

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 05-95

August 29, 2005

THOMAS GERARD McNAMARA

FORMER REGISTERED REPRESENTATIVE

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Violated Exchange Rules 408(a), (b) and (c) in that he exercised discretion in the account of a customer without written authorization and without notifying and obtaining the approval of his member firm employer, and engaged in excessive trading in a discretionary account; violated Exchange Rules 408(b) and 440 and Section 17(a) of the Securities Exchange Act of 1934 and Rules 17a-3 and 17a-4 thereunder, in that he failed to identify, as discretionary, orders entered on a discretionary basis; violated Exchange Rule 476(a) by: (a) engaging in the unsuitable use of margin, (b) engaging in excessive trading, and (c) making one or more material misstatements to his firm – Consent to censure and one year bar.

Appearances:

For the Division of Enforcement
Simon Swidler, Esq.
Michael S. Choi, Esq.

For the Respondent
G. Wayne Hillis, Jr., 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 Thomas Gerard McNamara (“Respondent”), a former registered representative with Sterne, Agee & Leach, Inc. (the “Firm”). Without admitting or denying guilt, Respondent consented to a finding by the Hearing Panel that he:

- I. Violated Exchange Rules 408(a), (b) and (c) in that he exercised discretion in the account of a customer without written authorization and without first notifying and obtaining the approval of his member firm employer, and engaged in excessive trading in a discretionary account.
- II. Violated Exchange Rules 408(b) and 440 and Section 17(a) of the Securities Exchange Act of 1934 and Rules 17a-3 and 17a-4 thereunder, in that he failed to identify, as discretionary, orders entered on a discretionary basis upon order entry.
- III. Violated Exchange Rule 476(a), in that he engaged in conduct inconsistent with just and equitable principles of trade by: (a) engaging in the unsuitable use of margin in a customer account; (b) engaging in excessive trading in a customer account; and (c) making one or more material misstatements to his member firm 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 October 1961.
2. Respondent entered the securities industry in 1988, and was employed as a registered representative approximately as follows: at member firm A, from December 1988 to September 1991; at member firm B from September 1991 to November 1992; at member firm C from November 1992 to February 1995; at non-member firm D from February 1995 to April 1999; at non-member firm E from April 1999 to August 2000; again at Firm D from August 2000 to May 2001; and at the Firm from May 2001 until his employment with the Firm ended in August 2002.
3. Since August 2002, Respondent has not been employed in the securities industry.
4. After his employment ended, the Firm reported to the Exchange that the Firm was undertaking an internal review of Respondent's exercise of discretion without written authorization in the account of a customer.
5. By letter dated March 10, 2003, which he received, Enforcement notified Respondent of its investigation pertaining to matters reported by the Firm.

Summary of Violative Conduct

6. During the period June 2001 through June 2002 (the "Relevant Period"), Respondent was the registered representative servicing the account of his sister MS. During the Relevant Period, Respondent exercised discretion in MS' account without written authorization; exercised discretion in MS' account without first notifying and obtaining the approval of his member firm employer; failed to identify orders entered on a discretionary basis upon order entry; engaged in the unsuitable use of margin; engaged in excessive trading; and made one or more material misstatements to his member firm employer.

Violative Conduct

Background

7. In 1991, MS received life insurance proceeds of approximately \$1 million upon the death of her husband, who passed away after a long illness. At that time, MS was 34 years old and the mother of two children, ages 8 and 10.
8. Other than the life insurance proceeds referenced above, MS had no other source of income. MS deposited the life insurance proceeds into a brokerage account to be managed by Respondent. Her goal, at that time, was to retain the ability to stay at home with her children. MS expected that her account would be managed in a fashion which would allow her the ability to fund her children's private high school

and college educations and generate sufficient income to cover her family's living expenses.

MS' Transfer of her Brokerage Account to the Firm

9. In June 2001, after Respondent became employed at the Firm, MS transferred her brokerage account to the Firm.
10. Respondent completed most entries on the new account form for MS and then provided it to her for signature.
11. Respondent prioritized MS' investment objectives on her Firm new account form as (a) capital gains (2) trading profits (3) income and (4) speculation. Additionally, Respondent checked both "cash" and "margin" on the new account form, which led to MS' account obtaining authorization to trade on margin.

Respondent's Exercise of Discretion in MS' Account at the Firm

12. For approximately 10 years prior to Respondent's employment with the Firm, MS had allowed him to exercise discretion in her account and to select the investments for her portfolio. He continued to exercise discretion when she opened her account at the Firm.
13. During the Relevant Period, Respondent effected approximately 112 discretionary transactions in MS' account at the Firm.
14. He did not obtain written authorization from MS to exercise discretion with respect to the transactions in her Firm account.
15. Respondent also did not indicate his exercise of discretion on any order tickets for transactions that he effected for MS' account.
16. During the Relevant Period, the Firm had a written policy prohibiting "acceptance of discretionary authority by its registered representatives."
17. Respondent never sought or obtained an exception to this policy, nor did he obtain Firm approval to exercise discretion in her account.

Respondent's Excessive Trading and Unsuitable Trading on Margin in MS' Account

18. During the Relevant Period, which spanned 13 months, the net portfolio value of MS' account decreased by approximately \$563,280, or 63%. Respondent effected approximately 112 discretionary transactions in common and preferred stocks in her account, a majority of them utilizing margin.
19. During the Relevant Period, he engaged in short-term stock trades in her account on margin, consisting monthly of trades in high-risk technology and biopharmaceutical securities.

20. During the Relevant Period, the annualized turnover rate in MS' account was approximately 11. In light of her investment objectives and goals, this turnover rate was high and indicative of excessive trading.
21. During the Relevant Period, the account incurred commission charges of approximately \$166,731, of which approximately \$67,503 was paid to Respondent. In November 2001, and again in February 2002, his branch office manager ("BOM") told him that discounted commissions were available at the Firm for family members. However, Respondent did not charge MS discounted commissions.
22. During much of the Relevant Period, MS' account carried a substantial margin balance. Respondent traded on margin in her account, using discretion as follows:

Month and Year	Net Portfolio Value of MS' Account	Margin Balance In MS' Account	Margin Interest Charged to MS
June 2001	\$889,478.51	\$0	\$0
July 2001	\$863,368.40	\$0	\$0
August 2001	\$798,912.58	\$330,229.22	\$0
September 2001	\$571,730.12	\$457,194.42	\$2,074.43
October 2001	\$717,469.39	\$116,878.18	\$2,064.42
November 2001	\$815,936.14	\$0	\$ 356.05
December 2001	\$811,931.79	\$365,690.46	\$1,021.07
January 2002	\$782,626.30	\$516,689.02	\$1,621.16
February 2002	\$561,834.61	\$591,634.60	\$2,312.03
March 2002	\$613,365.61	\$626,019.23	\$1,755.48
April 2002	\$476,000.50	\$538,717.00	\$2,657.41
May 2002	401,582.05	\$436,964.79	\$2,323.13
June 2002	\$326,198.28	\$450,695.19	\$2,050.66

23. The use of margin, totaling approximately \$18,235 in interest charges, was not suitable for MS in light of her investment objectives and goals.
24. As a result of the losses, the margin interest charges and commission charges incurred in the account during the Relevant Period, MS was compelled to return to work to cover her family's living expenses.

Respondent's Material Misstatements to the Firm

25. Respondent made false statements to his BOM concerning MS' knowledge of her account activity.
26. In Spring 2002, Respondent told his BOM that MS was very active in making her own decisions with respect to her account and was aware of everything that was going on with her account and about each trade.

27. In fact, she had little to no knowledge of the transactions in her account as she relied on Respondent and did not review her monthly account statements.
28. The false statements he made to his BOM served to conceal his exercise of discretion in MS' account.

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 one year bar from membership, allied membership, approved person status, and from employment or association in any capacity with any Exchange member or member organization.

In support of the penalty, Enforcement cites the following Exchange precedents: In the Matter of Gilbert F. Hartman HPD 03-30 (March 6, 2003) (Consent to censure and eight month bar for unsuitable, excessive, unauthorized trading and creation of inaccurate books and records), In the Matter of Gregory Fiske Wilbur HPD 96-108 (October 2, 1996) (Consent to censure and three year bar for unsuitable, excessive and discretionary trading, material misstatements, failing to report settlements and sharing in losses), In the Matter of Robert Lee Butler HPD 03-52 (April 10, 2003) (Consent to censure and one year bar for causing reimbursement of losses, exercising discretion, effecting excessive and unsuitable transactions, failing to follow customer orders and causing inaccurate records). The Hearing Panel considered the range of precedents presented, the different violations involved, the number of customers and transactions and the period of time involved. Considering all of the above, we find the penalty here to be in the range presented and reasonable.

For the Hearing Panel

Vincent F. Murphy
Hearing Officer
Panelists:
Jeffrey L. Friedman
David M. Tarrío