

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 05-79

July 6, 2005

STEPHEN PETER LUSCKO

FORMER REGISTERED REPRESENTATIVE

* * *

Engaged in conduct inconsistent with just and equitable principles of trade by rebilling losing trades from a customer account to the accounts of two other customers without their authorization, violated Exchange Rule 408(a) by exercising discretion in the account of a customer without first obtaining written authorization from the customer, caused a violation of Exchange Rule 440 and Regulations 240.17a-3 and 240.17a-4 by preparing inaccurate Firm documents that related to cancel and rebill of transactions, and caused a violation of Exchange Rule 352 (c) by agreeing to share in a loss in the account of a customer. – Consent to censure and a five year bar.

Appearances:

For the Division of Enforcement
Myles L. Orosco, Esq.
Deanna G.W. Logan, Esq.

For Respondent
Eden L. Rohrer, Esq.

* * *

A Hearing Panel of the New York Stock Exchange, Inc. (“Exchange”) met to consider a Stipulation of Facts and Consent to Penalty entered into between the Exchange’s Division of Enforcement (“Enforcement”) and Stephen Peter Luscko (“Respondent”), a former registered representative with member firm Janney Montgomery Scott LLC (the “Firm”). Without admitting or denying guilt, Respondent consented to a finding by the Hearing Panel that he:

- I. Engaged in conduct inconsistent with just and equitable principles of trade in that he rebilled losing trades from a customer account to the accounts of two customers without the authorization from those two customers.
- II. Violated Exchange Rule 408(a) in that, on one or more occasions, he exercised discretion in the account of a customer without first obtaining written authorization from the customer.
- III. Caused a violation of Exchange Rule 440 and Regulations 240.17a-3 and 240.17a-4 promulgated under the Securities Exchange Act of 1934 in that he prepared inaccurate Firm documents that related to cancel and rebill of transactions.

- IV. Caused a violation of Exchange Rule 352 (c) by agreeing to share in a loss in the account of a customer of his member organization employer.

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

Background and Jurisdiction

1. Respondent was born in August 1967. He began his employment in the securities industry in October 1989 at a member organization, in the capacity of a cold caller. In July 1990, he joined a different member firm as a registered representative where he remained until February 1995. In February 1995, Respondent went to work at a non-member firm as a registered representative until joining another non-member firm in November 1999, where he remained until November 2001.
2. In November 2001, Respondent became employed with the Firm, where he worked as a registered representative in the Firm's Red Bank, New Jersey branch office until his termination on July 18, 2002.
3. On or about July 18, 2002, Enforcement received a Uniform Termination Notice for Securities Industry Registration ("Form U-5") reporting that the Firm had terminated Respondent for rebilling a loss to a customer's account without customer permission.
4. By letter dated December 3, 2002, which Respondent received, the Exchange notified him that it was formally investigating allegations that he may have: i) exercised discretion in a customer's account without the proper written authorization; (ii) improperly cancelled and rebilled certain trades; and (iii) rebilled losing trades from one account to the account of another customer that resulted in losses to certain accounts.

Overview

5. Respondent made an agreement with a customer to effect discretionary transactions in the customer's account without the requisite written authority. Between November 2001 and July 2002, pursuant to this agreement, Respondent effected numerous discretionary transactions in this customer's account without written authorization. In order to mitigate losses to the customer, Respondent cancelled transactions that resulted in losses from the account of this customer and rebilled the losing transactions to the account of two other customers. In addition to canceling losing transactions from the customer's account, Respondent agreed to share in the losses of this customer by offering to take out a second mortgage on his home in order to reimburse the customer.

Discretionary Trading in the Account of a Customer without Written Authority

6. Exchange Rule 408(a) provides, in relevant part, that "[n]o...employee of a member organization shall exercise any discretionary power in any customer's account or

accept orders for an account from a person other than the customer without first obtaining written authorization of the customer.”

7. In Respondent’s capacity as a registered representative at the Firm, he was responsible for managing investment portfolios for approximately 40 retail accounts and approximately 16 institutional accounts. One of the retail accounts Respondent serviced was the account of the G’s. Mr. G directed all the activity in the G Account.
8. In or about December 2001, during the course of servicing the G Account, Respondent obtained verbal authorization to exercise discretion in the G Account. The verbal agreement between Respondent and Mr. G allowed Respondent to purchase investments that Respondent considered good investment opportunities. Respondent and Mr. G further agreed that Respondent would inform Mr. G of the purchases at a later time.
9. Between November 2001 and July 2002, the G Account was very heavily traded. Respondent knew that by exercising discretion in the G Account without written authority, he was in violation of Exchange Rules. Nevertheless, he failed to obtain the requisite written authorization in an attempt to avoid heightened supervision of the G Account or any potential restriction on his ability to effect transactions in the account.
10. By executing trades in the G Account while utilizing his discretion without the required written authorization, Respondent violated Exchange Rule 408(a).

Improper Use of Cancel and Rebill

11. Exchange Rule 440 requires that member organizations make and preserve books and records as the Exchange may prescribe and as prescribed by Regulations 240.17a-3 and 240.17a-4 promulgated under the Securities Exchange Act of 1934.
12. Regulations 240.17a-3 and 240.17a-4 require, among other things, every Broker/Dealer or member of a national securities exchange to make and preserve books and records associated with its business, including books and records associated with its financial and operational activities.
13. During the servicing of the G Account, Mr. G informed Respondent that he did not want any losing trades in the G Account. Mr. G further informed Respondent that should there be a trade in the G Account that resulted in a loss, Mr. G wanted the losing transaction “out of the account.”
14. At that time, Mr. G told Respondent that in the event the G Account sustained losses as a result of trading activity, Mr. G would inform the Firm of Respondent’s exercising discretion in the G Account without the requisite written authorization.

15. In order to prevent Mr. G from informing the Firm about his unauthorized use of discretion without the requisite written authority, Respondent used the Firm's cancel and rebill system to cancel trades from the G Account that resulted in losses. Respondent then rebilled the losing transactions to other customer accounts without their knowledge or authorization.
16. Between December 2001 and June 7, 2002, Respondent cancelled a total of approximately ten transactions that resulted in losses from the G Account and rebilled certain losing transactions to the accounts of the A's and B's, two other pairs of customers, without the authorization of either account.
17. Six of the ten transactions that resulted in losses were cancelled from the G Account and rebilled to the A Account between December 2001 and April 2002. The A Account suffered approximately \$23,851 in losses as a result of the transactions that Respondent cancelled from the G Account and rebilled to the A Account.
18. The remaining four transactions that resulted in losses to the G Account were cancelled from the G Account and rebilled to the B Account between May 2002 and June 2002. The B Account sustained approximately \$40,382 in losses as a result of the transactions that Respondent cancelled from the G Account and rebilled to the B Account.
19. In total, the ten transactions that Respondent cancelled from the G Account and rebilled to the A Account and B Account resulted in a total customer disadvantage of approximately \$64,233.
20. In failing to accurately fill out the Firm's cancel and rebill request forms, Respondent caused violations of Exchange Rules and federal securities laws, which require that member organizations make and preserve books and records associated with its financial and operational activities.
21. The manner by which Respondent used the cancel and rebill to remove transactions that resulted in losses from the G Account and rebilled them to the A Account and the B Account, as described above, did not comply with the requirements of Exchange Rules 440, as well as SEC Rules 17a-3 and 17a-4, and thereby caused violations related to the maintenance and preservation of accurate books and records.

Agreement to Share in Losses

22. Exchange Rule 352(c) states in pertinent part, "*No...registered representative...shall, directly or indirectly, ... (ii) share or agree to share in any losses, in any customer's account or of any transaction effected therein...*"
23. In addition to canceling trades that resulted in losses from the G Account and rebilling the transactions to the A Account and B Account, Respondent violated Exchange Rule 352(c) in that he offered to obtain a second mortgage on his house in order to reimburse Mr. G for some of the G Account's losses.

DECISION

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Respondent 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 Respondent of a censure and a five year bar from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization.

As support for the penalty, Enforcement cited the nature of the violations, the severity of the impact on the customers, the purpose of disciplinary proceedings, Exchange precedents, and the fact that Respondent had knowledge that his conduct was violative and took affirmative steps to conceal it.

The Hearing Panel agrees that Respondent violated the trust of his customers by billing losses to the A Account and B Account. Faced with the threatened exposure of his initial unauthorized trading, Respondent should have reported his violation to a supervisor instead of compounding the wrongdoing by rebilling losses to innocent customers. In addition, Respondent's actions were more egregious than those addressed In the Matter of Eddie Shu Fung, HPD 99-147 (Oct. 28, 1999), in which the respondent filled losses to his own account, with no customer harm (respondent consented to censure and \$25,000 fine). Respondent's actions more closely resemble those of the respondent in In re Lawrence Alexander Smith, IV, HPD 00-48 (March 22, 2000), who engaged in similar conduct by falsifying cancel and rebill forms to conceal unauthorized trading. Smith consented to a censure and a four year bar. Although Respondent's actions harmed fewer customers than Smith, the Hearing Panel imposes the higher penalty consented to by Respondent, in light of the current regulatory climate and the need to deter violations that undermine customer trust.

For the Hearing Panel

Peggy Kuo – Chief Hearing Officer
Panelists:
Soo-Mi Lee, Esq.
Nancy Romanzo