BEFORE THE BUSINESS CONDUCT COMMITTEE
OF THE
CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

In the Matter of:

David C-H Ho
440 S. LaSalle Street
Suite 1925
Chicago, IL 60605
Respondent

File No. 04-0014

BCC PANEL:
Mr. J. Slade Winchester, Chairman
Mr. Philip N. Hablutzel
Mr. Richard I. Fremgen

COUNSEL:

For the Exchange: Mr. Andrew D. Spiwak, Esq.
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For the Respondent: Mr. Robert E. Lewin, Esq.
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For the Business Conduct Committee: Mr. Richard S. Klott, Esq.
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Deerfield, Illinois 60015
DECISION AND ORDER

I. PROCEDURAL BACKGROUND

This disciplinary proceeding was instituted by the Business Conduct Committee (the “BCC” or the “Committee”) of the Chicago Board Options Exchange, Incorporated (the “CBOE” or the “Exchange”) under Chapter 17 of the Exchange’s rules. On or about July 20, 2004, pursuant to the authorization of the BCC, the CBOE Office of Enforcement (“Enforcement”) issued a Statement of Charges (the “Charges”) [See Exch. Ex. 2.] against the Respondent (“Respondent”), David C-H Ho (“Mr. Ho” or “DHO”), for certain alleged violations of Exchange Rules 4.1, 4.2, 8.1, RG00-52, and Federal Reserve Board Regulation X. [See Exch. Ex. 9.] On or about August 17, 2004, Respondent, by and through his attorney, filed an Answer to the Charges in which he admitted some facts, denied others and denied the Charges without asserting any affirmative defenses. [See Exch. Ex. 3.]

Pursuant to Exchange Rule 17.6, a hearing (the “Hearing”) was held in this matter before a panel of the Committee (the “Panel”) in Chicago, Illinois on February 24, 2005. During the course of the Hearing, both the Exchange and the Respondent were given a full opportunity to present evidence pertaining to the Charges. In accordance with Exchange Rule 17.9, the Panel subsequently presented its findings, conclusions, and sanction recommendation to a majority of the Committee.

This Decision and Order represents the decision of a majority of the members of the BCC and is based solely on the record established during the Hearing held in this matter. All findings and conclusions contained herein are based upon a preponderance of the evidence.

II. THE CHARGES

The Charges allege the following facts. From on or about January 19, 2004 through on or about January 26, 2004, Mr. Ho was registered to conduct business on the Exchange trading floor as a Market-Maker and nominee of DRO WEST Trading, LLC (the “Firm”), a member organization of the Exchange. On or about January 27, 2004, Mr. Ho terminated his membership with the Exchange, and remained a terminated Exchange Member until on or about March 22, 2004, at which point he became an effective Exchange member and (again) a nominee and Market-Maker of the Firm. The Charges also allege that during all relevant time periods noted in the Charges, the Firm was an Exchange member organization registered to conduct business on the floor in accordance with Exchange Rules as a floor brokerage and market-maker business.

The Charges allege that during all relevant periods described in the Charges, Exchange Rule 4.1—Just and Equitable Principles of Trade1 (“Rule 4.1”) [See Exch. Ex. 9 at 1.], Exchange Rule 4.2—Adherence to Law2 (“Rule 4.2”) [See Exch. Ex. 9 at 2.], Exchange Rule 8.1—Market-Maker

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1 Exchange Rule 4.1 provides that: “No member shall engage in acts or practices inconsistent with just and equitable principles of trade. Persons associated with members shall have the same duties and obligations as members under the Rules of this Chapter.”

2 Exchange Rule 4.2 provides that: “No member shall engage in conduct in violation of the Securities Exchange Act of 1934, as amended, rules or regulations thereunder, the Constitution or the Rules of the Exchange, or the Rules of the Clearing Corporation insofar as they relate to the reporting or clearance of any Exchange transaction, or any written interpretation thereof. Every member shall so supervise persons associated with the member as to assure compliance therewith.”
Defined\(^3\) (“Rule 8.1”) [See Exch. Ex. 9 at 3.], Exchange Regulatory Circular RG00-52—Market-Maker Use of Orders/Floor Broker Representation of Orders\(^4\) (“RG00-52”) [See Exch. Ex. 9 at 4.], and Federal Reserve Board Regulation X—Borrowers of Securities Credit (“FRB Reg X”) [See Exch. Ex. 9 at 5.], were all in full force and effect.

The Charges allege that as set forth in the Decision in CBOE Disciplinary Case No. 02-0018 (the “Decision”) [See Exch. Ex. 2B and Ex. 4.], Mr. Ho agreed to settle a previous disciplinary case brought against him pursuant to Chapter XVII of the Exchange Rules by agreeing to a sanction that included an 8-consecutive week suspension from Exchange membership or association with an Exchange member or organization, effective from January 19, 2004 through March 12, 2004. The Charges also allege that as part of the settlement process leading to the issuance of the Decision, Mr. Ho signed and submitted an Offer of Settlement on October 9, 2003 (the “Offer”). [See Exch. Ex. 2A.] In signing and submitting the Offer, Mr. Ho expressly agreed to the following restrictions on his trading activity as part of the 8-consecutive week suspension:

“…during this suspension, Respondent may enter **closing options orders only** from off of the Exchange Floor within the limits of CBOE Rule 8.7.” (Emphasis supplied)

The Offer and the Order in the Decision (“Decision Order”) both further specified that:

“For purposes of this sanction, ‘closing options orders’ shall be defined as strictly limited to orders to purchase only those option series that Respondent was short immediately prior to the start of his suspension, and orders to sell only those options series that Respondent was long immediately prior to the start of his suspension, in total quantities for each series that are no greater than the total quantity that Respondent was short or long, respectively, in each series immediately prior the start of his suspension. Any opening transactions or intra-day scalping in options classes, as well as any stock transaction in Respondent’s market-maker account(s), are all strictly prohibited.”\(^5\)

The Charges include two categories of misconduct. The Charges in the first category allege that even though Mr. Ho signed and submitted the Offer, in which Mr. Ho expressly agreed to abide by all the restrictions in the Decision during his 8-consecutive week suspension, Mr. Ho nevertheless violated those restrictions by effecting no fewer than 14 opening options transactions for his DHO market-maker account on numerous trade dates during his 8-consecutive week suspension, including on or about January 20, 2004, January 21, 2004, January 27, 2004, February 17, 2004, February 18, 2004, February 19, 2004, March 8, 2004, and March 12, 2004. [See Exch. Ex. 2C.] The Charges also allege that even though Mr. Ho signed and submitted the Offer, in which he expressly agreed to abide by all the restrictions in the Decision Order above during his 8-consecutive week suspension, Mr. Ho nevertheless violated those restrictions by effecting no fewer than 693 stock transactions (both opening and closing) for his DHO market-maker account on various trade dates during his 8-consecutive week suspension.

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\(^3\) Exchange Rule 8.1 provides that: “A Market-Maker is an individual (either a member or nominee of a member organization) who is registered with the Exchange for the purpose of making transactions as dealer-specialist on the floor of the Exchange in accordance with the provisions of this Chapter. Registered Market-Makers are designated as specialists on the Exchange for all purposes under the Securities Exchange Act of 1934 and the Rules and Regulations thereunder. Only transactions that are either (i) initiated on the floor of the Exchange or (ii) initiated from off the floor by a Market-Maker who elects to receive Market-Maker treatment for off-floor orders and who thereby becomes subject to the special requirements of paragraph B of Interpretation and Policy .03 under Rule 8.7 pertaining to Market-Maker treatment for off-floor orders shall count as Market-Maker Transactions for purposes of this Chapter and Rules 3.1 and 12.3(e).”

\(^4\) Exchange Regulatory Circular RG00-52 provides, in pertinent part, as follows: “Only a Market-Maker on a seat may initiate an order for his Market-Maker account. The term “initiated” has been interpreted as meaning the making of the investment decision in connection with the execution of a transaction or obtaining of a position or the entry or cancellation of an order. Clerks and other members or non-members may not initiate orders for a Market-Maker’s account. Inactive nominees do not have membership status and may not enter orders for a Market-Maker account.”

\(^5\) See Exch. Ex 2A, Footnote 1; See also, Exch. Ex. 2B, Footnote 1.
The Exchange alleges that the acts, practices, and conducts described in this paragraph constitute violations of Exchange Rule 4.1 by Mr. Ho, in that he violated just and equitable principles of trade when he violated the terms of a suspension that he had expressly agreed to follow when he settled CBOE Disciplinary Case No. 02-0018 (“Case No. 02-0018”). [See Exch. Ex. 4.]

The Charges in the second category allege that even though Mr. Ho was a terminated member from on or about January 27, 2004 through on or about March 19, 2004, Mr. Ho nevertheless effected no fewer than 14 opening options transactions for his DHO Market-Maker account during the period when his membership was terminated. [See Exch. Ex. 2C.] The Charges also allege that even though Mr. Ho was a terminated member from on or about January 27, 2004 through on or about March 19, 2004, Mr. Ho nevertheless effected no fewer than 208 opening stock transactions for his DHO Market-Maker account during the time period when his membership was terminated. [See Exch. Ex. 2D.] The Exchange alleges that the acts, practices, and conducts described in this paragraph constitute violations of Exchange Rules 4.1, 4.2, and 8.1, RG00-52, and FRB Reg X, by Mr. Ho, in that Mr. Ho caused and accepted market-maker treatment for numerous option and stock transactions, to which he was not entitled as a terminated member.

III. MOTION TO DISQUALIFY A MEMBER OR MEMBERS OF THE PANEL

Prior to the start of the Hearing, the Respondent, by and through his attorney, filed a motion with the Panel titled “Motion to Disqualify a Member or Members of the Panel” (the “Disqualification Motion”) which requested that those members of the Panel, appointed to hear this proceeding, who were present at the July 14, 2004 BCC meeting at which the Charges in the instant case were authorized, disqualify themselves, as members of the Panel. The Exchange opposed Respondent’s Disqualification Motion.

Specifically, the following are the principal arguments of Respondent’s Disqualification Motion which were made “upon information and belief:”

1. That the United States Supreme Court in Withrow vs. Larkin\(^6\) states ‘a fair trial in a fair tribunal is a basic requirement of due process.’\(^7\) The Court also stated that this applies to administrative agencies which adjudicate as well as to courts.\(^8\) The Court further stated that “[n]ot only is a biased decisionmaker constitutionally unacceptable but\(^9\) ‘our system of law has always endeavored to prevent even the probability of unfairness.’\(^10\)

2. Respondent argues that in July of 2004, the BCC met to consider whether there was probable cause to believe that the Respondent had committed any violations. Respondent argues that Exchange Staff present during this meeting made certain ex parte communications to the Panel Members of the BCC concerning the merits of this case. Respondent also argues that Exchange Staff made certain disparaging remarks to the Panel members of the BCC concerning the Respondent.

3. Respondent also references Exchange Rule 17.4(d) which provides in pertinent part, as follows: “No member or person associated with a member shall make or knowingly cause to

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\(^6\) Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. (1456) at 1464.
\(^9\) Withrow v. Larkin, supra at 1464.
\(^10\) In re Murchison, supra at 136.
be made an ex parte communication\textsuperscript{11} with any member of the Business Conduct Committee…”

4. Respondent further argues that Illinois Supreme Court Rules, Article I, Rule 63, Canon 3, Section A (4)(a)(ii) provides that a judge shall make provision to “…promptly notify all other parties of the substance of the ex parte communications and allow such parties an opportunity to respond.”

5. Respondent finally argues that since the Respondent was given no notice of any ex parte communications, he had no opportunity to controvert the statements made by Exchange Staff. Therefore, the Respondent contends that the uncontroverted statements made by Exchange Staff have biased the Panel Members against the Respondent and consequently the Respondent cannot receive a fair hearing before these Panel members.

At the outset, it is necessary to set forth and explain the reasons for and the analysis of the Panel’s decision to deny the Respondent’s Disqualification Motion.

First, members of the Exchange agree to abide by the rules of the Exchange, including the Exchange’s rules pertaining to the conduct of disciplinary proceedings, when such persons become members.

Second, the rules of the Exchange, including the Exchange’s rules relating to conduct of the disciplinary procedures have been approved by the Securities and Exchange Commission.

Third, the rules of the Exchange relating to the conduct of disciplinary proceedings were applied to the Respondent in the same manner that they have been applied to others who have been the subject of Exchange disciplinary proceedings.

Fourth, Rule 17.4(d) specifically states “No member or person associated with a member shall make or knowingly cause to be made an ex parte communication with any member of the Business Conduct Committee or Board concerning the merits of any matter pending under Chapter XVII of the Rules. No member of the Business Conduct Committee or Board shall make or knowingly cause to be made an ex parte communication with any member or any person associated with a member concerning the merits of any matter pending under Chapter XVII of the Rules.” Moreover, Rule 17.4(d) does not prohibit the members of the BCC, the Exchange’s Regulatory Staff, or Enforcement from discussing a pending investigation or disciplinary proceeding at a BCC meeting in connection with an adjudication of an investigation pursuant to the Exchange’s minor rule plan, a determination of whether to impose informal discipline, a determination of whether to authorize a statement of charges, a determination of whether to take no further action, or a determination of whether to accept an offer of settlement. In order to ensure that the Exchange’s disciplinary process functions efficiently, it is essential that in the above situations, all persons involved in the settlement process or the pre-authorization of charges process have the flexibility to endeavor to dispose of a disciplinary matter without formal proceedings being initiated.

\textsuperscript{11} See CBOE Rule 17.4(01) which defines “ex parte communication” to mean “…[A]n oral or written communication made without notice to all parties, that is, regulatory staff and Subjects of investigations or Respondents in proceedings. A written communication is ex parte unless a copy has been previously or simultaneously delivered to all interested parties. An oral communication is ex parte unless it is made in the presence of all interested parties except those who, on adequate prior notice, declined to be present.”
Fifth, under the rules of the Exchange, the BCC is the body designated both to decide whether to accept offers of settlement and to preside over disciplinary hearings.

Sixth, Mr. Ho will have the right, just like any other respondent, to fully avail himself of appeal procedures if he disagrees with the BCC's verdict in this Hearing.

Seventh, Respondent’s memorandum in support of his Disqualification Motion, Respondent references Illinois Supreme Court Rules, Article I, Rule 63, Canon 3, Section A (4)(a)(ii) which is a rule of Illinois judges’ canons of ethics titled A Judge Should Perform the Duties of Judicial Office Impartially and Diligently. This rule pertains to judicial performance of elected or appointed judges in the State of Illinois and does not make any reference otherwise. This rule has no application as to how a hearing panel for a self regulatory organization (“SRO”), such as this one, should fulfill its responsibilities, and makes no reference as such.

Eighth, the Respondent’s reference to the Withrow v. Larkin case is not on point with the facts of this case. In Withrow, that dealt with a hearing board that had authority to act as both the investigatory body and the adjudicatory body in the same case. In this case, the BCC is not involved in the investigations of Exchange members or persons associated with Exchange members. The Exchange’s Regulatory Services Division conducts the investigations and the BCC acts as the adjudicatory body.

Ninth, the Respondent relies heavily on In Re Murchison, believing that case to be very similar to this case. In that case, the prosecutor made the determination that there was probable cause to believe that a violation has occurred and then he proceeded to hear the trial. The Murchison case, however, is clearly distinguishable from this case because in Murchison, there was a single judge acting both as the investigatory body, which the Panel does not do, and as the adjudicatory body. The Respondent offered no factual evidence in his Disqualification Motion that the alleged ex parte communication took place. Pursuant to and in accordance with this rule, the Panel finds that there was no ex parte communication made by Exchange Staff.

Tenth, there is insufficient evidence to suggest that the Panel Members are biased towards Respondent and that the Respondent will not receive a fair hearing. In Withrow, supra at 1464, the court stated that there is a probability of actual bias on the part of a decisionmaker in cases “in which the adjudicator has a pecuniary interest in the outcome” and in which he has been the target of personal abuse or criticism from the party before him.”12 In this case, the Panel Members have no pecuniary interest in the outcome, and there has been no evidence presented that the Panel Members were targets of any type of abuse or criticism. The Respondent’s sole argument is based on alleged statements that were made in front of the BCC at the July 2004 BCC meeting, of which the Respondent has no substantive language as to what those statements were about. Therefore, the Respondent’s groundless, unsubstantiated, and uncorroborated claims do not rise to the level of producing possible unfairness that the Court stated in Withrow.

Eleventh, it is well-established that “‘fair procedure’ in SRO disciplinary proceedings gives rise to a due-process-like requirement that the decision-maker be impartial.” D’Alessio and D’Alessio Securities, Inc. v. Securities and Exchange Commission14, In D’Alessio, D’Alessio argued that since he and his firm previously filed a lawsuit against the New York Stock Exchange (the “NYSE”) and its highest officials, and that the allegations in the suit may embarrass the NYSE and its highest officials,

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14 380 F.3d 112.
all the NYSE employees, including the hearing officer, suffered from a conflict of interest with respect to D’Alessio and his firm, and thus were incapable of providing a fair hearing. The Court in D’Alessio ruled that a hearing officer’s participation in D’Alessio’s disciplinary proceeding did not render the proceeding unfair. The Court further stated that if the hearing officer is the specific target of a civil lawsuit brought by a NYSE member, it is the Court’s assumption that in such a scenario, the hearing officer should not participate in the disciplinary proceedings against the member, since the hearing officer’s interest would likely be directly adverse to the NYSE member’s interest. In this case, there is no evidence to suggest that the Panel Members have any interests that may be adverse to the Respondent’s interests. Respondent’s sole argument is based on alleged, uncorroborated statements made to the BCC. Based on the facts and the Court’s ruling in D’Alessio, the Respondent’s claims in this case do not rise to the level of bias or impartiality.

Finally, it is important to note that the Respondent offered no factual evidence in his Disqualification Motion which reflects an actual bias on the part of these particular Panel Members. With respect to such allegation, the Respondent, only, “upon information and belief”, alleged that Chief Enforcement Attorney (“Chief Enforcement Attorney”) made certain disparaging remarks to the Panel Members of the BCC concerning the Respondent. Additionally, it should be noted that with respect to one Panel Member, he was not present at the July 2004 BCC meeting and without any evidence to the contrary, the other two members of the Panel must be presumed to be without bias. Withrow vs. Larkin, supra, 421 U.S. 35 at 47. Thus, the Panel found no factual evidence presented in the Disqualification Motion which reflects an actual bias on the part of these particular Panel members.

In conclusion, after carefully considering Respondent’s Disqualification Motion and the Exchange’s opposition, the Panel denied Respondent’s Disqualification Motion and the Committee concurs with the Panel’s denial of the Respondent’s Disqualification Motion.

Following the Panel’s denial of the Respondent’s Disqualification Motion, the Respondent’s attorney made a motion requesting that, since the Panel was not composed of at least a majority of the BCC and to prevent a potential retrial of this case, the Panel’s decision denying Respondent’s Disqualification Motion be reviewed by the full BCC for their determination prior to proceeding with the Hearing (“Interlocutory Motion”).

As authority for Respondent’s Interlocutory Motion, Respondent referenced the second sentence of Exchange Rule 17.9 which states “[w]here the Panel is not composed of at least a majority of the members of the Business Conduct Committee, its determination shall be automatically reviewed by a majority of the Committee, which may affirm, reverse or modify in whole or in part or may remand the matter for additional findings or supplemental proceedings.” Exchange Rule 17.9, however, specifically contemplates a Panel’s decision conducted pursuant to Exchange Rule 17.6 and not a Panel’s ruling on a motion made during the Hearing. This is made clear by the first sentence of Exchange Rule 17.9 which states “[f]ollowing a hearing conducted pursuant to Exchange Rule 17.6 of this Chapter, the Panel shall issue a decision in writing, based solely on the record, determining whether the Respondent has committed a violation and imposing the sanction, if any, therefor.” Moreover, the Respondent, in

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15 Id. at 117.
16 Id. at 121.
17 When a Panel Member asked the Respondent’s attorney (“Respondent’s Attorney”), whether he received a list of the people present at that July 2004 meeting and whether he knew that he did not attend the meeting, Respondent’s Attorney answered no and indicated that the Disqualification Motion was made “on information and belief and I’ll apologize in advance, and again, certainly if people had not been present during any phase [of the July 2004 meeting] and they had no discussions with the Prosecutor [Chief Enforcement Attorney] prior to today [the Hearing date], then of course they in my mind would not be prejudiced.” [Transcript at 23-24.]
advancing his argument apparently ignores the provisions of Exchange Rule 17.6(b) titled “Prehearing Procedures” which states, in pertinent part, as follows: “[a]t the request of any party, the Panel or Panel Chairperson shall hear and decide all pre-hearing issues not resolved among the parties.” That is what was done here. Before the start of the Hearing, the Respondent presented his Disqualification Motion to the Panel, the entire Panel heard the Respondent’s arguments in support of the Disqualification Motion as well as the Exchange’s arguments opposing it, and after careful deliberation, the Panel made its determination to deny the Disqualification Motion.

Accordingly, for the foregoing reasons, the Panel decided to deny Respondent’s Interlocutory Motion and the Committee concurs with the Panel’s denial of the Interlocutory Motion.

IV. EVIDENCE PRESENTED AND FINDINGS


The Panel heard testimony at the Hearing. The Exchange called one witness in its direct case: A Senior Investigator in the CBOE Department of Market Regulation; and the Respondent, Mr. Ho testified on his own behalf.

A. Department Of Market Regulation Senior Investigator

A Senior Investigator (the “Senior Investigator”) in the CBOE Department of Market Regulation (“DMR”) was called as a witness on behalf of the Exchange and she identified herself for the record. The Senior Investigator began her testimony by stating that she was currently employed as a senior investigator with the Exchange, had been employed with the Exchange for over four years, and was an investigator for two years before being promoted to a senior investigator. [Tr. at 40.]

When asked by the Chief Enforcement Attorney whether the Senior Investigator was involved in the David Ho investigation surrounding Enforcement File No. 02-0018, the Senior Investigator testified “Yes, I was involved from start to finish.” [Tr. at 41.] Asked by the Chief Enforcement Attorney whether the Senior Investigator was involved in the investigation surrounding Enforcement File No. 04-0014, she answered “Yes.” The Chief Enforcement Attorney then asked the Senior Investigator whether she recognized the document in Tab A of Exchange Exhibit 2A, she replied “Yes I do. This was the statement of charges issued to Mr. Ho on July 20th, 2004 as shown on Page 3 of this document.” [Tr. at 41.]

The Chief Enforcement Attorney then asked the Senior Investigator how was it that the investigation surrounding Enforcement File No. 04-0014 was initiated, the Senior Investigator testified

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18 References to the Hearing Transcript are cited as “Tr. at [page number]”. All transcript cites are to the transcript page numbers, not the exhibit page numbers. Exchange’s exhibit references are “Exch. Ex. [number],” and Respondent’s exhibit references are Resp. Ex. [number].”
that “[t]he investigation was initiated as a result of the decision issued by the Business Conduct Committee… and that the Department of Market Regulation… was aware that Mr. Ho had commenced his suspension for the consecutive eight weeks effective January 19th, 2004…” [Tr. at 42.] The Chief Enforcement Attorney then directed the Senior Investigator’s attention to Exchange Exhibit 2B, titled “Decision Accepting Offer of Settlement” [See Exch. Ex. 2B.] and asked whether she recognized this document as the decision in connection with Enforcement File No. 02-0018 that she previously referred to and the Senior Investigator answered “Yes it is.” [Tr. at 43.] The Chief Enforcement Attorney then asked the Senior Investigator to state for the record what the sanction was [in the decision] and she stated that “[t]he sanction in this matter that was imposed as written on page 3 is that of a censure, a $15,000 fine, an eight-consecutive week suspension from Exchange membership, and from association with any Exchange member or member organization, to be commenced no later than Monday, January 19, 2004, provided that during the suspension, Respondent may enter closing options orders only from off of the Exchange floor within the limits of CBOE Rule 8.7.” [Tr. at 46.]

The Chief Enforcement Attorney then directed the Senior Investigator’s attention to the Footnotes 1 and 2 in the BCC decision order and asked the Senior Investigator what did Footnote 1 specifically reflect. [See Exch. Ex. 2B at 3.] The Senior Investigator answered by stating for the record that “[f]ootnote 1 on page 3 of Document 2B of Exch. Ex. 1 indicates that Mr. Ho can only effect closing options orders, not any opening options orders, for his market-maker account during the eight-week-consecutive suspension. The Footnote 1 also states that no stock transactions, be they opening or closing, may be effected in Mr. Ho’s market-maker account during this eight week suspension.” [Tr. at 47.] The Senior Investigator further testified that Footnote 1 which she just referenced in the disciplinary decision was the identical limitation with respect to closing options orders that was in Footnote 1 of the offer of settlement [See Exch. Ex. 2A.] and that “Footnote 1 of this offer of settlement clearly has the same identical language and says that Mr. Ho may only effect closing options orders only, no opening options order, for his market-maker account during the eight-week suspension, and also that he may effect no stock transactions, be they opening or closing, for his market-maker account during the suspension time period.” [Tr. at 48.] The Senior Investigator then testified that “[o]n page 3 of the document, we see that on October 9th, 2003, Mr. Ho signed and agreed to this offer of settlement.] [Tr. at 48.]

The Chief Enforcement Attorney then directed the Senior Investigator’s attention to Footnote 1 on page 1 of Exchange Exhibit 2A, titled “Offer of Settlement” and asked the Senior Investigator whether she saw the Footnote and whether that Footnote 1 is the identical limitation with respect to closing orders that was referred to in Footnote 1 in the disciplinary decision. The Senior Investigator replied “Yes, it is. Footnote 1 of this offer of settlement clearly has the same identical language, and says that Mr. Ho may only effect closing options orders only, no opening options orders, for his market-maker account during the eight-week suspension, and also that he may effect no stock transactions, be they opening or closing, for his market-maker account during the suspension time period.” [Tr. at 47 – 48.] When the Chief Enforcement Attorney asked whether “this offer of settlement is ordered to be signed by Mr. Ho?”, the Senior Investigator testified “Yes. On page 3 of this document, we see that on October 9th, 2003, Mr. Ho signed and agreed to this offer of settlement.” [Tr. at 48.]

The Senior Investigator, after being asked by the Chief Enforcement Attorney how she proceeded with the investigation surrounding 04-0014, the Senior Investigator explained that the DMR staff knew that Mr. Ho had started his 8-consecutive week [suspension] effective January 19, 2004 [Tr. at 42.] and they wanted to make sure that Mr. Ho was complying with the trading restrictions set forth in the Decision Order issued by the Committee. [Tr. at 54; See Exch. Ex. 2B and Exch. Ex. 4.] The Senior Investigator testified that “we determined to review any and all trading activity in his [Mr. Ho’s] market-
maker account effected on any and all trade dates during the 8-consecutive week suspension time period.” (the “Suspension Time Period”). [Tr. at 54-55.] The Senior Investigator then testified that she contacted his [Mr. Ho’s] clearing firm, ABN AMRO Sage (the “Clearing Firm”) to obtain all of his [Mr. Ho’s] market-maker account statements for all trade dates during that time period.” [Tr. at 55.] The Senior Investigator testified that the Clearing Firm provided her “…with all of these account statements, and then once having received them…[she] carefully reviewed [them] day by day to see if any options and stock trades had been effected in his market-maker account.” [Tr. at 55.] The Senior Investigator explained that if she detected any trading activity in options or stocks on a given trade date during the eight-week suspension time period, she “…then reviewed his [Mr. Ho’s] start of day position for that particular option series or stock first to see if he [Mr. Ho] had a position or if he was flat…” [Tr. at 55.] After seeing that position, the Senior Investigator examined “…the trading activity to determine if a particular option or stock trade was opening or closing.” [Tr. at 55.] The Senior Investigator further explained that after having completed this analysis, she “…input it all into two spreadsheets…[o]ne was all stock trading activity, the other was for all opening options trading activity.” [Tr. at 55.] The Senior Investigator testified that “…during my review, I also noticed that Mr. Ho had terminated his Exchange membership effective January 27th, 2004, and that he continuously remained a terminated Exchange member until effective the morning of March 22nd 2004.” [Tr. at 55–56.]

The Chief Enforcement Attorney next directed the Senior Investigator’s attention to Exchange Exhibit 8 of Exchange Exhibit Book I and asked how she in fact determined that Mr. Ho was terminated. The Senior Investigator then testified that she determined that Mr. Ho’s Exchange membership was terminated after she examined Mr. Ho’s Exchange membership history. The Senior Investigator then demonstrated, in detail, to the Panel the process she used to determine that Mr. Ho’s Exchange membership was terminated [Tr. at 57 - 58; See Exch. Ex. 8 at 1 - 2.] The Senior Investigator then testified that the relevancy of what was just looked at shows that “…Mr. Ho at no point between January 27th, 2004, and before March 22nd, 2004 (the “Termination Time Period”), applied for Exchange membership, and that he was continuously a terminated member during this time period.”[Tr. at 58; See Exch. Ex. 8 at p. 1; Tr. at 58.]

The Chief Enforcement Attorney, after indicating to the Senior Investigator that he has marked Exchange Exhibit BOOK II, titled “David Ho (“DHO”) Market-Maker Trading Activity Sheets (January 20, 2004 – March 19, 2004);” Exchange Exhibit BOOK III, titled “David Ho (“DHO”) Market-Maker Detailed Account/Trading Sheets (January 2004);” Exchange Exhibit BOOK IV, titled “David Ho (“DHO”) Market-Maker Detailed Account/Trading Sheets (February, 2004);” and Exchange Exhibit BOOK V, titled “David Ho (“DHO”) Market-Maker Detailed Account/Trading Sheets (March 2004)” asked the Senior Investigator whether these were the market-maker trading sheets for the account of David Ho that she had obtained from ABN AMRO Sage, the Senior Investigator testified that “[w]hat I obtained and what is contained within Exchange Exhibits II through V are Mr. Ho’s account statements. The trading sheets are a subset of the account statements.” [Tr. at 58 – 59.]

When the Chief Enforcement Attorney asked the Senior Investigator whether she conducted an analysis of the trading sheets that have been titled Books II through V, the Senior Investigator answered “Yes” [Tr. at 66.] and then she testified that she did review all of the account statements. [Tr. 66 – 67.] Asked by the Chief Enforcement Attorney what was her analysis, the Senior Investigator testified that she had conducted an analysis of the account statements contained in Exchange Exhibit Books II through V and she then provided a detailed explanation as to how she conducted her analysis. [Tr. at 66 - 67.] The Senior Investigator explained that after reviewing the documentation contained in Exchange Exhibit BOOKS II through V, she created two spreadsheets; one spreadsheet in which she noted any and all stock transactions effected in Mr. Ho’s DHO market-maker account during his suspension time
period and his termination time period; and the second spreadsheet in which she noted any opening options transactions effected in the DHO, Mr. Ho’s acronym, market-maker account during both his suspension time period and his termination time period. [Tr. at 67.]

Next, the Chief Enforcement Attorney directed the Senior Investigator’s attention to Exchange Exhibit 2C, identified this document as “Appendix C to the Statement of Charges in Case No. 04-0014” and asked the Senior Investigator whether she recognized this document. The Senior Investigator answered “Yes” [Tr. at 67.] In response to the Chief Enforcement Attorney’s question asking what the document was, the Senior Investigator testified “[t]hat this document shows the spreadsheet that I created for my analysis of any and all opening options transactions effected in the DHO market-maker account during Mr. Ho’s suspension time period and termination time period. [Tr. at 67 – 68.]

The Senior Investigator then described in detail, for the record, the various fields found in Exch. Ex. 2C. [Tr. at 68–69; See Exch. Ex. 2C.] The Senior Investigator next testified, in detail, how she conducted her analysis to create the chart in Exch. Ex. 2C. She explained that after noting any trading activity that was possibly violative, she input the findings, from her review of Mr. Ho’s account statements in Exchange Exhibits II through V, into Spreadsheet #1. [Tr. at 69–70.] The Senior Investigator explained that her next step was to determine if any of the transactions were opening or closing transactions and if there were any, then to what degree. To make that determination, the Senior Investigator testified that she utilized the position summaries contained in Mr. Ho’s account statements provided by the Clearing Firm. [See Exchange Exhibits II through V; Tr. at 70.] When the Chief Enforcement Attorney asked the Senior Investigator, what were her findings from the analysis of Mr. Ho’s account statements with respect to the documentation shown as Exchange Exhibit 2C, she testified that “[m]y findings from this review were that during Mr. Ho’s suspension time period, no fewer than 14 opening options transactions were effected in the DHO market-maker account and also that during the termination time period, no fewer than 14 opening options transactions were effected in the DHO market-maker account. [Tr. at 75.]

The Chief Enforcement Attorney then directed the Senior Investigator’s attention to Exchange Exhibit 2D and asked the Senior Investigator whether she recognized this document. The Senior Investigator answered “Yes, I do.” [Tr. at 76.] Asked by the Chief Enforcement Attorney what this document was, the Senior Investigator testified that “[t]his document is a spreadsheet I created to reflect my analysis of any and all stock transactions effected in the DHO market-maker account during Mr. Ho’s suspension time period and termination time period. (“Chart 2D”). The Senior Investigator then identified for the record the various fields in Chart 2D. [Tr. at 76–77; See Exch. Ex. 2D.]

The Chief Enforcement Attorney then directed the Senior Investigator’s attention to Exchange Exhibit D, titled “Stock Transactions in the DHO Market-Maker Account, January 20th, 2004 through March 19th, 2004 and asked the Senior Investigator to explain to the Panel and the record, how she conducted her analysis to create this chart. She explained that she “reviewed all of Mr. Ho’s market-maker account statements provided to [her] by Mr. Ho’s clearing firm ABN AMRO Sage contained in the Exchange Exhibits II through V, to see if any stock transactions had been effected in his market-maker account during both the suspension time period and the termination time period. If I saw any stock transactions during both of these time periods, I noted them in the chart [Chart 2D], and then determined if they were opening or closing. [Tr. at 77– 78.] When the Chief Enforcement Attorney asked the Senior Investigator what were her findings from this analysis, the Senior Investigator testified that “[m]y findings from this analysis were that during Mr. Ho’s suspension time period, more than 650 stock transactions were effected in the DHO market-maker account in violation of the BCC decision which expressly said that no stock transactions could be effected in his market-maker account during his
suspension time period. I also noted that approximately 209 opening stock transactions were effected in the DHO market-maker account while he was a terminated member.” [Tr. at 78-79.]

The Chief Enforcement Attorney then directed the Senior Investigator’s attention to Exchange Exhibit 10 and identified this as Sampling 1 contained in Exchange Exhibit 10 and asked the Senior Investigator whether this was the identical chart that she had just referred to in Exchange Exhibit C and she answered “Yes.” [Tr. at 79.] The Senior Investigator then identified for the Panel what was reflected in the section dated January 20, 2004. The Senior Investigator testified that in the DHO market-maker account, on January 20, 2004, a trade date during the Mr. Ho’s suspension time period, two sell transactions were effected in the ALD Feb 30 calls options series and that the topmost transaction was for a sale of 15 contracts and the transaction noted below was for a sale of 51 contracts for a net sale of 66 contracts at a price for all 66 contracts of 50 cents per share and that both transactions were opening. [Tr. at 79–80.] The Senior Investigator further testified that when these two transactions were identified during her analysis, she found it unusual that January 20, 2004 was the first trade date of Mr. Ho’s suspension, as January 19, 2004 was Martin Luther King Day and the Exchange was closed. [Tr. at 80.] The Senior Investigator also testified that “[o]n the first day of Mr. Ho’s suspension, I identified two opening options transactions in his market-maker account in violation of the BCC’s decision.” [Tr. at 80.]

The Senior Investigator next recognized and identified the second page of Exchange Exhibit 10 as being a document which shows trading activity effected in the DHO market-maker account on trade date January 20, 2004. [Tr. at 81; Exch. Ex. 10 at 2.] The Senior Investigator testified that this document was part of Mr. Ho’s market-maker account statements and that the document was contained within Exchange Exhibit [Books] II through V which provided to her by the Clearing Firm. [Tr. at 81.] The Senior Investigator testified that with respect to the highlighted transactions, this document shows that on January 20, 2004, in the DHO market-maker account, two sell transactions were effected in the ALD Feb 30 call option series and that at the very top of the page, there is a minus 15, and then immediately below it a minus 51 in the column titled short. She noted that the minus refers to a sell transaction. She further explained that below the 51 you see that the two aggregated to a sell transaction of 66 contracts in the ALD Feb 30 call on this trade date. [Tr. at 81.]

The Senior Investigator next recognized and identified page 3 of Exchange Exhibit 10 titled “Compressed Profit and Loss Summary, dated January 16, 2004 as being a document that shows any and all positions in the DHO market-maker account at the end of the trade date on January 16, 2004, for ALD stock and any positions in ALD options series. [Tr. at 82; See Exch. Ex. 10 at 3.] The Senior Investigator testified that this document was utilized to determine what Mr. Ho’s start of day position would have been in the ALD Feb 30 calls on January 20th since the Exchange was closed on January 19, 2004 and as such, Mr. Ho’s previous trade date account statement which gives his start of day position on January 29th is therefore January 16, 2004. [Tr. at 82–83.] The Senior Investigator further testified that about halfway down the first portion of the page, there was a minus 25 in a column titled short and that next to that it is seen this is for the ALD Feb 30 call option series which indicates that at the end of the trade date on January 16, 2004 and on the start of the trade date January 20, 2004, Mr. Ho’s market-maker account was short 25 contracts in this option series. [Senior Investigator at 83.] The Senior Investigator testified that this document was provided to her by the Clearing Firm. [Tr. at 83.]

Next, the Senior Investigator recognized and identified page 4 of Exchange Exhibit 10 titled “Compressed Profit and Loss Summary,” dated January 20, 2004, for market-maker account DHO which had been provided to her, as part of Mr. Ho’s account statements, by the Clearing Firm. [Tr. at 84; See Exch. Ex. 10 at 4.] The Senior Investigator testified that on this document in the column marked
short, there is a minus 91 with respect to the ALD Feb 30 calls and there was a minus 66 in the daily trade column which meant that the next activity in the ALD Feb 30 calls effected by Respondent was a sale of 66 contracts. Since Respondent started the January 20, 2004 trade date short, a total of 25 contracts, Mr. Ho had extended his existing short position by an additional 66 contracts which resulted in the minus 91 or short 91 which is seen in the short column. Thus, all 66 contracts were opening. [Tr. at 84-85.]

The Senior Investigator recognized and identified page 1 of Exchange Exhibit 11 [Sampling #2] titled “Appendix C to the Statement of Charges, Options Transactions in the DHO Market-Maker Account, dated January 20, 2004 through March 18, 2004” which the Senior Investigator testified was the identical chart she previously identified in Exchange Exhibit 10. The Senior Investigator testified that this chart was created to analyze Mr. Ho’s opening options transactions. [Tr. at 86; See Exch. Ex. 11, page 1.] The Senior Investigator also testified that looking at the three lines that start with February 19, 2004, in the trade date column, she found that this trade date was during both the Suspension Time Period and the Termination Time Period, that there were three sell transactions which were all effected in the same option series, and that 100 percent of each transaction’s contract volume was denoted as opening in the opening/closing column on each of the three lines. [Tr. at 86-87; Exch. Ex. 11, page 1.]

The Senior Investigator next recognized and identified page 2 of Exchange Exhibit 11 titled “Trading Activity for February 19, 2004, for Market-Maker Account DHO” [Tr. at 87; See Exch. Ex. 11 page 2.] and testified that this document was obtained from the Clearing Firm. [Tr. at 87.] The Senior Investigator testified that in the DHO market-maker account, three sell transactions were effected in the QFW Feb 35 put options series on trade date February 19, 2004 for a net sale of 100 contract. [Tr. at 88.]

The Senior Investigator next recognized and identified page 3 of Exchange Exhibit 11, titled “Position Summary for February 18, 2004, for Market-Maker Account DHO” [Tr. at 88; See Exch. Ex. 11 page 3.] and testified that this document was obtained from the Clearing Firm and that it was contained in the subset of Exchange Exhibit Books II through V. [Tr. at 88.] The Senior Investigator testified that this document shows Mr. Ho’s position in LEND stock and any and all positions that Mr. Ho had in the LEND option series. The Senior Investigator also testified that February 18, 2004 is the previous trade date to the activity on February 19, 2004, and that this document shows Mr. Ho’s end of day position on February 18th, the start of day position on February 19th. The Senior Investigator testified that the minus 17 next to QFW Feb 35 puts meant that at the end of the day on February 18th and on the start of day on February 19th, Mr. Ho’s DHO market-maker account was short a total of 17 contracts in this particular option series. [Tr. at 89.]

The Senior Investigator next recognized and identified page 4 of Exchange Exhibit 11, titled “Position Summary for February 19, 2004, for Market-Maker Account DHO” [Tr. at 89; Exch. Ex. 11 page 4.] and testified that this document was provided by the Clearing Firm as a subset of Respondent’s account statements contained in Exchange Exhibits [Books] II through V. [Tr. at 90.] The Senior Investigator testified that there is a minus 117 next to the QFW Feb 35 puts which means that Respondent’s market-maker account had an end of day position in this series on February 19, 2004 of short 117 contracts. The Senior Investigator further testified that on page 1 of Exchange Exhibit 11, it was seen that Mr. Ho’s DHO market-maker account had effected three sell transactions for an aggregate sale of 100 contracts and that the aggregate 100 contracts is shown in the daily trade column on page 4 of Exhibit 11 immediately to the right of the option series QFW Feb 35 puts. The Senior Investigator testified that as seen on page 3 of Exchange Exhibit 11, Mr. Ho started the day in his DHO market-maker account short a total of 17 contracts in the option series QFW Feb 35 puts and as a result of the
100 sold contracts, this added to Mr. Ho’s preexisting short position of 17 contracts resulting in an end of day position of short 117 contracts. [Tr. at 90.]

The Senior Investigator recognized and identified Exchange Exhibit 13, titled “Appendix D to the Statement of Charges, Stock Transactions in the DHO Market-Maker Account, dated January 20, 2004 through March 19, 2004” and testified that this document was the identical chart she created with respect to stock transactions and which she previously identified as Exchange Exhibit 2D. [Tr. at 91; Exch. Ex. 13.] The Senior Investigator then identified and testified that page 2 of Exchange Exhibit 13 shows that on January 22, 2004, a trade date during Ho’s Suspension Time Period, three buy transactions totaling 1,800 shares were effected in the DHO market-maker account in PFE stock, that all three transactions were opening stock transactions, and that because these transactions were effected during the Suspension Time Period, Ho was prohibited from effecting any opening or closing stock transactions in his market-maker account. [Tr. at 92.]

The Senior Investigator next recognized and identified page 3 of Exchange Exhibit 13, titled “Trading Activity for January 22, 2004, Market-Maker Account DHO” [Tr. at 93.] and testified that this document was provided to her as part of Ho’s DHO market-maker account statements which were part of Exchange Exhibits [Books] II through V. [Tr. at 93.] The Senior Investigator testified that in reviewing the Respondent’s account trading activity for January 22, 2004, with respect to the PFE stock, she found three PFE transactions in the Respondent’s market-maker account; one buy of 200 PFE shares, one buy of 1,000 PFE shares, and one buy of 600 PFE shares, all at $36.25 per share. [Tr. at 94.]

The Senior Investigator next recognized and identified page 5 of Exchange Exhibit 13, titled “Position Summary for January 21, 2004, Market-Maker Account DHO” [Tr. at 94.] and testified that this document was obtained from the Clearing Firm and was contained in Exchange Exhibits [Books] II through V. [Tr. at 95.] The Senior Investigator testified that at the bottom of the page, there was one entry to the immediate left of the symbol PFE which was the amount of 146,700 which appears in the long [position] column at the far left of the page. [Tr. at 95.] The Senior Investigator testified that this position summary is for January 21, 2004 which was the trade date before the trading activity that was being looked at. [Tr. at 95.] The Senior Investigator testified that the relevance of this page means that Mr. Ho’s DHO market-maker account ended the day on January 21, 2004 and started the day on January 22, 2004 long a total of 146,700 shares of PFE stock. [Tr. at 95.]

The Senior Investigator next recognized and identified page 6 of Exchange Exhibit 13, titled “Position Summary for January 22, 2004, Market-Maker Account DHO” [Tr. at 96.] and testified that this document shows Mr. Ho’s account position at the end of trading day on January 22, 2004 and at the bottom left-hand portion of the page, there was an entry of 148,500 in the long [position] column next to [the symbol] PFE. [Tr. at 96.] The Senior Investigator testified that this meant that at the end of January 24, 2004, Ho’s market-maker account was long a total of 148,500 shares. [Tr. at 97.] The Senior Investigator testified that towards the middle of the page, there was an entry of 1,800 in the Daily Trade column. The Senior Investigator also testified that the highlighted section [January 22, 2004] on page 2 of Exchange Exhibit 13 reflects her findings. [Tr. at 97.] The Senior Investigator also testified that on page 3 of this exhibit [Exch. Ex. 13] titled “Trading Activity for January 22, 2004”, it was seen that in the DHO market-maker account, a net purchase of 1,800 shares was effected in PFE stock and that on page 6 of the exhibit [Exch. Ex. 13], at the very bottom of the page titled “Position Summary “ for January 22, 2004, [an entry of] 1,800 was seen which meant that this net purchase added to the Respondent’s start of day position was, as seen on page 5 [of Exch. Ex. 13], long 146,700 shares. [Tr. at 97.] The Senior Investigator testified that Mr.
Ho’s position had increased by 1,800 on the long side. [Tr. at 97.] and as this was a trade date during the Suspension Time Period, the fact that it was opening is more of a side note, as Mr. Ho was not allowed to effect any stock transactions in his market-maker account during his suspension. [Tr. at 98.]

The Senior Investigator next viewed Exch. Ex. 2B, [the Decision] and testified that earlier in her testimony she had indicated that Mr. Ho’s suspension was to commence no later than January 19, 2004 [Tr. at 99.] The Senior Investigator then viewed Exch. Ex. 2A (the Offer) and testified that she had previously identified it and that the date of the Offer was October 9, 2003. [Tr. at 100.] The Senior Investigator again viewed Exch. Ex. 2B and testified that the date in the Decision is October 21, 2003. The Senior Investigator also testified that she was aware as to why Mr. Ho’s suspension was to commence on January 19, 2004, while the date that the BCC issued the Decision was October 21, 2003. The Senior Investigator explained that it was her understanding that the BCC was willing to accommodate Mr. Ho in terms of his ability to maintain the risk in his market-maker account and the delay in determining when the suspension could start would allow Mr. Ho to wind down positions, preexisting to his suspension, in his market-maker account. [Tr. at 104.] The Senior Investigator testified that from her experience, she thought that a period of about three months would be adequate for a person to close out their positions. [Tr. at 104.]

The Senior Investigator testified that it was her understanding that the reason why the limitation of activity contained in Footnote 1 of the Decision was granted to Mr. Ho was because the BCC was willing to accommodate Mr. Ho in terms of his ability to manage risk on preexisting, prior to his suspension, positions in his market-maker account. [Tr. at 104 - 105.] The Senior Investigator further testified that the BCC allowed the Respondent to effect closing options orders during his Suspension Time Period in order to wind down positions in his market-maker account. [Tr. at 105.]

The Panel found and the Committee finds the Senior Investigator’s testimony to be credible.

Following the completion of the Senior Investigator’s direct testimony, the Respondent’s Attorney objected to the admission of Exch. Ex. 2C and 2D on the basis that these exhibits were “compiled” in such a way that they were “prejudicial to the Committee.” [Tr. at 134.] The Respondent’s Attorney contended that it was prejudicial because the Chief Enforcement Attorney highlighted in bold the [Respondent’s] opening transactions which he thinks are the significant trades and that such a determination should be made by the Panel. [Tr. at 134.] The Chief Enforcement Attorney responded to the Respondent’s Attorney by arguing that the findings reflected in the [charts in the] exhibits were not his, but rather were the findings of the Senior Investigator who had created these [charts in the] exhibits and that in her testimony had laid the foundation for these [charts] exhibits and clearly demonstrated how the charts and analysis in these exhibits were reflected. [Tr. at 135.] After hearing the Respondent’s Attorney’s objection and the Chief Enforcement Attorney’s response, one Panel Member stated to the Respondent’s Attorney that in an adversarial process, if one side makes an argument for their side, then characterizing that argument as prejudicial may not make much sense since the Panel will hear both sides and it should not be assumed that the Panel will take one side and believe everything. [Tr. at 137.] The Respondent’s Attorney agreed with that Panel Member’s statement, but the Respondent’s Attorney

19 It is important to note that at this point of the Senior Investigator’s testimony, the Chief Enforcement Attorney stated that he skipped over Exchange Exhibit 12 [another sampling] which is an additional sampling regarding the Respondent’s activity in his market-maker account, as well as Exchange Exhibits 14 and 15 which reflect stock activity in the Respondent’s market-maker account. The Chief Enforcement Attorney submitted to the Panel that at this time the evidence is cumulative evidence and that he would walk the Panel through how the Senior Investigator conducted her analysis which is reflected in each and every one of these Exhibits C and D of the Exchange’s hearing binder. The Chief Enforcement Attorney asked the Panel if they would like him to walk them through these exhibits or any of the other evidence with respect to the 650 plus stock transactions, and if they did, Enforcement was prepared to do that, but Enforcement believed that it would be cumulative evidence and they would be willing to move the hearing forward at this point. The Respondent’s Attorney stated that he did not have any objection to stopping the testimony at this time relative to this type of questioning and the Panel directed Enforcement to proceed with Enforcement’s other questions.
contended that in his experience, when exhibits are entered, certain portions of the exhibits are not highlighted and that “…it certainly wouldn’t have taken anything for [the Chief Enforcement Attorney ] to just submit [the exhibits] without highlighting anything.” [Tr. at 138.]

The Respondent’s Attorney also objected to the admission of Exch. Exs. 5, 6 and 7, on the basis of relevance and Exch. Exs. 10, 11, and 13 on the basis of the highlighting certain documents.


B. The Respondent – David C-H Ho

Mr. Ho testified that he was 35 years old, married and that his two stepchildren and nine-month old live with him and his wife. Mr. Ho also testified that that he has been a market-maker for approximately seven years on the Exchange, two years on the Philadelphia Stock Exchange and was a member on the MLX in London for a year and a half. Mr. Ho further testified that he currently trades in the Citigroup pit which was the same pit that he was trading in when the alleged violations occurred. [Tr. at 143 - 144.]

Mr. Ho testified that he trades approximately 12 to 15 stocks in Citigroup pit and that he views his obligation as a market-maker to trade all of the options. Mr. Ho further testified that currently, he trades every month straight out to 2007 in approximately two large cap issues and several Reg SHO stocks [Tr. at 144.] Mr. Ho testified that when he trades in the Citigroup pit currently and at the time of his suspension, his average daily option volume was between 2,500 to 5,000 contracts and with respect to shares of stock, his daily volume was between 20,000 to 60,000 shares and his average monthly volume is 1.9 million shares. [Tr. at 146 - 147.]

Mr. Ho testified that he signed the Offer in 2003 and that a sanction was entered against him. Mr. Ho also testified that that during his 12-year market maker career, prior to that sanction “[he] had one minor violation on the PHLX… [and] it was a $100 fine.” [Ho at 147.]

Mr. Ho testified that in October of 2003, there were many discussions among his former counsel (“Former Counsel”) and the Chief Enforcement Attorney. Mr. Ho also testified that he and his Former Counsel attended a meeting which was also attended by the Chief Enforcement Attorney, an Exchange Enforcement Staff Attorney, and an Exchange Staff Intern. [Tr. at 161.] Mr. Ho further testified that at the meeting, the Chief Enforcement Attorney talked about an AMEX case that involved a sexual harassment suit and in which the market-maker on the AMEX floor was fined over $100,000 suspended for three months. [Tr. at 162.] Mr. Ho testified that the Chief Enforcement Attorney stated to him that “I definitely can get this sanctioned against you if we proceed to go to the panel.” [Tr. at 162.]

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20 PHLX is the abbreviation for the Philadelphia Stock Exchange.
21 AMEX is the abbreviation for the American Stock Exchange.
Mr. Ho testified that his Former Counsel said to him that “he wasn’t prepared” and that “it’s not his area of expertise to litigate this particular case nor to litigate in front of the Exchange.” [Tr. at 163.] Mr. Ho also testified that he did not have confidence in his [Former Counsel’s] ability to try his case. [Tr. at 163.]

Mr. Ho testified that he met with another attorney from a large law firm (“Large Law Firm Attorney”) in early fall of 2003, prior to the meeting with the Chief Enforcement Attorney, the Exchange Enforcement Staff Attorney, and the Exchange Staff Intern. Mr. Ho also testified that the Large Law Firm Attorney reviewed his case on a preliminary basis and told him that to argue the case, he would need a $15,000 retainer forwarded to him and that to litigate the case, it could cost more than $50,000. [Tr. at 163.]

Mr. Ho testified that about a week prior to the hearing date [for Disciplinary Case No. 02-0018], he had received a copy of the offer of settlement in the AMEX market-maker sexual discrimination case from his Former Counsel who in turn had received it from the Chief Enforcement Attorney. Mr. Ho testified that this caused him to “[s]ettle this fast and as quickly as I can.” [Tr. at 165.]

Mr. Ho testified that he signed the Offer [See Exch. Ex. 2A] and that he hastily read it “because at that time with all the numbers running around, I just wanted to get out…I just wanted it to stop…” [Tr. at 165 – 166.] Mr. Ho also testified that in October of 2003, his account was deficit probably about $80,000 and that he signed the Offer partly because of monetary considerations. [Tr. at 166.] Mr. Ho testified that he had received and endorsed several copies of the Decision and that when the Decision Order and sanction were entered in October of 2003, he claimed his understanding was that the Order and sanction included a $15,000 fine and a two-month suspension starting as of January [2004] expiration. In defense of his actions, Mr. Ho further claims that it was his understanding that he could not open his positions, but could balance his positions and close his positions. [Tr. at 167.] Mr. Ho testified that he came to this understanding during his and the Former Counsel’s discussions with the Chief Enforcement Attorney, the Exchange Enforcement Staff Attorney, and the Exchange Staff Intern. [Tr. at 167.] Mr. Ho testified that during these discussions, the Chief Enforcement Attorney mentioned the word “balance” several times because the Former Counsel said that Mr. Ho was a fairly large and active participant in the marketplace. Mr. Ho testified that his understanding of what balancing meant was in terms of delta neutralizing, gamma neutralizing, vega neutralizing, and theta neutralizing.”22 [Tr. at 167.]

Mr. Ho testified that after the Decision’s implementation, he never had a conversation with his Former Counsel as to what his Former Counsel’s understanding was of what could and could not be done with respect to the Decision’s Order. Mr. Ho further testified that “[he] felt that it was water under the bridge, this was done, [and] I was going to take my beating, and walk away from everything.” [Tr. at 169 – 170.]

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22 Mr. Ho then testified that under the Decision Order, it was his understanding that in a scenario where he had a position in a certain stock, such as Citi, which went down and it made him 3,000 delta short, he could either purchase the stock or look for puts that he was long that could be sold to get long to neutralize the delta risk. With respect to his understanding of what, if any option transactions he could do under the Decision Order, Mr. Ho testified that since the key word in his mind was balancing, if he was long the calls and he was short stock, he could balance it out with the puts to re-neutralize the gamma risk or the vega risk, so, if he were 50 – 50 calls in Citi, he could sell 50 puts and then have a reversal on. Mr. Ho further explained that if he was short and if the stock moved through the strike, meaning that the stock was lower than 50 at the time he had short stock against it, it was long a 50 call, and instead of unwinding the position one way, he would neutralize it via block puts. [Tr. at 168 – 169.][0]
Mr. Ho testified that during the time from January of 2004 to March of 2004 when he was under suspension, nobody from the Exchange talked to him regarding the trades that he was doing and nobody called and told him that he was violating the Decision Order. [Tr. at 170.]

Mr. Ho also testified that he now realizes, after looking back and hearing the Senior Investigator’s testimony, that he could not make any stock transactions in his market-maker account, that all opening transactions were strictly prohibited, and that he did violate the Decision Order. He further testified that if the understanding he had in January of 2004 had been the same understanding he has today, he would not have violated the Decision. [Tr. at 170.]

Mr. Ho testified that valid orders entered by the BCC should be obeyed by all market-makers and that he would be willing to pay a monetary fine for his violation of opening trades. [Tr. at 171.] Mr. Ho also testified that since his wife was currently unemployed and that he was currently the sole support of his family, he would certainly appreciate it if he were not suspended as a result of what has happened and that he would ask for the mercy of the BCC to not sanction him in terms of a fine and suspension. [Tr. at 171.]

Mr. Ho testified that since the October 2003 Decision to the present time, he would describe his relationship with the market-makers in his pit as that of good and cordial friends. Mr. Ho also testified that he has not engaged in any intimidating or coercive conduct and that he has behaved as an honorable market-maker since that time. Mr. Ho further testified that during the course of trading in the Citi pit, he provides substantial liquidity for these options and he does not feel that there was anybody in the Citi pit who traded more contracts than he did with the exception of perhaps the DPM.\(^{23}\) [Tr. at 172.]

Mr. Ho testified that “I know it sounds novice and ignorant in the sense that I didn’t thoroughly read this [Decision] order, but nor did my attorney [Former Counsel], who was representing me. And with all the numbers that were looming around, I couldn’t afford to go forward personally, nor could I expose the Firm that I was employed [by] with that financial risk, nor could I go to them and ask them to give me a retainer to go and find a proper attorney to defend me because I was already down $80,000. I can’t go to the partners and say look, I need another $35,000 for a retainer. That would jeopardize my employment.” [Tr. at 174.]

On cross-examination, Mr. Ho admitted that during the entire process with respect to Disciplinary Case No. 02-0018, he was represented by counsel, he did not terminate his representation by his Former Counsel, and he did not retain new counsel. [Tr. at 175.] Additionally, Mr. Ho admitted that he signed the Offer and that in signing the Offer, he acknowledged specifically that he would be bound by all the terms, conditions, and representations, and acknowledgments of the Offer [Tr. at 177; See Exch. Ex. 2A.] and that no promise or inducement of any kind was made to him by the Exchange or Exchange Staff. [Tr. at 178.]

On cross-examination, Mr. Ho admitted that he hastily reviewed the three-page Offer that was going to affect his career and his existence on the Exchange for the next two months, as well as his service on any Exchange committee, as well as a substantial monetary fine. [Tr. at 178 – 179.] Mr. Ho also admitted that the Decision’s limitation of activity contained in both the Decision’s sanction and Order is the same limitation of activity contained in the Offer. [Tr. at 181.]

At the end of the Exchange’s cross-examination of the Respondent, the Respondent’s Attorney, on behalf of Mr. Ho, stipulated that Mr. Ho violated the order and admitted that Mr. Ho should only

\(^{23}\) Designated Primary Market-Maker.
have engaged in closing transactions and that by engaging in stock transactions, Mr. Ho violated the Decision [Order]. [Tr. at 182.]

The Panel found and the Committee finds that Respondent’s testimony essentially regarding the disputed issues in this matter is not credible.

V. DISCUSSION, ANALYSIS, AND CONCLUSIONS

First, the Respondent, by and through his attorney24, argues that he has not violated Rule 4.1 because Rule 4.1 relates to just and equitable principles of trade and that examples of Rule 4.1 violations would include engaging in acts such as “…inside information [insider trading], front running, things of that nature.” [Tr. at 187.] The Respondent further argues that although he admitted to the violation of the Decision Order [Tr. at 118; Tr. at 182; Tr. at 185] that does not mean that the violation of the Order constitutes unjust trading. [Tr. at 21 – 23.] The Respondent contends that “…the mere violation of this order is not violating just [and equitable principles of trade]…nobody is being penalized.” The Respondent argues that “[n]obody is being harmed. The only one who’s being harmed by this violation is [the Respondent].” Thus, the Respondent contends that there is not “…any showing that anyone was harmed or that unjust principles of trade were followed by [the Respondent]…” [Tr. at 188.] and therefore, even when the Respondent chose to buy or sell certain shares of stock, there was no violation of Rule 4.1. [Tr. at 188 – 189.]

At the outset of our analysis of whether Respondent violated Exchange Rule 4.1, we set forth the relevant portion of the Exchange Rule. Exchange Rule 4.1 provides:

“No member shall engage in acts or practices inconsistent with just and equitable principles of trade. Persons associated with members shall have the same duties and obligations as members under the Rules of this Chapter.”

Rule 4.1 is broadly construed and as the Committee has continually recognized, Rule 4.1 is a “catch all” that permits the Exchange to discipline members and persons associated with members for unethical behavior. [See, e.g., In the Matter of William Murphy25; See also, Shultz v. Securities and Exchange Commission26 finding that Exchange Rule 4.1 and other CBOE Rules are “something of a catch all which…preserves [the Exchange’s] power to discipline members for a wide variety of misconduct, including merely unethical behavior.”] A direct harm to a customer is not required for there to be a violation of Rule 4.1.

The Senior Investigator testified to the Panel, about how she carefully and thoroughly reviewed and analyzed Mr. Ho’s trading activity in his market-maker account during the Suspension Time Period as prescribed in the 02-0018 Decision Order, as well as during the Termination Time Period when Mr. Ho terminated his Exchange membership.

The Senior Investigator testified to the Panel about how she detected each of the 14 opening options transactions in Mr. Ho’s DHO market-maker account that were in contravention of the BCC’s 02-0018 Decision Order. The Senior Investigator also testified to the Panel about how she detected

24 After Exchange rested its case, the Respondent’s Attorney made a motion to dismiss the Exchange’s charge stated in paragraph 14 of the Charges; [See Exch. Ex. 2, at p. 3.] The Exchange opposed Respondent’s motion to dismiss and the Panel, after hearing arguments from the parties, denied Respondent’s motion.
26 614 F.2d 561, 571 (7th Cir. 1980).
opening options transactions in Mr. Ho’s DHO market-maker account during the time Mr. Ho was a terminated member.

The Senior Investigator testified to the Panel about the numerous stock transactions effected in Mr. Ho’s DHO market-maker account which were in contravention of the BCC’s 02-0018 Decision Order and during the time Mr. Ho was a terminated member.

The BCC’s 02-0018 Decision Order was unambiguously clear as to what type of activity Mr. Ho could engage in during the Suspension Time Period. The 02-0018 Decision Order explicitly stated as follows:

“For purposes of this sanction, “closing options orders” shall be defined as strictly limited to orders to purchase only those option series that Respondent was short immediately prior to the start of his suspension, and orders to sell only those option series that Respondent was long immediately prior to the start of his suspension, in total quantities for each series that are no greater than the total quantity that Respondent was short or long, respectively, in each series immediately prior to the start of his suspension. Any opening transactions or intraday scalping in option classes, as well as any stock transactions in Respondent's market-maker account(s), are all strictly prohibited.”27

Mr. Ho violated just and equitable principles of trade when he violated the terms of the suspension that he expressly agreed to follow when he settled CBOE Disciplinary Case 02-0018. In addition, Mr. Ho violated Rules 4.1 4.2, 8.1, Regulatory Circular RG00-52, as well as Federal Reserve Board Regulation X in that Mr. Ho caused and accepted market-maker treatment for numerous options and stock transactions to which he was not entitled to as a terminated member of the Exchange.

Mr. Ho’s conduct was in direct violation of the Committee’s Decision Order. The Senior Investigator in the Exchange’s Department of Market Regulation testified about how carefully and thoroughly she reviewed and analyzed Mr. Ho’s trading activity in his DHO market-maker account during the suspension period prescribed in the 02-0018 Decision Order as well as during the time period (January 27, 2004 through March 19, 2004) when Mr. Ho terminated his Exchange membership. The Senior Investigator testified to the Panel how she detected each of the 14 opening options transactions in the DHO market-maker account that were in contravention of the Committee’s Decision Order. The Senior Investigator also testified to the Panel how she detected opening options transactions in Mr. Ho’s DHO market-maker account when he was a terminated member of the Exchange and the Senior Investigator testified to the numerous stock transactions involving thousands of shares of stock, both in contravention of the BCC’s Decision Order as well as when Mr. Ho was a terminated member of the Exchange.

At the Hearing, the evidence clearly demonstrated that:

1. Mr. Ho violated the trading restrictions set forth in the 02-0018 Decision Order when Mr. Ho effected no fewer than 14 opening option transactions for his DHO market-maker account on numerous trade dates during his 8-consecutive week suspension, including on or about January 20, 2004; January 21, 2004; January 27, 2004; February 17, 2004; February 18, 2004; February 19, 2004; March 8, 2004; and March 12, 2004;

27 See Exch. Ex. 2B footnote 1 at p. 3.
2. Mr. Ho violated the trading restrictions prescribed in the 02-0018 Decision Order by effecting no fewer than 693 stock transactions, both opening and closing, for his DHO market-maker account on various trade dates during his 8-consecutive week suspension;

3. While Mr. Ho was a terminated member of the Exchange from January 27, 2004 through March 19, 2004, Mr. Ho nevertheless effected no fewer than 14 opening options transactions for his DHO market-maker account during the time period Mr. Ho’s Exchange membership was terminated; and

4. While Mr. Ho was a terminated member of the Exchange from January 27, 2004 through March 19, 2004, Mr. Ho nevertheless effected no fewer than 208 opening stock transactions for his DHO market-maker account during the time period Mr. Ho’s Exchange membership was terminated.

In addition to the abundant and credible testimony of the Senior Investigator presented during the Hearing which clearly demonstrated by a preponderance of the evidence that Mr. Ho violated the Exchange rules cited in the Charges, the Panel heard testimony from the Respondent in which he, himself admits to the fact that he violated the Committee’s Decision Order. First, Mr. Ho testified that he signed the Offer. [Tr. at 165 – 166.] Mr. Ho asserted, however, that he knows “…that he did not get a clear understanding and did not read this order, but nor did my attorney who was representing me…” [Tr. at 174.] Mr. Ho did, however, admit that he signed the Offer and that in signing the Offer, he acknowledged specifically that he would be bound by all the terms, conditions, and representations, and acknowledgements of the Offer and that no promise or inducement of any kind was made to him by the Exchange Staff. [Tr. at 177 – 178.] In addition, Mr. Ho admitted that the Decision Order’s limitation of activity contained in both the Sanction and Order was the same limitation of activity contained in the Offer. [Tr. at 181.]

In another admission, Mr. Ho stated that he hastily reviewed the three-page Offer that was going to affect his career and his existence on the Exchange for the next two months, as well as his service on any Exchange committee, as well as a substantial monetary fine. [Tr. at 178 – 179.]

An additional admission was made at the end of the Exchange’s cross-examination of Mr. Ho, when the Respondent’s Attorney, on behalf of Mr. Ho, stipulated that Mr. Ho violated the order and admitted that Mr. Ho should only have engaged in closing transactions and that by engaging in stock transactions, Mr. Ho violated the Decision. [Tr. at 182.]

One last and noteworthy admission is found when the Respondent’s Attorney stated “I think that we can all safely say that he [Mr. Ho] violated the court order…I’m not going to …belittle anybody here and make some statement that he did not do that…” [Tr. at 205.]

In addition to the Senior Investigator’s abundant and credible testimony, as well as the evidence presented by the Exchange, Mr. Ho’s own admissions that he violated the Decision Order was prima facie evidence of misconduct. Thus, the Panel finds that the Respondent’s admissions that he violated the Decision Order also conclusively establishes the violations in this case.

28 It should be noted that during the Exchange’s cross-examination, Mr. Ho admitted that during the entire process with respect to Case No. 02-0018, he was represented by counsel, he did not terminate his representation by his counsel, and he did not retain new counsel. [Tr. at 175.]

29 See Tr. at 205
This case is especially aggravating and egregious considering the fact that the Committee accepted Mr. Ho’s Offer of Settlement in Disciplinary Case No. 02-0018 and issued its Decision on October 21, 2003 [See Exch. Ex. 2B.] and then the Committee accommodated Mr. Ho by allowing him to begin serving his suspension no later than January 19, 2004 which was a full expiration cycle\(^{30}\) after the Decision was issued in October 2003. A further aggravating factor in this matter is that the Committee granted Mr. Ho the opportunity to reduce risk in his market-maker account and unwind positions as a result of the delay starting his suspension. Moreover, the Committee provided Mr. Ho with an additional opportunity to eliminate risk in his market-maker account during his suspension through the limitation of activity by allowing Mr. Ho to effect closing only options transactions. Thus, not only did Mr. Ho breach the Committee’s Decision Order after the Committee provided him with these accommodations, but he did so with willful disregard on the very first day of his suspension.

The Panel found and the Committee concurs, by a preponderance of the evidence, that the Respondent violated Rule 4.1 and that the Exchange had demonstrated that violation through its evidence presented, the Senior Investigator’s testimony heard at the Hearing, and the Respondent’s own admissions that he violated the Decision Order. Mr. Ho violated the just and equitable principles of trade when he violated the terms of the suspension that he expressly agreed to follow when he settled CBOE Disciplinary Case No. 02-0018 and that conduct was in direct violation of the BCC’s disciplinary order. It is absolutely essential that the Committee’s Decision Orders and Sanctions be abided by.

The Panel also found and the Committee concurs, that the Exchange demonstrated by a preponderance of the evidence that Mr. Ho violated Exchange Rules 4.1, 4.2, 8.1, CBOE Regulatory Circular RG-00-52 and Federal Reserve Board Regulation X, in that Mr. Ho caused and accepted market-maker treatment for numerous option and stock transactions to which he was not entitled as a terminated member of the Exchange.

VI. SANCTIONS DISCUSSION

When determining the appropriate sanction for Respondent’s violations of Rules 4.1, 4.2, 8.1, RG00-52, and FRB Reg X, we begin by noting that each of these violations, standing alone, are serious infractions warranting the imposition of strong sanctions.

The Exchange requested that, given the clear evidence in this case, the severity of the Respondent’s conduct and the Respondent’s willful disregard to the Committee’s Decision in CBOE Disciplinary Case 02-0018, the Committee impose the following sanctions on the Respondent: a censure, a fine in the amount of $50,000, and a suspension for three consecutive years from Exchange membership and from association with any Exchange member or member organization. In support of the requested sanctions, the Exchange points out that this case is particularly aggravating and egregious, given the fact that the Committee accepted the Respondent’s Offer and issued its Decision on October 21, 2003. The Committee then accommodated Respondent by allowing him to commence serving his suspension no later than January 19, 2004 which was a full expiration cycle after the issuance of the decision in October. The Exchange also noted a further aggravating factor in this matter is that the Committee afforded Respondent the opportunity to reduce risk in the market-maker account and unwind

\(^{30}\) An expiration cycle relates to the dates on which options on a particular underlying security expire. A given option, other than LEAPS®, will be assigned to one of three cycles, the January cycle, the February cycle or the March cycle. At any point in time, an option will have contracts with four-expiration dates outstanding, the two near-term months and two further-term months. The Options Clearing Corporation, *Understanding Stock Options*, 37, (2003).
those positions as a result of that delay in serving the suspension. Moreover, the Committee gave Respondent additional opportunities to eliminate additional risk in the market-maker account during the term of his suspension through the limitation of activity by allowing Respondent to effect closing only options transactions. The Exchange points out that not only did Respondent breach the Decision after the Committee had provided him with these accommodations, but he did so with willful disregard on the first day of the suspension which commenced on January 20, 2004. As further support for its sanction recommendation, the Exchange cited three cases (discussed infra) as relevant precedent.

At the Hearing, after the Exchange’s closing argument and sanction recommendation, the Respondent’s Attorney declined to make a closing argument and said he was not prepared to make a sanction recommendation. The Panel stated that the Respondent’s Attorney would be permitted to submit to the Panel, within two weeks, a written statement that only includes relevant cases that “justify whatever sanction you [the Respondent’s attorney] think would be appropriate” The Panel also specifically indicated that this would not be an opportunity to submit a written closing argument. [Tr. at 202-206] The Respondent’s Attorney acknowledged the Panel’s limitation of the statement’s scope when he stated “…I will limit – and I appreciate the two weeks, and I’ll limit my memorandum relative to that issue.” [Tr. at 205-206]. After the Hearing, the Respondent’s Attorney submitted a memorandum, entitled Respondent’s Closing Argument (“Memorandum”), to support Respondent’s sanction recommendation. The Memorandum, however, contained certain statements and arguments that went beyond the scope of the Panel’s instructions. As the Respondent’s Attorney breached the Panel’s specific instructions by making closing statements and arguments in the Memorandum, such closing statements and arguments contained therein were not considered by the Panel and are stricken from the record.

In the Memorandum, the Respondent’s Attorney cited case law that is inapposite to the facts at issue in the present case. Specifically, the Respondent’s Attorney cited four Exchange cases In the Matter of William Lewis; In the Matter of Robert Leone; In the Matter of William Johnson; and In the Matter of Joseph Hartman. Upon review of these cases, it was found that those cases did not involve either individuals who violated a BCC disciplinary decision order or individuals who initiated transactions during a period in which they were not registered as market-makers with the Exchange. Additionally, not one of these cases is relevant to the present matter before the Panel. The Lewis case involved a market-maker who engaged in unbusinesslike verbal and physical conduct during a dispute with another market-maker in the trading crowd. Both the Leone and the Johnson cases involved market-makers who engaged in conduct consisting of harassment and intimidation of other market-makers. The Hartman case involved Hartman’s initiating and entering of numerous option orders that increased or established positions in his market-maker account from off of the Exchange trading floor, during a time period in which he failed to execute 80% of his transactions in person, rather than through the use of orders. None of those cases involved either individuals who violated a BCC disciplinary decision order, or individuals who initiated transactions while they were not registered as market-makers with the Exchange. Thus, those cases cited by the Respondent for sanction purposes are inapplicable and unfounded as to the facts and issues in this case.

31 When the Panel’s Legal Counsel asked the Respondent’s Attorney if he had a closing argument, the Respondent’s Attorney replied “No, I don’t – it went to the merits.” [Tr. at 205.]
32 See CBOE Disciplinary Case No. 02-0019.
33 See CBOE Disciplinary Case No. 00-0004.
34 See CBOE Disciplinary Case No. 00-0003.
35 See CBOE Disciplinary Case No. 02-0017.
One case cited by the Respondent’s Attorney that does contain similarities to the case presently before us is *In the Matter of William L. Darnall*36 which involved a clerk who was neither a registered market-maker with the Exchange nor a participant in Joint Account QLD and who initiated and entered numerous options orders on behalf of Joint Account QLD with Exchange floor broker members, as well as numerous stock orders through the Designated Order Turnaround systems (“DOT system”). As a result of these transactions clearing into Joint Account QLD, these transactions received preferential market-maker haircut and capital exempt treatment. In that case, Darnell settled his disciplinary case by the submission of an Offer of Settlement and was sanctioned accordingly.

In the Memorandum, the Respondent’s Attorney references Exchange Rule 17.11 which is titled “Judgment and Sanction”. The Respondent’s Attorney specifically cites Exchange Rules 17.11.01(2) and 17.11.01(03) which covers “Principal Considerations in Determining Sanctions.” Case precedent is offered by the Respondent’s Attorney that is not consistent with the objective of this rule as well as not on point with the facts in this case. As provided for in Exchange Rule 17.11.01(4), the Committee should impose sanctions tailored to the misconduct at issue. At the Hearing, the Exchange cited one recent NASD case, *Department of Enforcement v. Hornblower & Weeks, Inc., et al.*37 (“Hornblower”) and two Exchange disciplinary cases, *In the Matter of Richard Trojan and NS Limited Partners*38 (“Trojan”) and *In the Matter of James R. Jordan, Harry Simpson and TriJordy Partners*39 (“TriJordy”) as relevant precedent and argued that those cases were similar to this case in fact and issue as they involved either individuals who violated a disciplinary order or individuals who initiated transactions during a time period that they were not registered as market-makers with the Exchange. [See Tr. at 199 – 201.]

The Respondent’s Attorney also asserts in the Memorandum that his off-floor trading were impermissible opening transactions and references cases that the Respondent’s Attorney asserts are similar to this case. The Respondent’s Attorney specifically cites four Exchange disciplinary cases, *In the Matter of Daniel V. Marchese*40, *In the Matter of Scott A. Snyder*41, *In the Matter of Johnson Trading, J.V., et al.*42, and *In the Matter of Phillip J. Sylvester*43. That is not the case here because those cases did not involve a respondent who had violated a BCC Decision Order or engaged in activity as a terminated member of the Exchange, but just involved market-makers who had received market-maker treatment for off-floor orders in accordance with Exchange Rule 8.1, and where the market-makers were required to have executed in person, and not through the use of orders, at least 80% of their total transactions. Moreover, in those cases, the market-makers initiated and entered numerous options orders that increased or established positions in their market-maker accounts from off of the Exchange trading floor, during a time period in which they failed to execute 80% of their transactions in person, rather than through the use of orders.

In the Memorandum, the Respondent’s Attorney contends that the facts found in the Exchange’s cases cited as relevant precedent are clearly distinguishable from this case. Specifically, the Respondent’s Attorney argues that in the *Trojan* case, both respondents that were subject to a three year suspension were not market-makers, but rather Associated Persons of market-makers and that the actions of Richard Trojan and NS Limited Partners through Richard Trojan consisted of conduct

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36 See CBOE Disciplinary Case No. 99-0043
37 See NASD Disciplinary Proceeding No. CAF020022
38 See CBOE Disciplinary Case No. 99-0028
39 See CBOE Disciplinary Case No. 97-0022
40 See CBOE Disciplinary Case No. 03-0038
41 See CBOE Disciplinary Case No. 04-0004
42 See CBOE Disciplinary Case No. 03-0004
43 See CBOE Disciplinary Case No. 02-0031
designed to allow Joint Account QXY to receive preferential market-maker haircut and capital exempt treatment. Additionally, the Respondent’s Attorney references two Exchange disciplinary cases, In the Matter of Frank Fahey\(^44\) and In the Matter of Casey Platt\(^45\), in which the market-makers of Joint Account QXY who benefited from Richard Trojan’s conduct were only fined $25,000 and $7,500 respectively.

The Panel disagreed with the Respondent’s Attorney’s assertion that the Trojan case is distinguishable from the facts and issues in this case because the Trojan case involves an individual who initiated and entered options while he was not registered as an Exchange market-maker. In that case, NS Limited Partners, a former Exchange member organization and Richard Trojan, a former Associated Person of NS Limited Partners, were each censured and barred from Exchange membership and from association with any Exchange member or member organization for three consecutive years for the following conduct. From on or before July 28, 1995 through on or about April 1, 1997, Frank Fahey and Casey Platt were market-makers and nominees of Base Trading, LP, an Exchange member organization. Thereafter, Fahey and Platt were market-makers and nominees of Sallerson-Troob LP, an Exchange member organization. During all relevant periods, Fahey and Platt were active participants in Joint Account QXY. During the approximate period from July 28, 1995 through June 2, 1998, Trojan, who was not registered as an Exchange market-maker or a participant in Joint Account QXY, initiated and entered numerous option orders from off of the Exchange trading floor on behalf of Joint Account QXY with Exchange floor broker members, and identified Frank Fahey and Casey as initiators of these orders. The execution of these orders resulted in transactions representing numerous option contracts that Fahey and Platt allowed to be cleared or adjusted into Joint Account QXY, when Fahey and Platt did not initiate these orders. As a result of the transactions clearing or adjusting into Joint Account QXY, these transactions received preferential market-maker haircut and capital-exempt treatment. It should be noted that this case, approximately six years old, was resolved through the submission of an offer of settlement rather than a contested proceeding. [See Tr. at 200.]

The Respondent’s Attorney also argues that the TriJordy case cited as relevant precedent by the Exchange is distinguishable from this case in that James R. Jordan and Harry Simpson were each an Associated Person\(^46\) of market-makers who through their conduct misrepresented their orders so that their market-makers could receive preferential market-maker haircut and capital exempt treatment.

The Panel disagreed with the Respondent’s Attorney’s assertion that the present case is distinguishable from the facts and issues in the TriJordy case because the TriJordy case involves an individual who initiated and entered options orders in a market-maker range of an account while he was not registered as an Exchange market-maker. The Panel believed that the TriJordy case is similar to this case, although the conduct in the TriJordy case is not as egregious as the conduct of a terminated member entering orders into a market-maker range of an account. In the TriJordy case, TriJordy Partners (“TriJordy”), an Exchange member organization, James R. Jordan, an Associated Person and general partner of TriJordy, and Harry Simpson, an Exchange member and limited partner and Associated Person of TriJordy, were each censured and jointly and severally fined in the amount of $75,000. During the approximate period from on or about January 3, 1995 through on or about May 16, 1996, Jordan who was not registered as an Exchange market-maker initiated and entered numerous option orders from off of the Exchange trading floor on behalf of TriJordy’s sub-accounts with the Exchange floor broker members. The execution of these orders resulted in transactions representing

\(^{44}\) See CBOE Disciplinary Case No. 99-0030

\(^{45}\) See CBOE Disciplinary Case No. 99-0031

\(^{46}\) Person associated with a broker or dealer as defined in the Securities Exchange Act of 1934, as amended, Section 3(a)(18).
numerous option contracts which TriJordy’s nominee Alan Lirtzman allowed to be cleared or adjusted into TriJordy’s sub-accounts, when Lirtzman did not initiate or approve these orders. As a result of the transactions clearing or adjusting into TriJordy’s sub-accounts, these transactions received preferential market-maker haircut and capital exempt treatment. On or about June 16, 1996, Jordan provided testimony to the Exchange that all of the option orders referenced above were approved by Lirtzman, when, in fact, during the months of June 1995 and October 1995, Jordan initiated and entered at least 260 option orders from off of the Exchange trading floor on behalf of TriJordy’s sub-accounts with Exchange floor broker members without Lirtzman’s approval. It should be noted, like the Trojan case, this case was also settled through the submission of an offer of settlement rather than a contested proceeding. [See Tr. at 200.] As the SEC has clearly stated, “It is well recognized that the question of whether disciplinary action is excessive depends on the particular facts and circumstances of each case, and cannot be precisely determined by comparison with the action taken in other cases.” In addition, the SEC has clearly stated, “[I]t is well established that respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on ‘pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings.’”

The Respondent’s Attorney also asserts that the Hornblower case cited as relevant precedent by the Exchange is distinguishable from this case because the Hornblower case involves the fraudulent omission of material facts in a marketing letter that were necessary to provide readers with a sound basis for evaluating an investment in a company. In Hornblower, Hornblower & Weeks, Inc. (“Hornblower” or the “Firm”) John R. Rooney (“Rooney”), the Firm’s President, and Eric Ellenhorn (“Ellenhorn”), the Firm’s Chief Executive Officer, violated the terms of a Letter of Acceptance, Waiver and Consent by issuing a research report in violation of the terms of a suspension imposed by NASD. For this violation, Rooney was barred in all capacities, Hornblower was expelled from NASD membership, and Ellenhorn was suspended in all capacities for two years and fined $55,000. Additionally, Ellenhorn was fined $25,000 and he and Rooney were barred in all principal capacities for their failure to adequately supervise Paul E. Taboada (“Taboada”) (the marketing letter’s author) in connection with the preparation and release of the research report. Finally, Taboada was suspended in all capacities for six months and fined $25,000 for issuing a research report containing material misrepresentations and omissions.

The Panel disagreed with the Respondent’s Attorney’s assertion that the instant case is distinguishable from the facts and issues in the Hornblower case because that case involved individuals who violated the terms of a suspension imposed in a disciplinary decision order with the NASD by issuing a research report during the time period of their suspension which was in direct violation of the terms imposed by NASD. Thus, the Panel believed that the violations in the Hornblower case are similar to this case in that Mr. Ho violated the terms of the Decision he agreed to with the Exchange, by initiating and entering the “opening” options transactions and stock transactions in his DHO market-maker account.

The Committee finds that both the Trojan and TriJordy Exchange disciplinary cases involved individuals who initiated and entered options orders during a time period that they were not registered as an Exchange market-maker. The Committee also finds that these actions are similar to this case for the reasons that (1) Mr. Ho initiated and entered “opening” options transactions as well as stock transactions for his DHO market-maker account during the Suspension Time Period, which Mr. Ho was expressly

47 See In the Matter of Alan Lirtzman, CBOE Disciplinary Case No. 97-0024
49 See Id. (quoting Nassar and Co., Inc. SEC Release No. 34-15347 (November 22, 1978), 16 SEC Docket 222, 227, aff’d 600 F.2d 180 (D.C. Cir. 1979)).
prohibited from doing so in accordance with the Decision he agreed to in CBOE Disciplinary Case No. 02-0018; and (2) Mr. Ho also initiated and entered both options transactions and stock transactions for his DHO market-maker account during the Termination Time Period in which Respondent was a terminated member of the Exchange.

The Committee also finds that the Hornblower NASD case involved individuals who violated the terms of a suspension imposed in a NASD disciplinary decision order when such individuals issued a research report during the suspension period in direct violation of the terms imposed by NASD. The Committee also finds that the violations in the Hornblower case are similar to this Case for the reason that Respondent violated the terms of the Decision he agreed to with the Exchange, by initiating and entering the “opening” options transactions and stock transactions in his DHO market-maker account.

Because the facts and issues in the Trojan, TriJordy, and Hornblower cases are similar and on point with this case, the Committee finds that these cases are relevant precedent in support of Exchange’s sanction recommendation.

Finally, the Respondent stated that it was his understanding in discussing the Decision with his Former Counsel that he was entitled to engage in balancing stock trades under the terms of the Decision. Respondent argues that as far fetched as this explanation may seem, it is apparent that the trades conducted in Mr. Ho’s market-maker account were easily discoverable and would he knowingly violate an order on the first day that the Decision went into effect with the knowledge that his trades were certain to be discovered.

The Committee does not find Mr. Ho’s argument plausible and does not consider as mitigating the Respondent’s claim that he relied on his discussions with his Former Counsel that he was entitled to engage in balancing stock trades under the terms of the Decision. The terms of the Decision were explicit and clear as to what option or stock activity Mr. Ho would be permitted to engage in during his suspension time period. Further, during the cross-examination of Respondent at the Hearing, Respondent admitted to the Panel that he violated the Decision Order. Respondent further admitted that by engaging in stock transactions, he violated the Order. [See Tr. at 182.]

In addition to the points specifically discussed herein, the Committee has carefully considered all of the evidence and arguments presented by the parties. Such arguments are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Accordingly, based upon the evidence presented, the Panel found and the Committee finds that the evidence in this case establishes that the Respondent violated the trading restrictions set forth in the Committee’s Decision by effecting no fewer than 14 opening options transactions for the Respondent’s DHO market-maker account on numerous trade dates during the Respondent’s 8-consecutive week suspension, including on or about January 20, 2004; January 21, 2004; January 27, 2004; February 17, 2004; February 18, 2004; February 19, 2004; March 8, 2004; and March 12, 2004. Furthermore, the Respondent violated the trading restrictions set forth in the Committee’s Decision by effecting no fewer than 693 stock transactions (both opening and closing) for the Respondent’s DHO market-maker account on various trade dates during the Respondent’s 8 consecutive-week suspension. The evidence demonstrated that even though the Respondent was a terminated Exchange member from January 27, 2004 through March 19, 2004, the Respondent effected no fewer than 14 opening option transactions for the DHO market-maker account during the period when the Respondent’s Exchange membership was terminated. Finally, the evidence demonstrated that even though the Respondent was a terminated Exchange member from January 27, 2004 through March 19, 2004, the Respondent effected no fewer
than 208 opening stock transactions from the Respondent’s DHO market-maker account during the time period when the Respondent’s Exchange membership was terminated.

Therefore, based upon the record, the Committee finds, by a preponderance of the evidence, that the Respondent violated Exchange Rule 4.1, in that the Respondent violated just and equitable principles of trade when he violated the terms of the suspension that the Respondent agreed to follow when he settled CBOE Disciplinary Case No. 02-0018 and that the Respondent’s conduct was in direct violation of the Committee’s disciplinary order.

The Committee also finds that Respondent’s conduct violated Exchange Rules 4.1, 4.2, 8.1, RG00-52, and FRB Reg X, in that the Respondent caused and accepted market-maker treatment for numerous option and stock transactions to which he was not entitled as a terminated member.

SANCTIONS

In view of all of the foregoing circumstances, including the seriousness and severity of the Respondent’s conduct and the Respondent’s willful disregard to the Committee’s Decision Order in CBOE Disciplinary Case No. 02-0018, a reasonable and appropriate sanction for the Respondent shall be as follows:

1. A censure;
2. A fine of $50,000; and
3. A 3-consecutive-year suspension from Exchange membership and from association with any Exchange member or member organization.

ORDER

ACCORDINGLY, IT IS ORDERED THAT, Respondent David C-H Ho shall be and hereby is censured, fined in the amount of $50,000, and suspended for 3-consecutive years from Exchange membership and from association with any Exchange member or member organization.

SO ORDERED
FOR THE COMMITTEE

Dated: August 17, 2005

By: /s/ Bruce Andrews
Bruce Andrews
Chairman
Business Conduct Committee