SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No.8314 / October 24, 2003

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 48691 / October 24, 2003

Admin. Proc. File No. 3-9959

In the Matter of

DEL MAR FINANCIAL SERVICES, INC.,
KEVIN C. DILLS,
PRIVATE BROKERS CORPORATION,
ROBERT A. ROBERTS, and
MATTHEW R. JENNINGS

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud Violations

Net Capital Violations

Books and Records Violations

Registered broker-dealer and its president violated, and president aided, abetted, and caused firm's violations of, antifraud, net capital, and books and records provisions in connection with fraudulent scheme to lower sales prices on customer order tickets and avoid trading losses to the firm. Trader, clearing broker, and clearing broker's president also were charged with violating, and/or aiding, abetting, and causing violations of, these provisions, but allegations were not established. Held, it is in the public interest to order broker-dealer and broker-dealer's president, jointly and severally, to pay $860,159.38 in disgorgement, plus prejudgment interest (additional remedial sanctions previously having been declared final by Commission order).

The charges against trader, clearing broker, and clearing broker's president are dismissed.

APPEARANCES:

Stephen G. Topetzes and Leigh M. Freund, of Kirkpatrick & Lockhart LLP, for Robert A. Roberts and Private Brokers Corporation.

Stephen A. Zrenda, Jr., of Stephen A. Zrenda, Jr., P.C., for Matthew R. Jennings.

William H. Kuenhle and Douglas C. McAllister, for the Division of Enforcement.

Appeal filed: September 4, 2001
Last brief received: January 18, 2002

I.

This proceeding arose out of two fraudulent schemes involving the common stock of Comparator Systems Corporation, a company that purported to possess new fingerprint identification technology. An administrative law judge concluded that Del Mar Financial Services, Inc., a registered broker-dealer, and its sole owner and president, Kevin C. Dills, engaged in a scheme to promote Comparator stock during 1995 and early 1996. 1/ The law judge found that Dills bought Comparator stock at discount prices and thereafter sold the stock at market prices to doctors and other high income individuals solicited through an aggressive boiler room campaign. Dills assured customers that a nominal commission or no commission would be his only profit from their transactions. Dills did not disclose to customers that he was receiving substantial sums from the proceeds of their purchases.

1/ The order instituting this proceeding ("OIP") also charged Dills' associate, Jai Chaudhuri, in connection with the stock promotion scheme. The law judge found that Chaudhuri violated antifraud provisions and ordered him to cease and desist and to pay disgorgement. Chaudhuri did not appeal the law judge's decision, which became final as to him. Jai Chaudhuri, Securities Act Rel. No. 8008 (Sept. 25, 2001), 75 SEC Docket 2502.

The law judge concluded that Del Mar and Dills violated antifraud provisions of the securities laws. 2/

The second scheme followed a sudden spike in Comparator's stock price during trading on May 3, and May 6, 1996. The law judge found that Dills and others at Del Mar advised the large number of Del Mar customers with positions in Comparator stock to sell their shares. The flood of orders overwhelmed Del Mar's one-man trading operation. Numerous trading errors ensued and caused Del Mar to face enormous potential losses in a rapidly rising market. Dills addressed the situation by lowering prices on May 3 and May 6 customer trades after the fact and by giving false explanations to customers when they complained. The law judge determined that Del Mar and Dills violated antifraud, net capital, and books and records provisions. 3/ The law judge also determined, however, that Del Mar's trader, Matthew R. Jennings, Del Mar's clearing firm, Private Brokers Corporation, and Private Brokers' president and partial owner, Robert A. Roberts, did not engage in wrongdoing in connection with this scheme and dismissed the charges against them.

The law judge revoked Del Mar's registration and barred Dills from association with any broker or dealer. The law judge required Del Mar and Dills to pay third-tier money penalties of $500,000 and $200,000, respectively, and entered cease-and-desist orders against them. The law judge ordered Dills to disgorge $496,175, plus pre-judgment interest, in ill-gotten gains from the stock promotion scheme. The law judge ordered Del Mar and Dills, jointly and severally, to disgorge $505,502.50, plus pre-judgment interest, in ill-gotten gains from the fraudulent ticket price changing scheme. The law judge found that the $505,502.50

2/ See Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15(c) of the Securities Exchange Act of 1934, and Exchange Act Rules 10b-5 and 15c1-2.

3/ See Section 17(a) of the Securities Act of 1933, Sections 10(b), 15(c), 15(c)(3), and 17(a) of the Securities Exchange Act of 1934, and Exchange Act Rules 10b-5, 10b-10, 15c1-2, 15c3-1, 17a-3, and 17a-11.

The OIP charged Philip S. Brandon, Del Mar's general manager and compliance officer, with aiding, abetting, and causing these violations. Brandon settled the charges against him. See Del Mar Fin. Serv., Inc., Securities Act Rel. No. 7800 (Feb. 14, 2000), 71 SEC Docket 1909.

figure represented the proven gains from those Del Mar customers who testified at the hearing.

The Division of Enforcement appeals, seeking review of the dismissal of the charges against Private Brokers, Roberts, and Jennings, and of certain evidentiary rulings. The Division also requests an increase in the amount of disgorgement imposed on Del Mar and Dills for the ticket price changing scheme. The Division calculates that the proper disgorgement amount is $860,159.38, an amount that reflects the total ill-gotten gains from changing the tickets of all Del Mar customers who sold their Comparator stock on the relevant dates. Del Mar and Dills have not petitioned for review of the law judge's initial decision. That decision was declared final as to Del Mar and Dills, with the exception of the $505,502.50 in disgorgement. 4/ We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

Del Mar was an introducing broker-dealer that was engaged primarily in retail securities brokerage. 5/ Del Mar maintained a sales office in Del Mar, California, and employed approximately fifteen registered representatives. Dills was the president and sole owner of Del Mar. At the hearing, Dills invoked his Fifth Amendment right against self-incrimination and declined to answer most questions concerning the events at issue.

In September 1993, Del Mar entered into a Fully Disclosed Correspondent Agreement (the "Agreement") 6/ with Private Brokers

---

4/ Del Mar Fin. Serv., Inc., Securities Act Rel. No. 8063 (Feb. 7, 2002), 76 SEC Docket 2500.

5/ An introducing or correspondent broker deals directly with the public and originates customer accounts. See Katz v. Fin. Clearing & Serv. Corp., 794 F. Supp. 88, 90 (S.D.N.Y. 1992).

6/ In a fully-disclosed agreement, the clearing broker sends trade confirmation statements directly to the introducing broker's customers, whose names and addresses are disclosed to it.

Under applicable self-regulatory organization ("SRO") rules, all clearing agreements must identify the division of duties

(continued...)

Corporation, a small clearing broker-dealer 7/ located in Dallas, Texas. The Agreement provided, among other things, that Private Brokers was responsible for maintaining all customer accounts, preparing and mailing daily and monthly reports, and generating customer trade confirmations and account statements. Del Mar was responsible for trade tickets, time stamps, and the authenticity of customer orders. Del Mar also was responsible for ensuring that its personnel and practices complied with the applicable securities laws and regulations and the National Association of Securities Dealers, Inc. rules. Del Mar warranted that the information it provided to Private Brokers concerning customers and orders was complete, accurate, and correct. Del Mar customers periodically received a disclosure statement from Private Brokers that delineated the division of responsibilities between the two firms. The disclosure statement concluded with Private Brokers' disclaimer that it was not responsible for any matter relating to the servicing of Del Mar's customer accounts.

From September 1993 to March 1996, Private Brokers executed and cleared Del Mar's trades pursuant to the parties' Agreement. In March 1996, Del Mar hired Jennings as a trader and a market maker and began to execute its own trades. Between March 1996 and May 2, 1996, Del Mar engaged in minimal trading, consisting of less than ten trades per day. Although Private Brokers had

---

6/(...continued)
between the introducing and clearing brokers. See, e.g., NYSE Rule 382; NASD Rule 3230; AMEX Rule 400. However, the Commission has stated that "no contractual arrangement for the allocation of functions between an introducing and carrying organization can operate to relieve either organization from their respective responsibilities under the federal securities laws and applicable SRO rules." Order Approving Proposed Rule Change, Exchange Act Rel. No. 18497 (Feb. 19, 1982), 24 SEC Docket 1124, 1124 n.2.

7/ A clearing broker handles functions related to the clearance and settlement of trades in the accounts of the customers of its introducing broker. Dillon v. Militano, 731 F. Supp. 634, 636 (S.D.N.Y. 1990). The clearing broker usually has no direct contact with the customers of its introducing broker, except for the periodic mailing of reports and other records relating to their accounts. Stander v. Fin. Clearing & Serv. Corp., 730 F. Supp. 1282, 1285 (S.D.N.Y. 1990). During the relevant period, Private Brokers cleared around 150 to 200 trades per day from approximately twenty brokers.

stopped executing Del Mar's trades once Jennings was hired, it continued to clear Del Mar's trades, as provided in the parties' Agreement.

On Friday, May 3, 1996, the price of Comparator stock began to rise unexpectedly. 8/ Dills and others at Del Mar responded by contacting customers and recommending that they sell their Comparator stock. Del Mar's office became inundated with sell orders. In Jennings' words, "total chaos" ensued. Brokers gave Jennings written and oral orders, at times grabbing tickets back from him after they had been executed. Jennings assembled order tickets into stacks and grouped them for sale to market makers. Del Mar customers sold their Comparator stock on Friday at prices ranging from 1/16, or about 6 cents, to 9/32, or about 28 cents. The average price of Comparator stock that day was 3/16, or about 18 cents.

Jennings' regular practice was to time-stamp customer order tickets contemporaneously with his entry of the execution prices. However, due to the unusually large volume of Comparator trades that day -- nearly 240 -- Jennings acknowledged in testimony that he may have stamped some order tickets solely to reflect the date of the trade. On other order tickets, Jennings did not indicate the name of the broker to whom the customer's stock was sold. Nevertheless, at the end of the day on Friday, Jennings believed that he had traded correctly so that sell orders from customers balanced with purchases by market makers.

8/ According to Comparator's Form 10-K filed in October 1997, Comparator's stock price was stable between September 1994 and March 1996. The sudden rise in price on May 3, 1996, was the result of thousands of Internet message board postings touting the company.

In May 1996, the Commission suspended trading in Comparator stock because of questions raised concerning the adequacy and accuracy of publicly-disseminated information about the company. See Exchange Act Rel. No. 37209 (May 14, 1996), 61 SEC Docket 2759. That same month, the Commission filed a civil action in district court alleging, among other things, that Comparator and its former officers made false and misleading claims to investors about the company's new fingerprint identification technology. The district court found in favor of the Commission and ordered the defendants to disgorge their profits. The court of appeals affirmed. See SEC v. Rogers, 221 F.3d 1349 (9th Cir. 2000) (Table).

After the markets closed on Friday, Private Brokers' trading assistant, Cherri Childers, called Del Mar to ask if Del Mar had tickets to transmit because Private Brokers had not received any tickets for processing. Childers spoke to Jennings, who said it had been a hectic day at Del Mar with a high volume of Comparator sales. Jennings told Childers that the frenzied pace of trading in Comparator stock had hindered and delayed his transmittal of order tickets. Jennings also talked to Roberts and said he had batched a large number of agency trades for sale to market makers without recording the opposing side of the trades. Jennings told Roberts that it would take additional time for him to associate the opposing broker with each customer order ticket. Roberts instructed Jennings to transmit all incomplete order tickets by facsimile to Private Brokers so that Childers could enter the customer side of Del Mar's trades into the computer. Roberts decided to use Del Mar's principal inventory account as an error account to hold the incomplete trades until the dealer side of the trades could be entered. The parties' experts testified that the account in which the trades were placed did not change the capacity in which they were made. Childers testified that the confirmations that resulted from processing the trades in the principal inventory account were annotated to show they were agency trades.

On Monday morning, May 6, 1996, Roberts reviewed Private Brokers' internal reports of Friday's trading, 9/ and compared them with the National Securities Clearing Corporation ("NSCC") contract sheets. 10/ These reports revealed that on Friday, May 3, Del Mar had sold 14,272,670 shares of Comparator stock, but had submitted customer order tickets for only 11,366,409 shares. Roberts stated in testimony that he was not concerned about this share discrepancy. Roberts testified that he believed additional order tickets from Friday's trading that had not been transmitted to Private Brokers for processing accounted for the

---

9/ Private Brokers engaged in an overnight processing of the day's trading by its correspondent firms, and produced internal activity and position reports for review the next business morning.

10/ The NSCC contract sheets detail trade information provided by both sides of a transaction. Trades in which both parties agree appear on the compared section of the sheets. Trades that fail to match appear on the uncompared section. Firms may make corrections and transmit the information back to the NSCC. See generally NSCC Rules and Procedures, Section II.B.1. at pp. 168-170 (Jan. 13, 2003).

discrepancy. Roberts contacted Del Mar and verified that Del Mar still owed customer order tickets from Friday. Roberts also checked an on-line stock record position report and ascertained that Del Mar customers held more than enough Comparator stock to cover the apparent discrepancy. Roberts testified that he was assured by Del Mar that its trading in Comparator stock was under control.

Monday's volume of Comparator trades was less than Friday's volume but still enormous by Del Mar's standards. Customers sold their Comparator stock on Monday at prices between 5/16, or about 31 cents, and $1.00. Del Mar continued to submit customer order tickets for Friday and Monday trades throughout the day. Because Private Brokers entered orders as they accumulated, there was no way to verify on Monday whether the trade imbalances and pricing errors had been corrected. Thus, Roberts did not know on Monday during the trading day that Del Mar had oversold Comparator stock to market makers. Private Brokers did not finish entering all the trade data from the order tickets until Monday evening.

On Tuesday morning, May 7, 1996, Roberts again compared the activity and position reports and the NSCC contract sheets for the previous day. Roberts found that Del Mar had oversold more than 500,000 shares of Comparator stock. 11/ Roberts testified that the oversale concerned him, because it indicated a serious error had occurred. In addition, as to the shares sold by Del Mar customers to the market, Roberts ascertained that customers' sales prices exceeded market maker purchase prices by $494,479. Roberts did not expect this discrepancy because the trades were agency trades. Total customer sales prices should have equaled total market maker purchase prices.

Roberts acknowledged that the internal activity and position reports and the NSCC contract sheets indicated that the potential loss exposure for Del Mar's trading in Comparator stock was close to $900,000. The $900,000 figure consisted of the $494,479 loss from Monday's trading plus the oversale of 500,000 shares marked to market at $1.00, the price of Comparator stock as of Monday's close. 12/ Roberts testified that he knew Private Brokers held around $300,000 of Del Mar's funds which could be used to offset any trading losses. However, Roberts also testified that he made

---

11/ The parties' experts agreed that the oversale resulted from trading errors made by Jennings.

12/ Securities owed are valued at prevailing market prices (marked to market).

certain assumptions about the 500,000 share oversale and $494,479 price discrepancy which made him optimistic that the potential losses were less than what the activity and position reports and NSCC contract sheets indicated.

In particular, Roberts stated that he assumed the oversale occurred in the last customer trades on Monday, when the sales were at higher prices, so any losses in purchasing Comparator in the market to correct the oversale would be substantially less than $500,000. On cross-examination, however, Roberts conceded that the oversale could have occurred in earlier sales to the market at lower prices, thus making the potential losses greater than he assumed them to be. Roberts also testified that he assumed the $494,479 difference between customer sales prices and dealer purchase prices was the result of clerical errors that Del Mar could correct without causing additional financial exposure. Roberts explained in testimony, "My understanding [was that] the trades were agency trades. And, therefore, the price to the customer should equal the price sold to the street. And so to the extent that there is difference . . . [it] is an error. That is not a loss."

Roberts called Jennings Tuesday morning to determine if all of Friday's and Monday's customer order tickets had been faxed to Private Brokers. When Jennings replied that he did not have any more tickets to transmit, Roberts reported that Del Mar had made significant errors in overselling Comparator stock to the market, and, additionally, that the prices on Del Mar's customer trades were "wrong." Jennings informed Roberts that brokers had been shouting orders without always submitting written order tickets. Jennings testified that during this conversation he realized for the first time there was a "big problem."

After his call with Jennings, Roberts spoke with Dills and explained the problems. Roberts testified that Dills said not to worry about Comparator's stock continuing to rise because the company was worthless. Dills apparently was suggesting that Del Mar fail to deliver the stock and gamble that market makers would fail to buy in before the Comparator bubble burst. Roberts told Dills that "he didn't care what [Dills'] analysis of the company was," and demanded an additional $1 million clearing deposit in connection with the oversale. Dills replied he did not have $1 million and refused to pay. Roberts testified that as soon as he hung up the telephone with Dills he deleted Del Mar's access to the Automated Confirmation Transaction Service ("ACT"), ensuring

that Private Brokers would execute Del Mar's trades, and engaged in trading to cover the oversale. 13/

Regarding the $494,479 discrepancy, Roberts testified that he told Dills "it appeared that the prices that [Del Mar] had put on the customer tickets did not match with the prices that [Del Mar] had sold to the street[,] and that [Del Mar] had made an error and needed to correct that error to make the prices compare." Roberts emphasized that "[his] only conversation with [Dills] was to tell him that he needed to correct the prices to the customers to be in line with the actual sales." Roberts acknowledged that he suggested to Dills one possibility was to give all May 3 customers an average price -- that is, to lower prices on tickets with prices above the average and raise prices on tickets with prices below the average. Roberts testified that he told Dills he thought the average price in Comparator stock on Friday, May 3, was 3/16, and gave Dills copies of the contract sheets to review. Roberts stated that he did not discuss with Dills specific price corrections to any May 3 trade tickets or errors in the prices of May 6 trades. In Roberts' words, "I left the correcting activity to Del Mar. I felt that only they knew what the proper sequence of events that took place. And I left them to make their corrections." Roberts testified that for the rest of the day he was occupied with trading to cover the oversale. Roberts had no further communication with Del Mar on Tuesday until the end of the day when he advised Dills that Del Mar incurred a net loss of $94,000 on the oversale.

Immediately after his discussions with Roberts, Dills began to change a substantial number of both May 3 and May 6 customer order tickets by crossing out the sales prices on the original tickets and entering new, lower prices. Jennings participated in making these changes, but defended his actions on the basis that he did so only in response to Dills' orders and threats. Jennings also claimed that Dills said he had consulted a lawyer who gave assurances regarding the propriety of their actions.

The record indicates that prices were changed on 59 of 119 May 3 tickets and 85 of 106 May 6 tickets. All but three May 3 trades above the average price of 3/16 were lowered to 3/16. No May 3 trade below the average 3/16 price was raised to a higher price. All but seven May 6 trades above the lowest sales price of 5/16, or about 31 cents, were reduced to lower prices. The

---

13/ ACT is an automated system administered by Nasdaq that operates to transmit trading data to ACT participants for clearance and settlement purposes and to disseminate such information to the public. NASD Rule 6110(d).

Division calculated that the cumulative price reductions to May 3 and May 6 order tickets resulted in a total loss of $860,159.38 to Del Mar customers who sold their Comparator stock.

Del Mar faxed the changed order tickets to Private Brokers. Roberts testified that he instructed his staff to process the changed trade tickets as they came in and did not review any of the changes. Private Brokers generated trade cancellations and issued new trade confirmations with lower sales prices. The new trade confirmations falsely stated that the price changes were corrections. When customers called Del Mar and complained, Dills and others blamed Private Brokers or market conditions. Private Brokers maintained control over Del Mar's trade executions until the parties' Agreement expired in September 1996.

III.

A. Private Brokers' and Roberts' Liability

The OIP alleged that Private Brokers and Roberts willfully violated, and aided, abetted, and caused violations of, antifraud and books and records provisions by directing price changes on order tickets and processing and issuing new confirmations with false prices. 14/ As an initial matter, we find no basis for

---

14/ Specifically, the OIP alleged that Roberts and Private Brokers willfully violated Securities Act Section 17, Exchange Act Section 10(b), and Exchange Act Rule 10b-5; that Private Brokers willfully violated Exchange Act Sections 15(c)(1)(A) and 17(a) and Exchange Act Rules 10b-10, 15c1-2, and 17a-3; that Roberts caused and willfully aided and abetted Private Brokers' violations of Exchange Act Sections 15(c)(1)(A) and 17(a) and Exchange Act Rules 10b-10, 15c1-2, and 17a-3; that Roberts and Private Brokers caused and willfully aided and abetted Dills' and Del Mar's violations of Securities Act Section 17(a), Exchange Act Sections 10(b), 15(c)(1)(A), and 17(a), and Exchange Act Rules 10b-5, 10b-10, 15c1-2, and 17a-3.

Scienter is a required element under Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, but not Securities Act Sections 17(a)(2) or 17(a)(3). See Aaron v. SEC, 446 U.S. 680, 697 (1980). A finding of negligence is sufficient to establish liability under Securities Act Sections 17(a)(2) and 17(a)(3). See Jay Houston Meadows, 52 S.E.C. 778, 785 n.16 (1996), aff'd, 119

(continued...)

holding Private Brokers and Roberts primarily liable in relation to the fraudulent ticket price changing scheme. The record is devoid of evidence that Private Brokers and Roberts initiated or directly participated in the scheme with intent to deceive and defraud. 15/ The record reveals that Roberts acted immediately once he discovered what he saw as errors in the prices for agency trades. Roberts contacted Dills and advised him that he needed to correct the errors in prices and bring them in line with the market. Roberts suggested that if Dills could not identify the mismatched trades one possible way to remedy the pricing errors was to give an average price to May 3 trades that did not match. Roberts then left the corrections to Del Mar and Dills while he concerned himself with trading to cover the oversale. Private Brokers later received corrected order tickets from Del Mar for May 3 and May 6 trades. Roberts did not review the corrected tickets and had no knowledge that Del Mar and Dills had falsified the prices on these tickets. Private Brokers and Roberts also had no knowledge of Del Mar's communications with customers about the changes. Private Brokers processed the changed order tickets and sent new confirmations to customers. On this record, Private Brokers' and Roberts' conduct amounted to nothing more than the performance of their activities as clearing brokers in addressing trading problems resulting from an introducing broker's actions.

Nor do we find a basis for holding Private Brokers and Roberts secondarily liable as aiders and abettors of Del Mar's and Dills' fraud. 16/ The record fails to demonstrates that

---

14/(...continued)
F.3d 1219 (5th Cir. 1997).

15/ See McDaniel v. Bear Stearns & Co., 196 F. Supp. 2d 343, 353 (S.D.N.Y. 2002) ("[W]here a clearing firm moves beyond performing mere ministerial or routine clearing functions and [with actual knowledge] becomes actively and directly involved in the introducing broker's [fraudulent] actions, it may expose itself to liability with respect to the introducing broker's misdeeds.") (collecting cases).

16/ The elements for aiding and abetting liability are: (1) a primary violation by another party; (2) a general awareness by the aider and abettor that his role is part of an overall activity that is improper; and (3) substantial assistance by the aider and abettor in the violative conduct. Russo Securities Inc., 53 S.E.C. 271, 278-79 & nn. 16-18 (1997). One who aids and abets a violation also is a cause of the
(continued...)

Private Brokers and Roberts had an awareness or knowledge that the price changes submitted by Del Mar and Dills were false, or that Del Mar and Dills were changing the sales prices on matched trades. Further, the record fails to demonstrate that Jennings or anyone else at Del Mar informed Private Brokers and Roberts of the scheme or any aspect of the scheme. In addition, there is no basis for finding that Private Brokers and Roberts substantially assisted Del Mar's and Dills' violations. The proven facts were that on Tuesday, May 7, Roberts informed Dills of the sales price discrepancy on May 3 trades; Roberts made the suggestion that one way to resolve it if Dills could not reconcile the mismatched May 3 trades was to give those customers an average sales price; and Private Brokers processed Del Mar's changed order tickets for May 3 and May 6 trades.

We also find no basis for concluding that Private Brokers' and Roberts' conduct was negligent. On Monday, May 6, Roberts reviewed reports reflecting an apparent imbalance in Del Mar's sales of Comparator stock. Roberts believed that this imbalance was consistent with the fact that Del Mar was late in submitting its Friday order tickets. Roberts ascertained that Del Mar had more Friday order tickets to submit and that Del Mar customers had accumulated enough Comparator stock to cover the imbalance. In view of these facts, Roberts reasonably could believe that the additional order tickets that Jennings was submitting on Monday would correct the imbalance. When, on Tuesday morning, May 7, Roberts realized that the oversale had not been corrected, he notified Dills of the price and share discrepancies, deleted Del Mar's ability to execute its own trades, and began trading to cover the oversale. The propriety of these actions by Roberts was not disputed by the parties' clearing experts.

As for the pricing errors, Roberts correctly informed Dills that, under the terms of the clearing agreement, Del Mar was the party responsible for ascertaining the correct sales prices and transmitting corrections to Private Brokers. The record fails to demonstrate that Private Brokers and Roberts were on inquiry notice of Del Mar's fraud. Private Brokers and Roberts had no reason to suspect any trading irregularities by Del Mar. In addition, Private Brokers and Roberts were unaware of fraud involving the market for Comparator stock or Del Mar's customer complaints. Private Brokers and Roberts had no contact with Del

---

16/(...continued)
violation. See Sharon M. Graham, 53 S.E.C. 1072, 1085 n.35 (1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000).

Mar customers, and so had no occasion to question the bona fides of the changes.

The Division suggests that, had Private Brokers and Roberts done more, such as reviewing the changed customer order tickets against reports in Private Brokers' possession, they would have ascertained that the trade information contained in the customer order tickets was incorrect. As the parties' experts agreed, Del Mar, as the introducing firm, had all the information about the customers' orders. Private Brokers, as Del Mar's clearing firm, was not in a position independently to determine the prices at which the shares actually sold because it had no direct dealings with the customers. Roberts responded appropriately to evidence of oral orders and incorrect prices by giving Dills copies of the contract sheets and informing him that he needed to determine the correct prices and share amounts. Private Brokers and Roberts did not have a basis for believing that the follow-up trade information that Del Mar submitted was inaccurate or that the corrections were not made properly. On this record, Private Brokers' and Roberts' conduct conformed to their obligations.

B. Jennings' Liability

Jennings was charged with aiding, abetting, and causing Del Mar's and Dills' antifraud violations. Jennings argued that he participated in changing the order tickets only under duress, consisting of credible threats of violence by Dills. The law judge concluded that, while primary securities law violations by Del Mar and Dills had been demonstrated, Jennings' liability in connection with the illegal ticket price changing scheme had not been proven. The law judge credited Jennings' hearing testimony that, when Dills ordered Jennings to change the sales prices on the order tickets, Dills threatened to kill Jennings and referred to criminal associates who could carry out his threats. The law judge also cited to Jennings' testimony that on a prior occasion Dills had threatened to shoot Jennings in the head, boasted that he was unafraid to die, and displayed gunshot wounds in his torso and leg. The law judge decided that, in view of Dills' credible threats of physical violence, Jennings was not liable under the securities laws.

While we do not believe that the duress here provides an affirmative defense to the violations charged, we have determined, as a matter of equity on these unique facts, not to second guess the law judge's determination not to find liability. The law judge had the opportunity to observe both Jennings and Dills at the hearing. The law judge found that "Dills's overall demeanor include[d] a volatile temper, physical threats, and

tantrums." The law judge stated that she observed a display of this type of demeanor while Dills was testifying. Noting that the evidence of Dills' threats came from not only Jennings but other witnesses with no interest in the charges against Jennings, the law judge concluded that Dills' threats of physical violence were credible. In light of the law judge's findings, and in the exercise of our equitable powers, we will not hold Jennings liable.

IV.

The Division challenges the law judge's exclusion of certain investigative testimony. Specifically, the Division argues that statements made by Dills in his investigative testimony should have been admitted for use against Jennings, Roberts, and Private Brokers. 17/ The Division cites to the hearsay exception for statements against interest by an unavailable declarant under Federal Rule of Evidence 804(b)(3). 18/

We have stated on numerous occasions that the Federal Rules of Evidence, including the rules on hearsay, are not applicable to our administrative proceedings which favor liberality in the admission of evidence. Under the Commission's Rule of Practice 320, a law judge may receive all relevant evidence and shall exclude evidence that is irrelevant, immaterial, or unduly repetitious. 19/ Moreover, in deciding when to admit and whether to rely on hearsay evidence, its probative value, reliability,

17/ The law judge admitted Dills' investigative transcript for use against Dills only.

18/ A declarant such as Dills who invokes his constitutional right against self-incrimination is considered "unavailable" for purposes of the hearsay rule. Fed. R. Evid. 804(a)(1). Before the law judge, the Division also claimed that Dills' statements constituted co-conspirator statements and, as such, were admissible as non-hearsay under Federal Rule of Evidence 801(d). This claim has not been pursued on appeal.

19/ 17 C.F.R. § 201.320; see also Alessandrini & Co., 45 S.E.C. 399, 408 (1973).

and the fairness of its use must be considered. 20/ In doubtful cases, we have expressed a preference for inclusiveness. 21/

The law judge recognized that our standard of admissibility is broad, but determined to exclude Dills' statements as a matter of fairness. In view of the liberal standard of admissibility in the Commission's administrative proceedings, the better practice would have been for the law judge to allow Dills' statements to be used against these respondents and then to determine how much weight to give Dills' statements. In any event, the law judge expressly found that Dills' statements were self-serving and unreliable. Thus, even if the law judge had permitted Dills' statements to be used against the other respondents, she would have accorded those statements little or no weight.

The Division also argues that the entire transcripts of Roberts' and Jennings' investigative testimony should have been admitted into evidence, either as non-hearsay evidence if their prior statements were inconsistent with their hearing testimony, or as exceptions to the hearsay rule since the prior statements were against their interests. Again, we believe that the law judge should have admitted the investigative transcripts insofar as they contained evidence that was relevant to the issues in this case. That said, when the Division sought to introduce these transcripts, it did not identify those portions of the investigative transcripts that it viewed as relevant to the case. Our law judges are not required to evaluate these transcripts on an all or nothing basis. The law judge would have been within her discretion in requiring the Division to specify the specific statements that it was relying on and in excluding irrelevant, immaterial, or unduly repetitious evidence under Rule of Practice 320. 22/

20/ Compare Charles D. Tom, 50 S.E.C. 1142, 1145 (1992). Factors to consider include the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated. Id.

21/ See City of Anaheim, Exchange Act Rel. No. 42140 (Nov. 16, 1999), 71 SEC Docket 191, 193-94 & nn. 4-8.

22/ Compare Shahrokh Nikkhan, 2000 CFTC Lexis 122 (May 12, 2000) (Commodity Futures Trading Commission similarly disapproving

(continued...)

22/(...continued)
of practice of depositing entire investigative transcripts into record).

V.

The Division has requested that we increase the amount of disgorgement ordered against Del Mar and Dills, jointly and severally, from $505,502.50 to $860,159.38. 23/ Disgorgement is an equitable remedy that requires violators to return wrongfully obtained profits causally related to their wrongdoing. 24/ The Division has the initial burden of showing that its disgorgement figure reasonably approximates the amount of unjust enrichment in the case. 25/ Once the Division makes this showing, the burden shifts to the respondents to demonstrate that the figure is not a "reasonable approximation." 26/ Any risk of uncertainty as to the disgorgement figure falls on the respondents whose illegal conduct created the uncertainty. 27/

The Division has established that $860,159.38 constitutes a reasonable approximation of Del Mar's and Dills' ill-gotten gains from changing May 3 and May 6 customer tickets. The $860,159.38 reflects the total losses incurred by all Del Mar customers who sold Comparator stock on those dates, including those who did not testify in the proceeding. The Division also has shown that this amount is causally connected to Del Mar's and Dills' wrongdoing. The Division's showing presumptively has satisfied its burden of proof. We have conducted a de novo review of the record, and conclude, based on the evidence before us, that the $860,159.38

23/ Exchange Act Section 21B authorizes orders of disgorgement in, among others, cases involving willful violations of the Securities Act and the Exchange Act.

24/ SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989).

25/ Id. at 1232.

26/ Id.

27/ Id.

figure is a reasonable approximation of Del Mar's and Dills' ill-gotten gains. Accordingly, we will order Del Mar and Dills jointly and severally to pay $860,159.38 in disgorgement, plus prejudgment interest.

An appropriate order will issue. 28/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS).

Jonathan G. Katz
Secretary

28/ We have considered all of the parties' contentions and have rejected or sustained them insofar as they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 8314 / October 24, 2003

SECURITIES EXCHANGE ACT OF 1934
Rel. No.48691 / October 24, 2003

Admin. Proc. File No. 3-9959

In the Matter of

DEL MAR FINANCIAL SERVICES, INC,
KEVIN C. DILLS,
PRIVATE BROKERS CORPORATION,
ROBERT A. ROBERTS, and
MATTHEW R. JENNINGS

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the administrative proceeding against Private Brokers Corporation and Robert A. Roberts be, and it hereby is, dismissed; and it is further

ORDERED that the administrative proceeding against Matthew R. Jennings be, and hereby is, dismissed; and it is further

ORDERED that, within 30 days of the entry of this Order, Del Mar Financial Services, Inc. and Kevin C. Dills shall disgorge $860,159.38, jointly and severally, plus prejudgment interest computed at the rate set forth in Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600, from June 1, 1996, to the date of payment; and it is further

ORDERED that, within 60 days of the entry of this Order, the Division of Enforcement shall submit a plan of disgorgement in accordance with Rule 610 of the Commission's Rules of Practice, 17 C.F.R. § 201.610.

Payment of the civil money penalties and of disgorgement shall be: (i) made by United States postal money order, certified

check, bank cashier's check, or bank money order and made payable to the Securities and Exchange Commission; (ii) delivered by hand or courier to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312; and (iii) submitted under cover letter that identifies the respondents in, and the file number of, this proceeding. A copy of the cover letter and money order or check shall be sent to William H. Kuehnle, Counsel for the Division of Enforcement, Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C. 20549.

By the Commission.

Jonathan G. Katz
Secretary