

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee  
for District No. 2,

Complainant,

vs.

Donna R. Roach  
Murrieta, California,

Respondent.

DECISION

Complaint No. C02960031

District No. 1

Dated: January 20, 1998

This matter was appealed by respondent Donna R. Roach ("Roach") pursuant to NASD Procedural Rule 9310 (superceded).<sup>1</sup> For the reasons discussed below, we affirm the June 20, 1997 decision of the District Business Conduct Committee for District No. 1 ("DBCC")<sup>2</sup> in which Roach was censured, fined \$7,500, and suspended for 10 business days from associating with any NASD member in any capacity for making improper use of customer funds in violation of NASD Conduct Rule 2110 (formerly know as Article III, Section 1 of the NASD Rules of Fair Practice).

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<sup>1</sup> We cite here the Procedural Rules that were in effect at the time Roach appealed. We will apply NASD's new procedural rules governing disciplinary proceedings to cases served on a respondent on or after August 7, 1997 and appealed or called for review. See Special Notice to Members 97-55 (August 1997).

<sup>2</sup> The complaint in this case was issued by District No. 2 on July 26, 1996. By letter dated October 10, 1996, Roach requested a change of venue, which was granted by the National Business Conduct Committee ("NBCC") on October 21, 1996. Thus, the DBCC for District No. 1 considered this matter.

## Background

From July 16, 1992 to April 24, 1995, Roach was associated with Robert Scott Securities ("RSS"), and referred to herself as the owner of the RSS Riverside office ("the Riverside Office"), which operated under the name "Wilshire Discount Securities, a division of RSS" ("Wilshire Discount"). On October 9, 1992, Roach registered with the NASD as a general securities representative of RSS, and on February 17, 1995, she registered as a general securities principal of RSS. Roach currently is not associated with an NASD member.

## Facts

The one-cause complaint alleged that from about November 2, 1992 through March 30, 1993, Roach took possession and control of 16 customer checks totaling \$160,000 made payable to Wilshire Discount Securities, in connection with the sale of limited partnership interests in Hill Williams Income Fund II ("HWII"). The complaint alleged that Roach deposited the customers' checks into a bank account that she controlled in the name of "Donna Roach dba Wilshire Discount Securities." On that same day or the next day, Roach transferred those funds into an account in the name of "Donna R. Roach" where the funds remained for up to 112 days, without disclosing that fact to customers, and thereby placing those funds at risk, in violation of Conduct Rule 2110.

Respondent stated in her answer that from July until late October 1992, she worked in the Riverside Office as an unregistered person, where she paid the office expenses and the commissions due the brokers from payments received from RSS. She stated that in October 1992, customers GW and KW, a married couple, contacted Phil Fistori ("Fistori"), a former broker who worked at Wilshire Discount, to sell their limited partnership interests in HWII. According to Roach, Hill Williams Investment Partners ("Hill Williams"), advised her that transfers of the HWII interests could be expedited if they were handled directly by Wilshire Discount. Roach stated that she never spoke directly to any of the HWII customers, and that Fistori handed her the customer checks made payable to Wilshire Discount for deposit until the funds could be distributed to customers GW and KW after the transactions were processed by Hill Williams and the State of California.

Roach also claimed that Hill Williams advised her that RSS, the State of California, and the California Department of Corporations would be notified of the transactions. Roach stated that she informed Louis Ucciferri ("Ucciferri"), RSS' President and Compliance Officer,<sup>3</sup> that Wilshire Discount was selling the HWII interests for customers GW and KW. Roach recalled that another broker in the Riverside Office had also spoken with Ucciferri about the HWII transactions.

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<sup>3</sup> Ucciferri's office was located at RSS' headquarters in Newport Beach, California.

Roach's husband, the former owner of Wilshire Discount operating as "Gene Roach dba Wilshire Discount Securities" in Riverside, California, was barred by the NASD in 1991. Roach contended that, in connection with Gene Roach's ownership of Wilshire Discount, judgments had been entered against Wilshire Discount.<sup>4</sup> Roach further contended that because she was concerned that the customer funds would be attached if left in the "Donna R. Roach dba Wilshire Discount Securities" account,<sup>5</sup> she temporarily moved the funds into the Donna R. Roach account, which she insisted was used strictly as a business account.<sup>6</sup> Roach argued that the funds remained in the Donna R. Roach account only temporarily while the HWII transfers were being processed, and that she promptly disbursed the funds to customers GW and KW once the transfers were approved.<sup>7</sup> Roach also argued that she believed that the funds were protected while in the Donna R. Roach account because the account was federally-insured.

At the DBCC hearing, Roach admitted through counsel that she violated Conduct Rule 2110 in so handling the customers' funds. She argued that the only remaining issue related to sanctions and to the following mitigating factors: that her intent was to protect the customers' funds from her husband's creditors by moving them into the Donna R. Roach account, and that she relied on the experience of the

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<sup>4</sup> Roach stated that in May 1992, she became the sole proprietor of Wilshire Discount and shortly thereafter entered into an agreement in which Wilshire Discount became associated as a division of RSS.

<sup>5</sup> In support of Roach's contention that she believed that creditors would confuse her with proceedings against her husband and Wilshire Discount, Roach produced a copy of a May 15, 1992 summons issued to "Gene Roach ind. & dba Wilshire Discount Securities" by the Municipal Court of California County of Riverside, and a May 28, 1992 Memorandum from the NASD to "Donna Roach" regarding an NASD arbitration involving Wilshire Discount.

<sup>6</sup> Roach held three separate accounts: the "Wilshire Discount Securities dba Donna R. Roach" account; the Donna R. Roach account, which respondent asserted was used to pay the office's expenses; and a personal account.

<sup>7</sup> Allissa Johnson ("Johnson"), examiner for District No. 2, testified to the preparation of a schedule that listed the 16 purchasing investors, the check amounts, the dates the funds were deposited into the "Wilshire Discount Securities dba Donna R. Roach" account, the dates the funds were transferred to the Donna R. Roach account, the dates the funds were disbursed to GW and KW, and the number of days that the funds were held in the accounts controlled by respondent. The schedule reflects that the funds were held from 17 to 112 days, and that KW received two disbursements totaling \$131,200 in December 1992, and one disbursement totaling \$16,000 paid by RSS in March 1993. At the DBCC hearing, Roach, through counsel, stipulated to the accuracy of this schedule. Roach and NASD Regulation staff also stipulated that the 16 purchasers of HWII believed that their checks would be deposited into Wilshire Discount's account.

selling brokers, Hill Williams, and on RSS, in transacting the HWII sales from Wilshire Discount. Roach argued that RSS totally failed to supervise Wilshire Discount and that her culpability should be determined comparative to that of her RSS supervisors, and to the brokers in the Riverside Office who were involved in the sale of the HWII units.

Ucciferri claimed that he first learned of the HWII transactions on February 11, 1993, when GW's and KW's attorney called him to complain that Roach had withheld \$16,000 in proceeds from the sale of their HWII units. The customers attorney faxed him a copy of two checks written on the Donna R. Roach account reflecting a portion of the proceeds. Ucciferri testified that after verifying that the HWII transfers were complete, he instructed Roach to release the \$16,000 to the customers attorney in exchange for a full release from customer GW's and KW's claims. RSS paid the \$16,000 to the customers attorney, and it retained that amount from commissions due the Riverside Office. Ucciferri further testified that neither he, nor RSS' other President, David Colton ("Colton"),<sup>8</sup> had been aware of the HWII sales.

Ucciferri testified that he was "shocked" to see the checks written on the Donna R. Roach account, and was concerned that funds had been commingled. He asserted that he reprimanded Roach and contacted NASD Regulation, Inc. ("NASD Regulation") to report the incident. Ucciferri also testified that he conducted an investigation and learned from Fistori that Roach had urged Fistori not to tell him about the HWII sales because she did not want to share the commissions with RSS.

When questioned by Roach's counsel regarding RSS' compliance procedures, Ucciferri testified that he had discussed RSS' procedures with Roach prior to the HWII transactions. Ucciferri admitted that Wilshire Discount may never have been audited by RSS, but he contended that compliance meetings were held at all RSS branches, including at Wilshire Discount. Regarding the procedures relating to customer checks, Ucciferri verified that he instructed RSS' clearing firm's bank to accept checks made payable to Wilshire Discount. He contended, however, that this approval related only to transactions cleared by the clearing firm and for stock transactions.

At the DBCC hearing, Roach's counsel produced a September 17, 1992 letter from Debra Pohlson, Supervisor at NASD Regulation in Los Angeles, to Ucciferri, regarding NASD Regulation's review of activities related to a complaint received from an individual who transferred to RSS from another firm. This letter requested information from RSS regarding its supervision of Wilshire Discount.<sup>9</sup> Ucciferri could not recall what response he had given to NASD Regulation or what supervisory

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<sup>8</sup> Regional counsel submitted a signed statement from Colton that he was unaware that Wilshire Discount was reselling the HWII units until Ucciferri informed Colton of the customers attorney's complaint.

<sup>9</sup> Roach stated that she did not receive a copy of this letter until 1993.

procedures he had implemented in response to that letter.<sup>10</sup>

In Fistori's signed statement and testimony by telephone, he stated that in 1992 he heard that GW and KW wished to sell 1,600 HWII units priced at \$100 per unit. Fistori sold HWII interests to approximately 14 of the 16 buyers of GW's and KW's units, and was involved in the Hill Williams Funds III, IV, and V offerings when these securities were initially offered for sale. Fistori testified that during his association with RSS, the only time that customers made their checks payable to Wilshire Discount was in connection with the HWII transactions, and that he was unaware that the checks were deposited into the Donna R. Roach account. Fistori confirmed that Roach requested that he not inform Ucciferri about the HWII transactions, but he denied that Roach stated that she did not want to share the commissions with RSS. According to Fistori, he just walked away from Roach because he did not want to become involved in "office politics." When questioned by Roach's counsel regarding RSS' supervision of the Riverside Office, Fistori stated that to his recollection, he never discussed compliance procedures with Ucciferri, nor were any compliance meetings held at Wilshire Discount. He also stated that he never discussed with Ucciferri the HWII sales, or any other sales generally conducted at Wilshire Discount. He testified that he did not maintain daily "blotters" of the HWII transactions, and that the general practice at Wilshire Discount was for the brokers to maintain an informal list of securities sold.

Mark Sprunt ("Sprunt"), a former broker associated with RSS at Wilshire Discount from July 1992 to March 1993, also testified by telephone. According to the Association's records, Sprunt was listed as the principal at Wilshire Discount from December 1992 until July 1993. Sprunt testified that Fistori informed him that Wilshire Discount was selling the HWII units for GW and KW. He stated that he sold one HWII unit to a customer, and that he gave the customer's check made payable to Wilshire Discount to Fistori. Sprunt testified that he was unaware that the check subsequently was deposited into the Donna R. Roach account. Sprunt submitted a statement to NASD Regulation as part of this investigation claiming that there was a lack of supervision at Wilshire Discount. When questioned about this statement, Sprunt testified that Ucciferri was in the Riverside Office on two occasions from July 1992 to July 1993, that no compliance meetings were held, and that no NASD manual was available to his knowledge. He stated that Ucciferri discussed Sprunt's duties as branch manager only after Ucciferri became aware of the HWII transactions. When questioned regarding how commission checks routinely were handled, Sprunt responded that typically commission checks from stock transactions came directly from an RSS account, while commissions from the sale of limited partnerships came directly from Wilshire Discount.

Roach testified that it was not true that she urged Fistori not to inform Ucciferri about the HWII transactions. She argued that she had no reason to hide the transactions from RSS, because according

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<sup>10</sup> When questioned regarding this letter at the DBCC hearing, Johnson stated that she was unaware of this letter prior to the DBCC hearing.

to the terms of Wilshire Discount's Independent Contractor Agreement with RSS, Wilshire Discount was entitled to 100 percent of the commissions from discount brokerage trading activity processed by Wilshire Discount. Moreover, she asserted that any commission she personally would receive from the transactions would be minimal, only slightly over \$600. Roach stated that she thought RSS was aware of the transactions because Colton, one of RSS' presidents, was a wholesaler of the Hill Williams projects, and received information regarding all Hill Williams transfers. Roach also testified that she retained the \$16,000 from GW's and KW's proceeds only after learning that HWII was not making timely disbursements to the customers, and that customers GW and KW were trying to "unload" their units in a hurry based on their having insider information regarding HWII's possible bankruptcy.

Roach argued that RSS failed to supervise Wilshire Discount. She testified that Ucciferri never gave her instructions on procedures to follow when conducting business at Wilshire Discount, and that she did not receive an RSS compliance manual until 1994. She further testified that Ucciferri never audited Wilshire Discount, never conducted compliance meetings, and never examined Wilshire Discount's books and records. Roach claimed that RSS was aware that she was using the Donna R. Roach account to transact business at the Riverside Office and that RSS had issued commission checks in her name for disbursement to the brokers. She contended that she never questioned whether it was proper to deposit the customer funds into the Donna R. Roach account because the funds were not commingled with personal funds, and were placed in a federally-insured account.

The NASD Regulation regional counsel for District No. 2 argued that there were a number of aggravating factors present here. First, customer funds were put at significant risk. Second, Roach retained the \$16,000 until GW and KW retained an attorney. Third, Roach's concern that creditors would reach the funds is questionable because if she really had wanted to protect the funds, she could have turned them over to RSS.

The DBCC found that Roach had misused customer funds, but had not converted them. In assessing sanctions, it found that Roach kept the transactions from Ucciferri. It also determined that Roach failed to make the customers whole when they complained, and that RSS repaid the \$16,000 to customers GW and KW and withheld that amount from Roach's commissions. The DBCC noted, however, that Roach was new to the securities business at the time of the violation and that she was given neither guidance nor adequate supervision.<sup>11</sup>

On appeal, Roach argued that: (1) she was selectively prosecuted because she is married to Gene Roach; (2) Ucciferri and Colton knew of the HWII transactions; (3) the DBCC was led to believe that \$160,000 was in Roach's account all the time; however, Roach made two payments totaling \$131,200 to GW and KW in December 1992; (4) she did not refuse to send GW and KW their

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<sup>11</sup> The DBCC decision inadvertently cited Rule 2210, instead of Rule 2110, in its discussion regarding Roach's counsel having admitted the violation.

money; rather, Ucciferri elected to pay GW and KW directly from RSS; and (5) she was new to the industry and relied on others with more knowledge and experience.

### Discussion

We find that Roach misused the customers' funds. It is undisputed that Roach took possession of the 16 customer checks that were made payable to Wilshire Discount and placed those funds in the Donna R. Roach account. A respondent engages in the "improper use of funds" when customer funds are used for a purpose not directed by the customer, even without a showing of intent permanently to deprive the customer of those funds. See, e.g., Alderman v. SEC, 104 F.3d 285, 289 (9<sup>th</sup> Cir. 1997) (affirming violation of Rule 2110 for misuse of customer funds when associated person deliberately withheld payment to customer for two months after erroneous transfer of customer funds to firm account); In re Robert L. Johnson, 51 S.E.C. 828, 831 (1993) (finding misuse when registered principal of firm that had ceased doing business failed promptly to re-register unit trust in customer's name, to transmit distributions to customer, and to repay customer for almost two years). The misuse of customer funds is "patently antithetical to high standards of commercial honor and just and equitable principles of trade." In re Wheaton D. Blanchard, 46 S.E.C. 365, 366 (1975). By placing the funds in the Donna R. Roach account without customer authorization, and by subjecting those funds to risk, Roach violated Rule 2110.<sup>12</sup>

We have considered all of Roach's arguments in mitigation. Roach claims to have relied on the advice of the selling brokers and Hill Williams that Wilshire Discount should handle the transactions in order to expedite the process. She argues that she was new to the industry and was only registered as a representative one month prior to the violations. The violation for which Roach was sanctioned, however, relates to her unauthorized transfer of funds to the Donna R. Roach account--an action for which Roach received no advice. It is therefore inconsequential whether Roach relied on the advice of RSS or Hill Williams in permitting Wilshire Discount to handle customer funds. Because we find that Roach misused customer funds by placing those funds in the Donna R. Roach account, we decline to upset the DBCC's findings regarding Ucciferri's credibility and whether he was notified that Wilshire Discount was selling customer GW's and KW's HWII. We find that neither Ucciferri, nor the brokers, were aware that Roach had transferred the funds to the Donna R. Roach account.

We have also considered Roach's assertion that she was new to the industry and failed to realize that transferring customer funds into the office's Donna R. Roach account was improper. Roach contends that RSS and Ucciferri failed to provide her with any guidance on the procedures for handling

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<sup>12</sup> Through counsel at the DBCC hearing, Roach admitted violating Rule 2110 in so handling the customer funds. On appeal and without counsel, Roach stated that her attorney admitted guilt for her "against [her] wishes." Roach does not dispute, however, that she transferred the customer funds to the Donna R. Roach account without customer authorization.

funds at Wilshire Discount. There is no question, however, that as an associated person of a member firm, Roach had a duty to act in accordance with NASD ethical standards and to ensure the security of customer funds. See Alderman, 104 F.3d at 288. This duty was respondent's, regardless of RSS' and Ucciferri's alleged failure to supervise. The SEC has repeatedly held that respondents cannot shift responsibility for compliance with an applicable requirement to a supervisor. See In re Thomas J. Kocherans, Exchange Act Rel. No. 36556, at 5-6 (Dec. 6, 1995) ("Participants in the securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements."); In re Patricia H. Smith, Exchange Act Rel. No. 35898, at 4 & n.8 (Jun. 27, 1995) (rejecting respondent's argument that she had been improperly trained by a previous employer); see also Carter v. SEC, 726 F.2d 472, 473-74 (9<sup>th</sup> Cir. 1983) (rejecting representatives' defense that they were unaware of NASD rules and stating, "[a]s employees, [the representatives] are assumed as a matter of law to have read and have knowledge of these rules and requirements").<sup>13</sup>

### Sanctions

We note that Roach was in a position in which she routinely handled the Riverside Office's finances, and that she therefore had a duty to know the proper handling of funds. We also note that included in the record is a copy of the "Amendment to Independent Contractors Agreement" between RSS and Wilshire Discount dated August 10, 1992, which Roach signed on behalf of Wilshire Discount. Roach therefore placed herself in a position to assume responsibility under the terms of the agreement, one of them being that Wilshire Discount should appoint a designated branch manager "who will be responsible for supervision of the [b]ranch [o]ffice and ensuring compliance with all rules and regulations."

Grave questions are raised regarding the operation and supervision of Wilshire Discount under RSS. However, this does not excuse the serious nature of the allegation here and the fact that 16 customer checks totaling \$160,000 were transferred into the account of Donna R. Roach, an account

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<sup>13</sup> Roach argues that the NASD was biased, and that she was selectively prosecuted because her husband was barred by the NASD in 1991. The SEC has rejected contentions of bias, noting that the "staff does not decide cases . . . allegations of [staff ] bias, even if true, do not suggest that the fairness of the hearing itself was compromised." In re Joseph H. O'Brien II, 51 S.E.C. 1112, 1117 & n.16 (1994). Moreover, in order to succeed on a claim of selective prosecution, Roach must show that she was singled out for enforcement while others who were similarly situated were not and that her prosecution was motivated by arbitrary or unjust considerations, such as race, religion, or the desire to prevent a constitutionally-protected right. See In re George H. Rather, Exchange Act Rel. No. 36688, at 3 & n.5 (Jan. 5, 1996) (rejecting respondent's claim that he was a victim of selective prosecution when the NASD was aware of more serious violations committed by his firm and other employees). Roach has failed to demonstrate the elements of such a claim.

controlled solely by respondent.<sup>14</sup> It also does not excuse respondent's deliberate withholding from GW and KW of a portion of the customers' funds that were held in payment for the HWII purchases. Even if Roach had a good faith belief that GW and KW were improperly trying to "unload" their HWII shares, she should not have taken it upon herself to withhold the customers' \$16,000, but should have inquired as to the proper handling of the matter.

We recognize, however, that although Roach's handling of the checks resulted in the commingling of customer funds with funds used to pay the office's expenses, and that the customer funds were exposed to risk, there was no showing that any of the funds were misappropriated or converted. Subjecting customer funds to a risk of loss in situations other than conversion or misappropriation, however, clearly constitutes business conduct that contravenes Rule 2110. We therefore find no reason to alter the sanctions imposed by the DBCC,<sup>15</sup> and we affirm the DBCC's decision.

Accordingly, Roach is censured, fined \$7,500, and suspended for 10 business days from associating with any NASD member in any capacity. The suspension will commence on a date to be set by the President of NASD Regulation, Inc. Roach also is assessed DBCC costs of \$1,117.90 and NBCC hearing costs of \$750.<sup>16</sup>

On Behalf of the National Business Conduct Committee,

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Joan C. Conley, Corporate Secretary

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<sup>14</sup> We note that portions of the \$160,000 were held in the Donna R. Roach account for 17 to 112 days.

<sup>15</sup> The sanctions are consistent with the applicable NASD Sanction Guidelines ("Guidelines"). See Guidelines (1996 ed.) at 13 (Conversion Or Improper Use of Funds Or Securities).

<sup>16</sup> 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 Procedural 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 sanction, after seven days' notice in writing, will summarily be revoked for non-payment.