

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 05-93

August 24, 2005

MARCUS D. BRADEN

FORMER REGISTERED REPRESENTATIVE

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**Misappropriated funds from customers, violated Exchange Rule 346(b) by engaging in outside business activities without prior written consent, violated Exchange Rule 407(b) in that he maintained a securities account at a domestic non-member broker-dealer for himself and three customers without prior written consent and failed to arrange for duplicate confirmations and monthly statements. – Consent to censure and permanent bar.**

**Appearances:**

For the Division of Enforcement  
Julie Han Broderick, Esq.  
Kimberly J. Rosner, Esq.  
Jill Fieldstein, Esq.

For the Respondent  
Marcus D. Braden

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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 Marcus D. Braden (“Respondent”), a former registered representative with Charles Schwab & Co., Inc. (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 misappropriated funds from customers of his member firm employer.
- II. Violated Exchange Rule 346(b) by engaging in outside business activities without prior written consent of his member firm employer.
- III. Violated Exchange Rule 407(b) in that he maintained a securities account at a domestic non-member broker-dealer for himself and three customers of his member firm employer without the prior written consent of another person designated by his member organization to sign such consents; and failed to arrange for duplicate confirmations and monthly statements to be sent to another person designated by his member organization to review such documents.

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 December 1969. His employment in the securities industry commenced in December 1995 and ended in December 2003. He was employed by the Firm from September 1999 until September 2003.
2. Respondent is not currently employed in the securities industry.
3. By Uniform Notice of Termination (“Form U-5”) Amendment from the Firm dated December 8, 2003, Enforcement received notice that following Respondent’s termination on September 12, 2003, the Firm became aware that while Respondent was employed at the Firm, he had maintained an outside investment club brokerage account with several of the Firm’s customers without the Firm’s knowledge or approval. (Braden voluntarily left the firm in September 2003).
4. By Form U-5 dated January 16, 2004, Respondent’s subsequent employer reported to Enforcement that Respondent’s employment was terminated on December 18, 2003, after it learned of a customer complaint made to the Firm, relating to events that occurred while Respondent was employed at the Firm.
5. By letter dated April 29, 2004, which he received, Enforcement notified Respondent of its investigation and requested his written response to the allegations.

### **Overview**

6. In January 2001, Respondent, an investment specialist in the Firm’s Fort Wright, Kentucky office, opened an investment club brokerage account at XYZ (the “XYZ Account”), a non-member firm, with three customers of the Firm. Respondent did not receive prior written consent from the Firm prior to opening the XYZ Account nor did he arrange for duplicate copies of all confirmations and account statements to be sent to the Firm’s compliance department as required by Firm and Exchange Rules. Between May and August 2001, Respondent misappropriated approximately \$23,000 from the XYZ Account, which was closed due to inactivity in April 30, 2002 after suffering trading losses of approximately 90% of the XYZ’s Account’s initial value. (In 2003, the Fort Wright, Kentucky office of the Firm closed and Respondent moved to the Cincinnati, Ohio office).

### **Establishment of the Outside Investment Account**

7. In September 1999, Respondent began working as an investment specialist at the Firm. As an investment specialist, his duties included opening new customer accounts, encouraging customers to bring new or additional assets to the Firm, recommending money management firms which could monitor customer portfolios on a daily basis and make investment decisions, following up with customers on a quarterly basis, and advising customers on overall portfolio strategy.
8. EY (“Y”), JK (“K”), and BT (“T”) (collectively the “XYZ Investors”), each became Respondent’s customers in his capacity as investment specialist at the Firm. His job duties did not include and did not permit disseminating specific stock recommendations and advice for short term trading.

9. In or about December 2000 or January 2001, Respondent met with T, a personal friend of his. T informed Respondent that he wanted to trade some portion of his assets and he wanted Respondent to act as his broker. Because he could not serve as T's broker in connection with his position at the Firm, Respondent and T discussed the idea of opening an investment account outside of the Firm.
10. Aware that Y and K may be interested in having Respondent act as their broker as well, he proposed the opening of an investment club account at an online brokerage to T.
11. According to his plan, Respondent would make all of the investment decisions for the account, and the investment club structure would allow for his and all of the XYZ Investors' names to be on the account and avoid the commingling of the investors' funds.
12. Following his meeting with T, Respondent met with Y and K about participating in the investment club account, and both agreed to do so. Both Y and K understood that this account, and Respondent's participation in it, was not permitted by the Firm.
13. The terms of the agreement between Respondent and Y, K, and T were as follows: each participant, including Respondent, was to invest \$100,000 to open the account, all investment decisions were to be left to Respondent's discretion, Respondent would distribute profits to the XYZ Investors and update them on the account's performance on a quarterly basis, and Respondent would keep all profits earned in the account above 10 percent. The parties signed an agreement reflecting these terms.
14. On or about January 31, 2001, Respondent completed and signed an application to open an Investment Club Account at XYZ. On the application, Respondent failed to disclose his employment as an investment specialist with the Firm. Page one of the application asked, "Are you or a relation (or partner, if partnership) associated with securities firm, exchange, insurance company or investment advisor?" Respondent answered "no" to this question, which was untrue.
15. In or around the first week of February 2001, each of the XYZ Investors gave Respondent a check for \$100,000 made out to "M.B. Partners Fund," the name of the investment club account, and signed the new account documentation. Despite his agreement to do so and without the knowledge of the XYZ Investors, Respondent did not deposit his \$100,000 share into the XYZ Account. On or about February 14, 2001, \$300,000 was deposited into the XYZ account and Respondent began trading.
16. Respondent understood at the time he opened the XYZ Account that it was against the Firm's policies and procedures to open the XYZ Account without advance written approval from the Firm and that had approval been granted, duplicate copies of all confirmations and account statements were required to be sent to the Firm's compliance department. Respondent did not seek the Firm's approval prior to opening the XYZ Account, nor did he arrange for duplicate copies of the account statements or the trade confirmations to be sent to the Firm.
17. Respondent also understood at the time the XYZ Account was opened that he had an obligation to report his participation in any outside investments to the Firm's

compliance department and that he did not do so when the account was opened or at any point thereafter.

### **Misappropriation of Customer Funds**

18. Immediately after depositing the \$300,000 into the XYZ Account, Respondent began trading the account. By March 30, 2001, the value of the XYZ Account had dropped from \$300,000 to approximately \$87,700. Throughout April and May 2001, and July and August 2001, Respondent continued to trade the XYZ Account, and the account continued to suffer losses. Throughout this time, Respondent informed the XYZ Investors that the XYZ Account “was down,” however he never revealed to them the extent of the losses.
19. On or about May 30, 2001, Respondent transferred \$1,000 from the XYZ Account to a bank account at Fifth Third Bank in the name of MB Partners Fund. Respondent withdrew the \$1,000 transferred to the Fifth Third Bank account for his personal use. Respondent never sought the XYZ Investors’ authorization, nor did he have it, when he withdrew money from the XYZ Account for his own use.
20. Between June 12, 2001 and August 29, 2001, Respondent made five additional withdrawals from the XYZ Account totaling \$22,000. All of these withdrawals were transferred to the Fifth Third Bank Account, and withdrawn from that account by Respondent. The XYZ Investors did not know about or authorize any of the withdrawals, all of which were for Respondent’s personal use.
21. On September 30, 2001, following Respondent’s withdrawals of approximately \$23,000 and the trading losses suffered, the market value of the securities in the XYZ Account was \$5,477.
22. In or around November 2001, T informed Respondent that he wanted to discontinue his participation in the XYZ Account. Respondent informed T of the losses in the account and told him that he could provide T with a check for the remainder of the account. On or about November 20, 2001, Respondent sold the remaining securities in the XYZ Account, and on or about November 27, 2001, a check for \$6,938 was issued from the XYZ Account and given to T. Respondent never told T that he had misappropriated approximately \$23,000 from the account.
23. On April 30, 2002, without the knowledge of the XYZ Investors, the XYZ Account was closed for inactivity.
24. At some point in approximately late 2002 to early 2003, Y informed Respondent that he needed to withdraw some money from the XYZ Account. Respondent informed Y of the losses in the account and gave Y online access to the account activity. Y calculated that approximately \$30,000 had been withdrawn and distributed from the account. Respondent agreed to pay Y \$10,000, his share of the \$30,000, by the end of 2003, and Y was satisfied with this agreement.
25. When Respondent left the Firm and Cincinnati in September 2003 to work for his next employer in Sarasota, Florida, he did not inform Y. On or about October 16, 2003, upon learning that Respondent was no longer employed by the Firm, Y made

an oral complaint to the Firm revealing Respondent's involvement in the XYZ Account. The Firm settled with Y for \$10,000.

26. In or around July or August 2003, after Respondent informed Y of the losses in the XYZ Account, Respondent met with K and informed him of the losses in the XYZ Account. K never saw the account activity and was not told about Respondent's withdrawals or the monies that were given to T. K did not receive any money from the XYZ Account and he has not made any complaints against Respondent.
27. On December 5, 2003, the Firm filed an amended Form U-5 indicating that following Respondent's termination on September 12, 2003, the Firm became aware that while he was employed at the Firm, he had maintained an outside investment club brokerage account with several of the Firm's customers without the Firm's knowledge or approval. Respondent informed his manager at his then employer of the amended Form U-5, and following an investigation, that firm terminated his employment on December 18, 2003.

### **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 permanent bar from being a member, allied member or approved person and from employment or association in any capacity with any member or member organization. In support of this penalty, Enforcement relies on the following precedents: In the Matter of Fernando A. Gallardo, HPD 03-201 (November 4, 2003), In the Matter of Douglas E. Spainer, HPD 02-145 (July 17, 2002) and In the Matter of Michael Anthony Fortugno, HPD 02-89 (April 24, 2002). Each of these cases involved misappropriation of funds or securities complied with engaging in outside business activity or maintaining a securities account at another firm without his employer's written consent. Each of these cases resulted in the imposition of a censure and a permanent bar. In this case, the imposition of a censure and a permanent bar is an appropriate penalty after considering the precedents cited and the facts and circumstances of this case.

For the Hearing Panel

Vincent F. Murphy - Hearing Officer  
Panelists:  
Norman Marcus  
William B. Peterson, Esq.