We do not find that Doherty ever fully explained to them that he planned to engage in prearranged trading, so they could not fully appreciate the significance of his splitting the tickets on the return legs.

[106] Tr. 284, 440-41, 454; CX-45; CX-46.

Additionally, Doherty, not TS, suggested splitting the return tickets in six instances.[107] On May 26, 2015, Doherty executed the eighth "Melissa" trade. In this instance, TS did not ask Doherty to split the ticket, but Doherty suggested breaking the return leg into two or three trades.[108] In this series of transactions, TS never even placed a second call to Doherty to complete BGC's sales back to Scotia.[109] In total, Doherty independently executed the second leg of the prearranged transactions without receiving a call from TS in eight of the 19 prearranged series of trades.[110]

TS and Doherty also switched the order on some of the prearranged trades. For example, on May 27, 2015, TS called Doherty and said, "Hey, want to squeeze off a quick Melissa here while we're waiting."[111] TS then asked to purchase rather than sell bonds. Doherty agreed, even though he did not have the bonds to sell at the time.[112] Doherty created a short position for BGC, notwithstanding that short positions were not part of BGC's business model.[113] Doherty executed four additional short sales for TS. Thus, five of the 19 prearranged series of trades involved short sales.[114]

G. BGC's Investigation

On August 11, 2015, Lou Scotto ("Scotto"), general manager of BGC affiliate BGC North America, learned that Scotia had terminated TS, for suspected prearranged trading involving BGC.[115] Scotto asked Sulfaro to lead the firm's review of TS's trading.[116]

Sulfaro advised Doherty that TS had been terminated for prearranged trading.[117] Sulfaro asked Doherty if he brokered the trades at issue. Doherty replied that he had, and Sulfaro

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[107] Tr. 443-44.

[108] Tr. 286; CX-17, at 22.

[109] CX-17.

[110] Tr. 445-46; CX-45.

[111] CX-17, at 25.

[112] Tr. 290-91.

[113] Tr. 291. Doherty testified that Eckert and Sulfaro knew about the short sale at the time. Tr. 292-93. Sulfaro and Eckert denied knowing that Doherty intended to or in fact did execute short sales. Tr. 603, 732. Sulfaro testified that BGC does not have a borrowing facility to accommodate short sales on fixed income. Tr. 732-33. We credit Sulfaro's and Eckert's testimony over Doherty's. Executing short sales was so far outside of BGC's business plan, we do not believe that Sulfaro or Eckert would have allowed short selling at BGC.

[114] CX-46.

[115] Tr. 727; CX-11, at 1.

[116] Tr. 817-18.

[117] Tr. 307. Doherty testified that this was the first he learned of TS's termination. Tr. 307. Before that, TS had told Doherty that Scotia was investigating him, and Doherty assumed the investigation involved another internal matter at Scotia. Tr. 301-04.

directed him to pull the records of the trades.[118] Sulfaro testified that, at this point, he did not suspect Doherty of wrongdoing.[119] On August 13, 2015, Doherty brought trade tickets to Sulfaro.[120] Doherty indicated to Sulfaro and Scotto that he saw no issues with the trades in question.[121]

Sulfaro advised Doherty that compliance would continue to review the trades by listening to his telephone calls with TS. Doherty told Sulfaro and Scotto that they would find communications between Doherty and TS for only one side of some of the transactions and no calls for the second leg.[122] Sulfaro testified that he was confused by Doherty's statement, but he directed DuChene, a compliance person, to be sure to review all communications, including "all of the IMs, emails and voice communications."[123]

During BGC's investigation, Doherty identified 14 of the 19 prearranged series of trades that he entered with TS.[124] Doherty told BGC that, on each of the prearranged series of trades, he always received a second call or other type of contact from TS to direct him to execute the second leg of the trades.[125] This contradicted Doherty's earlier statement that BGC might not find calls for the second leg on some transactions. Indeed, in eight of the 19 prearranged sets of trades, there is no second call.[126]

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[118] Tr. 307, 733-34.

[119] Tr. 733.

[120] Tr. 741-42.

[121] Tr. 735-36; CX-11, at 1.

[122] Tr. 736-38; CX-11, at 2.

[123] Tr. 739-40. *See also* Tr. 744, 747-48 (Sulfaro's testimony that compliance reviewed audio tapes, emails, Bloomberg messages, and IMs, even though Doherty stated that he did not communicate with TS by those methods); CX-12 (Sulfaro's August 18, 2015 memorandum regarding BGC's review of Doherty's trading activity).

[124] Tr. 214-15, 306-07; CX-15. BGC terminated Doherty before he could identify the remaining five. Tr. 215-16.

[125] Tr. 228-30.

[126] Tr. 231. At the hearing, Doherty testified that there could have been a different type of communication, such as an instant message, for some of the return legs. BGC produced its records from other methods of communications to Enforcement. Enforcement did not find an alternate type of communication for the second leg of the eight prearranged transactions that had no second call. Tr. 231; CX-11, at 2. Furthermore, Doherty told Sulfaro that all of his communications with TS were by telephone. Tr. 232-33, 742-43; CX-11, at 2. Sulfaro testified that all the phone lines on Doherty's desk were recorded. Doherty did not suggest to Sulfaro that any of his conversations with TS were on an unrecorded, outside phone line. Tr. 743.

Doherty also suggested that BGC listen for the word "Melissa" to identify the calls involving prearranged trading.[127] Sulfaro was shocked to learn that Doherty and TS had used a code word to conceal their activities.[128]

The firm concluded that, although Doherty talked with BGC's compliance department before the trades, he did not fully disclose the nature of his scheme to compliance.[129] BGC terminated Doherty one or two days later, on August 17, 2015.[130]

Eckert was devastated to learn that BGC had terminated Doherty.[131] Doherty called Eckert several days later to meet because, when BGC terminated him, he had been unable to collect all of his belongings from his desk before leaving the office.[132] Doherty and Eckert met at Eckert's home in New Jersey.[133] Doherty surreptitiously recorded the conversation without Eckert's knowledge.[134] Eckert and Doherty were clearly upset during the conversation. Eckert stated that he understood why Doherty was terminated, but pledged to help Doherty collect deferred compensation and stock.[135]

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[127] Tr. 308.

[128] Tr. 309. BGC successfully captured telephone recordings for 17 of the 19 prearranged series of transactions. CX-17; CX-18.

[129] Tr. 308-12, 861. Scotto testified that Doherty said very little when he terminated him. Tr. 861. Eckert testified that, at this point, he learned for the first time that the purpose of TS's prearranged trades was to avoid Scotia's Aged Inventory Policy and that Doherty and TS had used the word "Melissa" as a code to identify the prearranged trades. Tr. 617, 633-34.

[130] Tr. 299. Examiner Segarra testified that he reviewed BGC's broker reports and trade blotters. Because the firm did not group trades by CUSIP number, it would be difficult for BGC to discern that Doherty had bought or sold a security in the morning and executed the corresponding trade or trades for the same security later in the day. Tr. 460-61. Thus, BGC did not unearth Doherty's prearranged trading scheme itself. Shields opined that BGC's surveillance could have been more robust at the time of these trades. Tr. 549, 558-59. BGC has since enhanced its surveillance programs. Tr. 550.

[131] Tr. 618, 620.

[132] Tr. 618-19.

[133] Tr. 619.

[134] Tr. 325-26, 620. Doherty testified that before he and Eckert met, he researched whether New Jersey required one- or two-party consent for recording conversations because he planned to record his meeting with Eckert. Tr. 348-49.

[135] Tr. 626-28; CX-20, at 5-6. On the recording, Doherty and Eckert stated:

> Eckert: Now they know. Now they know from what he said and how he never came back to execute, they know; they're going to know.
>
> Doherty: Yeah, but they never asked. I never said—I sad to 'em, I said, "Listen, the guy wants to sell 'em securities and buy 'em back at the end of the day at *a different price*. He's going to pay us a basis point.
>
> Eckert: Right.
>
> Doherty: Is that okay? He said, "Yeah." He said, "As long as we don't have—

IV. Conclusions of Law

Doherty and TS undertook the 19 prearranged round trip transactions identified in Appendix 1 to the Complaint for one purpose. Together, they sought to fraudulently update the "age" of TS's inventory on Scotia's books so that TS would not be financially penalized. In doing so, Doherty engaged in a fraudulent scheme. Doherty knew that Scotia would have to pay BGC commissions for non-bona-fide transactions in which there was no beneficial change in ownership. Doherty personally benefitted because he received a portion of BGC's commissions and kept his otherwise-difficult and second-largest client content. Although Doherty spoke with Eckert and Sulfaro before he executed the series of prearranged trades, we find that he did not fully disclose the facts and circumstances of the trades. Furthermore, even if Doherty had acted with their approval, which we find he did not, as a registered representative in the securities industry, he cannot escape liability for fraud by shifting blame to his supervisors.

A. Cause One

Cause one alleges that Doherty willfully violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010 by engaging in a fraudulent, prearranged trading scheme in May and June 2015.

Section 10(b) of the Exchange Act provides that it is "unlawful for any person . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe . . . ."[136] Exchange Act Rule 10b-5 similarly prohibits fraud:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or the mails . . . (a) To employ any device, scheme, or artifice to defraud, [or] . . . (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[137]

To prove fraud under subsections (a) and (c) of Rule 10b-5, Enforcement must prove that Doherty, in connection with the purchase or sale of a security (1) engaged in a manipulative or

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Eckert: [interposing] Market risk.

CX-20, at 7 (emphasis added). Doherty testified that he misspoke when he said "a different price." He claimed that he told Eckert and Sulfaro in advance that TS would buy and sell at the same price. Tr. 199.

[136] 15 U.S.C. § 78j(b).

[137] 17 C.F.R. § 240.10b-5.

"inherently deceptive act,"[138] (2) in furtherance of an alleged scheme to defraud, and (3) acted with scienter.[139] Subsections (a) and (c) of Rule 10b-5 "capture a wide range of conduct."[140]

FINRA Rule 2010 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[141] "FINRA Rule 2020 proscribes fraud in language similar to Section 10(b)."[142] Rule 2020 provides that "[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

1. Doherty Engaged in a Manipulative Act in Furtherance of a Fraudulent Scheme

Doherty intentionally participated in TS's prearranged trading scheme. Doherty's conduct, executing a series of prearranged trades at agreed upon prices, was designed to defraud Scotia and was inherently deceptive.[143] Similarly, in *Thomas C. Gonnella*, the Securities and Exchange Commission ("SEC") found that Gonnella violated Section 10(b) and Rule 10b-5(a) and (c) by engaging in a prearranged trading scheme.[144] Gonnella was a proprietary trader at a broker-dealer that maintained an aged inventory policy similar to Scotia's. Gonnella prearranged to sell and then quickly repurchase aged bonds to convey the false impression that he sold his inventory within seven months. He executed 12 prearranged sets of trades. The SEC held that "Gonnella's conduct—numerous prearranged transactions executed at prices he set, solely to

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[138] Courts have distinguished an inherently deceptive act from a misleading statement. *See SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011) (holding that scheme liability "hinges on the performance of an inherently deceptive act that is distinct from an alleged misstatement").

[139] *SEC v. Penn*, 225 F. Supp. 3d 225, 235 (S.D.N.Y. 2016); *SEC v. Sullivan*, 68 F. Supp. 3d 1367, 1377 (D. Colo. 2014). A violation of Section 10(b) of the Exchange Act also requires a showing that a person used any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange. *Dep't of Enforcement v. Nicolas*, No. CAF040052, 2008 FINRA Discip. LEXIS 9, at *63 n.53 (NAC Mar. 12, 2008). Doherty admitted that most of the business he conducted with TS occurred on a recorded telephone line at BGC. Tr. 244. Doherty's use of a telephone to communicate with TS satisfies this requirement. *See Michael A. Horowitz*, Initial Decisions Release No. 733, 2015 SEC LEXIS 43, at *60 (Jan. 7, 2015); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865 (S.D.N.Y. 1997).

[140] *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101 (2019).

[141] A violation of the federal securities laws or another FINRA Rule constitutes a violation of FINRA Rule 2010. *Stephen J. Gluckman*, 54 S.E.C. 175, 185 & n.31 (1999); *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 FINRA Discip. LEXIS 6, at *12-13 (NAC June 2, 2000); *Dep't of Enforcement v. Zipper*, No. 2016047565702, 2018 FINRA Discip. LEXIS 15, at *19 n.88 (OHO June 18, 2018), *modified*, 2019 FINRA Discip. LEXIS 11 (NAC Mar. 18, 2019), *appeal docketed*, No. 3-19138 (SEC Apr. 5, 2019).

[142] *Dep't of Enforcement v. Sandlapper Sec., LLC*, No. 2014041860801, 2018 FINRA Discip. LEXIS 33, at *45 n.188 (OHO Nov. 29, 2018), *appeal docketed* (NAC Dec. 21, 2018).

[143] *See, e.g.*, *Dep't of Enforcement v. John Carris Invs., LLC*, No. 2011028647101, 2015 FINRA Discip. LEXIS 32, at *130-39 (OHO Jan. 20, 2015) (finding fraud where respondents engaged in prearranged trading to manipulate prices of the underlying securities).

[144] *Thomas C. Gonnella*, Exchange Act Release No. 78532, 2016 SEC LEXIS 2786, at *21-22 (Aug. 10, 2016).

convey a false appearance of compliance with [his firm's] aged inventory policy and avoid charges to his trading book—constituted a deceptive device, scheme, and artifice to defraud."[145]

Doherty made it appear as though BGC facilitated legitimate purchases from and sales to Scotia, when in fact they were contrived transactions designed to remove bonds temporarily from TS's proprietary account. Doherty completed the return trip of the prearranged transactions at prices to which he and TS secretly agreed beforehand, often executing the return leg of the series without receiving a second call from TS.[146] Doherty made it appear as though he executed TS's trades in the ordinary course of business when in fact the trades were prearranged and manipulative. "Although the mechanisms for manipulation can be myriad, a recognized vehicle for manipulative activity is prearranged, matched trades."[147]

Doherty argues that *Gonnella* is inapposite because Gonnella (like TS) deceived his own firm, whereas Doherty deceived Scotia, BGC's customer. We disagree. The Commission did not premise its finding of liability in *Gonnella* on Gonnella's deception of his own firm, but on his engaging in deceptive acts and a course of conduct that defrauded a victim.[148] Like Gonnella, Doherty deceived a victim (Scotia) when he engaged in deceptive acts (prearranged trading) and participated in a fraudulent scheme by intentionally executing prearranged trades. The very terms of Exchange Act Rule 10b-5(a) and (c) "'provide a broad linguistic frame within which a large number of practices may fit.'"[149] Conduct, like prearranged trading, that is itself manipulative or deceptive violates Rule 10b-5, regardless of the identity of the victim.[150] The outcome does not

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[145] *Gonnella*, 2016 SEC LEXIS 2786, at *24.

[146] For example, on May 14 and 15, 2015, TS called Doherty to execute two trades—one identified as "operation Melissa," and one identified as "project Melissa." CX-17, at 2-4; CX-18, at 1. There was no second call to close out the first leg of either round trip, yet Doherty executed the second leg, without instructions from TS. CX-17, at 2-4; CX-18, at 1.

[147] *Howard R. Perles*, 55 S.E.C. 686, 698 (2002).

[148] *Gonnella*, 2016 SEC LEXIS 2786, at *31 n.28 ("The entire object of Gonnella's fraud was to retain certain securities in his trading book through prearranged sale-and-repurchase transactions involving those securities. Gonnella, therefore, is liable not because his conduct was in connection with his employment by a broker-dealer but because he effectuated a fraud on his employer through trading in securities.")

[149] *John P. Flannery*, Exchange Act Release No. 73840, 2014 SEC LEXIS 4981, at *37 & n.45 (Dec. 15, 2014) (citing *SEC v. Clark*, 915 F.2d 439, 448 (9th Cir. 1990) (noting the breadth of the terms "fraud, deceit, and device, scheme, or artifice")).

[150] *See Flannery*, 2014 SEC LEXIS 4981, at *39-40 (holding that "primary liability under Rule 10b-5(a) and (c) extends to one who (with scienter, and in connection with the purchase or sale of securities) employs *any* manipulative or deceptive device or engages in *any* manipulative or deceptive act"); *SEC v. Lorin*, 76 F.3d 458, 460 (2d Cir. 1996) (per curiam) (affirming liability against defendant who "knew of the manipulation agreement and knowingly participated in carrying it out"); *SEC v. U.S. Environmental, Inc.*, 155 F.3d 107, 112 (2d Cir. 1989) (holding that person who effected "the very buy and sell orders that artificially manipulated [the] stock price" participated in the manipulation, "despite the fact that someone else directed the market manipulation scheme").

change because the victim was Doherty's customer, not Doherty's employer.[151] Furthermore, Doherty never put any of the "Melissa" trades out to market for another broker to buy, so beneficial ownership never changed.[152] They were sham transactions and, by their nature, deceptive.[153]

2. Doherty Acted with Scienter

We also find that Doherty acted with scienter. Scienter is a "mental state embracing intent to deceive, manipulate, or defraud."[154] The trier of fact may infer the respondent's state of mind from circumstantial evidence.[155] Here, Doherty knew, or was reckless in not knowing,[156] that the prearranged trades he executed for TS would further TS's scheme and mislead Scotia into believing TS complied with the firm's Aged Inventory Policy.

Doherty admitted that he knew TS sought to avert Scotia's Aged Inventory Policy.[157] He also knew that, by doing so, TS deceived Scotia. Yet Doherty knowingly participated in the scheme to defraud Scotia by executing a series of prearranged transactions, sometimes even completing the return trip without first receiving a call from TS.[158] Doherty knew that Scotia paid commissions on each trade even though ownership of the bonds never really passed. Doherty nonetheless entered TS's trades as if they had a legitimate business purpose.

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[151] *Cf. United States v. Naftalin*, 441 U.S. 768, 770 (1979) (holding that Rule 10b-5 prohibits fraud against brokers as well as investors).

[152] Tr. 245.

[153] *See Flannery*, 2014 SEC LEXIS 4981, at *40-42 (holding that Rule 10b-5 encompasses many types of manipulative and deceptive acts, including "sham transactions" designed to give false appearances); *Dep't of Mkt. Regulation v. Proudian*, No. CMS040165, 2008 FINRA Discip. LEXIS 21, at *27 n.29 (NAC Aug. 7, 2008) (holding that, although not per se unlawful, matched orders—orders for the purchase or sale of a security that are entered knowing that orders for the sale or purchase of substantially the same amount of stock have been or will be entered by the same or different persons at substantially the same time and price—can be a manipulative or deceptive device because they mislead the market).

[154] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

[155] *Nicolas*, 2008 FINRA Discip. LEXIS 9, at *29 n.25; *Dep't of Mkt. Regulation v. Jordan*, No. 20120317482-03, 2017 FINRA Discip. LEXIS 39, at *34 (OHO Sept. 26, 2017).

[156] Recklessness is sufficient to prove scienter under Rule 10b-5. *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992); *DWS Securities Corp.*, 51 S.E.C. 814, 820-21 (1993).

[157] *See* Tr. 165-67, 362-63, 908.

[158] *See U.S. Environmental, Inc.*, 155 F.3d at 111-12 (holding that a finding that the respondent executed trades he knew were for a manipulative purpose is sufficient to support a finding of scienter and Section 10(b) liability); *Proudian*, 2008 FINRA Discip. LEXIS 21, at *30-31 & n.31 (finding scienter where respondent, at the direction of others, entered manipulative buy and sell orders that were crossed and matched).

Moreover, Doherty engaged in significant efforts to conceal his misconduct, providing even more support for our finding of scienter.[159] Doherty knew that BGC recorded his telephone communications, so he and TS used coded language by referring to the prearranged trading sequences as "Melissa" trades. Additionally, Doherty split the return trip on 11 of the transactions, sometimes at TS's request and sometimes on his own initiative. According to TS, it "look[ed] a little better."[160] In six of the prearranged series of trades, Doherty reversed the order to hide the scheme. He sold short to TS even though BGC was not equipped to execute short sales of bonds.

3. Doherty's Defenses Are Without Merit

Doherty argues that we cannot find him liable for fraud because he disclosed his intended conduct to Eckert and Sulfaro and relied on their advice. We reject Doherty's argument. We do not find credible Doherty's contention that he fully disclosed all the details of the prearranged trading scheme to Eckert and Sulfaro. If Doherty was truly concerned about the legality of his actions and wanted to ensure his supervisors approved, we question why he did not take notes or otherwise confirm his understanding in writing. We also find that his undisclosed use of the word "Melissa" to identify the prearranged trades contradicts his claim to have fully explained the scheme to Eckert and Sulfaro. And Doherty understood that BGC, as an interdealer broker, did not take positions in securities but rather matched customers' buy and sell orders. Yet he entered the prearranged trades without engaging a third party and even held short positions, even though BGC was not equipped for short sales.

We do not find credible that Doherty, a seasoned professional who entered the securities industry in 1993, did not understand the concept of market risk.[161] Indeed, Doherty claims that Sulfaro's approval of the trading activity was with the condition that there is market risk, and that Sulfaro said holding the security for four hours would constitute market risk. This notwithstanding, Doherty held 13 of the 19 securities at issue for less than four hours. Thus, even according to his purported understanding of the concept (which was an incorrect understanding), he did not follow Sulfaro's directives regarding market risk.

Finally, even if Doherty had fully disclosed his plans to his superiors, which we find he did not, he cannot rely on his supervisors' failure to supervise to insulate himself from his own

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[159] *See Gonnella*, 2016 SEC LEXIS 2786, at *32 (finding that attempts to conceal support a finding of scienter); *Phillip J. Milligan*, Exchange Act Release No. 61790, 2010 SEC LEXIS 1163, at *18-19 (Mar. 26, 2010) (same); *Justin F. Ficken*, Exchange Act Release No. 58802, 2008 SEC LEXIS 3047, at *11 (Oct. 17, 2008) (same).

[160] CX-17, at 8, 22.

[161] A transaction has no market risk if changes in market prices cannot affect it. *United States v. Atkins*, 869 F.2d 135, 140 (2d Cir. 1989). A transaction that has no business purpose, like the 19 round-trip transactions that Doherty executed solely for the purpose of TS's avoiding Scotia's Aged Inventory Policy, is a sham transaction and therefore not subject to market risk. *See Id.* at 139-40.

misconduct.[162] The SEC rejected a similar argument in *Howard R. Perles*.[163] There, the SEC found that two traders at separate firms aided and abetted a manipulation by engaging in prearranged trading. Perles, one of the traders, claimed that his supervisor had daily access to all of his trading records and never objected to his trading.[164] The Commission held that the supervisor's failure to supervise did not insulate Perles from liability.[165] "Registered representatives may not deliberately ignore that which they have a duty to know."[166] As a representative in the securities industry, Doherty had a duty to refrain from fraudulent conduct, regardless of what his supervisors advised.

4. Conclusion

Doherty participated in a prearranged trading scheme to earn compensation for himself, keep his second-largest client happy, and generate revenue for BGC, even though he knew, or was reckless in not knowing, that the purpose of the trading was to deceive Scotia and enable TS to obtain compensation to which he was not entitled. Doherty also knew, or was reckless in not knowing, that Scotia would suffer losses as a result of the prearranged trades, which had no legitimate business purpose. We find that he acted with scienter.

We also find that Doherty's violations of the Exchange Act were willful. "If one acts with knowledge, he will generally . . . be acting willfully."[167] Doherty knew he was executing prearranged trades at preset prices to participate in TS's scheme to avoid Scotia's Aged Inventory Policy. He also knew that these trades were not legitimate trades executed for business

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[162] *See Dane S. Faber*, 57 S.E.C. 297, 309-10 (2004) (holding that applicant's reliance on his employer firm for regulatory compliance does not defeat a finding of scienter); *Richard H. Morrow*, 53 S.E.C. 772, 779 (1998) (rejecting argument that applicant acted in good faith because of reliance on member firm for due diligence); *Donald T. Sheldon*, 51 S.E.C. 59, 71 (1992) (finding that fraudulent misstatements and omissions by a registered representative are not excused or mitigated by the representative's reliance on his firm's supervision), *aff'd*, 45 F.3d 1515 (11th Cir. 1995).

[163] *Perles*, 55 S.E.C. at 701-02.

[164] *Id.*

[165] *Id.*

[166] *Nicolas*, 2008 FINRA Discip. LEXIS 9, at *54 & n.45 (citing *Hanly v. SEC*, 415 F.2d 589, 596 (2d Cir. 1969)). *See also Guang Lu*, 58 S.E.C. 43, 56 (2005) (holding that a registered person is responsible for his actions and cannot shift blame to his supervisors); *Leonard John Ialeggio*, 52 S.E.C. 1085, 1088 (1996) ("[R]egistered persons are expected to adhere to a standard higher than 'what they can get away with.'"); *Dep't of Enforcement v. Jordan*, No. 2005001919501, 2008 FINRA Discip. LEXIS 41, at *35 (OHO June 18, 2008) (stating that registered representatives cannot avoid their responsibility for complying with applicable laws by relying on their employers).

[167] *Edward J. Mawod & Co. v. SEC*, 591 F.2d 588, 596 (10th Cir. 1979); *see also Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *41 (Nov. 9, 2012) ("A willful violation under the federal securities laws simply means 'that the person charged with the duty knows what he is doing.'") (internal citations omitted).

purposes, but were instead sham transactions in which ownership never changed. Because of our willfulness finding, Doherty is statutorily disqualified from the securities industry.[168]

Accordingly, we find that Doherty willfully violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010, as alleged in cause one of the Complaint.

B. Causes Two and Three

Enforcement pleaded causes two and three as alternatives to cause one. Because we find liability under cause one, we dismiss without discussion the alternative allegations of causes two and three.[169]

V. Sanctions

"[The SEC has] held that violations involving fraud are particularly serious and should be subject to the most severe sanctions."[170] For willfully violating Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010, we suspend Doherty from associating with any FINRA member firm in any capacity for two years and order him to pay Scotia restitution of $56,093, plus interest from the date of his last prearranged trade, June 30, 2015.

To determine an appropriate sanction, we turn to FINRA's Sanction Guidelines ("Guidelines").[171] The General Principles instruct us to consider, where appropriate, previous corrective action imposed by a firm on an individual respondent based on the same conduct.[172] "With regard to a firm's prior termination of the respondent's employment based on the same conduct at issue in a subsequent FINRA disciplinary proceeding, Adjudicators should consider whether a respondent has demonstrated that the termination qualifies for any mitigative value,

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[168] *See* Article III, Section 4 of FINRA's By-Laws (incorporating Section 3(a)(39) of the Exchange Act); Section 3(a)(39) of the Exchange Act (defining "statutory disqualification" and incorporating by reference Section 15(b) of the Exchange Act which, in Section 15(b)(4)(D), makes any willful violation of the Exchange Act or Exchange Act Rules a statutorily disqualifying event).

[169] *See Dep't of Enforcement v. Escarcega*, No. 2012034936005, 2016 FINRA Discip. LEXIS 5, at *5 (OHO Feb. 29, 2016) (dismissing causes of action pleaded in the alternative after finding liability on more significant violation), *aff'd*, 2017 FINRA Discip. LEXIS 32 (NAC July 20, 2017); *Dep't of Enforcement v. Ottimo*, No. 2009017440201, 2015 FINRA Discip. LEXIS 42, at *4 (OHO July 10. 2015) (same), *aff'd*, 2017 FINRA Discip. LEXIS 10 (NAC Mar. 15, 2017), *reversed and remanded in part*, Exchange Act Release No. 83555, 2018 SEC LEXIS 1588 (June 28, 2018).

[170] *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *45 (Mar. 27, 2017), *petition for review denied*, 733 F. App'x 571 (2d Cir. 2018).

[171] *See* FINRA Sanction Guidelines (2019), http://www.finra.org/Industry/Sanction-Guidelines. *See also Success Trade Sec.*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *80 (Sept. 28, 2017) (recognizing FINRA's Sanction Guidelines as a benchmark in conducting a review of sanctions).

[172] Guidelines at 5 (General Principle No. 7).

keeping in mind the goals of investor protection and maintaining high standards of business conduct."[173] BGC terminated Doherty for the misconduct at issue. Based on the circumstances of this case, and after considering Doherty's testimony and the evidence before us, we conclude that BGC's termination of Doherty provides some mitigation with respect to the sanctions we impose.[174]

We next turn to the Principal Considerations in Determining Sanctions.[175] We acknowledge that certain aggravating factors are not present here. For instance, Doherty does not have a disciplinary history and his misconduct did not directly harm public customers.[176] We balance that, however, against many aggravating factors.

First, Doherty attempted to conceal his misconduct from his firm and to shift responsibility for his actions to BGC's compliance department.[177] Although Doherty admitted that he executed the transactions at issue at preset prices, he has not accepted responsibility for willingly executing prearranged trades designed solely to evade Scotia's Aged Inventory Policy. Throughout this proceeding, Doherty deflected responsibility by suggesting that BGC's compliance department had approved of the prearranged trading scheme. Doherty argued that he never tried to hide his misconduct. We disagree. Doherty disclosed only select portions of his plan to Eckert and Sulfaro, used a code word to disguise his trading, split return-leg tickets, and sold short to conceal his misconduct.[178] We find Doherty's efforts to shift responsibility for his actions and conceal his misconduct from the firm aggravating.[179]

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[173] *Id.*

[174] *See Saad v. SEC*, 873 F.3d 297, 302-03 (D.C. Cir. 2017) (recognizing that a firm's disciplinary action prior to regulatory detection may be considered mitigating). In pre-hearing submissions, Doherty contended that he is financially unable to pay monetary sanctions. *See* Guidelines at 6 (General Principle No. 9). He did not, however, adduce evidence to support the claims and did not testify on the issue at the hearing. The burden is on the respondent to provide evidence of an inability to pay. *Id.* We find that Doherty has not met that burden.

[175] *See* Guidelines at 7-8.

[176] *See Dep't of Mkt. Regulation v. Naby*, No. 20120320803-01, 2017 FINRA Discip. LEXIS 27, at *32 (NAC July 24, 2017) (acknowledging that the absence of certain aggravating factors, such as disciplinary history and harm to the investing public, may affect sanctions).

[177] Guidelines at 7 (Principal Consideration Nos. 2, 10).

[178] Doherty contended that, when BGC told him that the firm intended to review the recordings of his telephone conversations with TS, he told his supervisors to "listen for 'Melissa.'" Tr. 215. He contends that this should be mitigating. Doherty, however, did not offer this information prior to detection by the firm, although he had sufficient opportunities to do so. We do not consider his conduct after the firm began its investigation mitigating. *Cf. Dep't of Enforcement v. Rubin*, No. 2012033832501, 2018 FINRA Discip. LEXIS 23, at *19 (NAC Oct. 3, 2018) (rejecting respondent's mitigation argument because he did not accept responsibility before member firm detected his misconduct).

[179] *See Dep't of Enforcement v. Clements*, No. 2015044960501, 2018 FINRA Discip. LEXIS 11, at *66-68 (NAC May 17, 2018) (finding respondent's failure to accept responsibility for his actions and attempts to shift blame

We also find it aggravating that Doherty acted intentionally or, at a minimum, recklessly.[180] The sole purpose of Doherty's prearranged trading scheme was to avoid Scotia's Aged Inventory Policy, and he knew that Scotia would incur commission costs for these sham transactions. He agreed to conceal the trades by using a secret code word, sometimes splitting the ticket on the return trip, and reversing the order of purchases and sales. At every step, Doherty exhibited intent and knowledge. We find the intentional nature of his misconduct aggravating.[181]

We also find it aggravating that Doherty engaged in a pattern of misconduct that spanned two months and involved 19 series of prearranged transactions (approximately 50 individual trades).[182] Furthermore, Doherty stopped the prearranged trading scheme only when Scotia fired TS for prearranged trading. Also aggravating is the harm that Doherty's misconduct caused Scotia.[183] Because Doherty executed transactions that had no real business purpose for Scotia, the firm incurred commission costs of $56,093 for no reason.

Conversely, Doherty benefitted from his misconduct. This too is aggravating.[184] Doherty testified that he generally earned approximately one-third of the commissions he generated for BGC (adjusting for the costs and expenses deducted from his 55 percent payout). Crediting Doherty with his one-third estimate, he stood to earn approximately $18,700 in two short months, solely from the commissions Scotia paid BGC. Additionally, he engendered goodwill with a difficult customer who, as Doherty's second-largest account, Doherty had an interest in maintaining. Overall, we find that Doherty benefitted from his misconduct and that this fact is aggravating.[185]

Having considered potentially aggravating and mitigating factors, we turn next to the violation-specific Guidelines for fraud.[186] The Guidelines recommend, for intentional or reckless misconduct, a fine of $10,000 to $155,000, and urge adjudicators to strongly consider a bar in all capacities.[187] The Guidelines advise that where mitigating factors predominate, Adjudicators should consider suspending the individual for a period of six months to two years.[188] Mitigating

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aggravating); *Dep't of Enforcement v. Casas*, No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *45 (NAC Jan. 13, 2017) (finding aggravating respondent's "refusal to admit wrongdoing and his continued finger-pointing").

[180] Guidelines at 8 (Principal Consideration No. 13).

[181] *See Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *11 (Sept. 3, 2015) (finding respondent's "high level of scienter" aggravating).

[182] Guidelines at 7-8 (Principal Consideration Nos. 8, 9, 17).

[183] *Id.* (Principal Consideration No. 11).

[184] *Id.* (Principal Consideration No. 16).

[185] *See Dep't of Enforcement v. Wicker*, No. 2016052104101, 2019 FINRA Discip. LEXIS 13, at *30 (OHO Mar. 21, 2019) (considering respondent's monetary gain as an aggravating factor), *appeal docketed* (NAC Apr. 12, 2019).

[186] *See* Guidelines at 89 (Fraud, Misrepresentations or Material Omissions of Fact).

[187] *Id.*

[188] *Id.*

factors do not predominate here. Based on the evidence before us, however, we find that BGC's termination of Doherty has "materially reduced the likelihood of misconduct in the future."[189] In light of Doherty's overall situation, including our determination to afford some mitigative effect to BGC's termination of Doherty, we do not find that a bar in all capacities is necessary here to remediate Doherty's misconduct and protect the investing public. Rather, we find that a two-year suspension from associating with any firm in any capacity is sufficient to deter future misconduct and provide investor protection.[190]

The General Principles Applicable to All Sanctions Determinations recommend that, where appropriate to remediate misconduct, we consider ordering restitution.[191] "Restitution is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer a loss."[192] It is appropriate for us to order restitution here because an identifiable victim of Doherty's fraudulent conduct, Scotia, suffered a quantifiable loss of $56,093 in unnecessary commissions.[193] We find that Doherty's execution of prearranged trades was the cornerstone of TS's fraudulent scheme and that his actions proximately caused Scotia to lose $56,093.[194] As directed by the Sanction Guidelines, we also order Doherty to pay interest on the base amount of the restitution order, running from the date of the last prearranged trade, June 30, 2015.[195]

We see no remedial value in fining Doherty, but we order him to pay restitution to Scotia of $56,093, plus interest on the unpaid balance from June 30, 2015, the date of the last prearranged trade, until paid in full. Interest shall accrue at the rate set in 26 U.S.C. Section 6621(a)(2).[196] Our order for Doherty to pay restitution to Scotia ensures that he is deprived of his ill-gotten gains and serves to make Scotia, the victim of Doherty's fraudulent scheme, whole.[197]

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[189] *Id.* at 5 (General Principle No. 7).

[190] As a result of our two-year suspension of Doherty, he must requalify by examination before re-entering the securities industry in a registered capacity.

[191] Guidelines at 4 (General Principle No. 5).

[192] *Id.*

[193] *See Success Trade*, 2017 SEC LEXIS 3078, at *86 (affirming FINRA's restitution award where it returned to customers funds they were wrongfully deprived of as a result of respondent's misconduct); *McGee*, 2017 SEC LEXIS 987, at *45 (affirming FINRA's restitution award against respondent where an identifiable individual suffered a quantifiable loss that was proximately caused by the respondent's misconduct).

[194] CX-43 and CX-44 identify the individual trades that make up Doherty's 19 sets of prearranged transactions and Scotia's corresponding losses. Enforcement examiner Segarra testified that CX-44 contained an error in the calculation of Scotia's total losses, whereby the losses were understated by $320. Tr. 426-27. Thus, taking into account the error identified by Segarra, we order Doherty to pay restitution of $56,093.

[195] *See* Guidelines at 11 (Restitution—Payment of Interest).

[196] The interest rate set in Section 6621(a)(2) of the Internal Revenue Code is used by the Internal Revenue Service to determine interest due on underpaid taxes and is adjusted each quarter.

[197] *See* Guidelines at 4-5 (General Principle Nos. 5, 6).

VI. Order

We find that, as alleged in cause one, Brian Colin Doherty willfully violated Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010 by engaging in a fraudulent, prearranged trading scheme in May and June 2015.[198] Causes two and three were pleaded in the alternative. Given our finding of liability under cause one, we dismiss causes two and three. Our finding that Doherty willfully violated the Exchange Act subjects him to statutory disqualification.

For this misconduct, we suspend Doherty for two years from associating with any FINRA member firm in any capacity and order him to pay Scotia Capital USA, Inc. restitution of $56,093, plus interest on the unpaid balance from June 30, 2015, until paid in full. Interest shall accrue at the rate set in 26 U.S.C. Section 6621(a)(2). As a result of the two-year suspension, Doherty must requalify before re-entering the industry in any registered capacity. Restitution is due and payable immediately upon this decision becoming FINRA's final disciplinary action. If this decision becomes FINRA's final disciplinary action, Respondent's suspension will begin with the opening of business on Monday, August 5, 2019 and end with the close of business on Wednesday, August 4, 2021.

Respondent is also ordered to pay costs in the amount of $7,897.48, which includes a $750 administrative fee and $7,147.48 for the cost of the transcript. The costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action.

SO ORDERED.

Carla Carloni
Hearing Officer
For the Hearing Panel

Copies to:

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Richard Chin, Esq. (via email)
Lara Thyagarajan, Esq. (via email)

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[198] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.