BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 10 Complainant, vs. Gerald Cash McNeil North Bergen, NJ, Respondent.	DECISION Complaint No. C3B960026 District No. 10 Date: January 21, 1999

Gerald Cash McNeil ("McNeil") appealed a November 21, 1997 decision of the District Business Conduct Committee for District No. 10 ("DBCC"). The matter was also called for review.[1] For the reasons discussed below, we find that McNeil effected three unauthorized transactions in two customer accounts in violation of Conduct Rule 2110. We order that McNeil be censured, fined $20,000, suspended from associating with any member firm in any capacity for two years, and required to requalify by examination in all capacities prior to associating with a member firm. In addition, McNeil is ordered to pay restitution of $3,712.50, plus interest from December 26, 1995, to Customer S. We also affirm the DBCC's assessment of hearing costs of $2,035.42.

Background

McNeil was registered as a general securities representative with Greenway Capital Corporation ("Greenway") from January 1993 through March 1994. He was registered in the same capacity with Investors Associates, Inc. ("IAI") from March 1994 through October 1996. McNeil has not been employed in the securities industry since then.

[1] The National Business Conduct Committee ("NBCC") called this case for review to determine whether the sanctions imposed by the DBCC were appropriate in light of the conduct in question. The matter was decided by the National Adjudicatory Council ("NAC"), which became the successor to the NBCC on January 16, 1998.

Procedural History

The DBCC filed the complaint against McNeil on November 26, 1996. The complaint alleged that McNeil executed seven unauthorized trades in four customer accounts in violation of NASD Conduct Rule 2110. On or about December 20, 1996, McNeil filed an answer in which he denied the substantive allegations of the complaint. A hearing before the DBCC was scheduled for August 14, 1997. Prior to the hearing, counsel for McNeil requested that the hearing be postponed for four months to permit a criminal matter involving McNeil to be resolved. The DBCC denied McNeil's request, however, and a hearing was held on August 14, 1997.

The district staff introduced the testimony of Customers K, S, and Q during the DBCC hearing. All three customers testified by telephone. The fourth customer referenced in the complaint, Customer R, was not available to testify. The district staff also introduced the testimony of McNeil and Diane Goldbeck, a special investigator with NASD Regulation, Inc. ("NASD Regulation"). McNeil, who was represented by counsel at the DBCC hearing, did not introduce the testimony of any witnesses. Both parties introduced certain documentary evidence at the hearing.

On November 21, 1997, the DBCC issued a decision. The DBCC found that McNeil had effected one unauthorized transaction in Customer K's account and two unauthorized transactions in Customer S' account in violation of NASD Conduct Rule 2110. The DBCC found that there was insufficient evidence to establish a violation of Conduct Rule 2110 with respect to the trading in the accounts of Customers Q and R.

The DBCC ordered that McNeil be censured, fined $20,000, suspended from associating with any member firm in any capacity for 20 days, and required to requalify by examination in all capacities prior to reassociating with a member firm. In addition, McNeil was required to provide proof that he had made restitution to Customer S in the amount of $3,712.50 plus interest from December 26, 1995, prior to becoming reassociated with any member firm. The DBCC also imposed hearing costs of $2,035.42.

On December 8, 1997, McNeil appealed the DBCC's decision. McNeil's grounds for the appeal are that the DBCC improperly based its determination of sanctions on conduct regarding customers for whom the DBCC did not make findings of violation and on conduct that was not charged in the complaint. In addition, McNeil asserts that the DBCC "potentially" deprived him of his Fifth Amendment rights against compelled self-incrimination by refusing to postpone the hearing until his criminal matter had been resolved. McNeil has not appealed the findings of violation regarding Customers K and S. In his brief on appeal, McNeil also claims, for the first time, that he is unable to pay the amount of the fine. By letter dated December 19, 1997, the Office of General Counsel for NASD Regulation informed the parties that the case had been called for review to examine the findings and sanctions, in particular to consider whether the violations merit higher non-monetary sanctions than a 20-day suspension.

After notice was provided to the parties, oral argument was held on July 9, 1998, at NASD Regulation's offices in New York, New York. The DBCC was represented by the district staff at the oral argument. McNeil did not participate.

Facts

The complaint in this matter covers conduct that occurred between September 1993 and December 1995 in relation to the accounts of four customers. However, we need only discuss the activity relating to the accounts of Customers K and S because the DBCC found, and we agree after having reviewed the entire record, that there was insufficient evidence to support findings of violation regarding the accounts of Customers Q and R.[2] The activity in the accounts of Customers K and S will be addressed separately.

Customer K. On October 5, 1993, McNeil "cold called" Customer K and solicited her to transfer an Individual Retirement Account ("IRA") she held at MarinEdge Brokerage Services ("MarinEdge") to Greenway, which she agreed to do. McNeil also solicited Customer K to purchase shares of Vertex Industries, Inc. ("Vertex") stock. Customer K testified at the DBCC hearing that McNeil was very "pushy and aggressive" during this initial call but that she did not authorize him to purchase Vertex. She stated that when she agreed to transfer the funds from her IRA account to Greenway she believed that such funds would not be used until she made a decision to purchase something. McNeil, however, entered an order to purchase 500 shares of Vertex in Customer K's account at $26 per share for a total price of $13,008 on October 5, 1993.

On October 12, 1993, Customer K received documentation to open an account at Greenway and to transfer her IRA. Customer K stated that she signed and returned the application but did not complete that portion of the form that requested certain financial information. After signing and mailing the form, however, Customer K decided that she did not want to transfer her funds from the IRA account to Greenway. She attempted to call and fax McNeil but was unable to get through to him. On October 13, 1993, the day after she signed the new account and transfer form, Customer K sent McNeil a letter indicating that she had changed her mind. The letter stated:

> After our discussion yesterday, I signed the authorization to Transfer Retirement Account. However, I have decided not to go through with any transactions with Greenway Capital. This is to state that the above-referenced form should not be used for any transaction and should be either returned to me or destroyed. I do not wish to transfer any funds from my MarinEdge account.

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[2] It must be emphasized, however, that we are not bound by the DBCC's findings. NASD Code of Procedure Rules 9311 and 9312 provide the NAC with the authority to review any issue raised in the decision and make independent findings.

On October 20, 1993, the day after learning that shares of Vertex had been purchased for her account,[3] Customer K wrote McNeil a letter protesting the transaction. Customer K's letter stated, "I have never authorized the purchase of any shares of VERTEX Industries, and therefore, I request that all steps leading to the purchase of such shares be null and void immediately."

At the DBCC hearing, McNeil testified that Customer K authorized the purchase of Vertex stock. McNeil admitted, however, that he did not have any specific recollection of the conversation with Customer K on the date when she supposedly authorized the purchase. McNeil also contended that Customer K's complaint was prompted by a drop in the price of Vertex stock.

Customer S. McNeil first called Customer S in 1994. At the DBCC hearing, Customer S testified that he had not opened an account with McNeil in 1994 because, at that time, McNeil was selling "over-the-counter highly speculative stocks" in which Customer S had no interest.[4] Customer S, however, did open an account with McNeil at IAI in July 1995. At McNeil's recommendation, Customer S purchased 150 shares of Quaker Oats Company ("Quaker Oats") stock on July 3, 1995, and another 250 shares in August 1995.

Customer S testified that, on December 26, 1995, McNeil called him and insisted that he sell his shares of Quaker Oats and buy shares of Combined COS International Corp. ("CCIC"). Customer S stated that, at that time, he informed McNeil that he was about to leave his house for a medical appointment and was in a rush. Customer S testified that, in response to McNeil's unrelenting recommendation of CCIC, "I distinctly and very clearly told him no, I did not have the funds for that at the time, I was not interested in investing in CCIC. He continued to pitch CCIC and I continued to tell him no." According to Customer S, McNeil then said, "I am not taking no for an answer," to which Customer S replied, "Fine, I've got to go."

When Customer S returned home later that day from his medical appointment, he had a message from McNeil on his answering machine stating that McNeil had sold the Quaker Oats shares and had purchased shares of CCIC for Customer S. Customer S then called a broker at Smith Barney and immediately made arrangements to transfer his IAI account. (The IAI account was transferred to Smith Barney in January 1996.) Although Customer S did not call McNeil to complain about the transactions, he did call McNeil's supervisor at IAI a week later and was told

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[3] On or about October 19, 1993, Customer K received a letter from Greenway, dated October 15, 1993, stating that Greenway's records indicated that it had not received payment for her purchase. Although this letter did not specifically reference the purchase of 500 shares of Vertex for her account, Customer K assumed -- in light of McNeil's previous attempt to persuade her to purchase shares of Vertex -- that there had been a mistaken purchase of shares of Vertex for her account. (Customer K apparently did not receive an account statement indicating that she had purchased 500 shares of Vertex until late November or early December of 1993.)

[4] Customer S testified that he was not interested in speculative stocks and that his investment philosophy was to buy and hold.

to put the complaint in writing. On January 25, 1996, Customer S wrote to NASD Regulation to complain about McNeil's actions regarding his account at IAI. On January 31, 1996, Customer S wrote to McNeil's supervisor at IAI and complained about the transactions in question. Customer S testified that he did not receive a response to his January 31 letter. Customer S' attorney also wrote to IAI on February 20, 1998, complaining about the transactions in Customer S' account.

At the hearing, McNeil stated that he called Customer S on December 26, 1996, to update him on his portfolio. According to McNeil, Customer S complained that his Quaker Oats shares were not performing well. McNeil stated that he then recommended that Customer S sell his Quaker Oats shares and buy shares of CCIC. McNeil admitted that Customer S originally stated that he did not want to sell his shares of Quaker Oats and buy shares of CCIC. McNeil testified, however, that he took Customer S' statement "Fine, I've got to go" to mean that Customer S was authorizing the sale of the Quaker Oats stock and the purchase of CCIC stock.

Discussion

Unauthorized Transactions. McNeil has not appealed the DBCC's findings that he effected unauthorized trades in the accounts of Customers K and S. Nonetheless, we have reviewed the entire record, and we determine that such findings are supported by a preponderance of the evidence.

Customer K testified that she did not authorize McNeil to purchase 500 shares of Vertex. She also stated that her investment objectives were to keep her money safe and to provide for the college education of her two children. Customer K testified further that she would never have used money from an IRA to purchase a stock like Vertex because she had no knowledge of the company. The DBCC credited this testimony. It is axiomatic that an "initial fact finder's assessments of credibility deserve 'special weight.'" Alderman v. SEC, 104 F.3d 285, 288 n.4 (9th Cir. 1997); see also In re Ashvin R. Shah, Exchange Act Rel. No. 37954, at 5 n.12 (Nov. 15, 1996). There is nothing in the record, moreover, to call this initial credibility determination into question.[5]

Customer S testified that he did not authorize the sale of 400 shares of Quaker Oats and the purchase of 3,300 shares of CCIC. He stated that his trading strategy was generally to

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[5] For instance, on October 13, 1993, the day after Customer K mailed the account transfer form, she sent a letter to McNeil stating that the "form should not be used for any transaction and should be either returned to me or destroyed. I do not wish to transfer any funds from my MarinEdge account." In addition, on October 20, 1993, after learning of the purchase of Vertex in her account, Customer K wrote a letter to McNeil stating, "I have never authorized the purchase of any shares of VERTEX Industries, and therefore, I request that all steps leading to purchase of such shares be null and void immediately." McNeil argued during the DBCC hearing that Customer K's complaint against him was prompted by a drop in the price of the Vertex stock. As the DBCC noted, however, Customer K wrote her first letter on October 13, 1993, and the price of Vertex stock at that time was trading in a range equal to or greater than the price at which McNeil originally purchased it for her account.

purchase and hold quality stocks as long-term investments. Customer S stated that, when McNeil called him to solicit the aforementioned transactions, he told McNeil that he was in a rush to get to a medical appointment and repeatedly said that he did not want to sell shares of Quaker Oats and buy shares of CCIC. Finally, attempting to get off the phone with McNeil to make his medical appointment, Customer S responded to McNeil's statement that he would not take no for an answer by exclaiming, "Fine, I've got to go." Customer S testified that this statement was not in any way meant to authorize the transactions. The DBCC found Customer S' testimony to be credible. We find no reason to alter the DBCC's determination in this regard.[6]

In light of the conduct described above, we find that McNeil engaged in unauthorized transactions in the accounts of Customers K and S. As the Commission has held, unauthorized trading in a customer's account is a violation of the requirement to observe just and equitable principles of trade. See In re Robert Lester Gardner, Exchange Act Rel. No. 35899 (June 27, 1995), aff'd, 89 F.3d 845 (9th Cir. 1996) (table format); In re Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992). Accordingly, we uphold the DBCC's finding that McNeil violated Conduct Rule 2110.

Procedural Fairness. McNeil argues that the DBCC committed error when it denied his request to postpone the hearing until after his pending criminal action had been resolved. Specifically, McNeil asserts that the DBCC's actions "potentially" deprived him of his Fifth Amendment right against compelled self-incrimination. We reject McNeil's contention. NASD Regulation is a private not-for-profit corporation organized under the laws of Delaware and is a self-regulatory organization ("SRO") registered with the Commission as a national securities association pursuant to the 1938 Maloney Act Amendment to the Securities Exchange Act of 1934, 15 U.S.C. §78o et seq.

The Fifth and Fourteenth Amendments to the United States Constitution protect individuals only against violations of constitutional rights by the government, not by private actors. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982). The Supreme Court has repeatedly held that private entities, even those that are intimately involved in governmental regulatory schemes, are not thereby changed into government actors. See National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 193 (1988); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544 (1987). Moreover, the courts have specifically held that NASD Regulation, in performing its statutory mandate and central role, is not a government actor. See, e.g., Jones v. S.E.C., 115 F.3d 1173, 1182-83 (4th Cir. 1997) (rejecting claim based on the Fifth Amendment's Double Jeopardy Clause because NASD is not a government agency), cert. denied, 118 S. Ct. 1512 (1998); Datek Secs. v. NASD, 875 F. Supp.

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[6] McNeil's claim that he took Customer S' statement "Fine, I've got to go" to mean that Customer S authorized the transactions is belied by the facts. McNeil did not provide this version of the events in his letter, dated April 23, 1996, in which he first responded to Customer S' complaint. In fact, when he was pressed by district staff at the DBCC hearing, McNeil admitted that he "went off" of Customer S' testimony. Moreover, in response to a specific question regarding whether he had any independent recollection of the above statement, McNeil conceded, "I can't recall anything."

230, 234 (S.D.N.Y. 1995) (dismissing Fifth and Fourteenth Amendment claims regarding a disciplinary proceeding because the NASD is not a state actor).[7] Accordingly, McNeil's claim that the DBCC deprived him of his Fifth Amendment right against compelled self-incrimination must fail. See United States v. Solomon, 509 F.2d 863, 867-71 (2d Cir. 1975) (finding no violation of Fifth Amendment right against self-incrimination because the NYSE is not a state actor).

We note as well that in NASD proceedings, the DBCC hearing panel, like a trial court in judicial proceedings, "has broad discretion in determining whether a request for continuance should be granted, based upon the particular facts and circumstances presented." In re Falcon Trading Group, Ltd., Exchange Act Rel. No. 36619, at 11 (Dec. 21, 1995), aff'd, 102 F.3d 579 (D.C. Cir. 1996). See also Morris v. Slappy, 461 U.S. 1, 11-12 (1983) (holding that "broad discretion must be granted trial courts on matters of continuances."); In re Whiteside & Co., 49 S.E.C. 963, 967 (1988) ("[T]he NASD has broad discretion as to whether or not a continuance should be granted."), aff'd, 883 F.2d 7 (5th Cir. 1989). Here, McNeil's only basis for requesting a postponement of the DBCC hearing was that his criminal-defense attorney had advised him that he should not testify in any civil proceeding until the criminal matter was resolved. McNeil made no showing that the allegations in NASD Regulation's complaint were related to the charges against him in the criminal investigation,[8] and he did not specify what, if any, prejudice he would face if the hearing were not delayed.[9]

McNeil's conclusory assertion provides no grounds for finding that the DBCC abused its discretion in denying the continuance. See, e.g., United States v. Certain Real Property, 943 F.2d 721, 729 (7th Cir. 1991) ("A blanket assertion of the [Fifth Amendment] privilege does not provide a sufficient basis for a district court to grant a stay."); Paine, Webber, Jackson & Curtis,

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[7] See also First Jersey Secs., Inc. v. Bergen, 605 F.2d 690, 698 & 699 n.5 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980) (holding that NASD is not a state actor); Graman v. NASD, No. Civ. A. 97-1556, 1998 WL 294022 (D.D.C. Apr. 27, 1998) (same); United States v. Bloom, 450 F. Supp. 323, 330 (E.D. Pa. 1978) (same).

[8] McNeil's attorney stated that "[t]he proceeding that raises the Fifth Amendment concern has absolutely nothing to do with unauthorized trading." DBCC Transcript, at 242. Courts have explained that "a stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter and is even more appropriate when both actions are brought by the government." Admiral Insr. Co. v. Federal Sec., Inc., No. 94-C-5649, 1996 U.S. Dist. LEXIS 3639, at *2-3 (N.D. Ill. Mar. 26, 1996); see also SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1375-76 (D.C. Cir.) (same), cert. denied, 449 U.S. 993 (1980); United States v. Private Sanitation Indr. Ass'n, 811 F. Supp. 802, 806 (E.D.N.Y. 1992) (same). In this case, the two proceedings did not, according to McNeil's attorney, involve the same subject matter and, as discussed supra, this disciplinary action was not brought by the government.

[9] In the absence of a showing of "substantial prejudice," it is well-settled that parallel criminal and civil proceedings are unobjectionable. Dresser Industries, 628 F.2d at 1374; see also IBM v. Brown, 857 F. Supp. 1384, 1387 (C.D. Cal. 1994).

Inc. v. Malon S. Andrus, Inc., 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980) ("[A] policy of freely granting stays solely because a litigant is defending simultaneous multiple suits would threaten to become a constant source of delay and an interference with judicial administration."). In addition, the public interest in the integrity of the securities market favors the efficient and expeditious prosecution of actions like the current matter. See, e.g., SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1377 (D.C. Cir. 1980) (rejecting stay request and emphasizing that "[i]f the SEC suspects that a company has violated the securities laws, it must be able to respond quickly."), cert. denied, 449 U.S. 993 (1980). Indeed, the Commission has stated flatly that "a pending collateral matter provides no basis for a stay" of an action brought by an SRO. In re Dan Adlai Druz, Exchange Act Rel. No. 36306 (Sept. 29, 1995). For these reasons, we reject McNeil's claim of procedural error.[10]

Sanctions

McNeil argues that the sanctions imposed on him by the DBCC were too severe. We disagree. In fact, in imposing sanctions on McNeil, we conclude that his misconduct warrants a two-year suspension from associating with any firm in any capacity, rather than the 20-day suspension imposed by the DBCC.

The relevant NASD Sanction Guideline for unauthorized trading -- which, as its name suggests, is advisory -- recommends fining the respondent the amount of any commissions, concessions, or profits, plus $5,000 to $50,000, and requiring restitution of customer losses. NASD Sanction Guidelines (1996 ed.) at 56. In cases involving customer losses and/or sizeable commissions, the Sanction Guideline recommends suspending respondent in all capacities for 5 to 30 business days. In "egregious" cases, the Sanction Guideline suggests that a bar should be considered.[11]

Although the Sanction Guideline does not define what constitutes egregious action, decisional precedent sheds some light on this issue. For instance, in In re Ted D. Wells, Complaint No. C07970045 (July 24, 1998), we recently held that "egregious" action warranting a

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[10] In addition to the reasons articulated above, we are mindful of the district staff's argument that a continuance might have jeopardized staff's ability to present live customer testimony at the hearing. NASD Regulation has no subpoena power and must rely on the good will of customers to cooperate. It is often difficult -- especially in cases involving multiple customer accounts -- to arrange a hearing date that is agreeable to all of the witnesses. Allowing continuances without substantial justification would threaten to affect NASD Regulation adversely in the performance of its duty to discipline its members. This is especially true in a case such as this, where the request for continuance was made shortly before the scheduled hearing date. (In the present matter, notice of the August 14, 1997 DBCC hearing date was provided on July 3, 1997, and McNeil did not file his motion for a continuance until August 5, 1997.)

[11] We note that the most recent version of the NASD Sanction Guideline for unauthorized trading states, "In egregious cases, consider a longer suspension (of up to two years) or a bar of an individual respondent." NASD Sanction Guidelines (1998 ed.) at 86.

bar can encompass either qualitative or quantitative unauthorized trading. According to the Wells decision, for a respondent's unauthorized trading to be qualitatively egregious, the following criteria must be met: (1) the evidence must "plainly" prove that the respondent's conduct was intentional; and (2) the respondent's actions must be "tantamount to conversion." We found that both of these elements of egregiousness were present in Wells. As to the strength of the evidence of intent, Wells admitted that he had effected the trade even though the customer had told him not to. With regard to the "tantamount to conversion" element, Wells also admitted that he had effected the trade because he was about to start a new job and "needed to make some money." As a result of this evidence, we determined that Wells' action was egregious and that he should be barred from associating with any member firm in any capacity, even though he had effected only one unauthorized transaction.[12]

Thus, there are cases, like Wells, where a single unauthorized transaction may be viewed as qualitatively egregious based on the respondent's motivation for effecting the trade. In other cases, the sheer number of unauthorized transactions may support a finding of quantitative egregiousness, warranting a bar or lengthy suspension. See, e.g., In re Adam S. Levy, Complaint No. C07960085 (Mar. 6, 1998) (imposing a bar where respondent engaged in 16 unauthorized transactions); In re Aaron Eugene Granath, Complaint No. C02970007 (Mar. 6, 1998) (imposing a bar where respondent executed 23 unauthorized transactions). Still other cases involve conduct that may not fit neatly into either the qualitative or quantitative egregiousness category but nonetheless warrants the imposition of substantial sanctions because of a combination of factors. See, e.g., In re Martin J. Cunnane, Exchange Act Rel. No. 39242 (Oct. 15, 1997) (upholding imposition of a three-year suspension where respondent effected four unauthorized trades and tried to conceal misconduct); In re Jonathan Garrett Ornstein, 51 S.E.C. 135 (1992) (upholding two-year suspension for effecting nine unauthorized transactions where there were customer losses and respondent attempted to evade the NASD's investigative efforts); In re Howard Alweil, 51 S.E.C. 14 (1992) (upholding imposition of a one-year suspension for effecting three unauthorized transactions where respondent previously had been sanctioned for engaging in similar misconduct).

Because the appropriateness of a particular sanction depends on the facts and circumstances of each case, sanctions will undoubtedly differ from one case to the next. Consistent with this notion, the Sanction Guideline recommends, in appropriate cases, imposing non-monetary sanctions ranging from a five-day suspension to a bar. In determining where on this broad spectrum a particular respondent's sanction should lie, the Sanction Guideline lists a number of factors that should be considered, including (1) prior or other similar misconduct; (2) the number of unauthorized transactions or customers involved and the length of time during which the misconduct occurred; (3) the amount of commissions or other benefits to the

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[12] The Wells decision does not, however, stand for the proposition that every case involving egregious conduct must result in the imposition of a bar. Nor does the Wells decision require that the two-pronged test enunciated in that decision must be satisfied before a bar or lengthy suspension may be imposed. Wells simply provides additional guidance for determining under what circumstances unauthorized trading may be considered qualitatively egregious, warranting the imposition of more weighty sanctions.

respondent; (4) the extent of customer injury; (5) the extent of threat to the investing public that respondent may repeat the misconduct; (6) attempt to conceal misconduct or lull customers; (7) misunderstanding of authority or terms of customer orders; (8) prompt and voluntary restitution by the respondent; (9) timeliness of customer notification or complaint; and (10) other mitigating or aggravating factors.

Here, McNeil used high-pressure sales tactics designed to intimidate and wear down his customers and when his tactics failed, he simply disregarded his customers' instructions and effected the three unauthorized trades in question.[13] As a result, Customers K and S both suffered monetary losses. McNeil's conduct represents a betrayal of his customers' trust. Additionally, we are troubled by McNeil's complete unwillingness to take responsibility for his misconduct. While we cannot conclude that the record in this matter supports a holding that McNeil's conduct was tantamount to conversion or that the number of transactions alone elevates this case to one involving egregious behavior, we find under the facts discussed above that his conduct was reprehensible. We also find that a two-year suspension is necessary to impress upon McNeil and others the importance of following customer instructions and to deter McNeil from engaging in similar misconduct in the future. In reaching this conclusion, we have considered all of the factors listed in the Sanction Guideline and find that, taken as a whole, these factors require imposition of a two-year suspension in order to remediate McNeil's misconduct.

In light of McNeil's serious misconduct, we also impose monetary sanctions, consisting of a $20,000 fine, $3,712.50 in restitution, and $2,035.42 in DBCC hearing costs. McNeil, however, asserts for the first time on appeal that he is unable to pay any fine or restitution amount. The Commission has held that a respondent "has the burden of producing evidence in support of [such a] claim and of proving bona fide insolvency." In re Toney L. Reed, Exchange Act Rel. No. 37572, at 5 n.12 (Aug. 14, 1996); see also In re Michael H. Novick, Exchange Act Rel. No. 37503, at 5 (July 31, 1996) (same). McNeil has failed to meet this burden.

In his brief on appeal, McNeil claims that he "has no funds in any checking or savings account and no other assets which could be used to pay the fine." In an attempt to prove this assertion, McNeil attached to his appeal brief a purported copy of a tax statement from his bank for the calendar year 1997 regarding certain checking and savings accounts. McNeil also requests in his appeal brief that he be provided an opportunity to submit evidence of his inability to pay the fine. It is unclear from McNeil's statement whether he is simply referring to the document attached to his appeal brief, discussed above, or whether he seeks to introduce additional information. In any event, by letter dated April 28, 1998, the Office of General Counsel for NASD Regulation -- on behalf of the NAC hearing panel that presided over the appeal proceeding -- sent McNeil a Disclosure of Assets and Financial Information Form. The letter instructed McNeil to complete the form prior to the hearing. In addition, the letter informed McNeil that the NAC would use the information contained in the completed form to

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[13] McNeil argues that the DBCC improperly imposed sanctions against him based, in part, upon conduct involving customers as to whom the DBCC did not make findings of violation. We need not resolve this issue, however, as the sanctions we impose today relate only to the activity in the accounts of Customers K and S.

determine his ability to pay monetary sanctions. McNeil, however, failed to take advantage of this opportunity. He did not submit the form, and he did not appear at the appeal hearing.

We hold that the information McNeil provided on appeal is insufficient to support his claim of inability to pay. The fact that McNeil may have limited funds in a particular bank account does not indicate that he is "insolvent" and does not prove that he is without funds or assets from other sources. Even assuming, arguendo, that the information McNeil submitted shows that he currently has inadequate funds to pay a monetary fine, which it does not, such information does not prove that he is unable to pay a fine because McNeil does not show that he is incapable of reducing his living expenses or borrowing funds. McNeil's failure to provide additional financial information as requested by the NAC hearing panel further weakens his position. In an analogous situation, the Commission rejected a claim of inability to pay and stated:

> As we have noted, a [respondent's] ability to pay is peculiarly within his knowledge, and it is appropriate that he bear the burden of demonstrating his inability. Since [respondent] refused to submit additional evidence as requested, he cannot complain that he failed to take advantage of this opportunity.

In re B.R. Stickle & Co., Exchange Act Rel. No. 33705, at 6 (Mar. 3, 1994). Consistent with Stickle and the discussion above, we hold that McNeil has not shown that he is unable to pay monetary sanctions.

Accordingly, McNeil is censured, fined $20,000, suspended from associating with any member firm in any capacity for two years,[14] ordered to pay restitution to Customer S[15] in the amount of $3,712.50 plus interest from December 26, 1995,[16] and required to requalify by

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[14] The suspension shall begin on a date to be set by the Chief Hearing Officer.

[15] We do not order McNeil to pay restitution of losses to Customer K because she was made whole as a result of a settlement with Greenway. We also do not order McNeil to pay restitution of commissions for either account because the amount of commissions could not be ascertained from the record.

[16] December 26, 1995, is the date on which McNeil engaged in the violative conduct regarding Customer S' account. The interest shall be calculated at the rate established for the underpayment of federal income tax in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2).

In addition, if McNeil is unable to locate Customer S after reasonable and documented efforts, he shall forward the undistributed restitution and interest to the appropriate escheat, unclaimed-property or abandoned-property fund for the state in which Customer S last resided.

examination in all capacities prior to associating with a member firm. We also affirm the DBCC's assessment of hearing costs of $2,035.42.[17]

On Behalf of the National Adjudicatory Council,

Alden S. Adkins, Senior Vice President and General Counsel

[17] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedure Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanctions, after seven day's notice in writing, will summarily be revoked for non-payment.