

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54384 / August 30, 2006

Admin. Proc. File No. 3-12165

In the Matter of the Application of

ARTHUR JAMES NIEBAUER
c/o Brian Reis, Esq.
61 Broadway, Suite 2820
New York, New York 10006

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY
PROCEEDING

Odd-lot trading in circumvention of round-lot auction market

Unbundling of round-lot orders into odd-lot orders for execution through
exchange's odd-lot order system

Registered representative and former principal of exchange member organization violated exchange rules by engaging in odd-lot trading in circumvention of exchange's round-lot auction market and by unbundling customer round-lot orders into odd-lot orders and executing those orders through exchange's odd-lot order system. Held, the application for review is dismissed.

APPEARANCES:

Brian Reis, for Arthur James Niebauer.

Virginia J. Harnisch, for the New York Stock Exchange, Inc.

Appeal filed: January 26, 2006
Last brief received: April 28, 2006

I.

Arthur James Niebauer, a former principal of Westminster Securities Corporation (“Westminster” or the “Firm”), a member organization of the New York Stock Exchange, Inc. (“NYSE” or the “Exchange”), appeals from NYSE disciplinary action. The NYSE found that Niebauer violated: (1) NYSE Rule 124 by “breaking up customer round-lot orders, wholly or partially, into odd-lot orders and effecting their execution through the Exchange’s odd-lot order system”; ^{1/} and (2) NYSE Rule 476(a)(6) by “engaging in odd-lot trading on the Exchange which circumvented the Exchange’s round-lot auction market.” ^{2/} For these violations, the Exchange censured Niebauer, suspended him for two months, and fined him \$25,000. ^{3/} We base our findings on an independent review of the record.

II.

Niebauer entered the securities industry in 1987 and joined Westminster in 1999. Niebauer was a principal, director, and vice president of the Firm and an allied member of the Exchange. ^{4/} As a floor supervisor for Westminster, Niebauer supervised the Firm’s two booths on the Exchange floor and, according to him, was responsible for “anything that involve[d]

^{1/} NYSE Rule 124 prescribes the handling of odd-lot orders on the Exchange’s odd-lot order system.

^{2/} NYSE Rule 476(a)(6) prohibits conduct inconsistent with just and equitable principles of trade.

^{3/} In a joint proceeding, the NYSE found Westminster liable for the same violations for which Niebauer was found liable, and in addition, found the Firm liable for failing reasonably to supervise odd-lot trading activities. The NYSE censured Westminster and fined it \$50,000. Westminster did not appeal that decision. We note that the NYSE’s initial joint charge memorandum against Niebauer and Westminster included a third charge against Niebauer alleging that he had transacted business on the Exchange floor without permission from an Exchange member, and a related charge against Westminster. The NYSE subsequently withdrew that charge and issued an amended joint charge memorandum reflecting the withdrawal of that charge and of the related charge against Westminster.

^{4/} At the time of the hearing, Niebauer also was chief executive officer of an unrelated registered investment advisory firm. Niebauer holds several securities licenses, including those for registered representative, financial and operations principal, and Exchange compliance official.

execution of an order, from the time an order [came] in through the time . . . [it was] reported . . . and processed. I supervise[d] it all.” As noted above, Niebauer broke up, or “unbundled,” some of those customer round-lot orders into odd lots for execution through the Exchange’s odd-lot order system. ^{5/} Niebauer’s unbundling activities occurred during the four-month period from July through October 2002.

The Exchange’s Odd-Lot Order System

Generally, round-lot orders are submitted to NYSE members for representation in the Exchange auction process on the Exchange floor for execution at the current market price. The auction process functions as a price-setting mechanism for the securities that are traded on the Exchange. Each security listed for trading on the Exchange is assigned to a particular specialist who manages the auction in his assigned securities. ^{6/} Floor brokers and specialists represent orders at a specialist trading post on the Exchange floor for execution against contra side interest available in the market, which may include contra side customer orders listed in the specialist’s electronic display book ^{7/} or represented by another member in the trading crowd. ^{8/} The price of each successive transaction on the trading floor “is determined by the competitive bidding by buyers and the simultaneous competitive offering by sellers. This occurs at a single, designated

^{5/} Pursuant to NYSE Rule 55, the standard unit of trading for most Exchange-listed stocks is 100 shares. An order for 100 shares or a multiple thereof is called a “round-lot” order, while an order for less than 100 shares is called an “odd-lot” order. See generally, Order Granting Approval and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 of a Proposed Rule Change Regarding an Information Memo on Odd-Lot Trading Practices, Securities Exchange Act Rel. No. 33678 (Feb. 24, 1994), 56 SEC Docket 408.

^{6/} See, e.g., NYSE Specialists Securities Litigation, 405 F. Supp.2d 281, 289 (S.D.N.Y. 2005) (explaining role of Exchange specialists); LaBranche Securities Litigation, 405 F. Supp.2d 333, 340-41 (S.D.N.Y. 2005) (internal citations omitted).

^{7/} The electronic display book is part of the Exchange’s “Display Book” system, an order management and execution facility that, among other things, receives and displays orders to the specialists, contains the electronic display book, and provides a mechanism to execute and report transactions. See Order Granting Accelerated Approval to Establish the Hybrid Market, Exchange Act Rel. No. 53539 (Mar. 22, 2006), __ SEC Docket __.

^{8/} See generally A Guide to the NYSE Auction Market, New York Stock Exchange, Inc. (2000). We note that the NYSE is in the process of changing its manual auction market into a more electronic hybrid market. See Order . . . to Establish the Hybrid Market, __ SEC Docket at __.

location on the [Exchange floor,]” that is, the specialist trading post, “where all buyers and sellers that are present can witness and participate in the auction.” ^{9/}

Odd-lot orders, by contrast, are executed in a dedicated odd-lot order system which is exclusive of the auction market. The procedures for execution of odd-lot orders are specified in NYSE Rule 124. These orders are entered into “SuperDOT,” an automated order routing system, which routes the odd-lot orders to the odd-lot order system for execution.

While the contra-party for trades in the round lot market could be an order in the electronic display book, an order represented by a floor broker in the crowd, or the Exchange specialist, the contra-party for an odd-lot order is the Exchange specialist in that security. ^{10/} In 1991, the Exchange implemented changes to its odd-lot order handling procedures to “afford pricing benefits to members and member organizations’ customers and to provide an inexpensive and efficient order execution system compatible with traditional odd-lot investing practices of smaller investors.” ^{11/} These changes were “designed to enhance odd-lot executions for all investors by providing more economic pricing policies achieved through efficient utilization of the Exchange’s odd-lot system.” ^{12/} One such change instituted the use of “Best Pricing Quote” for pricing odd-lot market orders to assure that an odd-lot market order sent to the Exchange for execution would be “priced on the basis of the best prevailing national market system quotation for that security.” ^{13/} Another change “eliminated all differentials on odd-lot limit orders entered by member organizations through” the Exchange’s odd-lot order system. ^{14/} The Commission has noted previously that the Exchange’s odd-lot order system “is predicated on the specialists’ willingness to provide execution and price guarantees to odd-lot orders, the majority

^{9/} A Guide to the NYSE Auction Market, at 3.

^{10/} See, e.g., Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. to Amend Exchange Rule 124 to Change the Way Odd-Lot Orders are Priced and Executed Systemically, Exchange Act Rel. No. 49536 (Apr. 7, 2004), 82 SEC Docket 2423, 2425.

^{11/} Order Granting Approval . . . Regarding an Information Memo on Odd-Lot Trading Practices, Securities Exchange Act Rel. No. 33678 (Feb. 24, 1994), 56 SEC Docket 408.

^{12/} NYSE Information Memo No. 91-29 (July 25, 1991).

^{13/} Order Granting Approval . . . Regarding an Information Memo on Odd-Lot Trading Practices, 56 SEC Docket 408, citing Exchange Act Rel. No. 27981 (May 2, 1990), 55 FR 19,409 (May 9, 1990).

^{14/} *Id.*, citing Exchange Act Rel. No. 28837 (Jan. 29, 1991), 56 FR 4660 (Feb. 5, 1991). A differential was a small extra fee -- usually an eighth of a point -- that dealers levied on odd-lot orders. See Jayne Levin, Big Board Seeks to Eliminate Extra Fee on Odd-Lot Orders, Investment Dealers’ Digest, Jan. 21, 1991, at 8.

of which are entered for smaller retail accounts.” 15/ The Commission has observed that these retail transactions are “too small to be handled efficiently through the regular Exchange auction process” and are generated by “retail investors to buy or sell a small amount of stock and are not used in short term trading strategies.” 16/ The Commission has recognized that, as a result, “Exchange specialists are able to provide execution guarantees to odd-lot limit orders without charging an additional handling fee.” 17/ In order to preserve the economic benefits afforded by the differential elimination, the odd-lot order system must be used “in a manner consistent with traditional odd-lot practices.” 18/

At the hearing, John Limerick, a managing director in the NYSE’s technology division, testified that odd-lot orders are not reflected in the quoted bid and offer for the security being traded and are not exposed to the trading crowd on the floor. According to Limerick, odd-lot orders bypass the auction market entirely and their execution is not printed to the tape. 19/ Prior to the events in question, the Exchange notified its members and their associated persons in Information Memos that, under the odd-lot order system set forth in NYSE Rule 124, it is impermissible to unbundle round-lot orders into odd lots for the purpose of qualifying those orders for the Rule 124 odd-lot order system and its automatic execution procedures. 20/

Limerick also testified about the pricing mechanism of the odd-lot order system as it existed in 2002, during the events in question. 21/ In effect, when a floor broker entered an odd-

15/ Order Granting Approval . . . Regarding an Information Memo on Odd-Lot Trading Practices, 56 SEC Docket at 409.

16/ Id.

17/ Id. With automatic execution through the odd-lot system, and Exchange specialists’ being assigned automatically as the contra side of an odd-lot order, the handling of odd-lot orders in the odd-lot order system became very efficient. As a result of that efficiency, the Exchange was able to eliminate the differential, or order handling fee.

18/ NYSE Information Memo No. 91-29 (July 25, 1991).

19/ The tape, or ticker, is a “telegraphic system that continuously provides the last sale prices and volume of securities transactions on exchanges. Information is either printed or displayed on a moving tape after each trade.” NYSE Glossary, <http://www.nyse.com>.

20/ See NYSE Information Memos Nos. 91-29 (July 25, 1991) and 94-14 (Apr. 18, 1994).

21/ In 2004, the Exchange amended NYSE Rule 124 to eliminate certain pricing advantages that the odd-lot order system possessed over the round lot auction market and to address “new odd-lot trading strategies” that were “not valid for use with odd-lot orders[,]” such as the unbundling of round-lot orders. Notice of Filing of Proposed Rule Change and

(continued...)

lot market order, that order would be executed automatically against the specialist at the market bid or offer prevailing at the time the odd-lot order system received the order. By contrast, when a trader placed a market order in the auction market, the trader ran the risk that, due to other orders trading ahead of his, the market may have moved against him by the time his order was executed. According to Limerick, a trader placing an odd-lot order limit order could guarantee that his order would be executed at or better than the order's limit price, as long as the limit order price in the odd-lot order system was reached, or "penetrated," during the trading day. Limerick explained that, if a trader were to transmit an odd-lot limit order to SuperDOT and a subsequent sale occurred at or better than the limit price, that odd-lot order would "[a]lways" receive execution, because there was "no such thing as shares ahead or anything like that" in the odd-lot order system. By contrast, a limit order placed in the auction market might not get executed even if the market reached the limit price, if the order was backed-up behind other orders during the time the limit price was reached. ^{22/} According to Limerick, "the potential for that [round-lot] limit order to not get executed was there if there were shares ahead. And actually, for the rest of the day it could potentially not get executed because there were shares ahead of it." Limerick testified that, by breaking up a round-lot limit order into odd-lot limit orders, a floor broker could guarantee that he would receive an execution if the odd-lot limit price were reached during the trading day.

The Unbundling of Round-Lot Orders by Niebauer

The facts concerning Niebauer's unbundling of round-lot orders are largely undisputed. Niebauer executed a total of 971 odd-lot orders, representing 71,506 shares, between July and October 2002. Of those 971 odd-lot orders, 176 were odd-lot market orders, comprising 12,099 shares, and 795 were odd-lot limit orders, comprising 59,407 shares. Niebauer unbundled twenty-six customer round-lot orders over nine different trading days between July and September 2002, and thirty-three customer round-lot orders encompassing every single trading

^{21/} (...continued)

Amendment No. 1 Thereto by the New York Stock Exchange, Inc. to Amend Exchange Rule 124 to Change the Way Odd-Lot Orders are Priced and Executed Systemically, Exchange Act Rel. No. 49536 (Apr. 7, 2004), 82 SEC Docket 2423, 2426 n.5. See Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. to Amend Exchange Rule 124 to Change the Way Odd-Lot Orders are Priced and Executed Systemically, Securities Exchange Act Rel. No. 49745 (May 20, 2004), 82 SEC Docket 3586.

^{22/} As a result of the 2004 amendment to NYSE Rule 124, odd-lot orders currently are priced and executed at the price of subsequent round lot transactions and in proportion to round lot volume. See Order Approving Proposed Rule Change . . . To Amend Exchange Rule 124, 82 SEC Docket 3586.

day between October 21 and October 28, 2002. 23/ In total, Niebauer unbundled fifty-nine customer round-lot orders and effected the execution of over 71,000 shares from those orders through the Exchange's odd-lot order system during that four-month period. 24/

Niebauer admitted at the hearing that he "traded the odd lots . . . to get the best possible price for [his] customers"; he argued that the unbundling was necessary, and in addition, claimed that he was unaware of prohibitions against unbundling. Niebauer explained that "the reason [he] got into the unbundling [was that he] felt the specialists were trading in front of [his] order flow, not honoring their quotes, they were walking away from their markets." Niebauer defended his conduct by asserting that he "was probably being ripped off in another stock. And if that was being the case, I would basically -- I would get very frustrated with it. I would get a little hot . . . and I would basically take everything off the market. I didn't find it to be a very fair trading platform." Niebauer conceded at the hearing, however, that, when he complained to the Exchange about certain orders, "they were all corrected." Anthony Anderson, at the time a clerk employed by Westminster on the Exchange floor, testified at the hearing that, at Niebauer's

23/ At the hearing, NYSE counsel introduced into evidence a series of system order database ("SOD") files that captured odd-lot trading activity by Westminster during the four-month period from July through October 2002. Limerick described a SOD file as "a comprehensive bible of all trading system activity that happens within the [NYSE]" and as "a very accurate file that is used by different divisions in the Exchange." The SOD files for Westminster identified some of the unbundled round-lot orders as recurring sequences of odd-lot orders for the same customer arranged in such a way that, if aggregated, they would add up to round-lots. For example, there were recurring sequences of fifty-share orders clustered together in those SOD files. Another pattern involved the following sequence of orders: 99 shares, 99 shares, 99 shares, 99 shares, 99 shares, five shares. This sequence of five separate orders for ninety-nine shares followed by an order for five shares appears throughout the SOD files for Westminster during the relevant period.

24/ In addition to the SOD files for Westminster, the NYSE introduced at the hearing numerous order tickets and charts demonstrating Niebauer's handling of various customer orders during the relevant period. The record evidence shows that, on numerous occasions during the relevant period, Niebauer unbundled customer round-lot orders into odd lots and executed them through the Exchange's odd-lot order system. For example, on October 25, 2002, Westminster received a customer round-lot order to sell short 2,000 shares of JPMorgan Chase & Co. stock at the market. Niebauer effected the execution of only 500 of those 2,000 shares through the Exchange's round-lot auction market. Niebauer altered the terms of the original customer order by unbundling the remaining 1,500 shares into five odd-lot market orders for 99 shares each (comprising 495 shares), ten odd-lot limit orders for 99 shares each (comprising 990 shares), and one odd-lot limit order for 15 shares. Niebauer transmitted those odd-lot orders to SuperDOT for execution through the Exchange's odd-lot order system.

direction, he “reported about eight or nine complaints to” the Exchange’s Division of Market Surveillance. Anderson asserted that “maybe about two of [those complaints] took about one or two days to come back. The others were probably rectified within an hour, 45 minutes.” Despite these favorable resolutions, Niebauer testified that he felt “in [his] heart [he] did the right thing” when he unbundled customer round-lot orders into odd lots for execution through the Exchange’s odd-lot order system.

Niebauer also contends that, until the Firm “got the telephone call” from the NYSE instructing it to cease its unbundling activities, he had not been aware of any Exchange rule against unbundling. He claimed that he was unfamiliar with Information Memos 91-29 and 94-14. Niebauer’s counsel indicated that Niebauer ceased unbundling round-lot orders “the minute the Exchange called him and told him to stop.”

The Hearing Panel “[did] not credit [Niebauer’s] claim that he was unaware of restrictions on the use of the Exchange’s odd-lot order trading system.” ^{25/} Daniel Tandy, an executive floor official and former Exchange governor who was accepted by the Hearing Panel as an expert witness, ^{26/} testified that “everybody knows” about the Exchange’s prohibition against unbundling customer round-lot orders into odd lots. Tandy also observed that the unbundling of a round-lot order into odd lots was “not allowed by Exchange rules.” Tandy emphasized that, “if the rule is you can’t unbundle, then . . . if there are no exceptions to the rule that say it’s acceptable under these circumstances, and as far as I know there aren’t, then you just can’t do it.” ^{27/} At the hearing, NYSE counsel asked Tandy what would happen on the Exchange floor if unbundling, in an attempt to obtain the best price for a customer, became the norm. Tandy responded, “If everyone did it? You would have no pricing. Because everything would be in the system, would be fed into the specialist account, and there would be no orders in the marketplace to settle price.”

In finding Niebauer liable with respect to the charges against him, the Hearing Panel concluded that Niebauer “intentionally ‘gamed’ the system; he advanced the Firm’s customer

^{25/} The Hearing Panel noted that “[s]ecurities professionals all understand [the] basic concept” that customers who place round-lot orders expect to trade in the auction market, not by-pass it. The Hearing Panel determined that Niebauer was a “highly experienced securities professional” and, like all securities professionals, should have been “aware that there are proscriptions against breaking up round-lot orders into odd lots.”

^{26/} The Hearing Panel accepted Tandy as an expert in the policies, practices, and standards governing execution of customer orders on the Exchange floor. Tandy was a floor broker and member of the Exchange who, at the time of the hearing, had served as a floor official for three years, an Exchange governor for six years, and an executive floor official for at least two years.

^{27/} Tandy stated that a round-lot order could “be broken up into round lots but not odd lots.”

orders for execution, ahead of round-lot orders awaiting their turn for execution.” The Hearing Panel censured Niebauer, suspended him for two months, and ordered him to pay a \$25,000 fine. On appeal before the Exchange’s Board of Directors’ Regulatory, Enforcement & Listing Standards Committee (the “RELS Committee”), Niebauer did not dispute the Hearing Panel’s findings of violation, but challenged only the sanctions imposed against him. The RELS Committee affirmed the Hearing Panel’s decision in all respects. This appeal followed.

III.

The NYSE’s odd-lot order system set forth in NYSE Rule 124 was created to benefit small retail investors trading fewer than 100 shares at a time. 28/ We have stated previously that the Exchange’s “odd-lot execution system [was] intended to provide efficient execution of odd-lot orders at the best prices available.” 29/ In that regard, we have agreed with the Exchange that “the odd-lot limit order trading practices identified in [Information Memo 94-14 were] not consistent with traditional odd-lot limit order investing practices.” 30/ Those prohibited trading practices include the “unbundling of round-lots” and “order entry practices intended to circumvent the round-lot auction market.” 31/ We have noted that “[s]uch practices could undermine the integrity of the system and contravene the odd-lot order system’s purposes.” 32/ We have cautioned that the abuse of the odd-lot order system “could reduce specialists’ willingness to provide cost-efficient executions of odd-lot limit orders.” 33/ We have stated that ensuring “the odd-lot limit order system is only utilized for the types of orders it was intended to accommodate will help to ensure the continued economic viability of the system” 34/

28/ See, e.g., NYSE Information Memo No. 94-14.

29/ Order Granting Approval . . . Regarding an Information Memo on Odd-Lot Trading Practices, 56 SEC Docket 408.

30/ Id.

31/ NYSE Information Memo No. 94-14.

32/ Order Granting Approval . . . Regarding an Information Memo on Odd-Lot Trading Practices, 56 SEC Docket 408-09.

33/ Id. at 409.

34/ Id. See also NYSE Information Memos Nos. 91-29 and 94-14. Information Memo 91-29 identifies the “unbundling of round-lots for the purpose of entering odd-lot limit orders in comparable amounts” as an abusive trading practice inconsistent with traditional odd-lot trading practices, and characterizes “order entry practices which are intended to circumvent the round[-]lot auction market” as “abuses of the odd-lot system.”

Information Memo 94-14 reiterates the Exchange’s prohibition against unbundling,

(continued...)

Throughout the proceeding below, Niebauer admitted to unbundling round-lot orders into odd lots in circumvention of the round-lot auction market, in order to obtain advantageous prices for his customers. Moreover, although nothing in the NYSE rules or interpretations states that scienter is required for a finding of liability here, the record supports the conclusion that Niebauer either knew or was reckless in not knowing that unbundling was prohibited. As a securities professional, Niebauer is considered to know the standards governing his conduct. ^{35/} The Hearing Panel did not credit Niebauer's claim that he was unaware of restrictions on the use of the Exchange's odd-lot order trading system, ^{36/} and Niebauer conceded that he should have remembered Information Memo 91-29 and its proscriptions against unbundling.

Before us, Niebauer argues for the first time that "the NYSE's findings of fact were based upon assumptions and conjectures rather than competent evidence, and such competent, credible evidence as did exist, overwhelmingly contradicted the NYSE's final findings of guilt." Niebauer fails, however, to identify any evidence that he claims contradicts the NYSE's findings of violation and our review of the record does not identify any such evidence.

Moreover, at no time during the proceedings below did Niebauer challenge the facts or the NYSE's findings of liability. Indeed, in his answer to the NYSE's initial charge memorandum and in his brief on appeal to the RELs Committee, Niebauer admitted to the conduct for which he was found liable. In addition, during oral argument before the RELs Committee, Niebauer's counsel stated that the "appeal [brief] as [he] read it dealt with the sanctions and did not raise the issue of the guilt finding" and that, "[t]herefore, [he came] to the

^{34/} (...continued)
noting "the possibility that the odd-lot limit order service could be abused through trading practices which are not consistent with traditional odd-lot investing practices" including "unbundling of round-lots [.]". The NYSE filed these prohibitions with the Commission as a policy, practice, or interpretation of Exchange rules in conformance with Section 19(b)(3)(A)(i) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(b)(3)(A)(i). See NYSE Information Memo No. 04-14 n.1 (Mar. 19, 2004).

^{35/} See Robert D. Potts, 53 S.E.C. 187, 205 (1997) (stating that "professionals are deemed to know the standards that govern their conduct"); Smith Barney, Harris Upham & Co., 48 S.E.C. 11, 15 (1984) (finding that respondent "was sufficiently apprised that the actions it was taking could run afoul of applicable ethical standards").

^{36/} Credibility determinations of an initial fact finder are entitled to considerable weight and deference because they are based on hearing the witnesses' testimony and observing their demeanor. Stephen Michael Sohmer and Spyder Securities, Inc., Exchange Act Rel. No. 49052 (Jan. 12, 2004), 81 SEC Docket 4066, 4078 n.27; David M. Levine and Triple J Partners, Inc., Exchange Act Rel. No. 48760 (Nov. 7, 2003), 81 SEC Docket 2303, 2313 n.21 (citing Brian A. Schmidt, 55 S.E.C. 576, 580 n.5 (2002) (citations omitted)), petition denied, 407 F.3d 178 (3d Cir. 2005).

Committee today dealing only with that.” Accordingly, we find that Niebauer violated NYSE Rule 124 by breaking up customer round-lot orders into odd-lot orders and executing those orders through the Exchange’s odd-lot order system during the four-month period from July through October 2002. Violations of Exchange rules such as NYSE Rule 124 constitute conduct inconsistent with the just and equitable principles of trade provisions of NYSE Rule 476(a)(6). ^{37/} Accordingly, we also find that Niebauer violated NYSE Rule 476(a)(6) by engaging in odd-lot trading in circumvention of the Exchange’s round-lot auction market.

IV.

We may cancel, reduce, or require remission of a sanction imposed by the NYSE if we find, having due regard for the public interest and the protection of investors, that the NYSE’s sanction is excessive or oppressive or imposes an unnecessary burden on competition. ^{38/} We make no such finding here.

We believe that in censuring Niebauer, suspending him for two months, and fining him \$25,000, the Exchange properly considered the scope and nature of Niebauer’s misconduct, as well as any mitigating factors. ^{39/} Niebauer unbundled fifty-nine customer round-lot orders and executed 971 odd-lot orders, involving over 71,000 shares. This was no mere oversight on his part; he admits that he unbundled the orders intentionally to obtain advantages for his customers not available in the round lot auction market. Of the 971 odd-lot orders, 795 of them were odd-lot limit orders, which enabled Niebauer to guarantee execution of certain of his customer’s orders at advantageous prices.

^{37/} This standard is analogous to that adopted by other self-regulatory organizations that find a violation of their rules a violation of just and equitable principles of trade. Cf. E. Magnus Oppenheim & Co., Exchange Act Rel. No. 51479 (Apr. 6, 2005), 85 SEC Docket 475, 478 (holding that a violation of another NASD rule is also a violation of NASD Conduct Rule 2110); Chris Dinh Hartley, Exchange Act Rel. No. 50031 (July 16, 2004), 83 SEC Docket 1239, 1244 (same); Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999) (same).

^{38/} See Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2). Niebauer does not claim, nor does the record show, that the NYSE’s sanctions impose an unnecessary or inappropriate burden on competition.

^{39/} See Levine, 81 SEC Docket at 2323 (finding that the Exchange “properly considered the wide-ranging scope and serious nature of [a]pplicants’ misconduct, as well as any mitigating factors”); Ralph Joseph Presutti, 52 S.E.C. 832, 839 (1996) (finding that “the Exchange’s sanction of a censure and a two-month suspension already reflect[ed] these mitigating factors.”).

Niebauer's misconduct "was not an isolated incident but rather an ongoing pattern that stopped only when it was detected." ^{40/} At first, Niebauer unbundled customer round-lot orders on nine days over a period of three months. In the week before he was caught, however, his unbundling had escalated into a daily practice. Specifically, between July and September 2002, Niebauer unbundled twenty-six customer round-lot orders over nine different trading days. In the one-week period between October 21 and October 28, 2002, Niebauer unbundled customer round-lot orders on every single trading day, for a total of thirty-three round-lot orders. ^{41/} As the Hearing Panel observed, "over time, [Niebauer's] use of odd-lot trading to bypass the market escalated, until [he] was caught." Nonetheless, Niebauer asserted that he felt he "did the right thing."

We have held previously that, "to be truly remedial, the sanctions must deter the applicants before us and others who may be tempted to engage in similar violations." ^{42/} We believe that the sanctions imposed here will have a deterrent effect. ^{43/} In imposing these sanctions, the NYSE emphasized that the integrity of the Exchange's market is dependent on the adherence of its professional participants to its trading rules. We recognize that the 2004 amendment to NYSE Rule 124 was designed, in part, to eliminate the incentives motivating professional participants like Niebauer from engaging in this specific violation in the future. However, the gravamen of Niebauer's misconduct was his at least reckless disregard of Exchange rules considered crucial to the integrity of the auction market. The NYSE rejected Niebauer's claim that he was justified in misusing the odd-lot trading system. In light of these

^{40/} Keith Springer, 55 S.E.C. 632, 648 (2002)

^{41/} Compare Keith Springer, 55 S.E.C. 839, 842 (2002) (denying applicant's motion for reconsideration and noting evidence of consistency in applicant's misconduct).

^{42/} Investment Planning, Inc., 51 S.E.C. 592, 599 (1993).

^{43/} See Edward John McCarthy, 406 F.3d 179, 189 (2d Cir. 2005) (emphasizing the importance of providing a deterrence rationale for our decisions, in the context of a two-year suspension). Cf. Schield Management Company and Marshall L. Schield, Exchange Act Rel. No. 53201 (Jan. 31, 2006), 87 SEC Docket 848 (noting in our review of an administrative law judge's decision that we consider the extent to which the sanction will have a deterrent effect); Ahmed Mohamed Soliman, 52 S.E.C. 227, 231 n.12 (1995) (stating in our review of an administrative law judge's decision that the selection of an appropriate sanction involves consideration of several elements, including deterrence); Steadman v. SEC, 603 F.2d 1126, 1142 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981) (in ruling on an appeal of our review of an administrative law judge's decision, the Fifth Circuit stated that "the Commission may consider the likely deterrent effect its sanctions will have on others in the industry.").

considerations, we believe that these sanctions are warranted to act “as a deterrent to others” by demonstrating the consequences of violating Exchange rules. 44/

Niebauer argues that the sanctions imposed by the NYSE are excessive and without any foundation or precedent in relation to its findings and the “actual facts” of this proceeding. We have held that the appropriate sanctions in a case depend on the particular facts and circumstances and cannot be determined by comparison with action taken in other cases. 45/ Nonetheless, we note that the sanctions here fall within the range of sanctions imposed for violations of comparable NYSE trading rules. 46/ In any event, we have examined the facts and

44/ Schild Management Company, 87 SEC Docket at 844.

45/ See, e.g., Michael A. Rooms, Exchange Act Rel. No. 51467 (Apr. 1, 2005), 85 SEC Docket 444, 450-51, aff’d, No. 05-9531 (10th Cir. 2006); Sohmer, 81 SEC Docket at 4085; Levine, 81 SEC Docket at 2322.

46/ See, e.g., Frank Joseph Ali, Exchange Hearing Panel Dec. 05-4 (Jan. 13, 2005) (consent to censure, five-year ban from functioning in a compliance or supervisory capacity, and undertaking to cooperate, where respondent participated in improper trading arrangement and failed to discharge compliance duties); Karl Zachar, Exchange Hearing Panel Dec. 04-93 (June 16, 2004) (consent to censure and fifteen-month bar, where respondent delayed allocation of trades until post-execution in order to grant preferential treatment to certain customers); Fernando Garcia Morillo, Exchange Hearing Panel Dec. 04-87 (June 2, 2004) (consent to censure, \$75,000 fine, and one-month suspension, where respondent effected improper post-execution allocations of trades in customer accounts); Charles C. Sorsby, Exchange Hearing Panel Dec. 98-71 (July 23, 1998) (consent to censure, one-month bar, and \$75,000 fine, where respondent effected improper post-execution allocations of trades in customer accounts); William Shanahan, Exchange Hearing Panel Dec. 97-119 (Sept. 9, 1997) (consent to censure, three-month plenary suspension, \$50,000 fine, and three-year suspension from working as a specialist, where respondent, among other things, allocated shares of stock to a two-dollar broker in the absence of a bona fide order, failed to accord proper treatment of customer orders, and failed effectively to execute commission orders).

We note that these are settled cases whose sanctions may understate the sanctions that would be imposed in litigated cases because settled sanctions reflect pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary litigation. See, e.g., Anthony A. Adonnino, Exchange Act Rel. No. 48618 (Oct. 9, 2003), 81 SEC Docket 981, 999, aff’d, No. 03-41111 (2d Cir. 2004) (noting that settled cases may result in lesser sanctions); Richard J. Puccio, 52 S.E.C. 1041, 1045 (Oct. 22, 1996) (noting that respondents who offer to settle may properly receive lesser sanctions than

(continued...)

the nature of the violations at issue here and see no basis for reducing the sanctions imposed by the NYSE.

We conclude that these sanctions are appropriate to protect the public from harm. This case exemplifies the kind of “abusive trading practice” inconsistent with traditional odd-lot trading practices and the integrity of the round lot auction market. By circumventing the round lot auction market, Niebauer threatened the integrity of the pricing mechanism required for the maintenance of a fair and orderly market. 47/ As Tandy testified, if everyone did the same, “[y]ou would have no pricing.” For all the reasons stated above, we do not find the sanctions imposed by the Exchange to be excessive or oppressive.

An appropriate order will issue. 48/

By the Commission (Chairman COX and Commissioners ATKINS, CAMPOS, NAZARETH and CASEY).

Nancy M. Morris
Secretary

46/ (...continued)
they otherwise might have received based on pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings).

47/ Compare SIG Specialists, Inc., Exchange Act Rel. No. 51867 (June 17, 2005), 85 SEC Docket 2679, 2696 (finding that applicants’ mishandling of certain trades “threatened the integrity of the Exchange’s pricing mechanism by disrupting the price continuity required for the maintenance of a fair and orderly market.”).

48/ We have considered all of the parties’ contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54384 / August 30, 2006

Admin. Proc. File No. 3-12165

In the Matter of the Application of

ARTHUR JAMES NIEBAUER
c/o Brian Reis, Esq.
61 Broadway, Suite 2820
New York, New York 10006

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

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION OF NATIONAL
SECURITIES EXCHANGE

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

ORDERED that the application for review of disciplinary action taken by the New York Stock Exchange, Inc. against Arthur James Niebauer be, and it hereby is, dismissed.

By the Commission.

Nancy M. Morris
Secretary