

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 04-166

October 19, 2004

MARSHALL LEWIS BRASS

FORMER REGISTERED REPRESENTATIVE

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Violated Exchange Rule 408(a) by exercising discretion without written customer authorization; violated Exchange Rule 352(c) by sharing in losses in a customer account; effected unsuitable customer transactions – Consent to censure and seven month bar.

Appearances:

For the Division of Enforcement
Simon Swidler, Esq.
Lara M. Posner, Esq.

For the Respondent
David S. Mandel, Esq.

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An Exchange Hearing Panel met to consider a Stipulation of Facts and Consent to Penalty entered into between the Exchange's Division of Enforcement and Marshall Lewis Brass, a former registered representative with Merrill Lynch, Pierce, Fenner & Smith Inc. (the "Firm"). Without admitting or denying guilt, Mr. Brass consents to a finding by the Hearing Panel that he:

- I. Violated Exchange Rule 408(a) in that, on one or more occasions, he exercised discretionary authority in the accounts of customers of his member organization employer without prior written authorization from the customer.
- II. Violated Exchange Rule 352(c) in that he shared in the losses in the account of a customer of his member organization employer.
- III. Engaged in conduct inconsistent with just and equitable principles of trade in that, on one or more occasions, he made recommendations and effected trades that were unsuitable in light of the customer's investment objectives, risk tolerance and circumstances.

For the sole purpose of settling this disciplinary proceeding, the Division of Enforcement and Mr. Brass stipulate to certain facts, the substance of which follows:

Background and Jurisdiction

1. Marshall Lewis Brass ("Brass") was born on March 3, 1947. He entered the securities industry in March 1978 when he joined the Firm in its Palm Beach, Florida office, as a trainee-broker. Brass became a registered representative in August 1978 and worked for the Firm until his retirement on August 30, 2002.

2. On July 24, 2002 the Exchange received a Form RE-3 from the Firm reporting a complaint by Customer S against Brass alleging unauthorized trading. Subsequently, the Exchange was notified of another customer complaint by Customer W alleging trading in her account without prior authorization and indicating sharing in the losses. The Firm settled with Customer S for \$56,000 and Customer W for \$45,000. Brass is not currently employed in the securities industry.
3. By letter dated December 20, 2002, Enforcement notified Brass that it had opened a formal investigation.

Overview

4. As set forth in detail below, Brass, during the period 1998 through 2002, exercised discretionary authority in the accounts of eleven customers without written authorization, recommended unsuitable transactions in one customer's account from 1999 through 2002 and shared in the losses of a customer's account.

Discretionary Trading Without Written Authorization

5. In July 1997, Customer W and her husband opened a joint account with Brass at the Firm and deposited \$25,650.
6. In August 1998, for personal reasons, Customer W decided to transfer the assets of the joint account into an account in her name only. The entire balance of \$26,116.28 of the joint account was transferred to the new single account.
7. Throughout 1998, 1999 and 2000, Customer W incrementally made additional deposits into her account, adding \$11,000 more in principal for a total of approximately \$36,000. After peaking at over \$80,000 in February 2000, Customer W's account began to decline sharply and by August 2002, Customer W closed the account when it had a debit balance of \$73.00.
8. After opening her account, Customer W gave Brass verbal authority to exercise discretion in her account.
9. Brass did not obtain the necessary written authorization to use discretionary power in Customer W's account.
10. During the period 1998 to 2002, Brass used this orally granted discretionary power to enter all of the trades in Customer W's account.

Sharing in the Losses in Customer W's Account

11. In July 2002, Brass informed Customer W that he would be sending her a check from his personal funds to compensate her for the substantial losses she sustained in her account. On July 6, 2002, Customer W received a personal check for \$3,000 from Brass and a note explaining that the money "will hopefully provide you with a little

base to work from.” The note also stated that Brass wanted to make Customer W “whole and beyond.” Brass instructed Customer W to deposit the check into her personal checking account with the Firm. Customer W did not cash the check and returned the check to Brass’ personal post office box.

12. On July 24, 2002, Customer W received a second personal check from Brass in the amount of \$1,073. Brass requested in the letter that Customer W send back \$73 in order to clear the debit that remained in the account. Customer W never deposited the second check and promptly notified the Firm’s Compliance Department.

Unsuitable Transactions and Margin Trading in Customer W’s Account

13. Customer W’s account profile disclosed an investment objective of “growth” and a risk tolerance of “moderate.” Customer W intended to use the account for retirement. Customer W had no previous experience with margin and limited experience in trading stock. Customer W’s account was set up as a margin account.
14. When Customer W opened her individual account in August 1998, Customer W had 53% of her money in mutual funds and 47% in equities. The value of the account was \$21,453.
15. Beginning in mid-1999, Brass recommended purchases of stock that were inconsistent with Customer W’s objectives and risk tolerance. Most of these recommendations were in speculative technology stocks, which were either not listed, not rated or rated below average in the Standards and Poor’s Stock Guides (“S&P”).
16. Brass also engaged in short-term trading of several stocks, including a not listed and a not rated stock -- holding these stocks as little as one week. For example, Brass purchased 110 shares of the not rated stock on August 31, 1999 and sold them on September 7, 1999. He purchased 105 shares of the not listed stock on August 30, 1999 and sold it less than a month later on September 21, 1999.
17. By late December 1999, the account had grown to a gross value of \$131,550 and a net value of \$76,518. The percentage of equity had grown to 72%, while the percentage in mutual funds had dropped to 28%.
18. During 2000, the technology markets collapsed. Customer W, with extensive positions in this sector, was extremely vulnerable to such declines and suffered heavy losses. By November 2000, Customer W’s account had a gross value of \$73,264 and a margin balance of \$44,751. The stocks that Brass had purchased for Customer W had lost over half of their value. Between January 1, 2000 and November 3, 2000, Customer W’s account sustained a loss of \$34,552 and generated over \$5,000 in commissions.
19. In July 2001, Customer W’s account had a gross value of \$51,143 which included a margin balance of over \$34,000. Brass continued to hold on to technology stocks that were dropping in value rapidly. By the end of February 2002, the account had declined to a net value of \$2,761.02. In June 2002, Customer W began receiving

maintenance calls for her account and Brass had to sell her remaining stocks in order to meet these calls. Customer W closed the account in August 2002, owing \$73.26.

20. Brass' use of margin and his recommendations for a heavy concentration in the technology sector exposed Customer W's account to risks that were unsuitable to her, in light of her circumstances, account objectives and risk tolerance. Additionally, Brass' recommendation to purchase a portfolio of unrated and low rated speculative stocks was unsuitable.

Discretionary Trading Without Written Authorization in Other Customer Accounts

21. During the period 1998 through 2002, Brass received verbal authority to exercise at least some discretion in the accounts of Customer S, and Customers SG, WM, ET, DP, BO, DC, PP, DM and GP.
22. Brass did not obtain the necessary written authorization to use discretionary power in these accounts.
23. In each of these accounts Brass exercised such discretion on some occasions. In Customer GP's account, Brass exercised discretion for all of the transactions in the account.

DECISION

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Mr. Brass guilty as set forth above by unanimous vote.

PENALTY

In view of the above findings, the Hearing Panel, by unanimous vote, imposed the penalty consented to by Mr. Brass of a censure and a bar of seven months from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization.

For the Hearing Panel

Milton M. Stein – Hearing Officer
Panelists:
Domitilia dos Santos
Joseph L. Dicandio