

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee  
For District No. 10,

Complainant,

vs.

Andrew D. Schiff  
West Long Branch, NJ,

Respondent.

DECISION

Complaint No. C10970156

District No. 10 (NY)

Dated: April 9, 1999

**Associated person of member firm effected 17 unauthorized transactions, held, DBBC's findings of violation sustained, but sanctions imposed modified.**

Andrew D. Schiff ("Schiff") has appealed the December 30, 1997 default decision issued by the District Business Conduct Committee for District No.10 ("DBCC") pursuant to NASD Procedural Rule 9312. We find that Schiff effected 17 unauthorized transactions in violation of Conduct Rule 2110. We order that Schiff be censured and barred. On the basis of the financial information that Schiff produced on appeal, we order that he pay a monetary sanction of \$14,000 (which includes restitution in the amount of \$1,509, plus pre-judgment interest to customer DC; any amount of the \$14,000 that is not paid as restitution, plus pre-judgment interest to DC, or as unpaid restitution, plus pre-judgment interest to the appropriate state, shall be paid as a fine).

Background

Schiff first became registered with the NASD in 1992 as a general securities representative. From March 1995 to July 1995, Schiff was associated with Corporate Securities

Group, Inc. ("Corporate Securities" or "Firm") as a general securities representative. Schiff is not currently registered with the NASD and is not employed in any capacity with a member firm.

### Procedural History

During the investigation of this matter, NASD District No. 10 staff ("Staff") conducted three separate on-the-record interviews of Schiff in accordance with Procedural Rule 8210.<sup>1</sup> Although Schiff cooperated with Staff during the investigation, he did not file an answer to the complaint. Based on Procedural Rule 9134, the DBCC concluded that constructive service of the complaint had been effected at Schiff's Central Registration Depository ("CRD") address. Procedural Rule 9134 provides that the mailing of a complaint to a respondent's last known address as reflected in the NASD's records constitutes valid service and notice. The DBCC also concluded that Staff completed actual service of the complaint because none of the mailings sent to Schiff's alternate address were returned to Staff. We affirm the DBCC's findings that Schiff received notice of the complaint. The DBCC treated Schiff's failure to file an answer as an admission of the complaint's allegations pursuant to Procedural Rule 9216 and issued a default decision based upon such admission and the evidence presented by Staff.

### Facts

The complaint consists of two causes. The first cause alleged that Schiff executed three unauthorized transactions in the account of customer DC in April and May of 1995 in violation of Conduct Rule 2110. The second cause alleged that from April 1 through July 30, 1995, Schiff executed 14 unauthorized transactions in the account of customer PA in violation of Conduct Rule 2110.<sup>2</sup> The record contains declarations from both customers that detail the facts and circumstances of the transactions at issue in this matter. The declarations state that DC and PA had accounts with Schiff while he was associated with Corporate Securities and that they never gave Schiff written or oral discretionary authority to execute any of the transactions at issue.<sup>3</sup> The declarations also state that DC and PA had received confirmations for trades they had not

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<sup>1</sup> The complaint alleges that Schiff engaged in unauthorized trading in the accounts of two customers (DC and PA). PA's declaration (which is contained in the record) states that on February 27, 1996, she wrote a letter of complaint to the NASD regarding Schiff's handling of her account. The record, however, does not contain a copy of PA's letter of complaint. Nevertheless, we infer from PA's declaration that the NASD's investigation of Schiff was prompted by PA's letter of complaint.

<sup>2</sup> With respect to PA, the complaint alleged alternatively that Schiff exercised discretionary authority in PA's account without having obtained prior express or implied permission from PA in violation of Conduct Rules 2110 and 2510(b).

<sup>3</sup> The trades that comprise the complaint were specifically described by both customers in their declarations.

authorized. In addition, the record contains copies of order tickets and confirmations for each transaction at issue in this matter that demonstrate that Schiff was the account executive in charge of each of the accounts in which the trades were executed.

Customer DC. The first cause alleged that on the dates set forth in the table below, Schiff executed three unauthorized transactions in customer DC's Corporate Securities account in violation of Conduct Rule 2110:

| <u>Trade Date</u> | <u>Security</u>               | <u>Buy/Sell</u> | <u>Shares</u> |
|-------------------|-------------------------------|-----------------|---------------|
| April 17, 1995    | Sigmatron International, Inc. | Buy             | 5,000         |
| May 16, 1995      | Hain Food Group, Inc.         | Buy             | 4,000         |
| May 19, 1995      | Greg Manning Auctions, Inc.   | Buy             | 6,500         |

According to DC's declaration, after she opened her account with Schiff in April 1995, Schiff and she routinely discussed the purchases and sales in her account. DC stated that she always approved those early purchases and sales prior to their execution. On April 20, 1995, however, DC received a confirmation for the purchase of 5,000 shares of Sigmatron International, Inc. ("Sigmatron") that she had not authorized. DC stated in her declaration that she promptly complained about the unauthorized trading to Schiff or Corporate Securities upon receiving the confirmation statement that disclosed the trade. DC represented in her declaration that she also promptly complained to Schiff or Corporate Securities upon receiving the confirmation statements that disclosed the other two unauthorized transactions alleged in the complaint.

When DC complained about the Sigmatron trade to Schiff through an intermediary, she was informed by the intermediary that the trade belonged to another customer with the same last name as DC and that the trade had been moved to the proper account; when she received her monthly account statement, however, she found that the 5,000 shares of Sigmatron were still in her account. On May 4, 1995, DC telephoned Schiff to complain about the trade but could not reach him. She eventually spoke to someone at Corporate Securities who informed her that she had waited too long to cancel the trade.

On May 18, 1995, DC received a confirmation for the purchase of 4,000 shares of Hain Food Group, Inc. ("Hain Food Group"). DC immediately called Schiff's office but was not able to reach him. The person who answered the phone identified himself as Schiff's brother and advised DC that the trade would be canceled. On May 29, 1995, DC received a confirmation for the sale of Hain Food Group, which resulted in a loss of \$2,509.

On May 22, 1995, DC received a confirmation of the purchase of 6,500 shares of Greg Manning Auctions, Inc. ("Greg Manning"). She immediately called Schiff, but again was unable to reach him. She spoke to an individual at Corporate Securities and advised him that she wanted the Sigmatron and Greg Manning trades canceled. According to DC, the Greg Manning trade was canceled on May 26, 1995.

On June 2, 1995, DC sent a facsimile to the compliance officer for Corporate Securities describing the unauthorized trading in her account. On June 2, 1995, DC also telephoned the compliance department of Corporate Securities to complain that the Sigmatron trade had not been canceled. She continued to call for the next couple of weeks, but was not successful in getting the trade canceled. Finally, after she called the compliance office and threatened to contact the Securities and Exchange Commission ("Commission") if she was not permitted to speak to the compliance officer, the compliance officer took the call and advised DC that she would contact her the following week. When DC did not hear back from the compliance officer, she again contacted the compliance department and finally reached the compliance officer after two or three attempts. The compliance officer advised DC that the Sigmatron trade would be canceled. The trade was, in fact, canceled on June 20, 1995. DC also asked the compliance officer to do "something" about the \$2,059 loss that she had incurred on the Hain Food Group trade. DC settled the losses on that trade with the Firm for \$1,000 even though she was dissatisfied with the settlement.<sup>4</sup>

Customer PA. The second cause alleged that from April 1, 1995, through July 30, 1995, as set forth in the table below, Schiff executed 14 unauthorized transactions in customer PA's Corporate Securities account in violation of Conduct Rule 2110.<sup>5</sup>

| <u>Trade Date</u> | <u>Security</u>               | <u>Buy/Sell</u> | <u>Shares</u> |
|-------------------|-------------------------------|-----------------|---------------|
| April 3, 1995     | Greg Manning Auctions, Inc.   | Buy             | 3,000         |
| April 6, 1995     | Greg Manning Auctions, Inc.   | Buy             | 4,000         |
| May 3, 1995       | Hain Food Group, Inc.         | Buy             | 3,000         |
| May 12, 1995      | Greg Manning Auctions, Inc.   | Sell            | 7,000         |
| May 24, 1995      | Sigmatron International, Inc. | Buy             | 3,000         |
| June 1, 1995      | Sigmatron International, Inc. | Buy             | 1,000         |
| June 14, 1995     | Western Power & Equipment     | Buy             | 500           |
| June 26, 1995     | Dynagen, Inc.                 | Buy             | 1,500         |

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<sup>4</sup> DC stated in her declaration that she was "nervous and just wanted to get out."

<sup>5</sup> See note 2, supra, for explanation of the alternative allegation, which also was included in cause two of the complaint.

| <u>Trade Date</u> | <u>Security</u>               | <u>Buy/Sell</u> | <u>Shares</u> |
|-------------------|-------------------------------|-----------------|---------------|
| June 26, 1995     | Sigmatron International, Inc. | Sell            | 1,000         |
| June 30, 1995     | New World Communication Group | Buy             | 500           |
| July 5, 1995      | Sigmatron International, Inc. | Sell            | 2,000         |
| July 10, 1995     | Greg Manning Auctions, Inc.   | Buy             | 5,000         |
| July 10, 1995     | Dynagen, Inc.                 | Sell            | 1,500         |
| July 11, 1995     | Greg Manning Auctions, Inc.   | Buy             | 2,000         |

PA stated in her declaration that on numerous occasions she had registered complaints with Schiff about unauthorized transactions. After receiving confirmations for two purchases of shares of Greg Manning that she had not authorized (3,000 shares purchased on April 3, 1995 and 4,000 shares purchased on April 6, 1995), PA immediately called Schiff to complain, but could not reach him. Thereafter, PA called Schiff repeatedly, two to three times a day, for approximately five business days, but was unable to reach him. When PA finally reached Schiff, he advised her that he had not received her messages.

Schiff sold the 7,000 Greg Manning shares on May 12, 1995, and, instead of sending PA a check per her instructions, purchased 5,000 shares of Greg Manning on July 10, 1995 and 2,000 shares of Greg Manning on July 11, 1995. PA immediately complained by telephone about the unauthorized trades to Schiff. PA also immediately contacted Schiff after receiving a confirmation for the unauthorized purchase of Hain Food Group that was effected on May 3, 1995. On that occasion, Schiff advised PA that the trade had been made in error. According to PA, Schiff also began trading her Corporate Securities account on margin without her approval.

Notwithstanding the problems that PA encountered with respect to Schiff's handling of her account at Corporate Securities, she initially decided to acquiesce to Schiff's suggestion to "work things out" with him. PA stated in her declaration that she liked Schiff and trusted that he would follow up on his representations that he would work out the problems in her account and that he wanted to settle the matter between them without getting other parties involved. According to PA's declaration, from July through October 1995, she managed to speak with Schiff a few times, but only after numerous unsuccessful attempts to reach him. Although Schiff made a total of five appointments to meet with PA to explain the activity in her account, he canceled three of those appointments and did not show up for the other two. On February 27, 1996, PA wrote a letter of complaint to the NASD concerning the unauthorized transactions effected by Schiff.

### Discussion

Unauthorized Transactions. In light of the declarations made by DC and PA, the testimony of Schiff, Richard Sitomer ("Sitomer") and Todd Rome ("Rome"), his supervisors at Corporate Securities, and the documentary evidence regarding the transactions at issue, we find that Schiff effected unauthorized transactions in the accounts of DC (three) and PA (14), as

alleged in the complaint.<sup>6</sup> A registered representative who effects unauthorized transactions in a customer's account is in violation of the requirement in Conduct Rule 2110 to observe just and equitable principles of trade. See In re Robert Lester Gardner, Exchange Act Rel. No. 35899 (Jun. 27, 1995); In re Keith L. DeSanto, Exchange Act Rel. No. 35860 (Jun. 19, 1995), aff'd, 101 F.3d 108 (2d Cir. 1996) (unpublished table decision). Accordingly, we find that Schiff violated Conduct Rule 2110.<sup>7</sup>

We reject all of Schiff's efforts to place responsibility for these unauthorized transactions on others at the Firm. In his on-the-record interviews and in his briefs on appeal, Schiff attempted to shift the blame for the unauthorized transactions to Sitomer and Rome, his supervisors at the Firm. Schiff suggested in his on-the-record testimony that because Sitomer and Rome were the only employees who were permitted to call in trades to Corporate Securities' trading room, they were responsible for the unauthorized transactions in the accounts of DC and PA. Sitomer and Rome acknowledged in their on-the-record testimony that they were the only individuals authorized to call trades in to Corporate Securities' headquarters office (located in a different geographic location) and that they routinely completed the order tickets given to them by the general securities representatives by filling in information about the price at which the trade was executed, the amount of commission charged, and the name of the trader at headquarters that executed the transaction. We discredit Schiff's attempts to shift the blame for the unauthorized transactions to Sitomer and Rome since there is no evidence in the record to support his argument.

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<sup>6</sup> It is unclear from the record who was responsible for writing "margin" on five of the order tickets at issue in PA's account. Schiff denied that he had ever effected a transaction for any customer on margin. Sitomer testified that the designation "margin" on the order ticket with respect to one of the transactions in PA's account was in his (Sitomer's) handwriting. Neither Schiff, Sitomer, or Rome could state unequivocally that PA had signed a margin agreement. Nor was there any documentary evidence in the record that PA had signed a margin agreement. PA stated in her declaration that she did not understand the concept of margin and had no knowledge of ever having signed a margin agreement. Based on the absence of documentary and testimonial evidence that would establish that Schiff ordered these trades to be executed on margin, we cannot conclude that he was responsible for designating those trades as "margin," rather than cash, transactions.

<sup>7</sup> Given our finding that Schiff effected unauthorized transactions in PA's account, we need not reach the alternative allegation that Schiff impermissibly exercised discretionary authority over PA's account. (The complaint did not contain this alternative allegation with respect to DC's account.)

In addition, Schiff acknowledged that he had received commissions for the 14 trades executed in PA's account.<sup>8</sup> Furthermore, the record establishes the amount of commissions that Schiff received for each of the 17 transactions at issue. Based on our collective experience in the industry, we find that Schiff's acceptance of commissions on these transactions is highly probative evidence that he effected the transactions at issue. Moreover, Schiff admitted in his on-the-record testimony that if he had not written an order ticket, he would not have received any commission for that trade, and in any event, he would not have accepted any commissions for the trade. Thus, Schiff's acceptance of commissions for all of the transactions at issue demonstrates that when Schiff collected the commissions for these trades, he believed that he had effected them.

Schiff testified that he could not have been the individual who effected the transactions at issue because the order tickets contained other individuals' handwriting, in addition to his own. We find Schiff's testimony not credible. Schiff had no adequate explanation as to how order tickets for his customers possibly could have been effected without his involvement. Further, the record demonstrates that it was not unusual for order tickets to contain Sitomer's and Rome's handwriting, because they routinely completed certain information on the order tickets after the trades were called in to Corporate Securities' headquarter's office.

With respect to the trades at issue in PA's account, Schiff argues that PA routinely signed the confirmations and returned them to him and that such evidence is proof that PA had authorized the transactions. The evidence in the record does not support Schiff's argument. PA stated in her declaration that she signed and returned trade confirmations to Schiff while he was associated with two other broker/dealers (before he became associated with Corporate Securities) because he had instructed her to do so. The declaration makes clear, however, that PA did not continue the practice of returning trade confirmations to Schiff once he became associated with Corporate Securities.<sup>9</sup>

Procedural Issues. On appeal, Schiff filed a motion to dismiss the appeal proceeding and remand the case or to vacate the default decision and hear additional evidence on appeal. Procedural Rule 9344(a) provides that when an appealing party does not participate in the proceedings below but shows good cause for his failure to participate, the NAC may dismiss the appeal and remand the matter for further proceedings, or may order that the appeal proceed.

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<sup>8</sup> Schiff could not explain why he would have accepted commissions for trades that were not executed by him. Schiff also admitted in his on-the-record testimony that he had talked to PA about some of the securities at issue in her account and that he had actually recommended some of the transactions.

<sup>9</sup> Schiff was not able to produce any evidence that PA had signed confirmations while he was associated with Corporate Securities.

Schiff argues that he had good cause for failing to participate in the disciplinary proceeding below because he had relied on representations made by Katherine Bayer (“Bayer”), the NASD attorney who had handled the arbitration matter involving Schiff and customer PA, as had been conveyed to him by David Jaroslawicz ("Jaroslawicz"), an attorney with whom Schiff initially consulted about this matter. According to Jaroslawicz' affidavit, when he asked Bayer “whether in light of the Alexander Settlement Mr. Schiff needed to respond to the complaint” in the instant disciplinary matter, Bayer advised him that nothing further was needed. Jaroslawicz attached to his affidavit a copy of a letter, dated September 29, 1997, that he had sent to Bayer, in which he stated: "I understand that there are no additional outstanding matters or complaints against Mr. Schiff at this time." Jaroslawicz further stated in his affidavit that Bayer did not respond to his letter and that, at a "minimum," he expected the NASD to advise him whether there was an outstanding complaint so that Schiff could “be afforded a reasonable time to answer and otherwise defend against the complaint” in this matter. Bayer represented by affidavit that she did not recall ever having had a telephone conversation with Jaroslawicz in connection with the arbitration case. Bayer maintained that neither she, nor, to the best of her knowledge, anyone from her staff, ever had advised "Jaroslawicz or anyone" that Schiff was not required to respond to the complaint in this matter.<sup>10</sup>

Regional Counsel for District No. 10 ("Regional Counsel") argues that Schiff's reliance on alleged representations made by NASD's arbitration counsel does not constitute good cause to remand this matter.<sup>11</sup> We agree and therefore deny Schiff's request for a remand. Schiff's explanation for not participating in the proceedings below is an attempt to place the responsibility for compliance with applicable requirements on the NASD. It is well-established that a registered representative cannot shift the responsibility for compliance with regulatory requirements to the NASD or the SEC. See In re William H. Gerhauser, Exchange Act Rel. No. 40639 (Nov. 4, 1998); In re Sherman, Fitzpatrick & Co., Inc., 51 S.E.C. 1048 (1994); In re Variable Investment Corp., 46 S.E.C. 1352 (1978); In re Don D. Anderson & Co., Inc. 43 S.E.C. 989, 991 (1968). As a registered representative, Schiff is responsible for knowing and complying with the NASD's rules and requirements. Carter v. S.E.C., 726 F.2d 472, 473-74 (9th Cir. 1983).

Schiff also has requested that the default decision be vacated. NASD's rules of procedure, however, do not provide for such relief. Instead, Procedural Rule 9344 gives the NAC authority to dismiss an appeal and remand the matter for further proceedings, or to proceed with the appeal proceeding on the basis of the written record (with possible additional evidence).<sup>12</sup> We therefore

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<sup>10</sup> The arbitration settlement occurred at the end of September 1997. The complaint in this matter was issued prior to the date of the arbitration settlement, on August 6, 1997. The DBCC's decision was issued on December 30, 1997.

<sup>11</sup> Schiff does not contend that he was not served properly with a copy of the complaint. Accordingly, he had the opportunity to file an answer and participate in the proceeding below.

<sup>12</sup> Procedural Rule 9344 does not provide for a hearing on appeal when the respondent



affirm the decision of the NAC subcommittee ("Subcommittee") that considered this matter on appeal to deny Schiff's motion to vacate.

Schiff also argues that he should be granted leave to introduce unspecified additional evidence to rebut certain findings of fact made by the DBCC. Schiff did not, however, describe each item of proposed new evidence, demonstrate that there was good cause for failing to introduce it below, or demonstrate why the evidence would be material to the proceeding, as required by Procedural Rule 9346. Accordingly, we affirm the Subcommittee's decision to deny Schiff's motion for leave to adduce unspecified additional evidence.<sup>13</sup>

### Sanctions

The DBCC ordered that Schiff be censured, ordered to pay a total of \$57,292.62 (which included a fine of \$50,000 and restitution for the losses sustained by customers DC and PA in the aggregate amount of \$7,292.62), and barred from association with any member firm in any capacity. Schiff argues that he owes no restitution and that the bar is unduly harsh. Schiff also argues that in light of his poor financial condition, he is unable to, and should not be required to, pay the monetary sanction imposed by the DBCC. We address each of Schiff's arguments below.

We find that serious sanctions are mandated by the following factors: the number of unauthorized trades at issue (17); Schiff's refusal to acknowledge his misconduct throughout these proceedings; and Schiff's attempts to keep DC and PA from complaining to his firm or regulatory authorities about the trades at issue. We therefore affirm the DBCC's imposition of a bar. We

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defaulted in the proceeding below.

<sup>13</sup> We uphold the Subcommittee's decision to admit into the record certain affidavits that were filed by the parties with their motions. We admit the affidavit of Henry Silberberg (attached to Schiff's reply brief in support of his motion to dismiss and remand) but find that it is not material to this proceeding. We also admit the affidavits of Schiff and David Jaraslowicz (attached to Schiff's motion to dismiss and remand). The affidavits of Jay M. Lippman (the regional staff attorney handling this case), Katherine Bayer, and Richard D. DeVita (the attorney who represented PA in the arbitration matter with Schiff) are admitted. In addition, we admit the affidavits of Carlyle E. Stiles (an NASD examiner) that were attached to the Department of Enforcement's answering brief, which provide further details about the amount of the customers' losses. Finally, we uphold the Subcommittee's decision to request the following additional documentary evidence: (1) the amount of customers' losses attributable to the allegations in the complaint and the amounts that were paid in restitution to each customer; (2) the amount of commissions that were paid to Schiff with respect to the unauthorized transactions that Schiff effected for each customer; and (3) the amount of any outstanding restitution that Schiff owed to customer PA as a result of the unauthorized transactions at issue in the instant matter (in view of the claim that was made in the motions on appeal that Schiff still owed PA \$1,292).

impose a monetary sanction of \$14,000 (restitution of \$1,509, plus pre-judgment interest to customer DC and a fine for any amount of the \$14,000 monetary sanction that is not paid as restitution, plus interest). We have reduced the \$50,000 fine that was imposed by the DBCC based on Schiff's argument on appeal that he is unable to pay the monetary sanctions imposed by the DBCC and our review of the financial information that he produced on appeal.

The applicable Sanction Guideline ("Guideline") states that a bar should be considered in egregious cases.<sup>14</sup> We find that a bar is essential given Schiff's misconduct. Schiff effected 17 unauthorized transactions. Moreover, when Schiff's customers complained to him about the unauthorized transactions, he either tried to avoid them for a period of time or led them to believe that he would correct the problems in their accounts (apparently to prevent them from complaining to the Firm or regulatory authorities). Further, during his on-the-record interviews, Schiff repeatedly attempted to shift the blame for the unauthorized transactions to his supervisors. Even during the appeal process, Schiff continued to maintain that others at the Firm were responsible for the unauthorized transactions.

Schiff argues on appeal that he is unable to pay a monetary fine because of his poor financial condition. In light of the Commission's decision in In re Toney L. Reed, Exchange Act Release No. 39354 (Nov. 25, 1997), we consider claims of bona fide inability to pay in assessing sanctions. The Commission held in Reed that a respondent "has the burden of producing evidence in support of [such a] claim and of proving bona fide insolvency." Id. After reviewing the financial information that Schiff produced on appeal,<sup>15</sup> we find that the information confirms his assertion that he has a negligible net worth and gross income.<sup>16</sup> The information does not,

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<sup>14</sup> See Guideline (1996 ed.) at 56 (Unauthorized Transactions).

<sup>15</sup> The financial information was submitted as "Exhibit A" to Schiff's supplemental brief in further support of his motion for an order dismissing the proceeding.

<sup>16</sup> Pursuant to Procedural Rule 9146(k), Schiff filed a motion for a protective order ("Motion") with respect to financial information that he submitted on appeal. In his Motion, Schiff sought relief from public dissemination of the financial information that he submitted on appeal.

The Subcommittee that considered this case on appeal denied respondent's motion, and we affirm that determination. Rule 9146(k)(1) permits a party to file a motion requesting a protective order to limit disclosure or prohibit from disclosure to other parties, witnesses or other persons, except the Department of Enforcement and other Association staff, documents or testimony that contain confidential information. We note that the rule was intended to apply to multiple-party cases to enable parties to limit the dissemination of confidential information to other parties and witnesses in the particular matter under review. In the instant matter, there are no other parties and no other persons who appeared as witnesses on appeal. Therefore, no persons other than the Department of Enforcement and other Association staff would have access

however, show that Schiff is insolvent. On the basis of the financial information that Schiff supplied on appeal, we hereby assess a monetary sanction in the amount of \$14,000, which, while not as high as his misconduct justifies, we believe is appropriate. As discussed further below, we are ordering that Schiff pay restitution in the amount of \$1,509, plus pre-judgment interest to customer DC. Any amount of the \$14,000 monetary sanction that is not paid as restitution, plus pre-judgment interest to DC, or as unpaid restitution, plus pre-judgment interest to the appropriate state, shall be paid as a fine.<sup>17</sup> Cf. In re Toney L. Reed, Exchange Act Rel. No. 37572 (Aug. 14, 1996) (NASD may wish to consider, in future cases in which respondent demonstrates bona fide inability to pay both a disciplinary fine and a restitution order, waiving a portion of the fine assessed in order to ensure that restitution is made).

As to the issue of restitution, we will analyze the facts relevant to each customer's account separately. The DBCC found that DC had sustained a loss of \$2,509 as a result of the unauthorized trades effected by Schiff. The DBCC was unaware when it issued its decision, however, that Corporate Securities had credited DC's account in the amount of \$1,000 as a result of Schiff's unauthorized trading.<sup>18</sup> Accordingly, we eliminate the DBCC's order that Schiff pay \$2,509 in restitution to DC and order that Schiff pay restitution to DC in the amount of \$1,509, plus pre-judgment interest at the rate set forth in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), which shall run from May 19, 1995, to the date of this decision.

We eliminate the DBCC's order that Schiff pay \$4,783.62 in restitution to PA. We note that the DBCC was unaware when it issued its decision that Schiff had paid \$15,000 to PA to settle an arbitration matter that included all of the transactions at issue in this case.<sup>19</sup> The DBCC stated in its decision that Schiff would be entitled to offset against the amount of restitution ordered by the DBCC any monies that he returned to DC and PA as compensation for their

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to the financial information at issue.

<sup>17</sup> See discussion on page 11, infra, regarding requirements to pay any unpaid restitution to the appropriate state fund.

<sup>18</sup> The Department of Enforcement's briefs on appeal confirm that the DBCC was unaware when it issued its decision that Corporate Securities had settled with DC on the Hain Food Group trade and had credited DC's account in the amount of \$1,000.

<sup>19</sup> The Department of Enforcement's briefs on appeal confirm that the DBCC was unaware of the arbitration settlement when it issued its decision. (The DBCC issued its decision on December 30, 1997, which was a couple of months after the parties had entered into the arbitration settlement. Both parties had signed the arbitration settlement agreement by September 30, 1997.) The record also contains a copy of the arbitration complaint and the settlement from which we were able to verify that the trades at issue in this disciplinary matter were also at issue in the arbitration case.

losses. Although the final settlement award in the arbitration matter was not allocated on a per transaction basis and included transactions in addition to those at issue here, we consider Schiff's \$15,000 payment in settlement of the arbitration matter as compensation for the \$4,783.62 in losses that PA incurred on the trades at issue in this matter.<sup>20</sup>

Accordingly, we order that Schiff be censured and barred from association with any member in any capacity.<sup>21</sup> In addition, Schiff is ordered to pay restitution to DC in the amount of \$1,509, plus pre-judgment interest at the rate set forth in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), which will run from May 19, 1995, to the date of this decision. We further order that satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to effect restitution, shall be provided to the staff of NASD Regulation no later than 90 days after the date when this decision becomes final. If, for any reason, Schiff is unable to locate customer DC after reasonable and documented efforts within such period, or such additional period agreed to by the staff of NASD Regulation, Schiff shall forward any unpaid restitution and pre-judgment interest to the appropriate escheat, unclaimed property or abandoned property fund for the state in which the customer last resided. We also order that any amount of the \$14,000 monetary sanction that we have imposed that is not paid as restitution, plus pre-judgment interest to customer DC, or as unpaid restitution, plus pre-judgment interest to the appropriate state, shall be paid as a fine. We eliminate the DBCC's order of restitution to PA in view of Schiff's payment to PA in settlement of the arbitration matter.<sup>22</sup> We

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<sup>20</sup> The record included an affidavit from PA's arbitration counsel ("Counsel") that stated that Schiff should be held responsible in this disciplinary proceeding for \$300 in arbitration costs and \$992 in alleged losses attributable to Schiff's misconduct as alleged in the arbitration matter but which were not covered in the arbitration award. Counsel provided no evidence, however, that any such losses were specifically attributable to the transactions at issue in this case. As a result, we reject the suggestion made by the Regional Counsel that Schiff should be held liable for 30 percent of PA's losses not covered by the arbitration award (district staff claimed that the transactions in PA's Corporate Securities account constituted 30 percent of the illegal transactions alleged in the arbitration matter).

<sup>21</sup> We deny Schiff's motion on appeal that the sanctions be revoked.

<sup>22</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.

also note that the NASD's installment payment plan is available as an option to Schiff with respect to the fine. The bar is effective upon service of this decision.

On Behalf of the National Business Conduct Committee,

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Joan C. Conley, Senior Vice President and Corporate Secretary