SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

CORRECTED

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54481 / September 22, 2006

Admin. Proc. File No. 3-12206

In the Matter of the Application of

DAVID C. HO

c/o Robert E. Lewin
6421 N. Kilborn Ave.
Lincolnwood, IL 60712

For Review of Disciplinary Action by the

CHICAGO BOARD OPTIONS EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE – REVIEW OF DISCIPLINARY PROCEEDING

Violations of Exchange Rules

Failing to Comply with Exchange's Suspension Order

Trading as a Market Maker After Registration Had Lapsed

Just and Equitable Principles of Trade

Market maker engaged in stock and options trades while suspended from doing so by national securities exchange and while registration with exchange was terminated. Held, exchange's findings of violation and the sanctions imposed are sustained.

APPEARANCES:

Robert E. Lewin, for David C. Ho.

Andrew Spiwak and Greg Hoogasian, for the Chicago Board Options Exchange, Inc.

Appeal filed: February 14, 2006
Last brief received: May 26, 2006

I.

David C. Ho, registered with the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") as a nominee market maker for CBOE member organization DRO-WST Trading, LLC, 1/ appeals from a decision issued by CBOE's Board of Directors on January 26, 2006 ("2006 decision"). In its 2006 decision, the Board of Directors, affirming the opinion of the Business Conduct Committee ("BCC"), found that Ho engaged in numerous stock and option trades that were prohibited according to the terms of a 2003 CBOE decision suspending Ho; it also found that many of those trades were improper because they were entered after Ho's CBOE registration had terminated on January 27, 2004. CBOE found that, by failing to comply with the terms of his suspension, Ho violated Exchange Rule 4.1, which requires adherence to just and equitable principles of trade. It also found that Ho violated Exchange Rules 4.1, 4.2, and 8.1, as well as CBOE Regulatory Circular RG00-52 and Regulation X of the Federal Reserve Board, when he "improperly caused and accepted market-maker treatment" for numerous option and stock transactions after his registration lapsed. 2/ CBOE imposed upon Ho a censure and a $50,000 fine, and suspended him for three years from CBOE membership and association with any CBOE member or member organization. Ho now seeks review of CBOE's 2006 decision. We base our findings on an independent review of the record.

II.

The facts of this case are not in dispute. Ho has worked as a market maker on the Exchange for more than eight years. Before becoming registered with CBOE, Ho worked for two years as a market maker on the Philadelphia Stock Exchange ("PHLX") and for more than a

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1/ Exchange Rule 8.1 defines a market maker as "an individual (either a member or nominee of a member organization) who is registered with the Exchange for the purpose of making transactions as [a] dealer-specialist on the Exchange. . . ." Ho was associated with DRO-WST as a nominee from June 11, 2002 through the time of the hearing in February 2005. Formerly, Ho was associated with AOT USA, LLC as a nominee from February 2001 through June 10, 2002.

2/ Exchange Rule 4.2 requires adherence to CBOE rules and other securities laws and regulations. Exchange Rule 8.1, which sets forth generally the requirements under which transactions may be treated as market maker transactions, defines a market maker as one who, among other things, is registered with CBOE to conduct business as a market maker. CBOE Regulatory Circular RG00-52 summarizes CBOE's rules and policies regarding the entry and execution of orders by market makers, and states, among other things, that "[o]nly a Market Maker on a seat may initiate an order for his Market Maker account." Federal Reserve Board Regulation X, 12 C.F.R. §§ 224.1-224.3, entitles market makers to favorable terms when they extend credit to customers.

year on the Macquarie London Exchange. Ho testified that he trades approximately twelve to fifteen stocks in the Citigroup pit. 3/

On July 26, 2002, CBOE issued a Statement of Charges against Ho, in which CBOE alleged that, on numerous dates from June 1999 to October 2001, Ho "engaged in an on-going course of verbal and physical conduct intended to harass, threaten and intimidate" members of his trading crowd and that he subsequently threatened a member of the trading crowd who had provided testimony against Ho during CBOE's investigation. Represented by counsel, Ho submitted an offer to settle the charges against him, which CBOE formally accepted in a decision issued on October 21, 2003 ("2003 decision"). According to the terms of the settlement agreement, Ho neither admitted nor denied the allegations against him but accepted sanctions for his conduct that included a censure, a $15,000 fine, completion of an anger-management program, abstention from service on any CBOE committee for one year, and an eight-week suspension.

In its 2003 decision, CBOE specified the terms of Ho's eight-week suspension, which was due to commence ninety days (one full options cycle) after the decision was issued. Specifically, Ho was to begin serving his suspension "no later than Monday, January 19, 2004, provided that during this suspension, [Ho] may enter closing options orders only from off of the Exchange floor within the limits of CBOE Rule 8.7." 4/ The decision went on to clarify the definition of prohibited options trades and also specified that all stock transactions in Ho's market-maker account were prohibited during the suspension period:

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

3/ Before the conduct at issue in this case occurred, he had been sanctioned one other time during his career as a market maker: Ho testified that the PHLX fined him $100 for a "minor violation."

4/ Exchange Rule 8.7 establishes the general obligations of market makers, which include, among other things, the requirement to engage in "a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market."

During the period of Ho's suspension, CBOE's Division of Market Regulation reviewed the trading activity in Ho's market-maker account to determine whether he was complying with the suspension. Division staff noted all option transactions and then compared each transaction against Ho's position in that option series at the beginning of the trading day to determine whether the trade was an opening or closing trade. It also noted all stock transactions in Ho's market-maker account, and, although the terms of the suspension prohibited all stock transactions in Ho's account regardless of whether they were opening or closing transactions, CBOE staff also analyzed which of Ho's stock trades were of which type.

Based upon this review of Ho's trading activity, on July 20, 2004, CBOE authorized a Statement of Charges against Ho. During the hearing on those charges, Ellen Miller, the Senior Investigator who reviewed Ho's trading activity testified that, during the suspension period, Ho had engaged in 693 stock transactions and fourteen opening option transactions. 5/ Miller also testified that, in monitoring Ho's trading, she discovered that Ho's registration with CBOE ended on January 27, 2004 and was not renewed until March 22, 2004. Thus, Ho made fourteen option trades and 540 stock transactions in his market-maker account after Ho's registration as his firm's nominee (and, consequently, his membership with CBOE) had lapsed. 6/

Based on the record of Ho's trading activity, and noting that during the hearing both Ho and his counsel admitted that Ho's conduct violated the terms of the 2003 decision, the BCC issued a decision making findings of violation and sanctioning Ho, which the Board of Directors affirmed. One member of the Board of Directors recused himself from participating in a decision on Ho's appeal when he learned that Ho had traded in a trading crowd in which the Designated Primary Market Maker was a firm with which the director was affiliated.

III.

Ho does not contest that he engaged in options and stock trades in violation of the terms of his suspension. Exchange Rule 4.1 provides that "[n]o member shall engage in acts or practices inconsistent with just and equitable principles of trade." The failure to observe a sanction imposed by the self-regulatory organization with jurisdiction over an associated person is inconsistent with just and equitable principles of trade. 7/

5/ The 693 stock transactions (254 of which were opening transactions) involved a total of more than 359,000 shares; the fourteen option transactions involved 840 contracts.

6/ Section 1.1 of CBOE's Constitution defines "member" to include individuals who are registered nominees of CBOE member organizations. The record does not indicate the reason for his lapse in registration/membership.

7/ Cf. Stephen Russell Boadt, 51 S.E.C. 683, 685-6 (1993) (sustaining NASD's finding that applicant failed to adhere to just and equitable principles of trade when he failed to

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Ho also does not contest that many of these options and stock trades were effected after his CBOE registration had ended. It is well established that operating any length of time in violation of exchange registration requirements is inconsistent with just and equitable principles of trade. 8/ Moreover, because of the lapse of Ho's registration, the trades Ho conducted after his registration had lapsed – which were processed as market-maker transactions – did not meet the requirements in Exchange Rule 8.1 for such treatment. 9/ Ho was authorized neither to act as a market maker while his registration was not in effect, nor to have his trades receive the benefits that accrue to a market maker's transactions. 10/

In the proceeding below, Ho did not challenge CBOE's finding that his trading during the period when his registration had lapsed was not in compliance with Regulation X (which requires

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7/ (...continued)
requalify as a financial and operations principal, as required by a prior NASD order); Gordon Kerr, 54 S.E.C. 930, 938 (2000) (sustaining NASD's finding that applicant failed to adhere to just and equitable principles of trade when he acted as principal despite NASD order barring him in that capacity).

8/ Cf. B.R. Stickle & Co., 51 S.E.C. 1022, 1024 & n.11 (1994) (holding that the operation for any length of time in violation of registration requirements is a violation of NASD Rules of Fair Practice, Article III, Section 1 (now NASD Rule 2110) requiring members to "observe high standards of commercial honor and just and equitable principles of trade").

9/ Specifically, Exchange Rule 8.1 states:

> A Market-Maker ("Market-Maker" or "market maker") is an individual (either a member or nominee of a member organization) who is registered with the Exchange for the purpose of making transactions as dealer-specialist on the Exchange in accordance with the provisions of this Chapter. Registered Market-Makers are designated as specialists on the Exchange for all purposes under the Securities Exchange Act of 1934 and the Rules and Regulations thereunder. Only transactions that are effected in accordance with Interpretation and Policy .03 under Rule 8.7 shall count as Market-Maker transactions for the purposes of this Chapter and Rules 3.1 [requiring that members conduct a "Public Securities Business"] and 12.3(f) [establishing minimum margin requirements].

10/ Market-maker transactions receive favorable treatment under several regulatory provisions, such as CBOE Rule 12.3(f) (which establishes minimum margin requirements); Rule 15c3-1 under the Securities Exchange Act of 1934, 17 C.F.R. § 240.15c3-1 (which establishes net capital requirements); and Federal Reserve Board Regulation X, 12 C.F.R. §§ 224.1-224.3 (which, with Regulation T, 12 CFR §§ 220.1-132, regulates the extension of credit to customers by brokers and dealers).

that brokers observe Regulation T when they extend credit), in that his trades were not eligible to receive favorable treatment under that rule. Ho argues for the first time in this appeal that "[c]ircumvention of market maker margin requirements does not constitute a violation," and that there was no evidence that, "had these trades been placed in David C. Ho's customer account[,] they would have violated Regulation T [and, consequently, Regulation X] of the Federal Reserve Board." The import of this argument is unclear. In any event, Ho does not offer any evidence to substantiate his claim, and our review of the record did not reveal any evidence to contradict CBOE's conclusion that Ho's trades received favorable treatment for which they were not eligible.

We therefore sustain CBOE's finding that Ho violated Rule 4.1 when he failed to observe his suspension. We also sustain CBOE's finding that Ho violated CBOE Rules 4.2 and 8.1, as well as CBOE Regulatory Circular RG-00-52 and Federal Reserve Board Regulation X, when he engaged in numerous stock and options trades in his market-maker account after his registration lapsed.

IV.

Ho argues that the proceedings against him were unfair because a member of CBOE's Office of Enforcement ("Enforcement") staff was present at the preliminary hearing during which the BCC authorized the institution of charges against him. Ho also argues that the BCC panel members who presided over Ho's subsequent adjudicatory hearing were biased because they decided his case although they had participated in the preliminary hearing at which he claims Enforcement staff was impermissibly present. Ho's arguments misperceive the structure of CBOE's disciplinary process.

CBOE's disciplinary proceedings comprise two distinct phases: the investigation and the adjudication. In the first phase, Exchange staff investigates possible rule violations by members and notifies the respondent of the allegations against him and the regulatory provisions that appear to have been violated. 11/ Exchange staff then reports its findings to the BCC, which conducts a preliminary hearing, denominated a "probable cause hearing" by CBOE, to determine whether, based on the staff's investigation and any written statement submitted by the respondent, there is "probable cause for finding a violation" and whether to authorize further proceedings against the respondent. 12/ In making this determination, the BCC performs a prosecutorial role.

11/ CBOE Rules 17.2(a), (d).

12/ CBOE Rules 17.2, 17.4.

Once charges are instituted, respondents receive a specific statement of those charges and access to the investigative file to prepare their defense. 13/ If settlement discussions do not result in an agreement, the BCC convenes a panel consisting of one or more members of the BCC to conduct an adversarial, evidentiary hearing. When the hearing panel is convened, the BCC assumes an adjudicatory role that is different from Enforcement's prosecutorial one. At the hearing, the respondent may be represented by counsel and may present evidence, produce witnesses, and question CBOE's witnesses. 14/ The panel produces a written decision that is reviewed by a majority of the members of the BCC before it is issued. Respondents may appeal the BCC's decision to CBOE's Board of Directors, which also issues a written opinion. 15/

Ho cites Exchange Rule 17.2(c), which states that when "an investigation results in a finding that there are reasonable grounds to believe that a violation has been committed, the Exchange Staff shall submit a written report of its investigation to the Business Conduct Committee." Relying on a rule of statutory construction, expressio unius est exclusio alterius ("the expression of one thing is the exclusion of another"), Ho argues that Rule 17.2(c) does not explicitly permit Enforcement staff to make oral representations to the BCC while it deliberates whether to institute charges, and that, therefore, CBOE violated its own procedures by allowing Enforcement staff to be present.

We reject this argument. 16/ The purpose and effect of Exchange Rule 17.2(c) is to require Enforcement staff to document the results of its investigation and submit its conclusions in writing to the BCC. It does not purport to define the only permitted communications between the staff and the BCC during the investigatory phase of the proceeding, during which the BCC decides whether there is sufficient evidence to warrant the institution of charges against a person. CBOE's determination to institute charges is a pre-adjudicatory administrative enforcement process appropriately conducted outside the respondent's presence to determine whether the agency's investigation has produced evidence meriting further proceedings. There is no basis for

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13/ CBOE Rule 17.4(c).

14/ CBOE Rules 17.5, 17.6.

15/ CBOE Rule 17.10.

16/ Courts and legal scholars disfavor the expressio maxim, which has been described variously as "one of the most fatuously simple of logical fallacies," Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 873-74 (1930), "a valuable servant, but a dangerous master," Ford v. United States, 273 U.S. 593, 612 (1927) (quoting Colquhoun v. Brooks, 21 Q.B.D. 52, 65), and "an especially feeble helper in an administrative setting," Cheney R. Co. v. ICC, 902 F.2d 66, 69 (D.C. Cir. 1990), having been "long . . . subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose." SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943).

reading CBOE's rules to preclude Enforcement staff from fulfilling its critical function as advisors to the BCC during those proceedings. Furthermore, we note that CBOE's rules were approved by the Commission as providing "a fair procedure for the disciplining of members and persons associated with members," the standard to which we hold all disciplinary rules promulgated by self-regulatory organizations. 17/ Ho agreed to abide by all these rules when he became a member of CBOE, and there is no evidence that CBOE at any time failed to observe these or any other procedural rules when it conducted the proceedings against Ho. We find, therefore, that the participation of CBOE's Enforcement staff in the Committee's determination to issue charges against Ho was neither a violation of CBOE rules nor unfair.

Ho's second argument – that the BCC panel members were biased because the BCC panel members who conducted his adjudicatory hearing were also present at the probable cause hearing during which Enforcement staff allegedly was impermissibly present – also fails. Ho does not argue, nor has he shown, that there is any evidence that any member of the BCC (or Board of Directors, for that matter) who participated in the proceedings against Ho was specifically biased against him due to any adverse economic or personal interest. 18/ Ho's objection is based only upon CBOE's allowance of Enforcement staff at the preliminary hearing.

As we stated above, it was not improper for Enforcement staff to have participated in the meeting at which the BCC made its charging decision. It has long been permissible for self-regulatory organizations to perform a dual role as both enforcers and adjudicators, where the organization "provide[s] through [its] internal structures and procedures protection against the harms that may be caused by potential conflicts." 19/ We have already described how CBOE's

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17/ Exchange Act § 6(a)(7), 15 U.S.C. § 78f(a)(7).

18/ Cf. D'Alessio v. SEC, 380 F.3d 112, 122 (2d Cir. 2004) (holding that an administrative proceeding was conducted fairly despite allegations of bias where respondent adduced "no evidence tending to show that the interests of the hearing officer himself were directly adverse to the petitioners or amounted to a personal stake in the outcome").

19/ Scattered Corp., 53 S.E.C. 948, 958 (1998); see also Steven P. Sanders, 53 S.E.C. 889, 906 (1998) ("It is well established . . . that the NASD 'may combine investigatory, prosecutorial, and quasi-judicial functions without violating due process.'") (quoting David A. Gringas, 50 S.E.C. 1286, 1292 (1992)); Daniel M. Pecoraro, 48 S.E.C. 875, 877 ("'It is . . . very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law. . . . The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due

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rules, which were reviewed and approved by the Commission, provide this protection to respondents involved in a disciplinary proceeding. In fact, the recusal from participation in Ho's appeal by a member of CBOE's Board of Directors because of a potential conflict of interest underscores CBOE's efforts to assure the proceedings against Ho were fair.

Ho concedes in his brief that "[t]he wearing of many hats by administrative officials has long been countenanced by the courts," but cites Withrow v. Larkin 20/ for the proposition that, nevertheless, there is an "argument that those who have investigated should not then adjudicate." However, Withrow serves only to undermine Ho's position. In that case, the Court found that a state medical board was within the bounds of due process when the same panel presided over both an investigatory and adjudicatory hearing in an administrative process to determine whether a physician's license should be suspended. The Court found that "there was no more evidence of bias or prejudgment that inhered in the very fact that the Board had investigated and [then] adjudicate[d]," and "[n]o specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation." The Court stated that it must therefore assume that the adjudicators "are [people] 'of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" 21/ Ho's claim of bias, based only generally upon the presence of an Enforcement staff member at the BCC's preliminary hearing, therefore fails.

We find that the record contains no evidence that the proceedings against Ho, conducted in full accordance with CBOE's procedures, were unfair. Moreover, the Commission's review affords Ho "ample protection from any claimed partiality or bias." 22/

19/ (...continued)
process violation.'") (quoting Withrow v. Larkin, 421 U.S. 35, 56, 58 (1975)); San Francisco Mining Exchange, 41 S.E.C. 560, 562 (1963) ("Congress and the courts have recognized that it is not constitutionally objectionable for a single agency to have responsibility for conducting investigations and for thereafter determining on a specific record in an adversary proceeding instituted on the basis of the investigation whether or not a statutory sanction should be applied.").

20/ 421 U.S. 35, 51 (1975).

21/ Id. at 54-55 (quoting U.S. v. Morgan, 313 U.S. 409, 421 (1941)).

22/ Cf. John R. D'Alessio, Exchange Act Rel. No. 47627 (Apr. 3, 2003), 79 SEC Docket 3627, 3649, aff'd, 380 F.3d 112 (2d Cir. 2004) (citing First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 699-700 (3rd Cir. 1979); Monroe Parker Sec., Inc., 53 S.E.C. 155, 163 (1997); R.H. Johnson & Co. v. SEC, 198 F.2d 690, 695 (2d Cir. 1952)).

IV.

CBOE censured Ho, fined him $50,000, and suspended him for three years from CBOE membership and association with any CBOE member or member organization. Under Section 19(e)(2) of the Securities Exchange Act of 1934, we may reduce or set aside sanctions imposed by CBOE if we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary burden on competition. 23/

In affirming the sanctions imposed by the Committee, the Board of Directors noted the seriousness and severity of Ho's violations, which involved a series of transactions conducted over a two-month period. It also found that Ho willfully disregarded the clear restrictions in the suspension order on Ho's trading, which was especially egregious because the Committee allowed Ho to serve his suspension a full options expiration cycle after the decision was issued, in order to give Ho the opportunity to adjust his market-maker positions. The Board pointed out that the sanctions imposed are consistent with sanctions imposed in similar cases, and that the Principal Considerations in Determining Sanctions outlined in CBOE Rule 17.11 were appropriately considered.

We conclude that the sanctions CBOE imposed in this case were neither excessive nor oppressive. The sanctions guidelines set forth in CBOE Rule 17.11 recommend, among other things, that sanctions be designed to prevent and deter future misconduct by wrongdoers, to escalate in severity when imposed upon recidivists, and to be tailored to address the misconduct at issue. It is undisputed that Ho engaged in hundreds of trades, over the course of several weeks, that violated the terms of his suspension. This is Ho's second violation of CBOE rules and his third violation of exchange rules as a market maker. Ho's recidivism, his disregard for CBOE's disciplinary authority in violating his suspension, and the seriousness of his violations all serve as adequate support for CBOE's decision to sanction Ho with a larger fine and longer suspension than he received for his 2003 violation. Although the appropriate sanction always depends upon the specific facts and circumstances of each case and cannot be determined by comparison with action taken in other cases, 24/ we note that CBOE correctly concluded that the sanctions it imposed upon Ho are well within the range of sanctions imposed upon individuals

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23/ 15 U.S.C. § 78s(e)(2). Ho does not claim, and the record does not show, that CBOE's action imposed an undue burden on competition.

24/ See, e.g., Michael A. Rooms, Exchange Act Rel. No. 51467 (Apr. 1, 2005), 85 SEC Docket 444, 450-51, aff'd, No. 05-9531 (10th Cir. 2006).

with similar violations. 25/ In any event, we have examined the facts and the nature of the violations at issue here and see no basis for reducing the sanctions imposed by CBOE.

Ho takes exception to CBOE's finding in making its sanctions determination that Ho "committed serious rule violations involving harassment and intimidation" when he engaged in the misconduct resulting in CBOE's 2003 decision to suspend him. Ho contends that, although he admitted in his offer of settlement in 2003 that he "engaged in an on-going course of verbal and physical conduct intended to threaten, harass and intimidate other members of the Citigroup trading crowd," Ho "is a lay person unschooled in the law who admitted to legal conclusions which should not serve as the basis for any findings of fact in subsequent legal proceedings." Ho's protest is unavailing.

As an initial matter, we note that Ho was, in fact, represented by counsel during the settlement negotiations with CBOE Enforcement staff in 2003. Moreover, it is undisputed that, in 2003, Ho agreed to settle the charges against him, and, while neither admitting nor denying the alleged violations, Ho stipulated to having "engaged in an on-going course of verbal and physical conduct intended to harass, threaten and intimidate" certain persons in his trading crowd. These words are plain and understandable to a non-lawyer. Moreover, CBOE, as does the Commission,

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25/ For example, in Department of Enforcement v. Hornblower & Weeks, Inc., Discip. Proc. No. CAF020022 (Mar. 10, 2004) (Hearing Panel), NASD found that the firm's president and chief executive officer were responsible for issuing a research report in violation of a prior NASD order suspending the firm from doing so; NASD barred the firm's president and suspended the CEO for two years and fined him $55,000. In James R. Jordan, File No. 97-0022 (Nov. 12, 1997), CBOE accepted an offer of settlement from an associated person who entered at least 260 option orders without being registered as an Exchange market maker; the associated person was fined $75,000. In Richard Trojan, File No. 99-0028 (Nov. 23, 1999), CBOE accepted an offer of settlement from an associated person who entered numerous option orders without being registered as an Exchange market maker; he was barred from Exchange membership and from association with any Exchange member or member organization for three years.

We note, as did CBOE, that some of these are settled cases whose sanctions may understate the sanctions that would be imposed in litigated cases because settled sanctions reflect pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary litigation. See, e.g., Anthony A. Adonnino, Exchange Act Rel. No. 48618 (Oct. 9, 2003), 81 SEC Docket 981, 999, aff'd, No. 03-41111 (2d Cir. 2004) (noting that settled cases may result in lesser sanctions); David A. Gringas, 50 S.E.C. 1286, 1294 (1992) (noting that "respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on 'pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings'") (citing Nassar and Co., Inc., 47 S.E.C. 20, 26 (1978)).

"has a strong interest in its settlement orders being final." 26/ We have consistently rejected attempts by respondents to avail themselves of an appeal to the Commission in one proceeding to attack collaterally a prior administrative decision by a self-regulatory organization in another proceeding. 27/

Ho contended at the hearing that he believed the terms of his suspension permitted "balancing trades" that were "gamma neutralizing, delta neutralizing, and vega neutralizing." Ho reiterates this argument in his appeal to us in connection with his claim that the sanctions CBOE imposed are excessive, arguing that "[n]o possible reasons have been advanced by [CBOE] as to why David C. Ho would flagrantly violate this order." However, the Hearing Panel found, and the Board of Directors specifically affirmed, that "Respondent's testimony essentially regarding the disputed issues in this matter" – including Ho's testimony that he did not understand the terms of his suspension – "is not credible." Credibility determinations by the fact-finder are entitled to considerable weight and deference because they are based on hearing the witnesses' testimony and observing their demeanor. 28/ The record offers us no reason to disturb CBOE's determination that Ho's explanation for his behavior was not credible.

Ho also argues that the Board improperly considered as an aggravating factor the fact that Ho's violative conduct occurred despite the fact that CBOE accommodated Ho by delaying the beginning of his suspension for a full options expiration cycle. Ho objects that the only basis for the "factual finding of accommodation" is the hearsay testimony of Miller, CBOE's Senior Investigator, who testified at the hearing that it was her "understanding that the BCC was willing to accommodate Mr. Ho in terms of his ability to maintain the risk in his market maker account. The delay in determining when the suspension could start was such that this would allow Mr. Ho

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26/ Putnam Invest. Mgmt., Order Denying Motion to Vacate Administrative Orders, Exchange Act Rel. No. 50039 (July 20, 2004), 83 SEC Docket 1262, 1265. See also David T. Fleischman, 43 S.E.C. 518, 522 (1967) ("Public policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to [follow] one course of action and, upon an unfavorable [result], to try another course of action.") (alterations in original) (quoted with approval in Gross v. SEC, 418 F.2d 103, 108 (2d Cir. 1969).

27/ See, e.g., Clyde J. Bruff, 53 S.E.C. 880, 887 n.23 (1998) (refusing to consider respondent's complaint that NASD improperly considered his disciplinary history in assessing sanctions because respondent's arguments were simply "an extensive collateral attack" on a prior NASD order); see also Schield Management Co., Exchange Act Rel. No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 859 (holding that where respondents consent to an injunction, they may not dispute the factual allegations in subsequent follow-on administrative proceedings).

28/ Leslie A. Arouh, Exchange Act Rel. No. 50889 (Dec. 20, 2004), 84 SEC Docket 1880, 1893 n.40; see also Anthony Tricarico, 51 S.E.C. 457, 460 (1993).

to wind down positions preexisting to his suspension in his market maker account." Ho argues that Miller's testimony is hearsay that cannot be considered substantial evidence unless it meets the criteria set forth in Calhoun v. Bailar, 29/ i.e., that the hearsay declaration "must have probative value and bear indicia of reliability." Ho further argued that the statements on which Miller's testimony was based were unreliable because they were unsworn and uncorroborated, citing Calhoun.

We have long held that hearsay evidence is admissible in administrative proceedings. 30/ In evaluating the probative value, reliability, and fairness of a particular piece of hearsay evidence, the Commission considers several factors, including "the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated." 31/ Consideration of these factors supports the probative and reliable nature of Miller's testimony as well as the fairness of its use here. The statement is probative because it bears on the level of sanctions that may be appropriate by indicating the opportunity provided by CBOE to reduce the financial impact of Ho's suspension. The testimony also appears reliable, as there is no evidence that Miller, who testified under oath in the course of her routine duties as an investigator, was biased or interested in the outcome of the case. Nor is there any testimony or other evidence in the record that contradicts Miller's statement: although he implies in his brief that CBOE made no accommodation, neither Ho nor anyone else testified about the issue at the hearing. In fact, Miller's testimony is corroborated by the fact that CBOE's 2003 decision afforded Ho a full ninety days before he was required to begin serving his suspension. We find, therefore, that Miller's testimony supports a finding that CBOE accommodated Ho by giving him a full options cycle before his suspension was to begin in order to minimize the financial harm to Ho of the suspension, and that CBOE properly considered this an aggravating factor in assessing sanctions against Ho for violating the suspension order.

Ho complains that, "looking back ten years from 1995 to the present[,] David C. Ho was the only market maker who was suspended by the CBOE who was prohibited from engaging in opening transactions," and points to this fact as evidence that the suspension CBOE imposed on Ho in its 2003 decision was not remedial but punitive. Ho misconstrues CBOE's jurisprudence: Ho appears to be the only market maker to be given the opportunity to conduct closing transactions during his suspension. Our review of CBOE's published disciplinary proceedings

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29/ 626 F.2d 145, 149 (9th Cir. 1980).

30/ See, e.g., Robert Fitzpatrick, 55 S.E.C. 419, 433 (2001) (citing Otto v. SEC, 253 F.3d 960, 966 (7th Cir. 2001); Dillon Securities, Inc., 51 S.E.C. 142, 150 (1992)), petition denied, 63 Fed. Appx. 20 (2d Cir. 2003) (unpublished summary order).

31/ Rooney A. Sahai, Exchange Act Rel. No. 51549 (Apr. 15, 2005), 85 SEC Docket 862, 872.

since 1995 indicates that no other market maker (or registered representative or floor broker) who was suspended from Exchange membership was permitted to enter opening or closing transactions in his or her market-maker account. We find, therefore, that it is appropriate to consider it aggravating that Ho failed to observe his suspension despite the unusual circumstance of having three months to balance his positions in advance of his suspension.

Ho also argues that the Board of Directors did not properly consider the public interest in assessing sanctions against him. However, CBOE's decision demonstrates that it gave due consideration to the public interest when determining Ho's sanction. In its decision, CBOE noted that Ho's "conduct in circumventing margin requirements by improperly receiving favorable market-maker margin treatment was harmful to the public interest and the sanctions in this matter will serve to protect the public from future harm," adding that the "impermissible use of margin causes systemic risk to the market and the public." CBOE also reasoned that the public interest is served by barring Ho because of his "propensity to ignore regulatory requirements as well as the sanctions imposed upon [Ho] for violations of those requirements." CBOE stated that the sanctions appropriately "recognize[] the potential that [Ho] may commit future violations" and "make[] clear to [Ho] and others that restrictions imposed in disciplinary decisions are not to be ignored and that there are significant repercussions for doing so."

We agree that under the circumstances of this case – where the respondent willfully engaged in a lengthy series of numerous transactions, ignoring sanctions imposed upon him in a decision to which he himself consented – the public interest is well served by the sanctions CBOE imposed. We therefore find that the sanctions CBOE imposed were neither excessive or oppressive.

Accordingly, we sustain CBOE's findings of violation and the sanctions it imposed against Ho. An appropriate order will issue. 32/

By the Commission (Chairman COX and Commissioners ATKINS, NAZARETH, and CASEY; Commissioner CAMPOS not participating).

Nancy M. Morris
Secretary

32/ We have considered all of the parties' contentions. We have rejected or sustained these contentions 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. 54481 / September 22, 2006

Admin. Proc. File No. 3-12206

In the Matter of the Application of

DAVID C. HO

c/o Robert E. Lewin
6421 N. Kilborn Ave.
Lincolnwood, IL 60712

For Review of Disciplinary Action by the

CHICAGO BOARD OPTIONS EXCHANGE, INC.

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action by the Chicago Board Options Exchange against David C. Ho be, and it hereby is, sustained.

By the Commission.

Nancy M. Morris
Secretary