

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
: INITIAL DECISION
VLADLEN "LARRY" VINDMAN : May 24, 2005

APPEARANCES: Alix Biel and Howard S. Kim for the Division of Enforcement,
Securities and Exchange Commission

Robert G. Heim of Meyers & Heim LLP for
Respondent Vladlen Vindman

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision sanctions Vladlen "Larry" Vindman (Vindman), a penny stock promoter, for his role in promoting Marx Toys & Entertainment Corp. (Marx). The Initial Decision concludes that Vindman engaged in a scheme to artificially inflate the demand for and price of Marx stock in violation of the antifraud provisions of the federal securities laws. The Initial Decision bars him from participating in an offering of penny stock, fines him \$20,000, and imposes a cease-and-desist order.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) commenced this proceeding with an Order Instituting Proceedings (OIP) on September 5, 2003, pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act).¹ Vindman was served with the OIP on January 5, 2004. The proceeding was stayed on September 16, 2003, because of a parallel criminal proceeding. The stay was lifted on October 8, 2004, after Vindman was found not guilty in the criminal proceeding.

¹ The proceeding was originally captioned Steven Wise and Vladlen "Larry" Vindman. It has ended as to Respondent Steven Wise, who settled. See Steven Wise, 84 SEC Docket 2719 (Jan. 25, 2005).

The undersigned held a three-day hearing on February 22-24, 2005, in New York City. The Division of Enforcement (Division) called four witnesses, including an expert witness, and Vindman testified in his own behalf and called an expert witness. A number of exhibits were admitted into evidence.²

The findings and conclusions in this Initial Decision are based on the record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the following posthearing pleadings were considered: (1) the Division's April 1, 2005, Proposed Findings of Fact and Conclusions of Law and Brief in Support of Proposed Findings of Fact and Conclusions of Law; (2) Respondent's April 1, 2005, Proposed Findings of Fact and Conclusions of Law; (3) the Division's April 8, 2005, Reply Brief; and (4) Respondent's April 8, 2005, Reply. All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

B. Allegations and Arguments of the Parties

This proceeding concerns the alleged manipulation of the price of the common stock of Marx from about August 2003 to September 5, 2003. The OIP alleges that Marx stock was a penny stock and that Vindman engaged in a scheme to inflate artificially the demand for and price of Marx stock that included offering two registered representatives of a broker-dealer free-trading shares of Marx stock to induce them to make a market in Marx stock and to solicit their customers to buy Marx stock.³ Thus, the OIP alleges, Vindman violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Vindman maintains that he was hired to do honest public relations for Marx, which he believed to be a legitimate company, and its products. He maintains that the people who the Division alleges were a network whose trading he directed were simply a group of day traders who shared ideas. Further, he maintains that his active trading of Marx stock was merely consistent with the way he day traded other stocks. Finally, he alleges that the registered representatives entrapped him and that the Division misconstrues his remarks during telephone calls with them. The Division requests a penny stock bar, a cease-and-desist order, and a third-tier civil penalty. Vindman maintains that no sanctions are warranted and that, in any event, he is financially unable to pay a penalty.

II. FINDINGS OF FACT

A. Respondent and Related Entities

² Citations to the Division's and Respondent's exhibits, and to the hearing transcript, will be noted as "Div. Ex. __," "Resp. Ex. __," and "Tr. __," respectively.

³ In its posthearing filings, the Division also argues that Vindman traded and tipped others while in possession of material nonpublic information about Marx's business prospects. The OIP did not, however, allege insider trading, so the undersigned has made no conclusions concerning this argument.

Vindman, thirty-three, graduated from high school and college in New Jersey and has a bachelor's degree in business administration. Tr. 405-06. After working for a newspaper for a few years, Vindman became a day trader in 1999. Tr. 406-10. He watched CNBC and frequented chatrooms and message boards on the Internet. Tr. 407-10. While not ignoring fundamentals, Vindman gravitated toward "charting" – making trading decisions based on charts of a stock's past price movements. Tr. 410-13. According to this theory, a stock trades between a lower "support" price and a higher "resistance" price; when the price drops below the support price, it will drop still lower, and when it rises above the resistance price, it will rise higher and establish a new resistance price. Tr. 411-13.

Vindman's career as a penny stock promoter started when he began doing "public relations" work for companies in late 2000, having lost everything he had gained from day trading after the stock market crashed in April 2000. Tr. 415, 564. His description of the services he performed for companies he promoted was vague.⁴ Tr. 416-17. Vindman found that the penny stock world abounds with unsavory characters, including promoters and chief executive officers (CEOs) seeking a quick profit rather than building a company. Tr. 424. Vindman was arrested on September 5, 2003, and charged criminally with securities fraud based on the facts at issue in this proceeding. Tr. 551. He was found not guilty after a two-and-one-half week jury trial. Tr. 552.

Vindman held Marx stock in his own name and in the name of Progress, Inc. (Progress), incorporated in Belize. Tr. 102-03, 568; Div. Exs. 201A-B, C, E-F. He offered an incoherent explanation as to why he chose to incorporate Progress in a tax haven. Tr. 568-70.

Marx, formerly known as Stereoscape.com, was incorporated on June 8, 1988, as a public shell, according to its Form 10-KSB for the year ended December 31, 2002. Div. Ex. 4A. Its audited financial statements for that year contained a "going concern" statement, indicating doubt that the company would survive as a going concern for another year. Div. Ex. 4A at 25. Marx was still little more than a shell in the summer of 2003, as it had only one employee, CEO

⁴ "[I]t just started where it was very small and I would help companies with little things, and then got a lot bigger." Tr. 416. "It was just getting exposure for the company, maybe getting on a website to give it more investors to have a look at it, maybe doing an e-mail. Not myself. I knew people that would do e-mail for a company; little stuff like that. You know, just word of mouth, let people know what this company is all about" Tr. 417. For DataMEG, "I introduced them to a gentleman at a very popular website that did an interview with the CEO [and] was able to get them a contact that would get them on the radio." Tr. 508. For Rocky Mountain Energy, "I set up some exposure campaigns. . . . There was also an interview with the CEO, . . . a radio thing, . . . a newspaper thing, an e-mail advertisement." Tr. 508-09. Vindman referenced helpful "contacts" – "different lawyers, accountants, different people at finance companies, different people that have websites that do interviews with CEOs, people that build websites for companies, people that basically do -- investor relations people that get a company in the paper, on the radio, which I've done many times before." Tr. 507.

Steven Wise (Wise), and little, if any, revenue. Tr. 94. Its only lifeline was a product called IM Buddies, licensed from United Internet Technologies (UIT), that Marx was trying to develop and market. Tr. 94, 621; Div. Ex. 4A at 17, 25, 32; Resp. Ex. A. IM Buddies was a toy in the form of a cartoon character, such as Bugs Bunny, that was to be attached to a computer and read instant messages (IMs) in its own voice. Tr. 94, 427-28. On August 18, 2003, UIT announced that its contract with Marx was null and void.⁵ Tr. 95, 467; Div. Ex. 3G. The price of Marx stock then declined. Tr. 95; Div. Ex. 311A.

Marx had 15,242,432 shares of stock outstanding on December 31, 2002; 30,473,000 shares on June 30, 2003; and 47,653,000 shares on September 30, 2003. Div. Exs. 4A at 187, 20; 4C at 5; 4D at 5. During 2003, Marx's closing price ranged from two-and-one-half cents to thirty-six-and-one-half cents (on August 15).⁶ Tr. 305; Div. Ex. 311A at 3, 6. There is no dispute that Marx stock was a penny stock. Penny stock is, essentially, a low-priced speculative stock that trades for pennies per share.⁷ Tr. 46-47. Penny stocks are considered volatile and subject to fraud and manipulation. Tr. 47. Many large broker-dealers will not do business in penny stocks, many institutions will not buy penny stocks, and, thus, there are no analysts following these stocks. Tr. 47. A trader or a group of traders can artificially affect the price if they control the float (the amount of a corporation's stock that is available for public trading); Kevin Coughlin (Coughlin) opined that it was necessary to control the float to do so.⁸ Tr. 50, 381. However, in addition to the absence of large investors and analysts willing to ferret out false information or trading, there is relatively little stock available in such a small issuer, and the spread between bid and ask may be wide because of less trading and liquidity.⁹ Tr. 48-49. Thus, almost any trade might move the price. Tr. 49. For this reason, it is not necessary to control the float to artificially affect the price; an individual or a small group could trade the price up or down, as Steven Thel (Thel) opined.¹⁰ Tr. 50-51. On a date, August 21, 2003, when Marx's float was 47,653,000 or fewer shares, Vindman himself believed that the price of Marx stock

⁵ The dispute was resolved on September 4, 2003. Tr. 474.

⁶ The stock declined drastically on news of Vindman's and Wise's September 5, 2003, arrests. Div. Ex. 311A. Currently, Marx has had a fifty-two week high of five cents and low of zero. <http://global.factiva.com/en/cqs/cqs.results.asp> (last visited May 23, 2005).

⁷ Penny stock is defined under the Exchange Act as a stock that trades for under five dollars a share. See Exchange Act Section 3(a)(51) and Rule 3a51-1.

⁸ Coughlin, a former Commission examiner, Ph.D. candidate in economics and professor of economics and finance, testified as an expert witness for Respondent and was accepted as an expert on market manipulation. Tr. 341-74; Resp. Ex. FFF.

⁹ In the bid-ask spread, "bid" is the [lower] price that a dealer would pay for a stock, and "ask" is the [higher] price for which he would sell it. Tr. 39.

¹⁰ Thel, a law professor who teaches securities regulation and related business law courses, testified as an expert witness for the Division and was accepted as an expert in market manipulation and securities pricing, markets, and regulation. Tr. 22-34; Div. Ex. 600.

could be moved by the purchase of as few as three to four million shares. Div. Exs. 4C at 5; 4D at 5; 401A; 401B at 11.

Wise was the president and CEO of Marx, having taken over the company in October 2002. Tr. 92-93, 427. He was arrested on the same day as Vindman. Tr. 210. He pleaded guilty to securities fraud and is awaiting sentencing. Tr. 212-13. Vindman did not trust him and considered him dishonest. Tr. 446-47, 452-53, 536, 579-82, 585. Vindman told Cal Massaro (Massaro) that he did not think that Wise was suitable as CEO of Marx. Tr. 264-65.

Vindman originally met Josh Weinfeld (Weinfeld), Massaro, Fred Nader (Nader), and William Brantley (Brantley) in internet chatrooms. Tr. 232-33, 419, 533-35. He met Max Bevins (Bevins) through Brantley. Tr. 534. Massaro, Nader, Brantley, and Bevins were fellow day traders. Tr. 533-35. Weinfeld was involved with Wise and Marx in some unspecified way. Tr. 454, 579. Wise told Vindman that Weinfeld had helped him take over the company from the previous owners. Tr. 427. Weinfeld held Marx stock in his own name and in the name of Shia Holdings, Marnco, and Jay Financial. Tr. 104-06, 171-75, 197; Div. Exs. 203A-B, 204A-B, 205A-C. Vindman disliked him and considered him dishonest. Tr. 261, 418-19, 577-78, 585.

Federal Bureau of Investigation (FBI) Agent Kurt Dengler (Dengler) was the case agent on the Marx case. Tr. 91-92. He opened the investigation as a result of information received from David Stetson (Stetson) and Steven Ingrassia (Ingrassia), stockbrokers who were cooperating witnesses in an unrelated fraud case.¹¹ Tr. 117-19. The brokers told Dengler that Wise had contacted them about Marx. Tr. 92. Dengler learned that Marx was in a parlous state and told them to learn more from Wise if he contacted them. Tr. 92. Dengler arranged to monitor and tape-record phone calls between them and Wise and Vindman.¹² Tr. 117-21.

B. Help With the Stock

Wise first contacted Vindman, on Weinfeld's recommendation, at the end of 2002. Tr. 237, 417-19. Wise said he wanted "help with the stock" and with marketing and financing. Tr. 419. Vindman conducted some due diligence on Marx that emphasized whether the float was increasing (which would tend to decrease the value of any stock that he was given). Tr. 423-27. Vindman knew that Wise had given Weinfeld some stock and asked him to stop doing so. Tr. 427-28. Later Vindman was distressed to learn that the float kept rising because Wise continued to give out stock to various individuals. Tr. 450-57, 584.

¹¹ Stetson and Ingrassia have pleaded guilty to money laundering and securities fraud and are awaiting sentencing. Tr. 119, 162, 165-66.

¹² Copies of the recordings and transcripts of the recordings of conversations between Vindman and Stetson or Ingrassia are in evidence as Div. Exs. 401A-B, 402A-B, 407A-B, and 409A-B (offered by the Division). Copies of the recordings and transcripts of conversations that did not include Vindman between Wise and Stetson or Ingrassia are in evidence as Div. Exs. 403A-B, 404A-B, 405A-B, 406A-B, 408A-B, 410A-B, 411A-B (offered by Respondent).

Vindman's interest was piqued when he learned about IM Buddies in February 2003. Tr. 429-30. Early in 2003, Vindman made an oral agreement with Wise to provide services over a one-year period in exchange for three million shares of Marx stock. Tr. 429, 434-35. He actually received, from Weinfeld, two million shares – one and one half million shares in March 2003 in his Progress offshore account in Belize, and an additional 500,000 shares in July 2003. Tr. 434, 568, 579; Div. Exs. 102, 103, 201E-F, 204A-C, 205C. In January, the share price was two or three cents, in March, six cents, and in July, twenty cents. Tr. 434; Div. Ex. 311A. Vindman considered that it would be desirable for the price to rise to forty cents, which he perceived to be the “resistance” price. Tr. 240-41, 503, 517-18.

The licensing contract for IM Buddies was signed April 1, 2003. Tr. 441-42; Resp. Ex. E. Vindman commenced providing services to Marx on about July 23. Tr. 430-31. Although Vindman claims that his role at Marx was public relations, he testified that his involvement in press releases was restricted to checking grammar and spelling. Tr. 464-66, 587-89. Although he denies that he engaged in market manipulation of Marx stock, he never explained what he did do except in terms of vague generalizations.¹³ Tr. 431-32.

C. Fighting the Shorts

Vindman was concerned that short sellers were harming Marx. Tr. 241-42, 475-77. If an investor (short seller) believes that the price of a stock is too high and is likely to fall, he will sell stock that he does not have and buy it back when the price drops.¹⁴ Tr. 40. His broker borrows the stock that is delivered to the buyer, and later the short seller “covers” by buying the stock and thus paying off the loan of stock. Tr. 40. Short selling communicates information that some people think the price is likely to fall. Tr. 40-41. “Squeezing the shorts” refers to a scenario in which the price is pushed up, the broker who is lending stock to the short seller becomes concerned, and the short seller has to put up more margin or cover by buying the stock back in, which in itself will increase price. Tr. 41. Some say that short sellers drive small companies out

¹³ “Part of it was, you know, help them getting new investors on board, help them with exposure to market, getting them get a niche for the company. Part of it was to help the product sell and help get the product out there and make the company successful. Part of it was to help with some stuff on the website. We had talked about financing. You know, I had some contacts in the financing area that could help once the company had achieved what they needed to. It was basically I multi-tasked everything from giving advice to the CEO on what lawyer to go to, what accountant to go to because I had been around the business a little bit. It was basic full faceted. I did a little bit of everything.” Tr. 431. “After I received the 500,000 shares I put together a plan, and I started some of the marketing stuff.” Tr. 435. “I was doing a lot of things. I mean I was working with Steven Wise as far as the company, the distribution and telling the story to the market, you know, getting it out to different avenues so it can have an audience. And I bought some stock myself, and I had friends that bought some, obviously. And, you know, basically, you know, in general terms developed a market.” Tr. 520. “I had e-mail advertising, . . . told friends about it, . . . had [Wise] do an interview [on] hotstockchat.com.” Tr. 587.

¹⁴ Short selling is sometimes perceived negatively, perhaps, Thel opined, because of feelings that profiting from bad news is unattractive. Tr. 41.

of business, on the theory that the short sellers intend to drive the price of the stock to zero so they can cover at no cost. Tr. 44. Thel opined that these allegations are usually made by companies that go broke on their own. Tr. 44.

Vindman believed that the stock price of Marx was kept unnaturally low by the activities of “naked” short sellers hoping to ruin the company.¹⁵ Tr. 241-42, 475-77, 526. He testified that some short sellers even posted messages on message boards stating they would stop shorting the stock if they were given three million shares, a practice known as “short and extort.” Tr. 476-77. Vindman did not complain to the Commission, the NASD, or any law enforcement authority. Tr. 615-17. He did not have confidence that the Commission would take action against the “short and extort” people. Tr. 615-17. Instead, Vindman engaged in what he described as “fighting the shorts.” Tr. 242, 619; Div. Exs. 401A, 401B at 6, 9; 402A, 402B at 1, 3. Vindman believed that unless the shorts were stopped, Marx would be unable to get financing to develop and market IM Buddies so that it could succeed on fundamentals. Tr. 619-22. He believed that the shorts would be forced to cover at forty cents. Tr. 240-41. Vindman denies that “fighting the shorts” meant fraudulent price manipulation, but never explained what he did do except in terms of vague generalizations.¹⁶

The evidence shows that Vindman’s “fighting the shorts” consisted of his coordinating trading in Marx for the purpose of exerting upward pressure on its price. The trading he coordinated was his own and that of Massaro, Nader, Brantley, and Bevins. Additionally, at Wise’s insistence, Vindman sought the assistance of Stetson and Ingrassia, who were to buy and solicit their customers to buy Marx in order to exert upward pressure on its price.

1. Trading

The record is clear that Vindman, Massaro, Nader, Brantley, and Bevins engaged in frequent trading in Marx stock during the period between July 23 and September 5, 2003.¹⁷ Div.

¹⁵ “Naked” short selling refers to a scenario in which a trader sells stock without having any reasonable prospect of actually borrowing that stock to cover at some point in time. Tr. 72.

¹⁶ “Part of it meant basically the conversations we had. Part was the message board stuff that was going on. Part of it I was just, you know, hoping that the company would come around and get the settlement done.” Tr. 477-78. “I just meant in general as far as, you know, battling as far as what was going on with the stock and all the postings they were doing on message boards, all the different extortion attempts they were doing. Just basically stuff like that.” Tr. 505.

¹⁷ Weinfeld, including his entities Jay Financial and Shia Holdings, also engaged in frequent trading of Marx between July 23 and September 4, 2003; the trades were predominantly sales. Div. Exs. 203A-B, 204A-C, 205A-C, 304. Vindman denies orchestrating Weinfeld’s trading, but he did, on one occasion, ask Massaro to ask Weinfeld to “put a bid up” to buy Marx; Massaro did so, and Weinfeld agreed. Tr. 245. Vindman claims that his request was in jest. Tr. 539. This claim is not altogether convincing, since Massaro did pass the request on to Weinfeld. Nonetheless, the record does not support a finding that Vindman was orchestrating Weinfeld’s trading. Weinfeld’s trades were predominantly sales, and there is no evidence in the record that they were matched with others’ purchases.

Exs. 201A, 201C-D, 201F, 202A-D, 206A-E, 207, 208A-D, 301, 302, 303, 305, 306, 307. Trading from July 23 through July 29 is an example. Vindman first bought Marx on July 23, 2003, making two purchases, of 15,000 and 30,000 shares, at nineteen cents.¹⁸ Tr. 308, 540; Div. Ex. 302. From July 23 through July 29, Vindman bought thirteen times (222,000 shares) and sold once (15,000 shares). Div. Exs. 302, 311A. Massaro, Nader, Bevins, and Brantley were also active during the same time period. Tr. 604-06, 643-45; Div. Exs. 302-03, 305-07. Massaro bought 55,500 shares during that period; Nader bought 175,000 and sold 100,000; Brantley bought 126,500 and sold 140,233; and Bevins bought 476,000. Div. Exs. 302-03, 305-07.

The group's trading accounted for significant percentages of daily trading volume in Marx. For instance, on July 23, Vindman, Massaro, and Bevins bought a total of 109,000 shares, accounting for 11.5% of the day's volume of 944,300. Div. Exs. 302, 303, 306, 311A. On July 29, Vindman, Massaro, Nader, Brantley, and Bevins bought a total of 534,000 shares, 30% of the daily volume of 1,770,400 shares. Div. Exs. 302, 303, 305, 306, 307, 311A. They also sold 127,900 shares; assuming, *arguendo*, that the sales were to other members of the group, the net of 406,100 shares accounted for 23% of the daily volume. The price of Marx stock, which had risen slowly from two and one-half cents since the beginning of 2003, increased rapidly from July 23 to July 30, when it reached about thirty-two cents. Tr. 309-10; Div. Ex. 311A.

During the period July 23 through September 4, 2003, price and volume increased. In 2003, before July 23, the share price was never higher than nineteen cents; after September 5, when Vindman was arrested, the price was never higher than sixteen cents. Div. Ex. 311A. Between those dates, the closing price ranged from twenty-two to thirty-six and one-half cents. Volume also increased: Marx's daily trading volume averaged fewer than 650,000 shares in 2003. From July 23 to September 4, the daily trading volume exceeded a million shares on seventeen of thirty-one trading days. Div. 311A.

2. The Network

Vindman denies directing Massaro's, Nader's, or Brantley's trading and even speaking with Bevins. Tr. 536-40, 635-36. He conceded he might "recommend" trades. Tr. 538. Understandably, Massaro, Nader, Brantley, and Bevins denied to FBI Agent Dengler that Vindman had any connection to their trading patterns. Resp. Exs. W, Y, Z, BB. The weight of the evidence shows otherwise.

a. Vindman Boasts of his Network to Stetson and Ingrassia

¹⁸ Vindman explained this coincidence by testifying that he purchased the stock based on charting and started day trading it like any other stock. Tr. 436. Yet he also testified that he was a long term investor in Marx and still has more than two million shares. Tr. 557-58.

After the disastrous news on August 18, Wise insisted that Stetson and Ingrassia be approached for help in raising the stock price.¹⁹ Tr. 484, 487-89. In August 21, 26, and 27, 2003, telephone conversations with them, Vindman discussed how they could help raise and stabilize the price of Marx stock and how they would be compensated.²⁰ Div. Exs. 401A-B, 402A-B, 407A-B, 409A-B. Vindman introduced himself by stating that stocks that he had promoted, DataMEG (DTMG), Rocky Mountain Energy (RMEC), Enviro-Energy (ENGY), and Wire, had risen 500 to 1,000 percent. Div. Exs. 401A, 401B at 6-7. Vindman told the brokers that his goal was to raise the price of Marx stock to forty cents. Div. Exs. 401A, 401B at 10-11. He expressed confidence in the soundness of the stock but stated it needed “some help to break it over some resistance points.” Div. Exs. 401A, 401B at 9. He offered to pay them one million shares if they helped achieve this goal. Tr. 620; Div. Exs. 401A, 401B at 11. On August 21, a Thursday, the brokers agreed to help; they would start by buying some for their own account and proposed to meet the following week to put together a game plan as Vindman was reluctant to divulge details over the telephone.²¹ Div. Exs. 401A, 401B at 7-9; 407A, 407B at 5-6, 8-9. Vindman hinted that Marx was expecting big news, and Stetson asked for the nonpublic information so that he could impress his customers; Vindman responded that Marx had contracts with Walmart and K-Bee Toys. Div. Exs. 401A, 401B at 9-10.

Vindman referred to Massaro, Nader, Brantley, and Bevins as his “network” and “my guys.” Div. Exs. 401A, 401B at 6-7, 9, 11; 407A, 407B at 7-8. Vindman described himself as the “quarterback” of the “team” who could not leave his position during trading hours. Div. Exs. 402A, 402B at 3. When Stetson commented that the stock had been going up and down, Vindman responded, “Yeah, it’s been my guys. . . . [W]e’ve been fighting the shorts and [were] on the verge of breaking them really well, and [the price] would have been 50, 60 [but for UIT’s terminating the licensing agreement].” Div. Exs. 401A, 401B at 5-6. While he testified that he was merely trying to impress Stetson and Ingrassia, Vindman conceded, “it’s partly true, I’m working with a lot of guys that invest in stocks that have a lot of available money and that I have a lot of trust with.” Tr. 514.

¹⁹ Wise first mentioned Stetson and Ingrassia in August 2003, telling Vindman that they could help a lot and that he would have to pay them in stock. Tr. 480-82. Vindman claims that Wise told him that Stetson and Ingrassia could conduct road shows and attract institutional investors. Tr. 481, 503. There is no support for this claim in the recorded telephone calls or elsewhere in the record. Tr. 589-90, 628.

²⁰ At the hearing Vindman attempted to explain away his more damning statements in the conversations and testified that he was trying to impress Stetson and Ingrassia. Tr. 505-24, 611, 620-21, 636, 641, 646.

²¹ Vindman never did meet in person with Stetson and Ingrassia. Tr. 532. He testified that he became disenchanted after learning more about them and after his panic over the plight of Marx stock faded. Tr. 528. There is no evidence in the record that the pair actually bought, or persuaded customers to buy, Marx or that Vindman caused them to be given Marx stock. Indeed, the price never reached forty cents. Tr. 517; Div. Ex. 311A.

Vindman estimated that, including shares bought through the brokers and by “my guys,” it would be necessary to buy three to four million shares, buying methodically; he warned that if buying stopped, short sellers would bring the price back down. Div. Exs. 401A, 401B at 11. Vindman told the brokers that the network was going to Atlantic City that weekend to engage in high-stakes gambling at the Trump Plaza. Div. Exs. 401A, 401B at 6-8. He invited the brokers to join them, but Stetson had a previous engagement. Divs. Exs. 401A, 401B at 5.

Although Vindman now claims that his statements concerning the network were exaggerations, he included purchases by “my guys” in estimating the number of shares that had to be purchased in order to stop the short sellers. He concedes that he was “working with” investors who had a lot of available money and whom he trusted. The existence of the network is additionally corroborated by other evidence in the record. This includes the group outing, Vindman’s contacts with the other investors, and the fact that they also had traded at the same time in other stocks that Vindman promoted.

b. The Network Outing in Atlantic City

The Atlantic City outing included Vindman, Massaro, Nader, Brantley, and Bevins; the group was joined by the CEO of DataMEG. Tr. 247, 250-52; Div. Ex. 10. The group discussed Marx during the outing. Tr. 549-50. Previously, Vindman, Massaro, Brantley, and Nader had taken a similar trip to Las Vegas.²² Tr. 248-49.

c. Vindman’s Contacts with the Network

Vindman spoke with Massaro two or three times a week. Tr. 533. Vindman offered Massaro shares if Massaro would solicit several others to invest in Marx; Massaro did that and received 100,000 shares from Weinfeld in a MyTrack (Track Data) brokerage account, which Vindman asked him to open, on July 24, 2003. Tr. 237-39; Div. Exs. 202A, 205C. Vindman asked him to buy a specified number of shares at a specified price two or three times during the summer of 2003. Tr. 240, 269. Sometimes Massaro bought a different amount. Tr. 240. Vindman never asked him to sell, but he did sell, to take profits. Tr. 240.

Vindman communicated with Nader by IM almost every trading day. Tr. 534. Vindman also spoke with Nader and Massaro together on a conference call. Tr. 246. Nader received 100,000 shares from Weinfeld on July 22, 2003. Div. Exs. 205C, 206B.

Vindman communicated with Brantley by IM almost every trading day and by telephone, once a week. Tr. 535. Brantley brought Bevins into the group; Vindman first met Bevins at the Atlantic City outing. Tr. 247, 250-52, 534, 537; Div. Ex. 10. Vindman denies speaking with him before or since then and testified that he saw Bevins, an older man, only at dinner and not during the remainder of the weekend. Tr. 534, 537. It was not necessary, however, for Vindman to speak directly with Bevins since he communicated daily with Brantley. Likewise, it was not necessary for Bevins to join the others for the remainder of the weekend’s activities to be part of

²² Vindman transferred \$20,000 to the Trump Plaza casino on May 15, 2003, and \$15,000 to Bally’s casino in Las Vegas on June 10, 2003. Tr. 116; Div. Ex. 6 at VIND2483, VIND2485.

the network. Indeed, the fact that Bevins traveled from his home in Arizona to Atlantic City solely to join the others at dinner underscores the fact that he was part of the network.

d. Trading in DataMEG and Other Stocks

Vindman (and Progress) traded in DataMEG in March and June 2003, at the same time that Massaro, Nader, Brantley, and Bevins were trading in DataMEG. Div. Exs. 201C, 201F, 202B, 206A, 207, 208A, 208D. Vindman (and Progress), Massaro, Nader, and Brantley traded at the same time in Rocky Mountain Energy in February and March 2003. Div. Exs. 201C, 201F, 202B, 206A, 208A, 208D. Vindman (through Progress), Nader, and Brantley traded Enviro-Energy at the same time in February 2003. Div. Exs. 201F, 206A, 208D.

In sum, the evidence establishes that the volume and timing of the trading in Marx from July 23 through September 4 by Vindman, Massaro, Nader, Brantley, and Bevins was not coincidental, but was rather a group effort coordinated by Vindman and intended to raise the price of Marx to forty cents. In Vindman's own words, while denying that he directed and controlled their trading, he "worked with" them and might "recommend" trades.

D. Vindman's Financial Condition

Vindman is currently unemployed. Tr. 557. He has been living with his parents since May 2003. Tr. 405, 484. Even during the time at issue he worked from home. Tr. 433. Vindman did not profit from his trading in Marx stock; he lost over \$120,000. Tr. 558. Vindman testified concerning his current financial situation. Tr. 560-62, 628-32. He also submitted a Statement of Financial Condition. Resp. Ex. GGG. He indicates minimal income for the past twelve months and assets, mainly cash, that are exceeded by liabilities related to his criminal proceeding, this proceeding, and unpaid taxes. As the Division points out, his filing does not completely accord with 17 C.F.R. §§ 201.630, 209.1 (Form D-A), which permit a respondent who wishes to assert an inability to pay penalties to provide financial information. For example, Vindman does not provide the gross income reported on his most recent federal tax filing, as required by item B.1. of Form D-A. The Division also argues that sums paid by family members on Vindman's behalf for representation in his legal proceedings may have been gifts rather than loans. However, the fact that Vindman's parents, brother, and uncle paid these expenses in itself indicates that his finances are circumscribed.

III. CONCLUSIONS OF LAW

In this section it is concluded that Vindman willfully violated the antifraud provisions of the Securities and Exchange Acts – Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5. Additionally, it is concluded (and not disputed) that Marx stock was a penny stock within the meaning of Exchange Act Section 3(a)(51) and Rule 3a51-1, and Vindman was a "person participating in an offering of penny stock" within the meaning of Exchange Act Section 15(b)(6)(C).

A. Antifraud Provisions

Section 17(a) of the Securities Act makes it unlawful “in the offer or sale of” securities, by jurisdictional means, to:

- 1) employ any device, scheme, or artifice to defraud;
- 2) obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary to make the statement made not misleading; or
- 3) engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 10(b) of the Exchange Act and Rule 10b-5 thereunder proscribe similar practices “in connection with” the purchase or sale of securities.

Manipulation of the market in a security violates Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5. Pagel, Inc., 48 S.E.C. 223, 228 (1985), aff’d, 803 F.2d 942 (8th Cir. 1986). The Commission has defined “manipulation” as “intentional interference with the forces of supply and demand.” Pagel, Inc., 48 S.E.C. at 226 (quoted in Brooklyn Capital & Sec. Trading, Inc., 52 S.E.C. 1286, 1290 (1997)); Amr Elgindy, 82 SEC Docket 1389, 1396 n.15 (Mar. 10, 2004); see also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1975) (“‘manipulative’ . . . connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.”).

“Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail [such as] from patterns of behavior, from apparent irregularities, and from trading data.” Pagel, Inc., 48 S.E.C. at 226. “[A] finding of manipulation does not hinge on the presence or absence of any particular device usually associated with a manipulative scheme. Rather, each case must be judged on its own facts.” Patten Sec. Corp., 51 S.E.C. 568, 574 (1993) (footnotes omitted), aff’d, 274 F.3d 525 (D.C. Cir. 2001). “While profit is the normal goal of manipulators, their actions are not rendered innocent simply because they fail to achieve the desired result.” Michael J. Markowski, 54 S.E.C. 830, 835 (2000) (citing R.B. Webster Inv., Inc., 51 S.E.C. 1269, 1274 (1994)).

Scienter is required to establish violations of Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5. It is “a mental state embracing intent to deceive, manipulate, or defraud.” Aaron v. SEC, 446 U.S. 680, 686 n.5, 695-97 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); SEC v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992). Recklessness can satisfy the scienter requirement. See David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997); see also Steadman, 967 F.2d at 641-42; Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990). Reckless conduct is conduct that is “‘highly unreasonable’ and represents ‘an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.’” Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978) (quoting Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977)).

The Division requests sanctions pursuant to Sections 15(b)(6) and 21B of the Exchange Act. The Commission must find willful violations to impose sanctions under Sections 15(b) and 21B of the Exchange Act. A finding of willfulness does not require an intent to violate, but merely an intent to do the act that constitutes a violation. See Wonsover v. SEC, 205 F.3d 408, 413-15 (D.C. Cir. 2000); see also Steadman v. SEC, 603 F.2d 1126, 1135 (5th Cir. 1979); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

B. Antifraud Violations

“Fighting the shorts” was a manipulative scheme to defraud within the meaning of Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5. Vindman’s role was to orchestrate buying of Marx stock by himself, Massaro, Nader, Brantley, and Bevins with the goal of raising the price of Marx stock to forty cents. This conduct was intended to artificially affect the price of Marx stock, and the price in fact rose during the period of the manipulative scheme.

During the telephone calls with Stetson and Ingrassia, Vindman indicated that Marx’s price was adversely affected by short sellers and that “my guys” had been combating the short sellers through their purchases; he described his goal of raising the price to forty cents through methodical, sustained purchasing of three to four million shares.²³ Massaro confirmed Vindman’s forty-cent target price and his concern with fighting short sellers. While denying that his influence over the other investors was so great that he controlled their trading, Vindman himself testified that he was “working with” investors who had a lot of available money and whom he trusted and that he might “recommend” trades.

The record shows Vindman’s scienter: he intended to artificially affect the price of Marx stock to combat what he saw as wrongful short selling that held the price down. Assuming, arguendo, that Vindman believed that his activities were acceptable in the penny stock world, his conduct was reckless – highly unreasonable and an extreme departure from the standards of ordinary care.

In sum, it is concluded that Vindman willfully violated Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5. His actions were clearly intentional. Thus, his violations were willful.

IV. SANCTIONS

The Division requests a penny stock bar, a cease-and-desist order, and a third-tier civil penalty of \$120,000. For the reasons discussed below, these sanctions will be ordered: a penny stock bar, a cease-and-desist order, and a civil penalty of \$20,000.

²³ Vindman argues that the brokers entrapped him into offering them Marx stock in return for their help. However, he does not argue that he was entrapped into describing his concern about short sellers and his target price of forty cents.

A. Sanction Considerations

When the Commission determines administrative sanctions, it considers:

the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d at 1140 (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)).

The Commission determines sanctions pursuant to a public interest standard. See Sections 15(b)(6) and 21B(c) of the Exchange Act. Thus, in addition to issues related to the violator, it "weigh[s] the effect of [its] action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally." Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975); see also Richard C. Spangler, Inc., 46 S.E.C. 238, 254 n.67 (1976). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); see also Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

B. Sanctions

1. Cease and Desist

Securities Act Section 8A and Exchange Act Section 21C authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of the Act or rules thereunder. Whether there is a reasonable likelihood of such violations in the future must be considered. KPMG Peat Marwick LLP, 74 SEC Docket 384, 429 (Jan. 19, 2001), reh'g denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. denied, 289 F.3d 109 (2002), reh'g en banc denied, 2002 U.S. App. Lexis 14543 (July 16, 2002). In determining whether a cease-and-desist order is appropriate, the Commission considers the Steadman factors quoted above, as well as the recency of the violation, the degree of harm to investors, and the combination of sanctions against the respondent. See KPMG, 74 SEC Docket at 436.

Vindman's violations were egregious and recurrent, involving many trades over a period of several weeks. The violations involved a reckless degree of scienter. The violations are recent. Consistent with a vigorous defense of the charges against him, Vindman has not affirmatively acknowledged the wrongful nature of his conduct. Additionally, the record shows that he believed that his conduct was an appropriate reaction to the harm that he believed short sellers were causing to the stock price. This increases the likelihood of such violations in the future. Finally, a cease-and-desist order is appropriate in light of the combination of sanctions ordered, which also include a penny stock bar and a civil penalty.

2. Penny Stock Bar

Vindman will be barred from participating in an offering of penny stock. Thus, he will be barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock. Vindman argues that a penny stock bar will deprive him of the opportunity to make a living. However, as noted above, Vindman's unlawful conduct was recurrent, egregious, and involved a reckless degree of scienter. Absent a penny stock bar, Vindman's occupation will provide opportunities for future violations.

3. Civil Money Penalty

Section 21B of the Exchange Act authorizes the Commission to impose civil money penalties for willful violations of the Securities and Exchange Acts and rules thereunder. In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud or deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. See Section 21B(c) of the Exchange Act; New Allied Dev. Corp., 52 S.E.C. 1119, 1130 n.33 (1996); First Sec. Transfer Sys., Inc., 52 S.E.C. 392, 395-96 (1995); see also Jay Houston Meadows, 52 S.E.C. 778, 787-88 (1996); Consolidated Inv. Servs., Inc., 52 S.E.C. 582, 590-91 (1996).

Vindman has no previous violations and was not enriched by his wrongdoing. However, he violated the antifraud provisions, and his scheme distorted the market price of Marx stock, thus subjecting investors to a significant risk of substantial losses. A penalty is in the public interest in this case. A penalty in addition to a bar and cease-and-desist order is necessary for the purpose of deterrence. See Sections 21B(c)(5) of the Exchange Act; see also H.R. Rep. No. 101-616 (1990). A third-tier penalty, as the Division requests, is appropriate because the violative acts involved fraud, and created a significant risk of substantial losses to other persons. See Section 21B(b)(3) of the Exchange Act.

The maximum third-tier penalty for each act or omission is \$120,000 for a natural person.²⁴ The Division requests a \$120,000 penalty. This penalty amount is consistent with Commission precedent. However, the amount imposed on Vindman will be reduced to \$20,000. This value takes into account the need for deterrence as well as record evidence bearing on Vindman's present ability to pay. See Sections 21B(c)(5), (d) of the Exchange Act.

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on May 3, 2005.

²⁴ See 17 C.F.R. § 201.1001.

VI. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, VLADLEN “LARRY” VINDMAN IS BARRED from participating in an offering of penny stock.

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, VLADLEN “LARRY” VINDMAN CEASE AND DESIST from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933 or Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 21B of the Securities Exchange Act of 1934, VLADLEN “LARRY” VINDMAN PAY A CIVIL MONEY PENALTY of \$20,000. Payment of the money penalty shall be made on the first business day following the day this Order becomes effective by certified check, U.S. Postal money order, bank cashier’s check, or bank money order payable to the Securities and Exchange Commission. The check and a cover letter identifying the Respondent and Administrative Proceeding No. 3-11247, shall be delivered by hand or courier to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter shall be sent to the Commission’s Division of Enforcement at the same address.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission’s Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission’s Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned’s order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge