BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of	DECISION
District Business Conduct Committee for District No. 9,	Complaint No. C9B960013
Complainant,	Dated: November 9, 1999
vs.	
Steven D. Goodman Allison Park, PA,	
Respondent.	

Where registered representative engaged in sales practice abuses in his individual capacity, held, that registered representative violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Conduct Rules 2110 and 2120. Also held that registered representative did not engage in sales practice abuses in his managerial capacity. DBCC sanctions of $75,000 fine and bar affirmed and censure eliminated.

I. Introduction

Respondent Steven B. Goodman ("Goodman") appealed the August 28, 1998 decision of the District Business Conduct Committee for District No. 9 ("DBCC") pursuant to Procedural Rule 9310. After an independent review of the entire record in this matter, we affirm in part and reverse in part the findings of the DBCC. We affirm the DBCC's finding that Goodman violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") ("Section 10(b)"), Exchange Act Rule 10b-5 ("Rule 10b-5"), and Conduct Rules 2110 and 2120, by committing numerous sales practice abuses in his individual capacity as a registered representative (cause one). We reverse and dismiss the DBCC's findings under cause one that Goodman engaged in abusive sales practices in his managerial capacity. We affirm the DBCC's dismissal of the allegations that Goodman encouraged and/or facilitated the purchase of Hibbard Brown & Co. ("Hibbard" or "the Firm") house stocks by Hibbard registered representatives for their customers' accounts without the customers' prior authorization (cause two). We also affirm the DBCC's dismissal of the allegations that Goodman purchased Hibbard house stocks for his customers' accounts without the customers' prior authorization or consent (cause two). Finally, we affirm the DBCC's dismissal of allegations that Goodman failed to establish, implement, and enforce reasonable supervisory procedures to deter or prevent the violations alleged in causes one and two (cause three).

We impose the following sanctions: $75,000 fine and bar in all capacities.

II. Background

Goodman was employed by Hibbard in its Pittsburgh office from June 1988 until August 1994 and was registered as a general securities representative. Hibbard was an NASD member firm from August 1986 until July 1994, when it was expelled from NASD membership.[1] Goodman also became registered with Hibbard as a general securities principal in March 1991, and he continued in this capacity until Hibbard's expulsion in 1994. Goodman is presently employed by VTR Capital, Inc. ("VTR Capital") (now known as Fairchild Financial Group, Inc. ("Fairchild Financial")) as a general securities representative.

III. Facts, Findings and Conclusions

The complaint in this matter was filed on May 8, 1996. Seven of the original 10 respondents, all of whom were former Hibbard managers (except for the head of Hibbard's research department, who was not characterized as one of the "managers" in the complaint), settled the allegations against them. The three remaining respondents, including Goodman, requested a hearing, which was held before a Special Hearing Subcommittee of the DBCC.[2] The hearing was held over a period of 14 days between December 1996 and July 1997.

The complaint consisted of three causes: fraud (cause one); unauthorized transactions (cause two); and failure to establish, implement, and enforce supervisory procedures to deter or prevent the violations described in causes one and two (cause three). The review period covered by the complaint was from January 1, 1991 through December 31, 1993.

<u>A. Fraud (Cause One)</u>

Cause one alleged that Goodman committed fraud in two respects:

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[1] At the time of its expulsion, Hibbard had 14 branch offices and about 450 to 500 registered representatives. It was based in New York City.

[2] The two other respondents also were found by the DBCC to have engaged in violations. They appealed the DBCC decision but subsequently settled.

(1) That Goodman, in his capacity as a branch manager, through his supervision of the activities of the registered representatives assigned to him, encouraged, directed, participated in and/or facilitated a "boiler room" operation featuring high-pressure sales tactics, material misrepresentations and omissions, unfounded price predictions, the use of false and misleading scripts and research summaries, and unauthorized transactions, among other things; and

(2) That Goodman, in his individual capacity as a registered representative, engaged in the same violative activities in his dealings with his own customers.

1. Background Regarding the Hibbard Operation. In the proceedings below, the staff presented evidence that Hibbard's registered representatives were trained in aggressive, high-pressure telemarketing sales techniques, which included a three-call system. After placing initial calls to prospective customers, Hibbard brokers would follow up by making a second series of calls (also known as "touch base" or "sizzle" calls) to interested prospects. The brokers were furnished aggressive and materially misleading scripts to assist them in making these calls. During this second call the brokers would tout an unspecified company with alleged exciting corporate developments.

The third series of calls, or "sales" calls, took place during the week following a firm-wide telephonic sales conference call conducted from New York by Hibbard's senior management (Hibbard's president, Hibbard's national sales manager, and Hibbard's research director).[3] Although other products were discussed, the focus of the conference calls was the Hibbard house stock(s) for the month. The Hibbard house stocks were generally low-priced, speculative, over-the-counter ("OTC") stocks of developmental or untested companies. The identities of the house stocks were first revealed to the brokers during the monthly sales conference calls. No negative information concerning the Hibbard house stocks was mentioned during the conference calls.

On the morning of the conference call, the brokers would be given an internal summary description that had been prepared by Hibbard's research director or his staff about the Hibbard house stock being discussed. The internal summaries contained bullet points for the brokers to use in closing sales with customers. The summaries contained only positive information about the stocks and omitted material negative information. There was a disclaimer on the summaries to the effect that the summaries were to be used in conjunction with annual and quarterly reports that were on file at the Securities and Exchange Commission ("SEC" or "Commission"). Hibbard's research director testified that he sent copies of the companies' annual and quarterly reports that were on file at the Commission to each Hibbard branch with the internal summaries.

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[3] These calls typically were conducted during the last week (or "sell week") of every month.

In addition to the internal summaries, the brokers were also given scripts to use for closing sales during "sell week." Brokers were encouraged or required to use these scripts in sales presentations to customers. The scripts generally were dictated (after the conference call) to the brokers in the Pittsburgh branch by Randolph Beimel ("Beimel") or Joseph Chester ("Chester"), who were the vice presidents in charge of the Pittsburgh office. The brokers would transcribe the scripts by hand, because they were prohibited from putting them into typewritten form. The sales scripts contained highly aggressive purchase recommendations, baseless price predictions, and material misrepresentations and omissions about the Hibbard house stocks.[4] They contained no negative information about the stocks, no discussion of risk factors, and little or no financial information about the companies whose stock was being touted by the Hibbard brokers. The Hibbard brokers were also given generic scripts that contained standard responses to common customer objections.

The majority of the business transacted in the Pittsburgh branch was in Hibbard house stocks. The brokers' commissions on customer purchases of Hibbard house stocks were eight to 10 percent, and sometimes more, of the purchase price. The commissions on products other than the Hibbard house stocks were far lower, and those commissions were split with the Firm. The brokers working in the Pittsburgh office experienced intense pressure to sell the Hibbard house stocks to customers. The expectation was for each broker to make a minimum of 10 sales every month. In the event a broker at the Pittsburgh office did not make enough sales, he was often likely to be subjected to physical and psychological abuse.

Hibbard management pressured brokers not to execute sell orders for Hibbard stocks. In order to discourage brokers further from executing sell orders for Hibbard stocks, Hibbard management designed the commission structure so that brokers would not be paid commissions on customer sales of Hibbard house stocks. If a broker received a sell order, he was encouraged to go back to the customer and try to dissuade him or her from selling the Hibbard house stock. Some customers had to move their stocks to another broker/dealer in order to sell them.

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[4] The scripts contained such statements as:

$ "biggest score of our lives";

$ "make you a millionaire";

$ "limited downside risk and the upside potential is tremendous";

$ "We're not even talking about gambling anymore!!";

$ "The only gamble we're talking is how HIGH is the stock gonna go!"; and

$ "liquidate every [mutual fund] or tax free or ANY ASSET you have."

2. Findings of Fact (Fraud Allegations). The DBCC found that Goodman had committed fraud in his individual capacity as a registered representative recommending securities to customers ER, MG, RT, and GM and AM (husband and wife account). We affirm the DBCC's findings that Goodman engaged in sales practice abuses in his individual capacity as a registered representative with respect to MG, ER, and RT. We reverse the DBCC's finding of Goodman's liability with respect to GM and AM. We begin by analyzing the relevant evidence about Goodman's conduct with ER, MG, and RT.

a. Customer ER. ER testified at the DBCC hearing that he was self-employed as a raw fur and scrap metal dealer. ER testified that, in addition to his fur and metals business, he was involved in the farming business (he owned 80 acres of land and raised cattle).[5]

ER became a customer of Hibbard after receiving a cold call from a former Hibbard broker. In April or May 1993, Goodman contacted ER and told him that the broker had left the Firm. Goodman advised ER that he wanted to "change [his securities position] around a little bit." ER purchased stocks of two companies that Goodman had recommended, and Goodman began to call ER every three or four weeks with another recommendation. ER described the transactions as follows: "Sell one, buy another. At all times . . . he always needed more money."

Goodman eventually visited ER at his home and told him that Process Equipment, Inc. ("Process Equipment") was the "hottest stock he had ever ran [sic] into." Goodman denied that he had made this representation. According to ER, Goodman told ER that he had just returned from a trip to the company, that he had met with the president of the company, and that the stock "was going to turn a profit pretty fast." Goodman asked ER to invest $50,000 for 10,000 shares, but ER initially said that it was too much because of the amount of money at stake. Goodman visited him a few more times within about a four-day period to push the stock. Goodman advised him to place funds from his business in the Process Equipment stock. According to ER, Goodman told him that he had invested some of his own money in Process Equipment. Goodman predicted that "they" would make somewhere in the range of $10,000 to $15,000 in a two- to four-week period. Goodman denied having made such a price prediction.

Goodman did not disclose to ER any of the negative financial information about Process Equipment that appeared in the company's annual report on file at the Commission, notwithstanding that the company's annual report showed that Process Equipment had sustained net losses in 1991 ($412,884), 1992 ($333,053), and 1993 ($259,826). Goodman testified that he had researched the Process Equipment stock by reading the company's annual report on file with

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[5] ER testified that his business (through which he conducted his fur and metals business, and a non-ferrous metals and a ginseng root extract business), was worth more than $1 million and that he had a $200,000 line of credit, which was collateralized by his property.

the Commission, but he was unable to testify as to any of the details about the negative financial information that appeared in the company's annual report.[6]

A third-party research report on the company (the "Bronson Report"), which Goodman had given to ER to review in connection with his (Goodman's) recommendation to purchase shares of Process Equipment, was undated, and the financial figures in it were more than two years old. Goodman had no explanation for why he had given ER a copy of a research report (the Bronson Report) that contained out-of-date information. There is no evidence that Goodman gave ER any material other than the outdated Bronson Report, notwithstanding Goodman's testimony that Hibbard had several other research reports that were more recent than the Bronson Report. Goodman responded to questioning by testifying that he could not say whether the more recent reports had been given to ER.

ER finally agreed to buy Process Equipment stock with funds from his own business. ER testified that he could not afford to lose $50,000 and that the only reason he made the investment was because he had a stop-loss agreement.[7] ER testified that he told Goodman that he could not afford to lose more than $5,000 and that Goodman agreed that there would be a "stop loss" at $4.50.[8] ER testified that he called Goodman five to seven times reminding him of the stop-loss order and that Goodman repeatedly reassured him that his position would be sold out if the price dropped.

ER also testified that he advised Goodman that if the Process Equipment stock did not increase in price by August 20, 1993, it would have to be sold because he needed $50,000 by September 1, 1993 to operate his ginseng root extract business. When ER advised Goodman of his plans, Goodman told him that the stock was not doing anything and that he wanted ER to give

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[6] Despite Goodman's claims, there is no persuasive evidence that he gave ER any information about the auditor's report (included in the company's annual report) which stated that there appeared to be doubt about the company's ability to continue as a going concern due to the losses that the company had experienced in 1991, 1992, and 1993. The auditor's report nevertheless concluded that, because the company had stockholders' equity and further had plans to reduce selling, general, and administrative expenses to levels that were consistent with the gross profit amount for the year ending April 30, 1993, it appeared that the company would continue as a going concern.

[7] A "stop loss order is an order to buy or sell a stated amount of a security at the market if and when a transaction occurs at a designated price." L. Loss and J. Seligman, Securities Regulation, 8B(3)(a) (1995).

[8] Although ER's declaration referred to the agreement as a "stop limit" agreement, he used the term "stop-loss" order in his testimony. Based on ER's use of the term "stop-loss" order at the DBCC hearing, the DBCC determined that ER believed that he had a "stop-loss" agreement. We adopt that reasoning.

him another seven to 10 days. ER testified that he could not get any quotes from Goodman about the price of the stock and that he finally obtained quotes from Hibbard's New York office on September 20, 1993.[9] Upon being advised that the price of the stock had fallen, ER contacted Goodman to determine whether the stock had been sold pursuant to the stop-loss order. According to ER, Goodman responded that "he had been too busy and the stock went out from underneath him too fast."

Goodman denied ever using the terms "stop-limit" or "stop-loss" order with any of his customers. He claimed that he first became aware that ER alleged that he had failed to place a stop-loss order on the Process Equipment stock when he read a declaration that ER prepared for these disciplinary proceedings. We find that, notwithstanding the fact that the record is unclear regarding the exact price at which the stop loss was set, the record demonstrates that ER purchased the Process Equipment stock because of the agreement he had with Goodman that the stock would be sold at a price that would limit any losses to no more than $5,000. We find that Goodman's denials about whether he led ER to believe that he had a stop-loss order are contradicted by the evidence in the record.

ER further testified that when he found out from Hibbard's New York office that the price of the stock had fallen, he did not sell the stock because he thought that he would lose legal standing to pursue the matter. ER estimated that he lost about $50,000 to $60,000 with Goodman.

The DBCC found ER's testimony to be "highly" credible and concluded that Goodman's testimony was not credible. We concur with those determinations.[10] We find noteworthy the fact

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[9] ER testified that he had been trying to reach Goodman about the price of the stock, but no one would talk to him.

[10] The DBCC concluded that the customers' testimony was "consistent, believable and tended to corroborate each other as to the improper conduct in which . . . Goodman engaged." The DBCC also stated that the complaining customers' testimony indicated a pattern of illegal conduct on the part of Goodman. Credibility determinations of an initial fact finder are entitled to considerable weight and deference. See Alderman v. SEC, 104 F.3d 285 (9th Cir. 1997); In re Ashvin R. Shah, 52 S.E.C. 1100 (1996); In re Jay Houston Meadows, 52 S.E.C. 778 (1996).

We find that Goodman showed an extraordinary lack of candor, as well as prevarication, during his investigative and DBCC testimony. The complaining customers, who did not know each other, testified consistently about similar high-pressure sales tactics and sales practice abuses to which they were subjected by Goodman. Importantly, Goodman was unable to give any specific examples of information that he had given to the customers regarding the risks of investing in the stocks at issue. When questioned about certain customer allegations of wrongdoing, Goodman generally denied any wrongdoing. These denials of wrongdoing are refuted by the documentary evidence in the record and the direct and consistent testimony of the complaining customers.

that notwithstanding Goodman's claim that he had disclosed negative information to ER about Process Equipment, he was unable to offer testimony concerning any of the negative financial information that was contained in Process Equipment's public filings.

b. Customer MG. During the relevant period, MG was employed by a mutual fund company. His duties consisted of writing marketing material and shareholder communications. He first spoke to Goodman in August 1993. MG testified that he told Goodman that he had never worked with a broker, that he did not want to risk his principal, and that he was a conservative investor. He told Goodman that he had $3,000 or $4,000 in a money market account and owned about $7,000 worth of stock that he had bought as an employee of the issuer.

Goodman called MG five or six times in an attempt to sell him stock. MG said that Goodman had an extremely aggressive presentation on the calls (and that Goodman raised his voice at times).[11] MG testified that when Goodman recommended stocks, he used superlatives about the touted stocks and stated that the investments were "great opportunities" and that "[MG couldn't] lose." Goodman, however, denied having told MG that he could not lose with any of the investments that Goodman had recommended to him. We credit MG's recollection of events and find that Goodman's denial is contradicted by the record evidence.

We also concur with the DBCC's conclusion that Goodman's credibility is further undermined by his misrepresentations regarding the factual basis of a September 25, 1992 consent agreement with the State of Ohio in which he consented to a cease and desist order and a 15-day suspension. The State of Ohio Order ("Order") was predicated on findings: (1) that Goodman misrepresented the value of a particular stock and had omitted to disclose the bid price of the stock; (2) that Goodman misrepresented the terms of his and Hibbard's compensation to the customer; and (3) that Goodman made misrepresentations about Donald Trump's participation in the company. We find that Goodman's contentions to the contrary are not supported by the record.

[11] With regard to Goodman's sales manner, MG testified that:

> [I]t was an extremely aggressive presentation, which I believe is why I succumbed to it. As a matter of fact, one of them occurred, I believe it was for the Chefs, it was the call that he hung up on me, and it lasted, it could have been more than 20 minutes, and there was somebody outside my office, and when I finally eventually hung up, and it was finally over, they apparently overheard it, and they heard me trying to say "no, I'm sorry, I'm really not interested, I don't have any money, I just don't want to get involved in this," and they said "what the heck was all that about." You know, it was just very insistent, "you have to do this." You know, it was just as insistent as you can imagine. <u>I'll say it was the most insistent sales pitch I've ever been subjected to in buying anything in my life.</u> (emphasis added.)

According to MG, Goodman never told him that the stocks in which he had invested were speculative securities. MG testified that he had advised Goodman that he was a conservative investor and that he did not have much money and therefore was not a good prospect for Goodman. Goodman recommended that he borrow money from a bank and use his children's college money to invest in the Hibbard house stocks. Although Goodman denied having made those statements, we are not persuaded by his denial in light of the evidence that Goodman also encouraged RT to obtain funds from other sources in order to invest in highly risky and speculative Hibbard house stocks.

MG initially resisted Goodman's recommendation to buy shares of Process Equipment. He advised Goodman that he could not afford to invest because he did not want to risk principal. MG testified that Goodman had characterized the investment as a great opportunity and that Goodman did not discuss the company's financial condition or any risks associated with the investment. On Goodman's advice, MG cashed in his money market account in order to buy 500 shares of Process Equipment stock for $2,500. Based on Goodman's representations, MG did not believe that "there would be any significant risk" associated with an investment in Process Equipment.[12]

There is no evidence that Goodman disclosed to MG any of the negative information about Process Equipment that was available in public documents.[13] MG testified that Goodman did not disclose to him any of the negative financial information about Process Equipment that appeared in the company's 1993 annual report on file at the Commission. The only information that Goodman had given to MG about Process Equipment was a copy of the same outdated Bronson Report that he had given to ER.[14] During the DBCC hearing, in response to a question about whether Goodman had disclosed any negative information to MG about Process Equipment, he stated: "I

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12 According to MG, Goodman never advised him that there was a possibility of drastic fluctuations in the price of Process Equipment stock. MG testified that Goodman led him to believe that Process Equipment was a Nasdaq-listed stock, but that he eventually learned that Process Equipment was a "pink sheet" stock. (A "pink sheet" stock is one which is not traded on The Nasdaq Stock Market or an exchange. Pink sheet stocks are quoted in the daily listings published by the National Quotation Bureau and are not generally listed in daily newspapers.)

13 See supra at note 10 for a discussion of the negative information that was contained in Process Equipment's public filings during the relevant period.

14 When questioned about problems associated with using a research report with out-of-date financial information, Goodman admitted that the revenue and net loss figures from the Bronson Report were current only as of January 31, 1991, and that the date of MG's purchase was August 20, 1993. Goodman testified that although Hibbard had more recent reports on the company, he could not say whether he had ever given those reports to MG. Significantly, Goodman provided no documentary proof of such other reports. Moreover, MG testified that he considered the Bronson Report to be a "strong report" and that it helped reassure him that Process Equipment was a "going, reasonably stable business."

provided him with [a] red herring on <u>Chefs International</u> that had written all over it high degree of risk." (emphasis added.) When Goodman was advised that the answer was not responsive (because the question related to the Process Equipment, rather than the Chefs International, Inc. ("Chefs International") investment)), Goodman stated that he had not "heard" the question and that it was not true that he had failed to disclose negative information about the Process Equipment stock. It is noteworthy, however, that Goodman did not give any examples of negative information about Process Equipment that he claimed to have disclosed to MG. Goodman eventually responded that it was "not true," without further elaboration, that he had failed to disclose any negative information to MG about Process Equipment.

After MG purchased Process Equipment, Goodman called MG and tried to sell him shares in an initial public offering ("IPO") for Chefs International. Goodman kept pressing MG to get involved and actually hung up on him once. As part of his Chefs International sales pitch, Goodman advised MG to sell stock that he held in a company where he had formerly been employed because it could go down, and Goodman told MG that he needed to diversify. As a result, MG eventually sold his employee stock and bought the Chefs International stock.

The following day, MG called Goodman, who advised him that the Chefs International IPO had been canceled and that Hibbard had some other investment opportunities for him. Goodman touted U.S. Transportation Systems ("U.S. Transportation") as a good investment. Goodman denied MG's assertion that Goodman told MG that he could not lose with an investment in U.S. Transportation. Nevertheless, based on our thorough analysis of the record, we credit MG's assertion in this regard, and we note that this statement would have been consistent with Goodman's standard sales pitch. MG bought 3,000 shares of U.S. Transportation for $6,187. According to MG, Goodman did not advise him about any risks associated with an investment in U.S. Transportation and did not give him any financial information about the company, including the fact that the company had lost $3.5 million in the fiscal year ending 1992. Once again, based on verbal assurances that MG had received from Goodman, MG believed that his principal would not be at any significant risk. Although Goodman could have testified about any negative information he had given to MG about U.S. Transportation, the record shows that he did not. Instead, he chose simply to deny that he had not disclosed such information.

After a few months, the two stocks that MG had purchased (Process Equipment and U.S. Transportation) declined in value steadily. When MG called Goodman to complain about the investments, Goodman advised him that he should invest more money to lower his average cost per share.

MG eventually sent Goodman a complaint letter, but Goodman did not respond. MG subsequently met with Goodman and advised him that the investments were unsuitable for him. MG was eventually instructed by Chester's secretary to send a letter to Hibbard's compliance office. After filing a complaint with Hibbard, MG received a letter from Hibbard stating that there was no merit to his complaint. MG had invested a total of $8,687. At the time of the DBCC hearing, his investments were worth $250.

MG also testified that Goodman discouraged him from selling the Process Equipment stock:

> [V]ery shortly after I bought Process Equipment, within a matter of days, I felt extreme reservation about having done so. And I called Steve Goodman and told him that. And he said well, let me see what the price is right now. He said you show a profit of $200. And at that point I was okay. I was reasonably assured . . . . . I asked him . . . how I would know when to sell. And he said I'll tell you when to sell. I never did sell, because I didn't want to lose my principal . . . . So I was somehow hoping that there was some value in these stocks, that there was some light.

Based on the foregoing evidence, we agree with the DBCC's finding that MG's testimony is highly credible and that Goodman's testimony is not credible.[15] We note, in particular, that Goodman repeatedly was unable to testify as to any negative information that he had given to MG about the Hibbard house stocks that MG bought.

c. Customer RT. RT testified that he was an engineer for General Electric and that he had become Goodman's customer in October 1993. RT testified that someone from Hibbard had contacted him about making an investment, but that he did not pursue it until he saw a Hibbard advertisement in the Wall Street Journal about a week later. He subsequently called Hibbard's Pittsburgh office to open an account, and Goodman was assigned to his account. RT told Goodman that he wanted to work with an experienced broker and invest in "high growth stocks of good companies."

According to RT, Goodman told him that Hibbard specialized in low-priced penny stocks. Goodman promised that he would "make a lot of money" for him, and that his money would "quadruple" in a short period of time. He told RT that Hibbard picked "stocks which are like a dollar or two at [the initial investment] stage, but within six months or a year they [increase in value] to double digit stocks." RT stated that he invested with Goodman because Goodman guaranteed that the stocks were going to do well. According to RT, Goodman told him that the stocks "[were] going to [increase] several dollars in a short period of time."

Goodman told RT that Great American Recreation, Inc. ("Great American"), was going to open casinos and a ski resort. Goodman also advised him that he knew the chief executive officer ("CEO") of Great American personally and that "everything [was] in good shape."[16] When

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[15] See supra at note 10 for a discussion of the DBCC's and our general findings with respect to credibility.

[16] RT testified about his initial reasons for having confidence in Goodman's recommendations:

questioned about his statement about knowing the CEO of Great American, Goodman completely denied having made the statement. Instead, he claimed that he had simply told RT that he had met "someone" who worked at Great American. We find Goodman's explanation highly implausible, and, in light of the specificity of RT's testimony credit RT in this regard.

We find Goodman's explanation highly implausible, and, in light of the specificity of RT's testimony, credit RT in this regard and find Goodman's explanation highly improbable. According to RT, Goodman also told him that Great American had the potential to reach a double-digit stock price within a few months and that Great American was "the company of the future." RT purchased 1,000 shares of Great American at $2.44 per share.

Contrary to the sales pitch that Goodman gave to RT about Great American's excellent potential, the company's public filings showed that the company had sustained net losses in 1991 and 1992. The annual report that was on file at the Commission during the relevant period showed that revenue from operations for fiscal year 1993 had decreased $713,744 from fiscal year 1992. Great American generated a negligible net income from operations of $214,869 for fiscal year 1993 (compared to a net loss of $7,804,865 in the comparable prior year). The annual report represented, however, that any improvement in net income was as a result of a quasi-reorganization that resulted in a "substantial improvement in reported net income, in the absence of any improvement in operating performance." Goodman did not disclose any of this negative financial information to RT.

At the DBCC hearing, Goodman was asked whether he had disclosed any negative information about Great American to RT, but he failed to answer the question directly. He simply responded that he had "disclosed risks to Mr. RT . . . [and that he had] told him they were speculative stocks." When Goodman was asked to explain the types of negative information that he had given to RT about Great American, he was unable to relate any negative information whatsoever about the company.

After RT bought Great American, Goodman called him later the same day to sell him more shares of Great American. RT testified that Goodman made the following representations to him in an effort to get him to buy additional shares of Great American:

> Goodman stated that I should invest more in Great American because it is a very hot company and I would not want to miss out on

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> these are . . . risky stocks so I wanted to make sure that people who are investing for me know fully and understand and they have a lot of confidence in what they do and that confidence Goodman gave me saying that he knows the CEO, this guy opening casinos, he had all the great reasons, . . . everything is looking real bright, there is nothing that can go wrong with this company . . . you are looking for this stock to double in six months, that's what he used to say.

> this one. And also, he has very few shares left and if I don't purchase [them] now, I may not be able to get these shares at such a great price. And he also mentioned that he is not receiving any commission on these shares of Great American and if I had to buy it on through some discount broker, I will end up paying more than what he is offering.

As a result, RT bought an additional 1,000 shares of Great American at $2.44 per share.

Within a week, Goodman called RT to sell him shares of U.S. Transportation. Goodman told RT that the stock was trading at a low price of $1 3/8, that it would go up to $7 in a few months, and that it might even reach "double digits" in a year.

According to RT, Goodman advised him that Hibbard performed a significant amount of research and only recommended companies that were the best in the market for "taking off." Goodman did not give RT any information regarding risks associated with an investment in U.S. Transportation, nor did he give RT any financial information about the company, even though the company's annual report showed that the company had sustained a $3.5 million dollar loss for fiscal year 1993. Goodman denied that he failed to give RT any negative information about U.S. Transportation, but Goodman did not testify to any particular negative disclosures that he had allegedly given to RT. RT purchased 2,000 shares (at $1 3/8) because Goodman told him that he should make the purchase quickly, and because he had confidence in Goodman's recommendation that U.S. Transportation was "a company of the future."[17]

A week after RT had purchased shares of U.S. Transportation, Goodman contacted him again with a recommendation to purchase shares of Consolidated Technology Group ("Consolidated Technology"). Goodman advised RT that Consolidated Technology was trading for about $6 per share and that it would increase to $15 to $20 per share within six months to a year.

Goodman told RT that Hibbard had researched Consolidated Technology and that the company was going to do extremely well in the very near future. Goodman did not disclose to RT the nature of Consolidated Technology's business, nor did he mention any risks associated with an investment in Consolidated Technology stock. In addition, Goodman did not provide RT with any information about the company's financial losses. RT testified that when he began to show some resistance to Goodman's recommendation, Goodman became "very pushy."

RT testified that he was hesitant to make any further investments (by investing in Consolidated Technology) because the prices of Great American and U.S. Transportation had been

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17 RT also testified that he trusted Goodman's recommendations based on Goodman's representations that when he recommended a stock, he did so because Hibbard had conducted research on the company.

declining. Nevertheless, Goodman sought to reassure RT by telling him that the prices of Great American and U.S. Transportation were simply experiencing market fluctuations and that he should not worry because Goodman was taking care of his investments. According to RT, Goodman told him something to the effect that, if RT were to invest about $10,000 in Consolidated Technology, it would be worth about $70,000 to $80,000 in one year. On November 26, 1993, RT purchased 500 shares of Consolidated Technology at $6.25 a share. RT testified that he finally agreed to buy the shares based on Goodman's recommendation to have a diversified portfolio[18] and Goodman's representations that he knew what he was doing and that he had made a lot of money for many other customers.

The Consolidated Technology annual report on file at the Commission during the relevant period contained negative financial information that Goodman should have disclosed to RT. The company had net losses for each of the four fiscal years ending in 1992, 1991, 1990, and 1989. Although there was income for the fiscal year ending July 31, 1993 of $662,244, it was described in the annual report as merely a one-time gain that resulted from the acquisition of certain assets of another company by a subsidiary of Consolidated Technology.

After RT's purchase of Consolidated Technology, Goodman called him five or six times per week with additional recommendations. Goodman asked whether RT had any other investments and whether he could use money from other investments to buy shares of companies that Goodman was recommending. RT testified that after his purchase of Consolidated Technology, the prices of Great American, U.S. Transportation, and Consolidated Technology had all declined, although Consolidated Technology's prices fell at a less precipitous rate. RT told Goodman that, at a minimum, he wanted to get out of Consolidated Technology before it substantially declined. According to RT, Goodman refused to sell RT's shares of Consolidated Technology and told him that if RT sold any of the securities, RT would have to pay large commissions to Hibbard and that he would lose a large portion of his investment. Although Goodman denied having told RT that he would have to pay large commissions and would lose much of his investment if he sold the Consolidated Technology stock, we find that his denial is contradicted by his refusal to sell the Consolidated Technology stock as requested by RT.

RT told Goodman to send his Consolidated Technology stock certificates to him so that he could sell the shares through a discount broker. Goodman refused RT's request. RT eventually called Hibbard's New York office, requested that the stock certificates be sent to him, and threatened legal action if this did not occur. Hibbard eventually sent RT's stock certificates to him. Goodman testified that RT never instructed him to sell his shares of Consolidated Technology and that he never refused to do so. Goodman testified that he sent a written transfer request for the stock certificates to Hibbard's New York office and that he did not have any more involvement

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[18] RT testified that Goodman told him that his customers should have stocks of three different companies in order to have a "diversified" portfolio. We note, however, that the stocks that RT bought through Goodman -- Great American, U.S. Transportation, and Consolidated Technology -- were all speculative stocks.

with the process after he had filled out the transfer request. Goodman's denials are belied by the extraordinary efforts that RT testified to with respect to his attempts to sell his shares of Consolidated Technology.[19]

RT testified that he lost his entire $5,000 investment in Great American because the company had gone into bankruptcy; that he recovered only $70 of the $2,754 that he paid for the U.S. Transportation stock; and that he had sold the Consolidated Technology stock a couple of years before the date of the DBCC hearing and thought that he had lost no more than a couple of hundred dollars on it.

The DBCC found RT's testimony to be highly credible and Goodman's testimony not credible. Based on the evidence set forth above, we agree with the DBCC's determinations on the issue of credibility.[20] We also note that Goodman's general denials about having made any price predictions to RT are contradicted by the evidence. The evidence shows that Goodman gave RT price predictions in connection with each of his (RT's) purchases of Great American, U.S. Transportation, and Consolidated Technology.[21]

3. Discussion (Fraud). We affirm the DBCC's finding that Goodman knowingly committed numerous sales practice abuses that operated as a fraud upon his customers (ER, MG, and RT) in violation of Exchange Act Section 10(b), Rule 10b-5, and Conduct Rules 2110 and 2120.[22] Brokers owe a special duty of fair dealing to their clients. Charles Hughes & Co. v. SEC,

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[19] RT also testified that Goodman had refused his requests for balance sheets for each of the companies in which he had invested. Other individuals at Hibbard that RT had contacted about getting the balance sheets also refused his requests. RT eventually received the balance sheets directly from the companies, but only after much resistance from each of the companies.

[20] See supra at note 10 for a discussion of the DBCC's and our general findings with respect to credibility.

[21] In response to a question about whether he had told RT that the price would increase to $15 or $16 within six months, Goodman stated: "I have never made a price prediction."

[22] We find, however, that there is no evidence that Goodman made any misrepresentations or material omissions to GM and AM "in connection with a purchase or sale of a security," a requirement for a finding of liability under Exchange Act Section 10(b) and Rule 10b-5. We also find that there is insufficient evidence to conclude by a preponderance of the evidence that Goodman violated Conduct Rules 2110 and 2120 with respect to GM and AM. Thus, we reverse the DBCC's findings of violation under cause one as to GM and AM.

The DBCC also found Goodman liable in his managerial capacity for fraud with respect to Hibbard's sales abuse practices. We disagree. The record contains no evidence of sales practice abuses by Goodman in his managerial capacity. The brokers who testified at the DBCC hearing did not work for Goodman and were unable to give any specific examples of Goodman's engaging

139 F.2d 434, 437 (2d Cir. 1943), cert. denied, 321 U.S. 786 (1944) (finding that registered representatives dealing in OTC stocks are under a special duty not to take advantage of a customer's trust and confidence). By making a recommendation, a broker implicitly represents to a buyer of securities that he has a reasonable basis for the recommendation. See Hanly v. SEC, 415 F.2d 589 (2d Cir. 1969). The United States Court of Appeals for the Second Circuit held in Hanly that "brokers and salesmen are under a duty to investigate . . . . Thus a salesman cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant. He must analyze sales literature and must not blindly accept recommendation[s] made therein." Id. at 595-96. The court in Hanly also stated that:

> [T]he standards by which [brokers] . . . must be judged are strict. [A broker] cannot recommend a security unless there is an adequate and reasonable basis for such recommendation. He must disclose facts which he knows and those which are reasonably ascertainable. By his recommendation he implies that a reasonable investigation has been made and that his recommendation rests on the conclusions based on such investigation.

Id. at 597.

The facts demonstrate that Goodman acted with scienter (i.e., he acted knowingly and or recklessly), which is a necessary element to establish a violation under Exchange Act Section 10(b) and Rule 10b-5.[23] Scienter is a "mental state embracing intent to deceive, manipulate, or defraud."[24] At the appeal hearing, Goodman referred to the higher level of professionalism that he had experienced at firms with which he has been associated since leaving Hibbard, thereby implying that his training at Hibbard had been inadequate. We reject any attempt to assert a defense of lack of training. "'Those who hold themselves out as professionals with specialized knowledge and skill to furnish guidance cannot be heard to claim youth or inexperience when faced with charges of violations of the anti-fraud provisions of the securities laws.'" SEC v. Hasho,

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in fraud in a managerial capacity "in connection with the purchase or sale of [a] security," one of the elements that must be satisfied in order to find a violation of Rule 10b-5. Moreover, there is no evidence that the brokers who were managed by Goodman engaged in any fraudulent activity in violation of Exchange Act Section 10(b) or Rule 10b-5. Accordingly, we reverse the DBCC's finding of liability and dismiss the allegations in cause one related to Goodman's managerial activities.

[23] See ITT v. Cornfeld, 619 F.2d 909 (2d Cir. 1980); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023-1025 (6th Cir. 1979); First Virginia Bancshares v. Benson, 559 F. 2d 1307, 1314 (5th Cir. 1977), cert denied, 435 U.S. 952 (1978); In re Universal Heritage Investments Corporation, 47 S.E.C. 837 (1982).

[24] See Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

784 F. Supp. 1059,1108 (S.D.N.Y. 1992) (quoting In re Ramey Kelly Corp., 39 S.E.C. 756 (1960)). Neither youth nor inexperience can excuse a registered representative's breach of his duty to his customers. Hasho, supra, at 1108. Moreover, such youth or inexperience does not excuse violations of the anti-fraud provisions of the securities laws. Id. Thus, Goodman cannot hide behind reliance on deficiencies in Hibbard's training to insulate him from liability. Id. Goodman's flagrant misconduct with respect to three of the four complaining customers (MG, RT, and ER) supports the conclusion that he acted knowingly and or recklessly in violation of the anti-fraud provisions of the federal securities laws.

Goodman recommended purchases of stocks to customers MG, RT, and ER without having an adequate basis for such recommendations. See Hasho, supra; Hanly, supra. The Hibbard house stocks that Goodman recommended were low-priced, highly speculative stocks involving untested companies that had substantial negative financial information in their public filings. Goodman used "internal summaries" that had been drafted by Hibbard's research department and contained only optimistic information about the companies' prospects as a basis for recommending Hibbard house stocks. In contrast to those Hibbard-generated documents, the public filings available on the Hibbard house stocks during the relevant period showed that there was absolutely no basis for such optimistic representations. "'Where [a] salesman lacks essential information about a security, he should disclose this as well as the risks which arise from his lack of information.'" Hasho at 1107 (quoting Hanly at 597). We conclude that Goodman deliberately ignored that which he had a duty to know. As a result, when the transactions were completed, customers MG, RT, and ER were left with rosy expectations of gain without risk. See Berko v. SEC, 316 F.2d 137, 143 (2d Cir. 1963).

Goodman failed to disclose and/or misrepresented to RT, MG, and ER the risks of purchasing speculative OTC stocks and the Hibbard house stocks in particular. Goodman completely failed to advise ER, MG, and RT about the high degree of risk involved in purchasing shares of American Recreation, U.S. Transportation Systems, Consolidated Technology, and Process Equipment, all of which were extremely speculative securities. At no time did Goodman disclose known or reasonably ascertainable adverse information or give any word of caution as to the risks involved. Id.

The record establishes that Goodman failed to disclose to ER, MG, and RT material negative information about the Hibbard house stocks, as detailed above. The relevant annual reports and quarterly reports for each company that are contained in the record include material negative information that should have been disclosed to the customers before they made any investment decisions. Notwithstanding that this information was available in public filings, Goodman misrepresented the prospects of each of the securities by describing them only in extremely optimistic terms. Moreover, although Goodman testified that as a general matter he consulted the companies' annual reports that were on file at Hibbard's Pittsburgh branch, he was unable to testify as to even one specific negative disclosure about the Hibbard house stocks that he had given to any of the complaining customers.

Goodman grossly misrepresented the prospects of the Hibbard house stocks that he recommended to ER, MG, and RT through the use of baseless predictions of substantial price increases, unwarranted hyperbole, and other misrepresentations as noted above.[25] Predictions of substantial price increases are actionable absent a reasonable basis for the prediction. See SEC v. R.A. Holman & Co., 366 F.2d 456 (2d Cir. 1966) cert. denied, 389 U.S. 991 (1967); SEC v. Wellshire Securities, 737 F. Supp. 251 (S.D.N.Y. 1990); Hiller v. SEC, 429 F.2d 856 (2d Cir. 1970). The fraud is not remedied in cases in which the positive predictions about the future performance of securities are cast as opinion or possibilities rather than as guarantees. Hasho, supra, at 1109; Hiller, supra, at 858. Moreover, the record is devoid of evidence that Goodman conducted any independent research on the Hibbard house stocks. Goodman gave specific dollar price predictions to ER (with respect to Process Equipment) and to RT (with respect to Great American, U.S. Transportation, and Consolidated Technology).

Goodman advised his customers that they would earn high percentage returns in short periods of time (between two weeks and one year). In addition, Goodman used unwarranted statements to tout the stocks that he was recommending, by using the following superlatives: "hottest stock he had ever [run] into"; and "you can't lose." Goodman also made guarantees of profits to RT by representing that the stocks he purchased from Goodman would do well and would increase in price in a short period of time.[26]

Finally, Goodman discouraged customers MG and RT from selling Hibbard house stocks without having a reasonable basis for doing so. Goodman sought to reassure MG regarding his ambivalence about whether to sell his Process Equipment stock by advising him that he (Goodman) would tell him when to sell. Further, when MG complained to Goodman about the steady decline in value of his Process Equipment and U.S. Transportation stocks, incredibly, Goodman told him to invest more money to lower his average cost per share. When RT told Goodman that he wanted to sell Consolidated Technology, Goodman told him that he (RT) would have to pay large commissions to Hibbard and that he would lose a substantial portion of his investment if he sold the stock.

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[25] Goodman even encouraged RT and ER to obtain funds from other sources to purchase the speculative and risky Hibbard house stocks. On a number of occasions, Goodman urged customers: (1) to liquidate other (non-Hibbard) securities investments or funds for their children's education; or (2) to take money out of bank accounts or businesses in order to invest in the highly speculative and risky Hibbard house stocks that he was touting.

[26] Additionally, Goodman led RT to believe that he possessed favorable inside information about securities that he recommended, falsely bolstering his recommendations by lending an air of certainty and authority to them. "The false assertion by a registered representative, in connection with the offer, purchase or sale of securities, that the registered representative possesses 'inside' or material non-public information regarding an issuer, is a material misstatement violative of the anti-fraud provisions of the federal securities laws." See Hasho, supra, at 1109; see also e.g., Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 312 (1985); Hiller, supra, at 857-58.

B. Unauthorized Transactions (Cause Two)

Cause two of the complaint alleged that Goodman, in his managerial capacity, facilitated unauthorized purchases by other brokers, and that he effected unauthorized purchases in his individual capacity as a registered representative, in violation of Conduct Rules 2110 and 2120. We dismiss the allegations in cause two as they relate to Goodman. We affirm the DBCC's finding that there is insufficient evidence that Goodman facilitated unauthorized transactions by other brokers at Hibbard. In addition, we affirm the DBCC's finding that there is insufficient evidence to find that Goodman effected an unauthorized transaction in GM's and AM's account.

C. Supervisory Procedures (Cause Three)

Cause three of the complaint alleged that Goodman failed to establish, implement and enforce reasonable procedures to deter or prevent the violations described in causes one and two of the complaint, in violation of Conduct Rules 2110 and 3110. We affirm the DBCC's dismissal of cause three as it relates to Goodman.[27] We agree with the DBCC's reasoning that, although Goodman carried the title of "branch manager" and held himself out to the public as a "branch manager," he was not acting as a branch manager in any real sense. Cf. In re Christopher J. Benz, 52 S.E.C. 1280 (1997).

IV. Sanctions

At the outset, we note that the DBCC found Goodman liable for sales practice abuses in both his managerial and individual capacities (cause one). With respect to Goodman's liability in a managerial capacity, the DBCC found that Goodman was an "integral cog" in the fraudulent Hibbard sales system as implemented in the Pittsburgh office. The DBCC imposed the following sanctions on Goodman: censure; $75,000 fine; bar from association with any NASD member in any capacity, and one-third of the DBCC hearing costs (which totaled $18,496.14).

Notwithstanding our finding that Goodman was not liable for fraud in a managerial capacity, we affirm the DBCC's $75,000 fine and bar in all capacities. We conclude that a bar is essential in this matter based on the number of aggravating factors (as discussed below) and the fact that Goodman's misconduct in an individual capacity was intentional or reckless.[28] We are

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[27] The DBCC found Goodman liable under cause one for sales practice abuses in his managerial capacity. The DBCC dismissed cause three because the DBCC reasoned that it would not be appropriate to base the supervisory violation on the same acts and practices and that the activities were more appropriately addressed in cause one. Contrary to the DBCC, we have determined that the evidence is insufficient to find Goodman liable in a managerial capacity in connection with the allegations in cause one.

[28] The sanctions are consistent with the NASD Sanction Guideline ("Guideline") for Misrepresentations or Material Omissions of Fact. See Guidelines (1996 ed.) at 34. Goodman's

also mindful of our duty to impose sanctions that are designed to protect the general public and that will have a deterrent effect on others who might attempt to engage in the same activities. In reaching these sanctions, we have considered that Goodman repeatedly engaged in abusive sales practices and violated his customers' trust for his personal benefit. The evidence demonstrates that in dealing with customers MG, ER, and RT, Goodman consistently engaged in fraud in order to sell Hibbard house stocks that would generate substantial commissions for himself. In assessing sanctions, we have also consulted the principal considerations under the Sanction Guideline for misrepresentations or material omissions of fact and have taken into consideration the following aggravating factors: that Goodman used high-pressure sales tactics; that Goodman engaged in numerous material misrepresentations and omissions; and that Goodman's misrepresentations and omissions were intentional or reckless.

Other aggravating factors include the evasive and misleading nature of Goodman's testimony during the DBCC and NAC proceedings and Goodman's past disciplinary history. Goodman's testimony is replete with general denials of any wrongdoing. With respect to each example of a sales practice abuse, Goodman either generally denied the allegation or testified that the customer's recollections of events were incorrect. We find Goodman's consistent lack of candor during these proceedings to be disturbing.

Moreover, Goodman consistently has failed to take responsibility for his sales practice violations. He testified that he had conducted his own research by consulting the relevant filings, yet he was unable to testify about even one negative disclosure that he had made to any of his customers about any of the stocks at issue. We also note that Goodman's past disciplinary history (see n. 10, supra), involved findings of material misrepresentations and omissions strikingly similar to the violations in this matter. We also cannot ignore the fact that Goodman demonstrated an extraordinary lack of candor during his testimony at the DBCC hearing about the circumstances that led to the findings of misconduct in a prior disciplinary action. Taken together, these aggravating factors further justify the sanctions that we are imposing in this matter.[29]

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attorney argued at the appeal hearing that any sanctions imposed should be commensurate with settlements that were entered into by brokers at another Hibbard branch. It is well established, however, that respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received. See In re Richard J. Puccio, 52 S.E.C. 1041 (1995). The Commission has held that respondents who settle typically receive lesser sanctions than they otherwise might have received "because, in fashioning [sanctions], the NASD is entitled to take into account pragmatic considerations such as the avoidance of time-and-staff-consuming adversary proceedings." In re Brian L. Gibbons, 52 S.E.C. 791 (1996), aff'd mem., 112 F. 3d 516 (9th Cir. 1997).

[29] We reject Goodman's argument on appeal that his misconduct should be mitigated because of the types of customers with whom he was dealing. Goodman's attorney implied in his argument on appeal that the complaining customers were sophisticated investors and that they therefore were aware of the speculative nature of the securities in which they had invested. An investor's level of sophistication in financial matters and knowledge that a security is speculative,

Accordingly, Goodman is fined $75,000 and barred from association with any NASD member firm in any capacity.[30] The bar is effective immediately upon the issuance of this decision. Goodman is also assessed one-third of the DBCC hearing costs (which totaled $18,496.14), or $6,165.38.

On Behalf of the National Adjudicatory Council,

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Joan C. Conley, Senior Vice President and
Corporate Secretary

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however, are not defenses to sales practice abuses. See In re Armstrong Jones & Co., 43 S.E.C. 73 (1968), aff'd, 421 F. 2d 359 (6th Cir. 1970), cert. denied, 398 U.S. 958 (1970). See In re William Kicklighter, 51 S.E.C. 1 (1991), aff'd sub nom. Brown v. SEC, 992 F.2d 328 (11th Cir. 1993); Hanley, supra. Additionally, the entire record demonstrates that, as a direct result of Goodman's sales practice abuses, customers MG, RT, and ER were not aware of the true nature of their investments with Goodman. Goodman simply gave them no information from which they could accurately assess the risk involved in these investments.

[30] Consistent with our newly adopted policy regarding censures, we have eliminated the censure imposed by the DBCC. Under this new policy, we have determined not to impose censures in cases in which respondents are barred or suspended, since bars and suspensions are severe sanctions that already signify the NASD's disapproval of a respondent's misconduct. See Notice to Members 99-59 (July 1999).

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.