SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 48760 / November 7, 2003

Admin. Proc. File No. 3-10816

In the Matter of the Application of

DAVID M. LEVINE

and

TRIPLE J PARTNERS, INC.
c/o Lee D. Unterman, Esquire
Kurzman Karelsen & Frank LLP
230 Park Avenue
New York, New York 10169

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Executing Trades for Account in Which Had Interest

Executing Trades for Account in Which Shared Profits

Engaging in Conduct Inconsistent with Just and Equitable Principles of Trade

Engaging in Acts Detrimental to the Exchange

Accepting Executions from Specialist to Which not Entitled

Permitting Improper Use of Badge Number

Improperly Transmitting Orders to Specialist

Failing Reasonably to Supervise Business Activities

Failing to Make and Maintain Records

Conducting Business With Public Customer Without Exchange Approval

Failure to Know the Customer

Making Material False Statements to Exchange

Former member of national securities exchange and former member organization executed trades for an account in which member and member organization had an interest and with which they shared profits; improperly transmitted orders to a specialist; allowed orders to circumvent exchange rules of priority, parity and precedence; accepted executions from a specialist to which they were not entitled; allowed member's badge number to be used for trading for orders for which he was not the executing broker; failed reasonably to supervise the firm's business activities; failed to keep proper books and records; and conducted business with a public customer without exchange approval. Former member made material misstatements to the exchange. Held, exchange findings of violations and sanctions imposed are sustained.

APPEARANCES:

Lee D. Unterman and Patricia Moore, of Kurzman, Karelsen & Frank, LLP, for David M. Levine and Triple J Partners, Inc.

Robert A. Marchman, Nancy Reich Jenkins, Susan F. Axelrod, and Craig Hammond, for the New York Stock Exchange, Inc.

Appeal filed: June 25, 2002
Last brief received: October 9, 2002

I.

David M. Levine, a former lessee member of the New York Stock Exchange, Inc. (the "Exchange"), and Triple J Partners, Inc. ("Triple J"), a former Exchange member organization, appeal from Exchange disciplinary action. The Exchange found that Applicants violated Section 11(a)(1) of the Securities Exchange Act of 1934 and Exchange Act Rule 11a-1(a) by effecting orders in an account in which they had an interest; 1/ violated Exchange Rule 352(c) by effecting orders in an account in which they

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1/ 15 U.S.C § 78k(a) prohibits a member of a national securities exchange from effecting "any transaction on such exchange for its own account, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion." 17 C.F.R. § 240.11a-1(a) provides that, "[n]o member of a national securities exchange, while on the floor of such exchange, shall initiate, directly or indirectly, any transaction in any security admitted to trading on such exchange, for any account in which such member has an interest . . . ."

shared profits and losses; 2/ engaged in conduct inconsistent with just and equitable principles of trade and in acts detrimental to the Exchange, in contravention of Exchange Rule 476(a); 3/ improperly accepted executions from a specialist in violation of Exchange Rule 117.10; 4/ allowed Levine's badge number to be used in transactions when he was not in the trading crowd and therefore was not entitled to an execution, in violation of Exchange Rule 132; 5/ permitted Applicants' clerks to transmit orders to a specialist that were not written market or limit price orders, in violation of Exchange Rule 123A.20; 6/ failed reasonably to supervise in violation of Exchange Rule

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2/ Exchange Rule 352(c) provides that no member or member organization may, directly or indirectly, take or agree to take or receive a share in the profits or losses in any customer's account or of any transaction therein.

3/ Exchange Rule 476(a) provides that members and their employees can be disciplined by the Exchange for conduct inconsistent with just and equitable principles of trade, acts detrimental to the interest or welfare of the Exchange as well as, among other things, for violating any provision of the Securities Exchange Act of 1934 or Exchange Act rules, violating any rule of the Exchange, and making a material misstatement to the Exchange.

4/ Exchange Rule 117.10 provides that,

> When a member keeps a [written] order in his possession and leaves the Crowd in which dealings in the security are conducted, he is not entitled during his absence to have any bid, offer or transaction made in such security on his behalf or to have dealings in the security held up until he is summoned to the Crowd.

5/ Exchange Rule 132.40 provides that a member who effects a transaction on the floor must "promptly upon effecting the transaction, notify: the appropriate Exchange official of the member's broker badge number" and supply the "executing broker badge number . . . in regard to its side of the contract," to "the clearing member organization for his side of the transaction for submission by such clearing member organization."

6/ Exchange Rule 123A.20 provides "members and member organizations must not transmit to specialists any orders except written market or limited price orders."

342; 7/ failed to make and preserve books and records with respect to the true identity of the person executing orders entered through Applicants, in violation of Exchange Act Rules 17a-3 and 17a-4 and Exchange Rule 440; 8/ and conducted business with the public without Exchange approval, in violation of Exchange Rules 319, 345, 382, 401 and 405. 9/ Levine was also

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7/ Exchange Rule 342 provides that,

> [e]ach office, department or business of a member or member organization shall be under the supervision and control of the member or member organization, . . . and [t]he person in charge of a group of employees shall reasonably discharge his duties and obligations in connection with supervision and control of those activities of those employees related to the business of their employer and compliance with securities laws and regulations.

8/ Exchange Act Rule 17a-3 requires members of national securities exchanges, brokers, and dealers to make and keep current records relating to their business, containing, among other things, an itemized daily record of all sales and purchases, showing the account for which each transaction was effected. Exchange Act Rule 17a-4 requires members, brokers, and dealers to preserve the records for a period of six years.

Exchange Rule 440 requires every member organization to make and preserve records as prescribed by the Exchange and Exchange Act Rules 17a-3 and 17a-4.

9/ Exchange Rule 319 requires member organizations to carry fidelity bonds in such forms and in such amounts as the Exchange requires.

Exchange Rule 345 prohibits a member or member organization from permitting any natural person not registered with, qualified by, and acceptable to the Exchange, to perform regularly the duties performed by a registered representative, a securities lending representative, a securities trader, or direct supervisor of any of these.

Exchange Rule 382 requires that all agreements between a member or a member organization and any non-member organization relating to the carrying of customer accounts on an omnibus or fully disclosed basis, shall be approved by

(continued...)

charged with making material misstatements to the Exchange in investigatory testimony, in violation of Exchange Rule 476.

The Exchange censured Applicants, suspended them for six months from Exchange membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization, and jointly fined them $100,000. We base our findings on an independent review of the record.

II.

Applicants' Dealings with Tribeca

Levine formed Triple J in 1989. Levine was Triple J's president, secretary, and treasurer. 10/ One of Levine's customers was Tribeca Capital Corporation ("Tribeca"), a public customer. Tribeca was owned by Timothy J. Barry, a long-time friend of Levine. Between January 1996 and February 1998, Tribeca was Levine's and Triple J's major customer. Levine testified that he spent 85% of his time handling Tribeca's business, and that payments from Tribeca provided 40% of Triple J's and Levine's revenue.

9/ (...continued)
the Exchange prior to becoming effective. These agreements must address, among other things, acceptance of orders and execution of transactions.

Exchange Rule 401 requires every member and member organization to adhere to the principles of good business practice in the conduct of his or its business affairs.

Exchange Rule 405 requires a member organization and its general partner or principal executive officer to use due diligence to learn essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization.

10/ On May 30, 2000, Levine's lease terminated and he ceased being a lessee member of the Exchange. The same day, Triple J ceased being an Exchange member organization. Levine is currently employed as a floor broker with a broker-dealer firm.

Between late February 1996 and October 1997, Tribeca was the public customer of Oscar Gruss & Sons, Incorporated ("OG"). 11/ Generally, a public customer would place an order with OG, and OG would relay the customer's order to the Exchange floor. The order ticket for the customer's order was time-stamped at the time OG received and sent the order to the floor.

OG handled the Tribeca account differently. Between February 1996 and August 1996, OG permitted Barry to by-pass OG's order desk. Instead, at the beginning of each day, Jeffrey Kramer, the OG order clerk, would "clock" (i.e., time stamp) blank order tickets for Tribeca. Barry did not give Kramer any order information at this time. During the day, Barry faxed Kramer information about opening transactions for Tribeca, including the issuer, number of shares, price, and side of the market (i.e., buy or sell), and Kramer would record this information on a "pre-clocked" ticket. Later, Barry would send Kramer the information concerning the subsequent transaction that offset Tribeca's opening position. When Kramer received Barry's fax about the offsetting transaction, Kramer would prepare and time-stamp a ticket for that transaction.

Instead of placing orders through OG's order desk, Barry placed his orders directly with Triple J. Levine testified that Barry had a direct line to Triple J's booth, and Levine spoke with Barry on a regular basis during the day. Triple J was not qualified by the Exchange to do business with public customers. Levine admitted that he never took any action to determine whether he or Triple J could take an order directly from Tribeca, and he did not ask Barry about his or Tribeca's status. He also never instructed Triple J's clerks that Tribeca's orders were required to come from OG. If Levine had checked, he would have discovered that he could not do business directly with Tribeca since neither Barry nor Tribeca were members of the Exchange, Tribeca was not registered as a broker-dealer, and Barry was not associated with a broker-dealer.

The PGT List and Accepting Executions

Triple J's customers, including Tribeca, placed orders with Triple J for the purchase and sale of shares of Putnam Intermediate Government Trust ("PGT"). PGT was not an actively traded security and tended to trade within the same price range over months at a time and at a small spread, typically a quarter or an eighth of a point (the minimum price variation in 1996). Levine knew that PGT had significant volumes at various prices on both sides of the specialist's book awaiting execution. He further knew that the PGT trading crowd was small, and that, at times, there was no one in the PGT trading crowd. William

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11/ In late October 1997, Tribeca transferred its account to Spear, Leeds & Kellogg, where it remained through February 1998.

Shanahan, a specialist at the Exchange for Wagner Stott Mercator, was the specialist who handled PGT on the floor. Levine testified that Shanahan was his "best friend."

According to Shanahan's specialist clerk, Terence Reilly, almost every day from February 1996 through mid-August 1996, Shanahan's post received a piece of paper marked with Triple J's letterhead (the "PGT List"). 12/ Shanahan told Reilly that the PGT List represented Applicants' customers who wanted to trade in PGT at certain prices and amounts. 13/ The PGT List was divided in half -- one side representing buys and the other sales. The entries under buys or sales generally set forth the number of shares, prices, and clearing firm responsible for the trade, e.g., LXE 5,000 at 5/8.

If, however, the clearing firm was OG, the PGT List merely stated the total position held by OG's customer and whether the position was "long" or "short" in a separate section. Tribeca was OG's customer for these PGT trades. Reilly testified that Shanahan exercised discretion over executing trades for OG. At times Shanahan executed an order for OG that exceeded the position noted on the PGT List. From Shanahan's actions, Reilly concluded that Shanahan was exercising discretion over the OG trades.

Reilly kept each day's PGT List beside his computer keyboard, and threw the list away at the end of each day. The PGT List was never time-stamped. Reilly never entered any of the information contained in the PGT List into the specialist's book because he "didn't have an order for it."

From February 1996 through mid-August 1996, Applicants' customers received almost daily executions in PGT in accordance with that day's PGT List. For example, Reilly testified that, if Shanahan's post received an order to sell 5,000 PGT shares, and, based on the PGT List, Applicants' "customers wanted to buy 2,000 shares," Shanahan would direct Reilly to allocate 2,000 shares to Applicants' customer and the remaining 3,000 shares to the specialist's book. Applicants received approximately 329 executions in PGT during this period. Applicants bought and sold twice as many shares in PGT for OG as for all of Triple J's other clearing firms combined.

12/ Sometimes Shanahan or Reilly picked up the PGT List from Triple J's booth. At other times, one of Triple J's clerks brought the PGT List to Shanahan's post.

13/ The PGT List included orders for more than one of Applicants' customers. With the exception of Tribeca, the record does not identify the Triple J customers that received executions from the PGT List. The record identifies only the clearing firms.

When Reilly executed a trade from the PGT List, he entered Levine's badge number, 851, as the executing broker for audit trail purposes. Reilly testified that, "more often than not," Levine was not in the PGT trading crowd when he received an execution. Reilly noted that Applicants and their clerks accepted allocations for Levine's badge number without question, and never refused any of the executions they were given in PGT during this period.

In at least two instances, Shanahan's post allocated shares of PGT to Applicants' customers at a time Levine was not on the floor at all, let alone in the PGT trading crowd. On both occasions, Shanahan allocated PGT stock to a Triple J customer, and went to Applicants' booth to report the execution. Shanahan discovered that Levine was not on the floor. Shanahan instructed Reilly to use another broker's badge number as the executing broker for purposes of the audit trail.

Reilly's testimony was corroborated by Peter Larkin, then a relief specialist with Wagner Stott Mercator Partners. Larkin testified that, in August 1996, he was at Shanahan's PGT post when an order came in to sell 4,000 shares of PGT. Although no one was in the PGT trading crowd, Reilly allocated 2,000 shares to the specialist's book and 2,000 shares to Levine's badge number for one of Applicants' clients. Reilly then took down a piece of paper and wrote on it. Larkin reported these actions to his supervisor at Wagner Stott later that day. 14/ Shanahan was removed from the floor after Larkin reported this incident. 15/ Reilly testified that, after Shanahan was removed, Reilly never again received a PGT List for Applicants' customers.

The Exchange's examiner found that, between February 1996 and August 1996, all of Applicants' trades for OG in PGT were at a profit. Applicants always bought on bid and sold on offer, and PGT rarely moved. After Shanahan was removed from the floor in August 1996, Applicants' activity in PGT suddenly and dramatically decreased. Applicants did not execute any trades in PGT for OG between September 3, 1996 and the end of October 1996.

14/ Applicants assert that Larkin's testimony should be discounted because he could not recall the specific date this event occurred. However, Larkin's testimony is corroborated by his report of these events to his supervisor and Shanahan's subsequent removal from the floor.

15/ Shanahan was found guilty of violating various Exchange rules and federal securities laws in connection with his improper allocation of PGT executions to Applicants, among other violations. Shanahan was censured, received a plenary suspension of three months, was suspended from working as a specialist for three years, and fined $50,000. See William L. Shanahan, NYSE Case No. 97-119 (Sept. 9, 1997).

Applicants' Payments from Tribeca

Levine claimed that Applicants worked on a commission basis for Tribeca. Through October 1997, Levine claimed that he billed Tribeca at the commission rate of $2 per hundred shares executed. In October 1997, Tribeca moved its account to Spear, Leeds & Kellogg. Levine testified that, at that time, he raised his commission billing rate for Tribeca to $3 per hundred shares executed. Levine stated that he personally prepared Tribeca's commission bills by hand, because Barry required them to be almost 100% accurate. However, when the Exchange staff asked for the Tribeca bills, Levine informed them that he had not retained copies of the bills that he sent to Tribeca.

Between February 1996 and August 1996, Applicants received extraordinary overpayments from Tribeca, considering the number of executions. For example, Applicants received $120,000 in February 1996, although, based on the commission billing rate, they were entitled to only $32,092. 16/ In total, Applicants received approximately $333,000 more than they should have from Tribeca if they had been paid based upon Levine's claimed billing rate. 17/ To justify the amount received at Applicants' asserted billing rate, Applicants would have had to execute almost 28 million more shares of PGT than they in fact executed. After Shanahan was removed from the floor, Applicants did not receive any payments from Tribeca for the next five months despite the fact that Levine continued to spend 85% of his time servicing the Tribeca account and executed transactions of almost five million shares for it.

Joseph Cangemi, the Exchange's expert witness concerning the business practices of floor brokers, testified that floor brokers are paid either on a retainer contract or in accordance with a commission billing rate. Levine testified that there was no retainer contract between Triple J and Tribeca. Cangemi noted the "dramatic, exasperating" overpayments from February 1996 through August 1996. Cangemi could not reconcile these payments with the number of executions performed by Applicants. Moreover, Cangemi stated that it was highly unusual for a broker to go more

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16/ Applicants suggest that one reason for over-payment may have been to make up for earlier unpaid commissions. However, in January 1996, Tribeca had paid Applicants over $80,000.

17/ In addition to the amount Applicants received, Levine and Exchange staff testified that Tribeca had authorized payments to Applicants amounting to $75,000 for work performed in February 1998. According to the stated billing rate, Applicants were entitled to receive only one-third of this amount, approximately $25,000. At the time of the hearing before the Exchange, Levine had not received any of the $75,000.

than a single month -- let alone five months -- without being paid, particularly when Levine was devoting 85% of his time to Tribeca, which had been a major source of revenue for Applicants. Cangemi stated that he could find nothing to explain the payments Tribeca made to Applicants during this period, and concluded that "there's more to what's going on here" than just billing on commission. 18/

Although Levine denied that he shared profits and losses with Tribeca, he helped at least one other floor broker to enter into a profit-sharing arrangement with Tribeca. Robert Miller, an independent broker and member of the Exchange, approached Levine in June 1996 for help obtaining Exchange floor business. Levine introduced Miller to Barry and Tribeca. Miller began to recommend trades to Barry through one of Applicants' clerks. Miller testified that, when he asked Levine's clerk about what commission billing rate Miller should charge Tribeca, the clerk told Miller, "You don't bill [Barry]. He will pay you."

In August and September 1996, Miller received payments from Tribeca that were far in excess of what he expected based upon the number of shares that he had executed for the account. 19/ Miller approached Levine after the August overpayment, and Levine told him that "if [he] did the right thing, [Barry] would pay [Miller] off." After he received a second large payment in September, Miller asked Levine about the payment. Levine informed Miller that Barry was paying up to 70% of what was earned on trades, and that Miller could receive either 70% of the profits through the National Securities Clearing Corp. or 50% of the profits in cash. 20/

18/ The Exchange was unable to compute profit and loss figures for the Tribeca account. See text accompanying note 39 infra.

19/ In August 1996, Miller received approximately $25,000 from Tribeca for executing approximately 300,000 to 350,000 shares. This payment would equal a commission rate of approximately $12 per hundred shares. Miller testified that he received a comparable amount in September.

20/ Miller's executions for Tribeca resulted in losses in November and December. Miller was paid nothing for those months. Barry complained that Miller was not "protecting" Tribeca's business, and claimed that Miller owed Tribeca money because of the losses. Miller refused to pay money to Tribeca and dropped Tribeca as a client.

False Statements to the Exchange During Investigation

In August 1996, the Exchange began an investigation of suspicious trading in PGT involving Shanahan. During this investigation, Exchange staff took the testimony of a number of individuals, including Levine. Levine testified that Tribeca paid him on a commission basis. Levine also testified that he did not receive executions in PGT while he was absent from the trading crowd.

III.

As an initial matter, we note that the Exchange did not credit Levine's hearing testimony. Before the Exchange, Levine testified that he had never seen the PGT list and that he always had a written order for PGT when he received an execution. He claimed that he was always in or near the PGT crowd when he received a PGT execution. He denied that he had an interest in the Tribeca account or shared in that account's profits. He also asserted that he did not realize that Tribeca was a public customer. The hearing panel did not give "credence" to Levine's denials. We give deference to the credibility determination of the fact-finder. 21/

21/ Credibility determinations of an initial fact-finder are entitled to considerable weight and deference, since they are based on hearing the witnesses' testimony and observing their demeanor. Brian A. Schmidt, Exchange Act Rel. No. 45330 (Jan. 24, 2002), 76 SEC Docket 2255, 2258 n.5 (citations omitted).

The Hearing Panel also observed:

> To accept Mr. Levine's denials of these facts, the Hearing Panel would have to believe that Mr. Levine accepted the customer's gross overpayments without clear knowledge of the reasons for such overpayments; that he similarly tolerated a long period of non-payment; that he never explained to a broker to whom he had introduced the customer that the customer paid on the basis of profits; that he did not recognize that the public customer was entering orders directly to the booth even though he was in frequent contact with the customer; and that he did not know that his clerks gave daily lists to a specialist, through which he received favorable executions, often while not in the crowd.

A. Applicants' Improper Dealings with a Public Customer

The Exchange imposes certain conditions on members and member organizations doing business with the public, including licensing, registration, net capital, and insurance requirements. 22/ Joseph Cangemi, the Exchange staff's expert witness, testified that these requirements are designed to protect both the public customers and the trading community and assure them that the member or member organization has the training and financial ability to stand behind trades.

The Exchange found that, between February 1996 and August 1996, Applicants improperly dealt with a public customer, Tribeca. Applicants stipulated that, during this period, Tribeca was a public customer of OG, and not a registered broker-dealer. They also stipulated that the Exchange had not approved either Levine or Triple J to accept orders directly from public customers. Levine admitted that he did not perform any due diligence to determine whether Barry or Tribeca could properly transact business on the floor through him or Triple J. Given the Exchange requirements for a member to conduct business with a public customer, the fact of being a "public customer" is an "essential fact" that members are responsible for learning. 23/

22/ The Exchange charged Applicants with violations of Exchange Rules 345, 319, 342, 382, 405, 401, and 476. Exchange Rule 345 prohibits Exchange members and member organizations from accepting public customer orders without proper registration and approval. Rule 319 requires members and member organizations doing business with the public to carry fidelity bonds as determined necessary by the Exchange. Rule 342 requires members and member organizations to reasonably supervise and control the activities of their employees. Rule 382 requires approval by the Exchange of all agreements between members or member organizations and any nonmember, relating to the carrying of assets. Rule 405 requires member organizations, through a partner or principal, to use due diligence to learn essential facts relative to every customer. Rule 401 requires every member to adhere to good business practices in the conduct of his or its affairs. Rules 401 and 476 provide that members and their employees can be disciplined by the Exchange for violating any rule of the Exchange or for conduct that is "inconsistent with just and equitable principles of trade."

23/ Applicants claim that OG, not Triple J, was responsible for performing the due diligence to determine Tribeca's status. Rule 405 requires all member organizations to "use due diligence to learn the essential facts relative to every

(continued...)

Levine also admitted that he allowed his clerks to take orders directly from Barry and Tribeca. Therefore, we find that Levine and Triple J violated Exchange Rules 319, 342, 345, 382, 401, 405, and 476.

B. Transmitting Improper Orders and Accepting Executions to Which Not Entitled

1. Improper Transmission of Orders

The Exchange charged Levine and Triple J with violations of Exchange Rules governing transmission of orders to specialists, 24/ and failing reasonably to supervise Applicants' business and employees. 25/

Shanahan's clerk, Reilly, testified that Applicants transmitted the PGT List to him almost every day. He kept the list by his computer. The entries on the PGT List did not constitute orders, 26/ and specifically did not contain written market orders or limit orders as required by Exchange Rule 123A.20. 27/ With respect to OG, the clearing broker for

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23/ (...continued)
customer [and] every order . . . accepted . . . by such organization" (emphasis added). Since Tribeca was placing its orders directly through Applicants, Triple J, acting through Levine, had an independent obligation to ascertain Tribeca's status. The fact that OG also had such an obligation does not insulate Triple J from liability for its own acts and omissions.

24/ Exchange Rule 123A.20.

25/ Exchange Rule 342.

26/ Although, except for OG, the PGT List contained numbers of shares, prices and the clearing firms responsible for the trade, there were no specific time-stamped orders. Reilly stated that he did not place any of the listings in the specialist's book because they were not "orders."

27/ Exchange Rule 13 defines "market orders" and "limit orders" as follows:

> Market Order
>
> An order to buy or sell a stated amount of a security at the most advantageous price obtainable after the order is represented in the Trading Crowd.

(continued...)

Tribeca, the PGT List did not contain any information about price, number of shares sought, or the side of the market. Instead, the PGT List merely stated OG's total position in PGT and whether OG's position was "long" or "short." There was, therefore, no order for the specialist to execute for OG. Despite the lack of any OG order or price information on the PGT List, and absent any formal written market or limit price order, OG received almost-daily executions in PGT from Shanahan's post. We find that Applicants violated Exchange Rules 476 and 123A.20, which prohibits members and member organizations from giving specialists any orders, except written market or limit price orders.

Applicants further violated Exchange Rule 342, by failing reasonably to supervise their employees. One of Applicants' clerks often submitted the PGT List to Shanahan's post. Neither Levine nor the clerks ever refused an execution that resulted from the PGT List. Levine testified that he had never seen the PGT List, testimony the Hearing Panel did not credit. However, given the frequency and number of the executions in PGT for Tribeca, even if we were to accept for the sake of argument Levine's claim that he was unaware of the PGT Lists, Levine had a duty to enquire of his clerks why transactions were being effected in PGT for Tribeca, his most important client.

2. Circumvention of Exchange Rules and Accepting Executions to Which Broker is Not Entitled

The Exchange alleged that Applicants participated in a scheme designed to benefit their customers by allowing them to circumvent Exchange Rules regarding priority, parity, and precedence; 28/ accepted executions from a specialist to which they were not entitled; 29/ engaged in conduct inconsistent with just and equitable principles of trade, and in acts detrimental to the interest of the Exchange; 30/ and allowed the use of

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27/ (...continued)
Limit, Limited Order or Limited Price Order

An order to buy or sell a stated amount of a security at a specified price, or at a better price, if obtainable after the order is represented in the Trading Crowd.

28/ Exchange Rule 401.

29/ Exchange Rule 117.10.

30/ Exchange Rule 476.

Levine's badge number in connection with transactions for which Levine was not the executing broker. 31/

Exchange Rule 72 provides that, when a bid is the first made at a particular price, the bid is entitled to "priority," and will have "precedence" for the next execution at that price up to the number of shares specified in the bid. When no bid is entitled to priority, all bids for a number of shares equal or exceeding the number of shares on offer are at "parity" and are executed in chronological order, based on the time that they are entered. 32/ Orders are time-stamped to establish that chronological order.

A broker is required to be in the trading crowd after the previous sale and prior to the next sale to be at "parity" with prior bids. If a broker leaves the trading crowd, the broker is not entitled during his absence to have any bid, offer, or transaction made on his behalf or to have activity halted until he is summoned to the crowd. 33/ In order to insure representation of an order in the market during his absence, the broker may turn the written order over to another broker who will undertake to remain in the crowd. 34/ The broker also may leave the written order with a specialist, and the specialist must enter the order into the specialist's book behind other orders previously entered at that price. The specialist is considered to be a participant in the trading crowd. If no bid has priority, bids in the specialist's book at the amount of the current bid are at parity with the bids in the trading crowd.

Applicants' receipt of executions without time-stamped orders and when Levine was not in the crowd circumvented and compromised the Exchange floor trading system. As Pat Giraldi, a supervisory investigator with Market Surveillance at the Exchange, testified, having "priority" at a certain price can be extremely important as to whether a particular bid or offer is successful. Here, there were a large number of orders for PGT on both sides of the market in Shanahan's book that had waited for hours or days for execution because the stock had a relatively small trading volume and traded in a narrow price range.

31/ Exchange Rule 132.

32/ For example, if the market is at 7-1/2, and a broker bids 7-5/8, that broker is entitled to priority to execute the trade. After the execution, any broker in the crowd is on "parity" and may, depending on the availability of shares, execute a transaction at 7-5/8 until the next trade.

33/ See Exchange Rule 117.10.

34/ Id.

Levine admitted that he never left an order in PGT on the specialist's book because there was too much stock at a range of prices ahead on both sides of the market. If Levine had left an order with the book, his order would have been executed behind these earlier orders. Despite this fact, Shanahan and Reilly gave preference to Applicants' customers on the PGT List over orders waiting in Shanahan's book.

Shanahan and Reilly also ascribed Levine's badge number to executions from the PGT List, even when Levine was not in the PGT trading crowd. Reilly testified that, "more often than not," when he allocated shares to Applicants' customers, Levine was not in the trading crowd. 35/ Applicants contend that the Exchange's audit trail records show that Levine was in the trading crowd when Applicants received PGT allocations. They cite testimony by the Exchange staff that, when the Exchange's audit trail reflects a broker's badge number, the broker is "recorded as being" in the crowd at the time of the subject trades.

Shanahan, however, had instructed Reilly to record Levine's badge number for each execution from the PGT List, whether or not Levine was in the crowd. Reilly also testified that, at least twice after he had entered Levine's badge number, Levine was not on the floor and Shanahan told Reilly to replace Levine's badge number with another broker's number for audit trail purposes. Larkin confirmed that on at least one occasion, Reilly allocated PGT to Applicants' customers using Levine's badge number when Levine was not in the trading crowd. 36/ We find that Applicants violated Exchange Rules 117.10, 132, 342, 401, and 476.

35/ Levine testified that he really did not know when PGT trades took place, or where he was at the time, and that he only learned of executions after the fact. In apparent contradiction, Levine also testified that he always had a written order when Applicants received an execution, and that he was always in the trading crowd, or at least within "eyesight" or "earshot."

36/ Applicants also assert that Exchange staff found no discrepancies between Levine's order tickets and the Exchange's audit trail. This, Applicants claim, evidences that Levine was in the trading crowd.

It is not surprising that these two sets of documents would match. Reilly testified that each time he executed a trade from the PGT List he informed Triple J's booth. Neither Levine nor his clerks ever refused an execution from the PGT List.

C. Applicants' Interest in the Tribeca Account

The Exchange charged Applicants with violating (1) Exchange Act Section 11(a) and Exchange Act Rule 11a-1(a), by effecting orders for an account in which they had an interest; (2) Exchange Rule 352(c), by sharing in the profits or losses in Tribeca's account; (3) Exchange Rule 476, by engaging in conduct inconsistent with just and equitable principles of trade; and (4) Exchange Act Rules 17a-3 and 17a-4, and Exchange Rule 440, for failing to make and preserve accurate books and records identifying the "true identity of the person executing PGT orders entered through" Triple J. These charges relate to the payments Applicants received from Tribeca.

During the Exchange's investigation, Levine claimed that, during the period in which Tribeca had an account with OG, Applicants billed Tribeca at a commission rate of $2 per hundred shares executed. When Tribeca transferred its account to Spear, Leeds & Kellogg, Applicants assertedly raised their commission rate to $3 per hundred shares executed.

The payments Tribeca made to Applicants have no apparent relationship to these commission rates. Between February 1996 and August 1996, Tribeca made huge overpayments to Applicants, totaling approximately $232,000 more than Applicants claim to have billed. 37/ The Exchange presented evidence that every trade Applicants made in PGT for Tribeca during this period was profitable because they were able to buy at the bid and sell at the offer in a stock that was very stable.

There was a sudden and dramatic decline in payments from Tribeca to Applicants immediately after Shanahan was removed from the floor. Beginning in September 1996, for five months Tribeca made no payments to Applicants, although Levine continued to devote 85% of his time to, and executed trades of almost 5 million shares for, the Tribeca account.

The Exchange expert testified that in eighteen years he had never before seen anything like the degree of disparity between the commission arrangement Levine claimed and the actual amounts that the Applicants received. He stated that he could not find any correlation or consistency between the amounts billed and the amounts paid. The expert had never before in his experience seen

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37/ For the full twenty-six month relevant period, Tribeca paid Applicants a total of approximately $333,000 more than their quoted billing rates. In addition, for the period January 25, 1998 through February 24, 1998, Applicants billed Tribeca $25,275. However, Tribeca authorized Applicants to receive $75,000. This payment had not been made by the time of the Exchange hearing, although Levine testified that he still expected to receive these funds.

a pattern where the broker received payment for more than he billed. Similarly, the expert stated that, while he had seen rare situations where customers missed a single payment that they subsequently made up, he never had seen a pattern of nonpayment over numerous months.

Applicants argue that there is no evidence that Levine had an interest in Tribeca in the "traditional sense," because he was not an officer, director, shareholder, employee, or partner. They argue further that there was no formal agreement between Applicants and Tribeca concerning sharing profits and losses; nor was there a subaccount for Levine set up at Tribeca. However, where an Exchange member shares the economic risk of trades in another account, that member has an interest in the account. 38/

Applicants assert that the evidence presented by the Exchange was entirely circumstantial. In particular, Applicants complain that the Exchange failed to compute whether there were profits or losses in the Tribeca account. The Exchange staff testified that they could not compute a profit and loss statement for the Tribeca account from February 1996 to September 1996 because neither Barry nor Tribeca would provide trading records, and OG's records were in disarray. 39/

We believe that the seven fact witnesses and one expert witness who testified for the Exchange, together with the exhibits, demonstrated that Applicants had an interest and were sharing profits in the Tribeca account. The arrangements between Applicants and Shanahan resulted in consistently profitable executions for Tribeca during the time Shanahan was the PGT specialist. During the same period Applicants received

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38/ Edward John McCarthy, Exchange Act Rel. No. 48554 (Sept. 26, 2003), __ SEC Docket __; John R. D'Alessio, Exchange Act Rel. No. 47627 (Apr. 3, 2003), 79 SEC Docket 3627, 3637, quoting New York Stock Exchange, Inc., Exchange Act Rel. No. 41574 (June 29, 1999), 70 SEC Docket 153, 156.

39/ The Exchange staff also attempted to calculate profits and losses from Spear, Leeds & Kellogg's records for the Tribeca account after it was transferred to that firm -- a period from October 1997 to February 1998. However, in this four-month period, Applicants did not receive any payments for two of those months.

The Exchange staff, therefore, stated that they believed the sample was too small to conclude that Applicants had an interest in the Tribeca account during those four months. Contrary to Applicant's contentions, this determination does not preclude the conclusion that Applicants shared profits and losses in the Tribeca account for the preceding period.

correspondingly large over-payments from Tribeca. As soon as Shanahan was removed, and for two months thereafter, Applicants did not receive any PGT executions. Although they performed substantial work for Tribeca over the next five months, they received no or minimal payments. We believe that this pattern, although circumstantial, demonstrates that Applicants were sharing profits and losses with Tribeca.

Applicants suggest that one explanation for the over-payments is that they were compensation for earlier missed or under-payments. Applicants, however, do not provide any evidence to support this contention. Levine testified that he did not retain his Tribeca commission bills. Moreover, Levine provided conflicting testimony concerning the over- and under-payments, which the Exchange properly did not credit. In addition to asserting that Tribeca's over-payments compensated for earlier missed payments, Levine variously suggested that: (1) Barry paid Applicants whatever he wanted to pay; (2) the over-payments were due to the fact that Levine did a good job for the account; (3) when Applicants received no payments, it was because Tribeca's money was tied up in stock positions; and (4) Levine could not account for why he was paid the amounts he was paid. 40/ Moreover, although Levine denies that he shared profits with Tribeca, he introduced Miller to Tribeca and explained to Miller that Tribeca would pay Miller based on the profits Tribeca made from executions Miller obtained. Once the Exchange produced evidence that supported its assertion that Levine had an interest in Tribeca and shared in its profits and losses, the burden of going forward then shifted to Applicants to rebut this evidence. 41/ We find that Applicants violated Exchange Act Section 11(a), Exchange Act Rule 11a-1(a), and Exchange Rules 352(c) and 476. 42/

40/ Applicants assert that they were restricted in their ability to call Barry as a witness. Barry refused to appear unless the Exchange staff agreed to limit its cross-examination. The staff objected to this limitation. The panel informed Applicants that they would draw an adverse inference from the questions Barry declined to answer, and Applicants determined not to call Barry as a witness. We believe that the panel's ruling was reasonable. Applicants made the strategic decision not to call Barry.

41/ Jonathan Feins, Exchange Act Rel. No. 41943 (Sept. 29, 1999), 70 SEC Docket 2116, 2128.

42/ Applicants contend that the evidentiary standard should be clear and convincing evidence. The United States Court of Appeals for the District of Columbia has held that a preponderance of the evidence is the appropriate standard

(continued...)

D. Misstatements to the Exchange

The Exchange charged Levine with making misstatements in his investigative testimony. He falsely testified that Tribeca paid him on a commission basis, and that he did not receive executions for PGT unless he was in the trading crowd. For the reasons stated above, these statements were false and misleading and violated Exchange Rule 476.

IV.

Section 19(e) of the Exchange Act directs that we review Applicants' sanctions to determine whether they are excessive or oppressive or impose an undue burden on competition. 43/ The Exchange censured Applicants, suspended them for six months from Exchange membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization, and jointly fined them $100,000. Applicants assert that these sanctions are excessive because the Exchange imposed lighter sanctions in other cases which, Applicants assert, are more egregious than this case. We have consistently held that the appropriate sanctions in a case depend on its particular facts and circumstances and cannot be determined by comparison with action taken in other proceedings. 44/

Applicants engaged in serious misconduct in connection with their activities on Tribeca's behalf. They freely accepted orders directly from a public customer without compliance with the Exchange's requirements. They circumvented the Exchange rules for transmitting orders to specialists. Their requests on the PGT List often displaced orders previously and properly filed

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42/ (...continued)
for a self-regulatory organization disciplinary action. Seaton v. SEC, 670 F.2d 309, 311 (D.C. Cir. 1982)(upholding preponderance of evidence standard in NASD disciplinary proceeding). See also Steadman v. SEC, 450 U.S. 91, 102 (1981)(upholding preponderance of evidence standard in Commission enforcement proceedings alleging antifraud violations); Jonathan Feins, 70 SEC Docket at 2127-28 (upholding preponderance of evidence standard in an AMEX proceeding).

43/ See Section 19(e)(2) of the Exchange Act, 15 U.S.C. § 78s(e)(2). Applicants do not claim, and the record does not show, that the Exchange's action imposed an undue burden on competition.

44/ Butz v. Glover Livestock Comm. Co., 411 U.S. 182, 187 (1973); Jonathan Feins, 70 SEC Docket at 2131 & n. 36.

with the specialist by other customers. They accepted executions to which they knew they were not entitled. They received and accepted from Tribeca numerous payments for their trades over a long period of time which had no correlation to their stated billing rate, evidencing an interest in the Tribeca account beyond payment for their services. In imposing its sanctions, the Exchange considered that there was no evidence that Levine disadvantaged his other customers through his relationship with Tribeca, character testimony introduced on Levine's behalf, and a period of unemployment that resulted from the proceeding.

We believe that, in imposing these sanctions, the Exchange properly considered the wide-ranging scope and serious nature of Applicants' misconduct, as well as any mitigating factors. Under the circumstances, we do not find the sanctions imposed by the Exchange to be excessive or oppressive.

An appropriate order will issue. 45/

By the Commission (Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS); Chairman DONALDSON, not participating.

Jonathan G. Katz
Secretary

45/ We have considered all of the arguments advanced by the parties. We reject or sustain 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. 48760 / November 7, 2003

Admin. Proc. File No. 3-10816

In the Matter of the Application of

DAVID M. LEVINE

and

TRIPLE J PARTNERS, INC.

For Review of Disciplinary Action Taken by the

NEW YORK STOCK Exchange, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NATIONAL SECURITIES EXCHANGE

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

ORDERED that the sanctions imposed by the New York Stock Exchange, Inc. against David M. Levine and Triple J Partners, Inc. be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary