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AMERICAN STOCK EXCHANGE LLC
AMEX ADJUDICATORY COUNCIL

IN THE MATTER
OF
JAMES B. COHEN

DECISION ON APPEAL

On April 3, 2003, the Exchange instituted a formal disciplinary proceeding against James B. Cohen ("Cohen"), a registered employee of Salomon Smith Barney Inc. ("Salomon"), charging him with the violation of certain Exchange rules.

Exchange Statement of Charges

In its Statement of Charges, the Exchange brought the following charges against Cohen:

1. Cohen caused his member firm employer to violate Exchange Rule 208, and engaged in conduct inconsistent with just and equitable principles of trade in violation of Exchange Rule 345(a)(4), in that during the period between December 4, 2000 and December 14, 2000, Cohen through his exercise of trading discretion in public customer and family-related accounts as well as accounts of family members, entered a total of 83 odd-lot orders for execution, when such orders should have been consolidated into round lots.

2. Cohen engaged in conduct or proceeding inconsistent with just and equitable principles of trade, in violation of Exchange Rule 345(a)(4) in that Cohen sold odd-lot share orders rather than round-lot orders between December 4, 2000 and December 14, 2000 to prevent sell side pressure on EML stock and to allow him to sell EML stock without affecting the market price of the security.

Exchange Disciplinary Panel Decision

A Disciplinary Panel conducted a hearing on the charges on October 21, 2003. On July 22, 2004, the Disciplinary Panel issued its written decision and unanimously found Cohen guilty of the charges brought against him by the Exchange. Cohen was censured, suspended in all capacities for 20 business days, and fined \$25,000.

Cohen Appeal

Cohen thereafter appealed the Exchange Disciplinary Panel decision to the Amex Adjudicatory Council. He contested both the Disciplinary Panel's finding that he engaged in serious misconduct in connection with the odd-lot orders and the sanctions imposed on him by the Panel. After careful consideration of the record and briefs submitted by both parties, the Adjudicatory Council voted unanimously at a meeting of the Council held on January 13, 2005 to affirm the decision of the Exchange Disciplinary

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Panel. In the Council's view, the finding of serious misconduct was fully supported by the record and the penalty imposed by the Exchange Disciplinary Panel was justified and consistent with the misconduct.

Right of Appeal to the SEC

In accordance with Rule 345(i) and Rule 12 of the Rules of Practice Applicable to Exchange Disciplinary Proceedings, a public announcement will be made of the Exchange's action. In addition, the Exchange, simultaneously with the sending of this decision, is notifying the Securities and Exchange Commission of the final action it has taken in this disciplinary proceeding, as required by SEC Rule 19d-1. A copy of the notice to the SEC is enclosed. The sanctions imposed by the Exchange will become effective 30 days after the filing of such notice with the SEC and receipt of a copy by Cohen, unless Cohen files an application for review with the SEC by that time, accompanied by a request for a stay of the sanctions.

AMEX ADJUDICATORY COUNCIL



Kenneth M. Duberstein
Chairman

Dated: February 28, 2005

**Disciplinary Panel
American Stock Exchange, LLC**

IN THE MATTER
OF
JAMES B. COHEN

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Case No. 02-04
Hearing Officer - JN
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Disciplinary Panel Decision
July 22, 2004
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Digest

Respondent entered odd-lot orders that should have been consolidated into round lots, in violation of Exchange Rule 208. The entry of the odd-lot orders was also conduct inconsistent with just and equitable principles of trade and thus violated Exchange Rule 345(a)(4). For these offenses, he was censured, suspended for 20 business days, and fined \$25,000.

DECISION

I. Introduction

On April 3, 2003, the Exchange issued a Statement of Charges, alleging that Respondent James Cohen engaged in certain odd-lot transactions, in violation of Exchange Rules 208 and 345(a)(4). On May 15, 2003, Cohen filed an Answer, which denied liability. Thereafter he filed a Motion to Dismiss, which the Department of Enforcement opposed. On September 30, 2003, the Disciplinary Panel heard oral argument on that Motion, and on October 7, 2003, the Chair issued an Order denying it without prejudice.

On October 21, 2003, the Panel heard the case on its merits. Enforcement filed a post-hearing brief on December 11, 2003. Respondent filed his brief on February 3, 2004 and Enforcement replied on February 10, 2004.

Enforcement's exhibits are cited with the prefix "CX"; Respondent's exhibits are cited with the prefix "RX"; and the parties' stipulation is cited as JX-1. Pages of the hearing transcript are cited with the prefix "Tr."

II. Factual Background

A. Odd-lot orders

An "odd lot" order for stock involves the purchase or sale of less than 100 shares (the approved unit of trading). See Amex Rules 120 and 204. As explained by the Exchange's Vice President for Market Surveillance, the odd-lot system was designed to "accommodate small orders from small order givers and for certain transactions [which combined round lots and odd lots, such as an order for 125 shares] ... that kind of thing" (Tr. 26).

Odd-lot orders are not reflected on the tape, or seen by the trading "crowd" – i.e., the specialists and others on the trading floor – or otherwise displayed to the market (JX-1, par. 66; Tr. 23, 24). An odd-lot order is executed automatically, generally at the prevailing round lot bid, and is not seen by floor specialists until the end of the day (Exchange Rules 204 and 205; JX-1, pars. 64, 65; Tr. 23).

A broker who uses the odd-lot system as a way to dispose of larger volumes "tak[es] advantage of the entire system" (Tr. 24). Such action results in "not having orders represented properly, not having the markets reflect the appropriate volume that's out there, not allowing individuals to see what the actual supply and demand is, so that bids and asks are not real because all the activity is going through the odd-lot system which nobody sees. You don't see them on the tape, you don't see them in the crowd" (Id.).

The Respondent is a registered employee of Salomon Smith Barney. The Statement of Charges alleges that by breaking round lots into odd lots and selling them as odd lots (thus

circumventing the market), Cohen caused his firm to violate Exchange Rule 208, which, as discussed infra, requires that member firms consolidate certain odd-lot orders into round lots. It further alleges that this conduct was inconsistent with just and equitable principles of trade and thus violated Rule 345(a)(4), which authorizes the Exchange to discipline any employee of a member who engages in such conduct.

B. The transactions in this case

This case involves odd-lot sales of shares in the Eastern Company (EML). This security was listed for trading on the Exchange and the transactions in issue occurred on the Exchange. In 1997, certain of Cohen's customers, acting on his recommendations, had purchased EML shares. In early December 2000, through various conversations with customers, he recommended that some clients sell some of their shares. Many followed those recommendations and "[i]n most cases, they authorized sales of EML in amounts up to specific round lots, and gave Cohen discretion to determine the times and prices at which to execute those orders, and the specific amounts to be sold at one time" (JX-1, par. 18).

Between December 4 and December 14, 2000, the total volume of EML shares traded was 26,200 (JX-1, par. 32). That total included 6,875 shares reflected in 82 odd-lot sales, which Cohen entered (Id. at par. 33).¹ Most of those odd-lot sales were for his public customers. A few such sales were for his wife (for whom he held discretionary authority), and for his children (for whom he was custodian). The 82 sales involved the entry of multiple odd-lot orders for the same client. Though all of the customers owned at least one round lot, Cohen made the decision as to how much EML stock to sell at one time (Tr. 47, 164, 169-70).

¹ During the same period, Cohen also entered many round-lot orders (JX-1, par. 35), transactions which are not in issue.

For customer SK, for example, Cohen chose to enter the following small odd-lot sale orders (RX-130²):

Dec. 6 (at 12:11):	90 shares
Dec. 6 (at 12:33):	75 shares
Dec. 7 (at 2:16):	95 shares
Dec. 7 (at 2:39):	90 shares
Dec. 7 (at 2:51):	90 shares
Dec. 7 (at 3:38):	90 shares
Dec. 8 (at 9:48):	75 shares
Dec. 8 (at 10:17):	95 shares
Dec. 8 (at 11:29):	90 shares
Dec. 8 (at 3:41):	95 shares
Dec. 14 (at 3:35):	90 shares

Instead of selling that customer's 975 EML shares in a round lot of 900 plus an odd lot of 75, Respondent broke the holding into 11 pieces and sold each one as an odd lot. Over the same time, Respondent similarly sold off other customers' EML holdings. On December 7 and 8, for example, Cohen sold 540 shares for customer GM and 365 shares for customer WB by breaking them into six and four pieces, respectively, and selling each piece as an odd lot (RX-130). Respondent did the same thing for his wife's and children's accounts on December 13 and 14, 2000, by breaking some of their EML holdings into multiple pieces and selling each piece as an odd lot (Id.).³ As noted, between December 4 and 14, 2000, Cohen made 82 odd-lot sales, reflecting a total of 6,875 EML shares (JX-1, par. 33).

EML was a thinly traded stock (only 26,200 shares over nine business days), and as the Exchange's Vice President for Market Surveillance and his senior analyst explained, round-lot orders generally have a negative price impact on such a security (Tr. 42, 51, 75-76). As to the transactions in issue here, Respondent acknowledged that he decided to sell the shares as odd

² The parties agreed that this chart summarizes the relevant EML trades (Tr. 169).

³ Cohen also executed two round lot orders for his wife.

lots because, in his experience, an offer of small round lots would have led the specialist to make a disproportionately low bid (Tr. 181-83, 225, 228). As Cohen said, “I’ve never denied that I was selling odd lots at times so that I wouldn’t take out the hundred share bid” (Tr. 229). Respondent knew that odd-lot transactions were not displayed to the market and told the investigators that he was reluctant to induce a bid for 100 shares “because I didn’t want to show all the other people that there was consistent selling in the stock, and again my experience was the stock went down on light volume” (Tr. 223-24, 236-37; CX-6).

III. Liability

A. Exchange Rule 208

The Exchange’s Rule 208 requires consolidation of odd lots into round lots in certain circumstances. It states in pertinent part:

When a person gives, either for his own account, for various accounts in which he has an actual monetary interest, or for accounts over which such person is exercising investment discretion, buy or sell odd-lot orders which aggregate one or more round lots, a member or member organization shall not accept such orders for execution unless they are, as far as possible, consolidated into round lots

The SEC explained that Rule 208 “mirrors” Rule 411(b) of the New York Stock Exchange, citing its recent approval of an amendment to that Rule.⁴ That approval, in turn, reflected the NYSE’s view that requiring additional odd-lot consolidation was appropriate because “in the absence of an aggregation requirement, [certain odd lot] orders are not exposed to the auction market, even though the orders may total multiple round lots”⁵ Thereafter, the SEC approved Rule 208, reciting the requirements of Section 6(b)(5) of the Securities Exchange

⁴ Notice of Filing of Proposed Rules Change by American Stock Exchange, Exchange Act Release No. 32,762, 1993 SEC LEXIS 2075 at *3 (Aug. 17, 1993).

⁵ New York Stock Exchange, Inc., Order Approving Proposed Rule Change, Exchange Act Release No. 31,048, 1992 SEC LEXIS 1934 at *2 (Aug. 18, 1992).

Act of 1934 “that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts or practices, [and] to remove impediments to and perfect the mechanism of a free and open market . . .”⁶ In the instant case, therefore, the Panel seeks to construe Rule 208 in a manner consistent with enhancing a “free and open” market.

Respondent argues that Rule 208 requires consolidation, but does not address the breaking up (unbundling) of a round lot into odd lots (Br., p. 12). The Panel rejects this defense. A rule that demands consolidation of odd lots necessarily precludes dividing a round lot into odd lots and selling the pieces individually. It would make no sense to require a broker put the pieces together, only to allow him or her to break them up and sell them individually. Indeed, Rule 208 would require that the small orders be re-bundled before sale. The result of Cohen’s argument would render Rule 208 meaningless, and the Panel declines to adopt it here.

Cohen argues that it is unfair to punish him because he could not have foreseen that unbundling round lots into odd lots for sales purposes would violate Rule 208 (Br., pp. 16-17). Cohen admittedly knew that he was using the odd-lot system as a device to withhold information that otherwise should have been known to the trading crowd and to thereby circumvent the market place. He received orders to sell blocks of stock, which, in each instance, involved at least one round lot. He chose to break the customers’ holdings into odd lots for the express purpose of concealing the orders from the market so that he could get a higher price for the stock than the market otherwise would have produced. In the Panel’s view, it should have been obvious to Respondent that his conduct was improper.

⁶ American Stock Exchange, Inc., Order Approving Proposed Rule Change, Exchange Act Release No. 33,306, 1993 SEC LEXIS 3395 at *9 (Dec. 9, 1993).

As a registered person, Respondent may properly be charged with Rule 208,⁷ which, as shown, necessarily prohibits unbundling. As an experienced broker, he should have realized that breaking the required round lots into pieces to evade the market place was improper.

The instant case is unlike X, Former Analyst, NYSE Disc. Action 83-52, 1983 NYSE Disc. Action LEXIS 106 (June 3, 1983), where the panel found that a respondent's conduct did not violate any NYSE rule or policy. In contrast, Cohen's conduct violates Rule 208 and its underlying policy. In addition, that respondent sought the help of his firm's compliance department and his supervisor and acted in accordance with the latter's view. Cohen did not consult with anyone in his firm. Nor does this case resemble KPMG, LLP v. SEC, 289 F.3d 109 (D.C. Cir. 2002), where the SEC's interpretation created "something entirely different" from what was intended. Reading Rule 208 as precluding unbundling is entirely consistent with preventing circumvention of the market place.

B. Market orders vs. limit orders

Next Cohen urges that the Rule is inapplicable because the orders in this case were market orders, not "limit" orders (Br., pp. 12-13). This argument rests on an NYSE information memo, which states, inter alia, that "the unbundling of round-lots for the purpose of entering odd-lot limit orders in comparable amounts" was inconsistent with traditional odd-lot practice (Respondent's Appendix, Tab 9).

That language does not mean that unbundling for the purpose of entering a market order, as Cohen did here, is proper. Mentioning one type of "unbundling" does not bless all other such actions. Nothing in the NYSE Rule or in Amex Rule 208 restricts their applicability to "limit orders." That phrase appears nowhere in them. Breaking round lot orders into odd-lot orders –

⁷ E.g., Gilbert M. Hair, Exchange Act Release No. 32,187, 1993 SEC LEXIS 883 at *11 (Apr. 21, 1993) (citations

whether limit or market orders – evades the public reporting of market activity and prevents the orders from being exposed to market forces. As noted, the NYSE memo concluded in general terms that “order entry practices which are intended to circumvent the round lot auction market constitute abuses of the odd-lot system.” Consistent with that broad remedial language, the Panel declines to construe Rule 208 as containing limitations that do not appear in it.

C. Alleged requirement for simultaneous orders in same account

Respondent argues that because he gave the orders at different times, there were no outstanding “unexecuted” orders from the “same” account and thus nothing could have been consolidated (Br., pp. 13-14). The customers gave Cohen a broad order to dispose of their holdings, up to a certain amount. It was he who decided to break that amount into pieces to be sold as odd lots. Under Respondent’s reading, any broker could evade Rule 208’s consolidation requirement by breaking a customer’s round lot into two parts: one to be sold now and the second to be sold later.

Certainly odd-lot activity in the same account could violate the Rule, but nothing in its language limits applicability to that situation. Indeed, its references to “various accounts,” or “accounts” over which the broker is exercising investment discretion, and its requirement for consolidation “as far as possible,” go well beyond the notion of simultaneous sales in the same account. The Rule has broad scope, and the Panel declines to adopt a reading that would facilitate evasion.

D. Investment discretion

Rule 208 extends, *inter alia*, to orders entered in “accounts over which [a person] is exercising investment discretion.” Insofar as the transactions occurred in Cohen’s wife’s and

omitted).

children's accounts, where he held written discretionary authority or was custodian, Respondent was unquestionably "exercising investment discretion," and his brief so concedes (Br., pp. 14-15).

As to transactions for public customers, Respondent contends that his exercise of time-and-price discretion does not constitute "exercising investment discretion" under Rule 208⁸ because time-and-price discretion is an exception to the requirement that discretionary power be accompanied by the customer's written authorization (Rule 421). The Panel rejects this contention.

Rule 421's written authorization requirement has nothing to do with Rule 208's mandate for consolidation of odd lots. These two separate provisions, located in different chapters ("General and Floor Rules" and "Office Rules," respectively), address entirely different subjects and have different purposes. There is no reason, and Respondent suggests none, why a firm's duty to consolidate should turn on whether the underlying discretion was oral or written.

Cohen received the sell orders on behalf of the firm and exercised the discretion that the customers gave him. The Rule speaks broadly of orders in accounts over which a person "is exercising investment discretion." It contains no exception for time-and-price discretion and the Panel declines to create one. Cohen was a person "exercising investment discretion" and his unbundling caused a violation of Rule 208.

IV. Exchange Rule 345(a)(4)

A. Just and Equitable Principles

Exchange Rule 345(a)(4) makes it a violation for any employee of a member organization to engage in "any conduct or proceeding inconsistent with just and equitable

principles of trade.” Respondent argues that the charge based upon that Rule should be dismissed because he acted in good faith and believed that the odd-lot sales were permissible and in his customers’ best interests. The Panel concludes that Enforcement has established a violation of Rule 345.

Under NASD’s analogous Rule 2110 (which also mandates “just and equitable principles of trade”), the SEC applies a “long-standing and judicially recognized policy that violation of another NASD rule or regulation ... constitutes a violation of Rule 2110.” Mark H. Love, Exchange Act Release No. 49,248, 2004 SEC LEXIS 318 at *13 (Feb. 13, 2004). Violations of NASD Rules are “viewed as violations of Conduct Rule 2110 without attention to the surrounding circumstances because members of the securities industry are expected and required to abide by the applicable rules and regulations.” Dep’t of Enforcement v. Aleksandr Shvarts, 2000 NASD Discip. LEXIS 6 at **12-13 (NAC, June 2, 2000) (citations omitted) (emphasis added).

Cohen’s violation of Rule 208 also constitutes a violation of Rule 345 “without attention to the surrounding circumstances” (Id.). His asserted good faith thus cannot create a defense to the charge itself. See Dist. Bus. Conduct Comm. v. William Gerhauser, 197 NASD Discip. LEXIS 69 at **18-19 (NBCC, Nov. 20, 1997), aff’d, Exchange Act Release No. 40,639, 1998 SEC LEXIS 2402 at **20-21 (Nov. 4, 1998), rejecting a “good faith” defense where, as here, liability rested on Respondent’s violation of another Rule.

Moreover, Respondent’s conduct violated just and equitable principles of trade, even apart from Rule 208. He certainly violated the principle underlying that Rule. He broke orders

⁸ In fact Respondent was exercising more than time-and-price discretion. He also had discretion to choose the amount of stock to be sold, “up to” a given number (JX-1, par. 18; Tr. 168).

into odd lots for the specific purpose of avoiding their exposure to the marketplace. Under Section 6(b)(5) of the 1934 Act, Exchange rules are designed, *inter alia*, to “remove impediments to and perfect the mechanism of a free and open market.” Reading Rule 345 in that light, the Panel concludes that Cohen’s intentional attempt to circumvent that “free and open market” was conduct inconsistent with just and equitable principles of trade.

B. The Faragalli case

Respondent relies on a footnote in Henry James Faragalli, Exchange Act Release No. 37,991, 1996 SEC LEXIS 3263 at *45 (Nov. 26, 1996), finding that the NYSE failed to establish that certain unbundling violated just and equitable principles of trade (Br., pp. 18-21). In Faragalli, there was no finding that the unbundling also violated a particular Exchange Rule. In the present case, as explained, Cohen violated Rule 208, misconduct that itself constitutes a violation of the Exchange’s prohibition of conduct inconsistent with just and equitable principles of trade, a result that occurs “without attention to the surrounding circumstances.” Shvarts, *supra*.

Moreover, the defects that led to the Faragalli result were not present here. Although Faragalli was involved in extensive unbundling for many customers, “the Exchange inexplicably made findings that this particular violation occurred with respect to only a small number of trades in just two accounts” (1996 SEC LEXIS 3263 at *45). In the instant case, the Panel finds Cohen liable for all of the violations alleged in the Complaint – over 80 odd-lot sell orders in accounts held by many customers, as well as by his wife and children. His liability thus does not turn on an unexplained singling out of a few trades in two accounts.

Nor was this a case where “the Exchange failed to establish that these trades had, or that [Respondent] intended that they have, an impact on the [stock’s] market” (Id.). Here, Exchange

witnesses explained that unbundling took advantage of the system by circumventing the normal operation of market forces. Nor was there any mystery about Cohen's intent. He acknowledged that his goal was to avoid what he saw as the specialist's excessively low offers when small round lots of EML stock were offered for sale.

Under any view, the instant case is not Faragalli.

V. Penalty

This violation involves serious misconduct. Respondent circumvented a system that is designed to benefit investors and other participants by reflecting actual market conditions. Though no one knows precisely what would have happened if he had offered the stock in round lots, the Exchange's witnesses and Cohen himself thought that such offers would have produced lower bids. But, under any view, market participants were entitled to know (and react to) the fact that one broker was disposing of significant blocks of this otherwise thinly traded security. By selling the shares in odd lots, Cohen effectively concealed that fact.

It is true that the misconduct occurred because Cohen was trying to get the best price for his customers and not because he was trying to enrich himself. Respondent ultimately netted nothing from the odd-lot sales and, indeed, would have received commissions if he had sold the stock in round lots (Tr. 171-74, 180).⁹ It is also true that there were no customer complaints. But insofar as Cohen received a better price for the shares by breaking round lots into odd lots (as he

⁹ Seeking better prices for customers also benefited Respondent's wife and children, whose EML shares were sold in odd lots. There were only 12 such sales (involving 1,120 shares), as compared with 70 sales for the public customers (involving 5,755 shares) (JX-1, pars. 33, 34). The family shares were sold at the end of the period in question, when the EML prices were at their lowest (CX-8). Nor did Cohen achieve better prices for the family than for his other customers. On the contrary, each sale of the family shares brought prices equal to or less than those that he obtained for his public customers on the same days (JX-1, pars. 34h, 34i). In these circumstances, the comparatively small family sales have no additional significance for sanctions purposes.

expressly intended), he also forced the buyers to pay more than they would have if the shares had not been unbundled. In this sense, the buyers were victimized by his maneuvers.

The Panel finds it of no significance that he was unaware of Rule 208, promulgated after he entered the profession, and that the firm's compliance department and his supervisor did not educate him about it (Br., p. 23). Ignorance is not mitigating; brokers have a continuing duty to know and abide by the rules, and cannot shift blame to others. Thomas C. Kocherhans, Exchange Act Release No. 36,556, 1995 SEC LEXIS 3308 at **9-10 (Dec. 6, 1995).¹⁰

Some circumstances do cut in Respondent's favor. He did not hide his activity and readily acknowledged it when questioned. There is no suggestion that he failed to cooperate with the Exchange, and he ceased the odd-lot sales immediately after the Exchange's inquiry.

Aside from the instant violation, Respondent has been an honest, useful, and productive member of the industry during his 23 years as a broker. He has no disciplinary history and has never been the subject of a customer complaint (Tr. 158; RX-134, p. 14). He testified that he always tries to get the best price for his clients and generally charges commissions that are heavily discounted from Smith Barney's schedule (Tr. 137, 141). His customers have done well, even during down market years, and as a result, his business is generally attributable to referrals (Tr. 137, 143). Respondent's branch manager confirmed that Cohen has "done well for his clients. He tends to have clients who have a lot of money and who give him a small portion of

¹⁰ See Dist. Bus. Conduct Comm. v. Joel Dean Moore, 1999 NASD Discip. LEXIS 27 at *18 (NAC, Aug. 9, 1999) ("Moore's ignorance of his obligations and his inexperience in the industry do not mitigate his violations"); Dist. Bus. Conduct Comm. v. Prime Investors, Inc., 1995 NASD Discip. LEXIS 219 at *54 (NBCC, Sept. 11, 1995) ("ignorance of the rules," *inter alia*, did not mitigate respondents' actions), *aff'd*, 1997 SEC LEXIS 761 at *9 (Apr. 8, 1997) ("Claimed ignorance of the regulations at issue affords no excuse. [Securities professionals] are obligated to be familiar with and to comply with" the rules); Dist. Bus. Conduct Comm. v. Covato/Lipsitz, Inc., 1994 NASD Discip. LEXIS 53 at *23 (NBCC, Mar. 15, 1994) (sustaining NBCC holding that ignorance of a rule did not constitute mitigation); Dist. Bus. Conduct Comm. v. Herbert C. Stine, 1993 NASD Discip. LEXIS 280 at *6 (NBCC, Apr. 2, 1993) ("Stine's professed ignorance of the Interpretation operates as neither a defense to nor a circumstance in mitigation of the allegations of the complaint").

that money for ... more aggressive small company investment” (RX-134, p. 10). Finally, Cohen recognized that “in hindsight, [he] would do things differently” and that, in the future, he would check with compliance where there was the slightest doubt or ambiguity (Tr. 208, 289).

Enforcement urges a censure, a fine of \$60,000, and a thirty-day suspension (Tr. 295; Br., p. 17). Respondent argues that any penalty should be limited to a censure and a \$5,000 fine (Br., p. 21-27). The Panel believes that the appropriate sanction should be significantly more than Respondent urges, but somewhat less than Enforcement seeks.

As to a fine, Enforcement relies upon recent Amex decisions involving \$20,000 and \$30,000 fines for unbundling¹¹ and argues that Cohen’s fine should be higher because those cases involved settlements (Br., pp. 18-19). But those fines were imposed for other misconduct in addition to unbundling.¹² The amount attributable to the unbundling itself must, therefore, have been less than \$20,000 or \$30,000.

Cohen’s unbundling was more extensive (in volume and duration) than that in the cited cases.¹³ But, Merrill Lynch’s misconduct, which produced the \$30,000 fine, involved a two-year failure to maintain appropriate odd-lot detection and prevention procedures, during which any number of violations may have occurred – a period far in excess of Cohen’s December 4 through

¹¹ Charles Schwab & Co. Inc., No. 02-28 (May 15, 2003); National Investor Services Corp., No. 02-03 (June 12, 2003); and Merrill Lynch, Pierce Fenner & Smith, Inc., No. 02-02 (Nov. 4, 2003).

¹² In Schwab, the firm was fined \$20,000 for unbundling of a round lot into odd lots and for its failure to maintain policies or procedures to detect and prevent such activity – a failure that revealed “instances of further potentially violative odd-lot trading activity in [NYSE] stocks.” In National Investor Services, the firm was fined \$20,000 for an unbundling violation and for two other violations, involving failures to submit certain automatic trading data to the Exchange and to maintain policies and procedures to detect and prevent unbundling. Merrill Lynch involved a \$30,000 fine for unbundling and for the firm’s failure to maintain appropriate detection and prevention procedures over a two-year period, during which one month alone saw over 1800 odd-lot orders.

¹³ Although Cohen violated Rule 208 (unbundling) and Rule 345 (just and equitable principles of trade), the misconduct underlying both violations is the same. The Rule 345 allegation is simply another way of charging the Rule 208 violation, and Cohen’s liability under Rule 345 occurs precisely because he violated Rule 208. For sanctions purposes, therefore, the Panel treats the two charges as one.

December 10 period. On balance, the Panel concludes that the appropriate fine should be \$25,000. Even though Cohen made no money on the transactions, the Panel believes that this serious monetary penalty, comparable to fines imposed on large firms who also violated Rule 208, should send a signal to individual brokers that odd-lot violations will not be tolerated.

The Panel concludes that a suspension is appropriate. As noted, the misconduct resulted in the non-reporting of trades that should have been reported, an event which hid the transactions from the marketplace. For analogous violations of trade reporting requirements, the NASD Sanction Guidelines recommend suspensions of the responsible individual for up to two years in egregious cases (p. 72).¹⁴ Cohen's misconduct was egregious. He circumvented the trading crowd over a ten-day period, during which he made 82 odd-lot sales involving 6,875 shares of EML, transactions that accounted for 26% of the stock's total trading volume during the time in question. As noted, his conduct led the buyers of the 82 odd lots to pay more for the stock than they otherwise would have. Balancing the seriousness of the misconduct against the mitigating circumstances discussed above, the Panel concludes that Cohen should be suspended for 20 business days.¹⁵

Finally, Cohen should be censured for his misconduct.

The Disciplinary Panel further finds that the results of this disciplinary proceeding should be publicly disclosed, as provided in Rule 12 of the Exchange Rules on Disciplinary Proceedings.¹⁶

¹⁴ An Amex Panel may appropriately consider analogous provisions of the NASD Sanction Guidelines in determining sanctions. See Barry Wayne Blank, 2003 SEC LEXIS 439 at *14 (Mar. 7, 2003).

¹⁵ The NASD Sanction Guidelines provide that suspensions of 30 or fewer days should be measured in business days (p. 12).

¹⁶ Rule 12 exempts from publicity those cases where the Panel finds that the offense "related solely to minor administrative requirements of the Exchange and does not materially affect the public interest or the interest of investors." Those exemptions do not apply to the facts of this case.

VI. Conclusion

Based on the foregoing, the Disciplinary Panel, by unanimous vote, finds that Respondent Cohen entered a series of odd-lot orders that should have been consolidated into round lots, and did so in order to prevent sell-side pressure on the stock in question and to sell without lowering its prevailing price. This conduct violated Exchange Rules 208 and 345(a)(4).

For this misconduct, the Panel orders that Respondent be censured, suspended in all capacities for 20 business days, and fined \$25,000.

FOR THE DISCIPLINARY PANEL

Jerome Nelson, Chair

Copies to: James B. Cohen (*via overnight courier and first class mail*)
Andrew W. Sidman, Esq. (*via facsimile and first class mail*)
David E. Rosenstein, Esq. (*electronically and via first class mail*)

Disciplinary Panel
American Stock Exchange LLC

.....	X	
	X	
IN THE MATTER	X	
OF	X	STATEMENT OF CHARGES
JAMES B. COHEN	X	Case Number 02-04
	X	April 3, 2003
	X	
.....	X	

Charges are hereby preferred pursuant to Exchange Rule 345(d) of the Constitution of the American Stock Exchange LLC (the “Exchange”) against JAMES B. COHEN (“Cohen”) (CRD # 721032), a registered employee of Salomon Smith Barney Inc. (“Salomon” or “the firm”), a regular member organization of the Exchange.

STATEMENT OF FACTS:

- 1.1 At all times relevant herein, Salomon was a Regular Member Organization of the Exchange.
- 1.2 During all relevant periods herein, Cohen was a registered employee of Salomon.
- 1.3 During all relevant periods herein Exchange Rule 208 provided in relevant part that:

“When a person gives, either for his own account, for various accounts in which he has an actual monetary interest, or for accounts over which such person is exercising investment discretion, buy or sell odd-lot¹ orders

¹ Exchange Rule 204 defines an odd-lot order as any order less than the unit of trading. Exchange Rule 204 further states that an odd-lot order “shall be executed . . . at a price based on the price of a transaction in the round-lot market on the Floor of the Exchange, plus or minus, if any differential is charged the amount

which aggregate one or more round lots, a member or member organization shall not accept such orders for execution unless they are, as far as possible, consolidated into round lots, except that selling orders marked “long” need not be so consolidated with selling orders marked “short.”

- 1.4 Pursuant to Exchange Rule 205, Specialists on the Exchange are required to execute an odd-lot market order at the prevailing offer (in the case of an order to buy) or bid (in the case of an order to sell).
- 1.5 During all relevant periods herein, Exchange Rule 345(a)(4) provided that the Exchange may disapprove or suspend or withdraw its approval of the employment of an employee of a member or member organization and the Exchange may, in addition to or in lieu of any such action, (a) censure him; (b) declare him ineligible for employment in specified capacities; and/or (c) assess a fine against him if the Exchange determines that such employee has been guilty of any conduct proceeding inconsistent with just and equitable principles of trade.

Cohen’s trading in The Eastern Company during December 2000:

- 1.6 During all relevant periods herein, The Eastern Company (“EML”) was listed for trading on the Exchange.
- 1.7 Between December 4, 2000 and December 14, 2000, Cohen solicited customer sell orders for EML. After soliciting his customers, Cohen, using time and price discretion, entered seventy-one (71) odd-lot sell orders for fifteen (15) different *public* customer accounts in sizes of 30, 45, 60, 75, 90 and 95 shares as follows:

of such differential.” Odd-lot orders are not printed to the tape, i.e. such orders are not displayed to the market.

Date	A/C Name	Order Qty.	Activity	Price	Order	Execution
December 4, 2000	Customer A	95	Sold	14 3/4	2:32	2:32
December 5, 2000	Customer A	5	Sold	14 7/8	12:48	12:48
December 6, 2000	Customer D	90	Sold	14 1/4	12:11	12:11
December 6, 2000	Customer D	75	Sold	14 1/4	12:33	12:33
December 6, 2000	Customer C	90	Sold	14 1/4	1:41	1:41
December 6, 2000	Customer B	92	Sold	14 1/4	1:59	1:59
December 6, 2000	Customer E	90	Sold	14 1/4	2:27	2:27
December 7, 2000	Customer I	90	Sold	14 3/8	10:45	12:10
December 7, 2000	Customer B	95	Sold	14 1/4	12:10	12:10
December 7, 2000	Customer K	95	Sold	14 1/4	12:19	12:19
December 7, 2000	Customer I	90	Sold	14 1/4	12:55	12:55
December 7, 2000	Customer H	95	Sold	14 1/4	1:44	1:44
December 7, 2000	Customer H	65	Sold	14 1/4	1:46	1:46
December 7, 2000	Customer D	95	Sold	14 1/4	2:16	2:17
December 7, 2000	Customer C	95	Sold	14	2:31	2:31
December 7, 2000	Customer D	90	Sold	14	2:51	2:51
December 7, 2000	Customer G	90	Sold	14	3:10	3:11
December 7, 2000	Customer F	95	Sold	14	3:23	3:23
December 7, 2000	Customer D	90	Sold	14	3:38	3:39
December 7, 2000	Customer J	90	Sold	14	3:39	3:40

Date	A/C Name	Order Qty.	Activity	Price	Order	Execution
December 8, 2000	Customer H	95	Sold	14 5/16	9:42	10:16
December 8, 2000	Customer D	75	Sold	14 5/16	9:48	10:16
December 8, 2000	Customer D	95	Sold	14 3/16	10:17	10:17
December 8, 2000	Customer H	95	Sold	14 1/8	10:44	10:44
December 8, 2000	Customer J	90	Sold	14 1/8	10:53	10:54
December 8, 2000	Customer I	90	Sold	14 1/8	11:03	11:03
December 8, 2000	Customer D	90	Sold	14 1/8	11:29	11:29
December 8, 2000	Customer I	95	Sold	14 1/8	11:53	11:53
December 8, 2000	Customer J	90	Sold	14 1/8	11:58	11:58
December 8, 2000	Customer G	95	Sold	14 1/8	12:28	12:28
December 8, 2000	Customer D	90	Sold	14 1/8	12:40	12:40
December 8, 2000	Customer D	95	Sold	14 1/8	12:40	12:40
December 8, 2000	Customer H	95	Sold	14	1:16	1:16
December 8, 2000	Customer C	95	Sold	14	1:16	1:17
December 8, 2000	Customer L	95	Sold	14	1:29	1:29
December 8, 2000	Customer L	45	Sold	14	1:31	1:31
December 8, 2000	Customer H	95	Sold	13 7/8	2:44	2:44
December 8, 2000	Customer E	98	Sold	13 7/8	3:14	3:15
December 8, 2000	Customer D	95	Sold	13 7/8	3:41	3:41
December 11, 2000	Customer I	95	Sold	13 7/8	11:19	11:19
December 11, 2000	Customer L	95	Sold	13 3/4	12:12	12:13
December 11, 2000	Customer J	30	Sold	13 3/4	12:20	12:20
December 11, 2000	Customer I	75	Sold	13 3/4	12:21	12:21
December 12, 2000	Customer F	90	Sold	13 3/8	12:20	12:20
December 12, 2000	Customer H	95	Sold	13 3/8	12:21	12:22
December 12, 2000	Customer G	75	Sold	13 3/8	12:43	12:43
December 12, 2000	Customer I	65	Sold	13 3/8	12:43	12:43
December 12, 2000	Customer L	90	Sold	13 3/8	1:38	1:38
December 12, 2000	Customer M	95	Sold	13 3/8	2:49	2:49

Date	A/C Name	Order Qty.	Activity	Price	Order	Execution
December 13, 2000	Customer H	75	Sold	13 1/8	10:34	10:34
December 13, 2000	Customer M	90	Sold	13 1/8	11:00	11:00
December 13, 2000	Customer N	90	Sold	13 1/8	11:37	11:38
December 13, 2000	Customer G	90	Sold	13 1/8	11:39	11:39
December 13, 2000	Customer B	95	Sold	13 1/8	12:33	12:33
December 13, 2000	Customer M	90	Sold	13	1:25	1:25
December 13, 2000	Customer M	90	Sold	12 3/4	3:18	3:18
December 13, 2000	Customer N	90	Sold	12 3/4	3:50	3:50
December 14, 2000	Customer C	90	Sold	12 3/4	9:53	9:53
December 14, 2000	Customer C	90	Sold	12 3/4	10:20	10:21
December 14, 2000	Customer I	90	Sold	12 3/4	11:07	11:08
December 14, 2000	Customer H	95	Sold	12 3/8	11:15	11:15
December 14, 2000	Customer O	95	Sold	12 3/8	12:00	12:00
December 14, 2000	Customer N	75	Sold	12 3/8	12:40	1:08
December 14, 2000	Customer N	85	Sold	12 3/8	1:08	1:09
December 14, 2000	Customer M	60	Sold	12 3/8	1:43	1:43
December 14, 2000	Customer O	90	Sold	12 1/8	3:20	3:27
December 14, 2000	Customer C	70	Sold	12 1/8	3:22	3:22
December 14, 2000	Customer H	90	Sold	12 3/8	3:27	3:27
December 14, 2000	Customer O	90	Sold	12 3/8	3:27	3:27
December 14, 2000	Customer D	90	Sold	12 3/8	3:35	3:35
December 14, 2000	Customer K	95	Sold	12 3/8	3:50	3:50

Cohen's trading in family related accounts of EML during December 2000:

1.8 On December 13, 2000 and December 14, 2000, Cohen entered sell orders for EML in family accounts over which he directly traded. Cohen, using time and price discretion, entered twelve (12) odd-lot sell orders for two (2) family accounts in sizes of 90 and 95 shares as follows:

Date	A/C Name	Order Qty.	Activity	Price	Order	Execution
December 13, 2000	Family Account 1	95	Sold	12 7/8	1:40	1:40
December 13, 2000	Family Account 1	95	Sold	12 3/4	2:42	2:43
December 13, 2000	Family Account 1	95	Sold	12 3/4	3:17	3:17
December 13, 2000	Family Account 1	90	Sold	UNAV	UNAV	3:32
December 14, 2000	Family Account 1	95	Sold	12 3/8	11:18	11:18
December 14, 2000	Family Account 1	90	Sold	12 3/8	11:31	11:31
December 14, 2000	Family Account 1	90	Sold	12 3/8	1:20	1:21
December 14, 2000	Family Account 1	90	Sold	12 1/8	2:29	2:29
December 14, 2000	Family Account 1	95	Sold	11 3/4	2:46	2:47
December 14, 2000	Family Account 2	95	Sold	11 3/4	2:58	2:58
December 14, 2000	Family Account 2	95	Sold	11 3/4	2:59	2:59
December 14, 2000	Family Account 1	95	Sold	12	3:14	3:14

- 2.1 Between December 4, 2000 and December 14, 2000 Cohen effected eighty-three (83) odd-lot sell orders for customer and family-related accounts. The odd-lot sell orders were eligible to be consolidated into a round lots.
- 2.2 By entering multiple odd-lot sell orders for EML, Cohen circumvented the execution of a round lot order which would have appeared on the Exchange tape, thereby failing to publicly reflect actual market interest by Cohen in EML. Additionally, by entering multiple odd-lot orders rather than a round lot order, the odd-lot order(s) was not represented to the trading crowd, thereby depriving public customers the opportunity for price improvement in the auction market for EML.

- 2.3 By entering multiple odd-lot sell orders for EML, Cohen limited participation on the execution of the odd-lot orders to the Specialist in EML, since only the Specialist can be the contra party to odd-lot trades.
- 2.4 By entering multiple odd-lot sell orders for EML, Cohen compelled the Specialist to execute the multiple odd-lot sell orders at the prevailing offer in EML. The prevailing offer in EML stock at the time of entry of the odd-lot sell orders between December 4, 2000 and December 14, 2000 ranged from 11 3/4 to 14 7/8.
- 2.5 During investigative testimony before the Exchange on March 13, 2002, Cohen stated in substance that he entered multiple odd-lot orders to prevent negative effects on the stock and that entering multiple odd-lot orders would keep the stock from breaking the trend line. Portions of the transcript from Cohen's interview are attached as Exhibit A.

CHARGES PREFERRED

- 3.0 Cohen caused his member firm employer to violate Exchange Rule 208, and engaged in conduct inconsistent with just and equitable principles of trade in violation of Exchange Rule 345(a)(4) in that during the period between December 4, 2000 and December 14, 2000, Cohen through his exercise of trading discretion in public customer and family-related accounts as well as accounts of family members, entered a total of eighty-three (83) odd-lot orders for execution, when such orders should have been consolidated into round lots, as described in above paragraphs 1.7 through 2.4.
- 3.1 Cohen engaged in conduct or proceeding inconsistent with just and equitable principles of trade, in violation of Exchange Rule 345(a)(4) in that Cohen effected odd-lot share orders between December 4, 2000 and December 14, 2000 to prevent sell side pressure on EML and to allow him to sell EML stock without affecting the market price of the security.

Cohen shall have 20 days from the date of service of this Statement of Charges to answer such charges in accordance with the provisions of the Exchange Constitution and rules thereunder. The answer shall specifically indicate which statements, or portions thereof, are admitted and which are denied. Any statements, or portion thereof, not specifically denied shall be deemed admitted.

AMERICAN STOCK EXCHANGE, LLC

By: _____

Glen Barrentine
Senior Vice President