BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE
NASD REGULATION, INC.

In the Matter of District Business Conduct Committee for District No. 2, Complainant, vs. Lori Sue Koppel-Heath 1306 East Sonoma Drive Atladena, California 91001 and 46 Glen Echo Dove Canyon, California 92679, Respondent.	DECISION Complaint No. C02950044 District No. 2 Dated: January 6, 1998

Lori Sue Koppel-Heath ("Koppel-Heath") has appealed the July 26, 1996 Decision of the District Business Conduct Committee for District 2 ("DBCC") pursuant to Procedural Rule 9310 of NASD's Code of Procedure (now superseded)[1]. After a review of the entire record in this matter, we find that Koppel-Heath recommended unsuitable mutual fund and unit investment trust switches, as more fully described below.

We hold that Koppel-Heath violated Conduct Rules 2110 and 2310 (formerly Article III, Sections 1 and 2 of the Rules of Fair Practice) by recommending purchases, sales and redemptions of mutual funds, unit investment trust shares and other investments in public customer accounts without having reasonable grounds for believing that they were suitable for

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

these customers in view of the size, frequency and nature of the recommended transactions, and the facts disclosed by those customers as to their other securities holdings, financial situation, circumstances and needs. We order that Koppel-Heath be censured, fined $59,021.31, suspended for 30 days as a general securities representative, required to requalify by examination as a general securities representative, and assessed costs of the DBCC hearing in the amount of $1,143.

Background

Koppel-Heath entered the securities industry in 1983, and was associated with Dean Witter Reynolds, Inc. ("Dean Witter") from April 23, 1990 through May 8, 1992, as a general securities representative in its Burbank, California branch office. Koppel-Heath currently is associated with another member of this Association and her registration currently is effective.

Facts

Assistance League of Southern California. The Assistance League of Southern California ("Assistance League") is a nonprofit, charitable organization based in Los Angeles, California. In 1991, the Assistance League's President was Beverly Thrall ("Thrall"), its Finance Chairman was Jean Roeschlaub ("Roeschlaub"), and its Executive Director was Alice Fitzpatrick ("Fitzpatrick").

The Assistance League opened an account with Koppel-Heath in June 1991, shortly after Thrall attended an investment seminar where Koppel-Heath spoke. The Assistance League opened its account by depositing approximately $2.35 million. In December 1991, the Assistance League deposited an additional $500,000.

Before the Assistance League opened an account with Koppel-Heath, Van Deventer & Hoch managed its investments. While Koppel-Heath was soliciting the Assistance League's business, she wrote a letter to Thrall, Roeschlaub, and Fitzpatrick in which she discussed the fees that the Assistance League was paying at Van Deventer & Hoch. Koppel-Heath represented that two model portfolios that the Assistance League could purchase through Dean Witter "would totally eliminate fees and increase your total portfolio income."

The Assistance League transactions at issue in the complaint occurred over a period of approximately eight months, from July 1991 to February 1992. During this time, the Assistance League purchased numerous mutual funds and unit investment trusts ("UITs"), sold them, and purchased new mutual funds.

Gottesman/Brown Accounts. Judith Gottesman ("Gottesman") and Dorris Brown ("Brown") became customers of Koppel-Heath in August 1990, shortly after they heard Koppel-Heath speak at an investment seminar. Gottesman and Brown opened a joint account with Koppel-Heath, account no. 219-24835 (the "Gottesman/Brown Account") and Gottesman opened an individual account with her, account no. 219-25453 (the "Gottesman Account").

In 1990, Gottesman and Brown owned and operated an escrow services business as partners. Before entering the escrow business, Gottesman taught elementary school for several years and was also employed as a realtor. Brown taught junior high school for nine years before becoming an escrow officer. Gottesman and Brown testified that neither of them had knowledge of investing and that they were essentially novices. Their previous investment experience was with another broker, who made all of the investment decisions for them and recommended limited trading activity.

Over a period of four and one-half months, from August 1990 through January 1991, Gottesman and Brown purchased and sold several mutual funds. The complaint alleges that these purchases and sales were unsuitable switches.

In the Gottesman/Brown Account and the Gottesman Account, from August 1990 through April 1991, Gottesman and Brown purchased eight different mutual funds that all had an investment objective of providing income exempt from California personal tax by investing in municipal securities. The complaint alleges that Koppel-Heath made unsuitable recommendations in that she failed to obtain reduced commissions when Gottesman and Brown purchased these similar mutual funds.

Discussion

The Securities and Exchange Commission ("SEC") and NASD have long held that excessive turnover rates of mutual funds are not consistent with the mutual fund concept of investment.

> Mutual fund shares generally are suitable only as long-term investments and cannot be regarded as a proper vehicle for short-term trading, especially where such trading involves new sales loads. A pattern of switches from one fund to another by several customers of a registered representative, where there is no indication of a change in the investment objectives of the customers and where new sales loads are incurred, is not reconcilable with the concept of suitability.

In re Winston H. Kinderdick, 46 S.E.C. 636, 639 (1976); see also In re Harold R. Fenocchio, 46 S.E.C. 279, 281 (1976) (SEC relied on NASD determination that because mutual funds have a high initial sales charge, registered representatives should recommend and sell them as long-term investment vehicles -- if clients desire to adjust readily to changing markets, registered representatives should recommend other investment vehicles); In re Investment Management & Research, Inc., No. C3B940028, National Business Conduct Committee, at 5-6, 1997 NASD Discip. LEXIS 43, at *10-11 (NBCC July 25, 1997) (factors to be considered in analyzing mutual fund switching allegations included: pattern and frequency of switches; characteristics of the mutual funds being redeemed and purchased; amount of the load; economic feasibility of the customer making a profit; registered representative's stated reasons for making each switch,

including registered representative's decision to trade part or all of a customer's holdings; whether there was a valid investment purpose for the switch in light of the customer's financial circumstances and investment objectives, including whether there had been a change in the customer's financial circumstances and investment objectives; and the customer's reason for making the switch), appeal filed, SEC Admin. Proc. File No. 3-9394 (appealed by respondent Krull on Aug. 27, 1997).

The SEC has stated that where the record establishes a pattern of switching transactions in similar mutual funds, "it is incumbent upon the person responsible to demonstrate the unusual circumstances" that justify such a "clear departure from the manner in which investments in mutual funds are normally made." Kinderdick, 46 S.E.C. at 639. The registered representative must rebut the presumption that the recommended transactions were unsuitable for the customer. See id.; In re Charles E. Marland & Co., Inc., 45 S.E.C. 632, 636 (1974) (pattern of switches in customer accounts justified presumption of improper recommendations that respondent failed to rebut).

In March 1994, the NASD issued Notice to Members 94-16 in order to remind members of their mutual fund sales practice obligations. Among other things, NASD reminded members of their obligation to evaluate the net investment advantage of any recommended mutual fund switch. The Notice stated that members should consider whether the transaction fees would undermine the financial gain or investment objective to be achieved by the switch. The Notice also reminded members that registered representatives' recommendations to engage in market timing transactions should be made, if at all, for transactions within a family of funds or where the trade has virtually no transaction costs associated with it.

Transactions in the Assistance League Account. Cause one alleges that from about July 1, 1991 to about February 20, 1992, Koppel-Heath recommended purchases, sales, and redemptions of mutual funds and UIT shares in the Assistance League's account as detailed in Schedule A to the complaint, also attached to this decision. This cause further alleges that Koppel-Heath made these recommendations without having reasonable grounds for believing that they were suitable for the Assistance League in view of the size, frequency and nature of the recommended transactions and the facts disclosed by the Assistance League as to its other securities holdings, financial situation, circumstances, and needs.

The DBCC found that Koppel-Heath recommended all the transactions listed on Schedule A. We uphold this finding, which is well supported in the record. Koppel-Heath's answer to the complaint admitted that she recommended all the transactions referenced in the complaint. Her attorney stipulated to the same fact at the DBCC hearing. In addition, Thrall testified that Koppel-Heath recommended all of the transactions in the Assistance League's account.

To evaluate the allegations of switching, we will follow the organization of Schedule A and review seven groups of transactions in the Assistance League's account. Set one involves

the purchase of $249,999[2] of government securities UIT, holding it for 45 days, and then purchasing 8 mutual funds. The UIT purchase carried a sales load of 1% and two of the mutual funds carried front-end loads of 3 2% and 4 2%. The remaining mutual funds had contingent deferred sales loads for early share redemptions.

Set two consists of the purchase of $279,999 of two government securities UITs, holding the UITs for 66 days, and purchasing six mutual funds. The UIT purchases carried sales loads of 1.4% and 1% and four of the mutual funds carried front-end sales loads of 4%, 4%, 3:%, and 4 2%. The remaining two mutual funds had contingent deferred sales loads for early share redemptions. We find that the switches in sets one and two were unsuitable because of the short holding periods and the substantial sales charges incurred by the Assistance League.

Set three involves the purchase of $49,994 of the First Australia Liquidity Fund, holding it for 93 days, and purchasing a mutual fund. The First Australia Liquidity Fund carried a sales charge of 3% and the mutual fund had a contingent deferred sales load for early share redemptions. We find that the switches in set three were unsuitable because of the short holding period and the 3% sales load paid by the Assistance League.

Set four consists of the purchase of $199,967 of six Dean Witter mutual funds, holding the mutual funds for 130 days, and purchasing five MFS Lifetime Investment Program ("MFS") mutual funds. All six of the Dean Witter mutual funds carried contingent deferred sales loads, starting at 5% in the first year and declining at an annual rate of approximately 1% for early share redemptions. The Assistance League paid a 5% load on all six of the Dean Witter mutual funds and all five of the MFS mutual funds had contingent deferred sales loads. We find that the switches in set four were unsuitable because the Assistance League paid high sales loads when it sold the Dean Witter funds after a short holding period.

Sets five, six and seven share the same basic characteristics and we will discuss them together. These sets include the purchase of approximately $375,000 of seven Dean Witter mutual funds, holding them between 168 and 228 days, and purchasing 19 new mutual funds. All of these Dean Witter mutual funds carried contingent deferred sales loads that declined annually at a rate of approximately 1% for early share redemptions. When the Assistance League sold these Dean Witter mutual funds, they paid a 5% load on four of them and a 32% load on the fifth. Twelve of the new mutual funds carried front-end sales loads of between 32% and 4:%. We find that the switches in sets five, six and seven were unsuitable because the Assistance League held the mutual funds for a short time and paid high sales loads, often on both the sale of the initial investment and the purchase of the subsequent investment.

For all seven sets of transactions, Koppel-Heath has not rebutted the presumption that the switching was unsuitable. Koppel-Heath testified that the Assistance League decided to switch between the initial and the subsequent investments to take its profits, diversify out of Dean

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[2] We have rounded off the figures in this section to the nearest dollar.

Witter funds, or to change to mutual funds -- the MFS funds -- where the Assistance League could later switch without fees to other mutual funds within that family of funds, among other reasons. In contrast, Thrall testified that the Assistance League relied on Koppel-Heath entirely to make its investment decisions and that Koppel-Heath did not tell the Assistance League about the sales charges. The DBCC found Thrall a more credible witness, and we uphold this determination. See In re Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992).

We also find that Thrall's testimony is consistent with claims made in Koppel-Heath's solicitation letter to the Assistance League. In that April 25, 1991 letter, Koppel-Heath misled the Assistance League by stating that it would be paying no fees:

> Your approximated total current fees are 43,600. Thus, because Dean Witter funds are 12 B-1 funds; there are no charges to invest in these funds; these mutual funds may be diversified amongst several different investment strategies at no charge, thereby totally eliminating your current annual fees of 43,600. Further, the T-Bill unit trust does not have any fees to purchase or sell.

(emphasis in original). Contrary to Koppel-Heath's assurance, the treasury bill UITs that the Assistance League purchased on July 1, 1991, had sales charges of 13% and 23%.

Unsuitability Based on High Level of Risk. The DBCC decision also found that four of the mutual funds Koppel-Heath recommended were unsuitable for the Assistance League based on the level of risk they posed. Thrall testified that the Assistance League was investing approximately 2.5 million dollars for only one year, at which time the Assistance League would use the funds to purchase a facility for one of its charitable programs. In light of this investment objective, we agree with the DBCC and find that Koppel-Heath's recommendations to invest in the MFS - Lifetime High Income Trust was unsuitable. The MFS - Lifetime High Income Trust had speculative characteristics that made this investment too risky for the Assistance League.[3]

We disagree with the DBCC that the MFS - Lifetime Government Income Plus Trust,

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[3] The prospectus for the MFS Lifetime Investment Program notes that for the High Income Trust mutual fund:

> Securities offering the high current income sought by the High Income Trust are ordinarily in the lower rating categories of recognized rating agencies (that is, ratings of Baa or lower by Moody's or BBB or lower by S&P) or are unrated and may involve greater volatility of price and risk of principal and income than securities in the higher rating categories. In particular, securities rated BBB by S&P or Baa by Moody's (and comparable unrated securities) are considered to have speculative characteristics. Securities rated lower than BBB by S&P or Baa by Moody's and comparable unrated securities (commonly known as "junk bonds") are considered speculative.

Putnam High Income Government Trust, and MFS Government Income Plus Trust were unsuitable. Based on the record before us, the evidence does not establish that these investments involved an inappropriately high level of risk.[4]

Transactions in Gottesman and Brown's Accounts. Cause two alleges that from about August 28, 1990 to about January 11, 1991, Koppel-Heath recommended purchases, sales and redemptions of mutual funds and unit investment trust shares in the Gottesman/Brown Account as detailed in Schedule B to the complaint.[5] This cause further alleges that Koppel-Heath made these recommendations without having reasonable grounds for believing that they were suitable for customers Gottesman and Brown in view of the size, frequency and nature of the recommended transactions, and the facts disclosed by these customers as to their other securities holdings, financial situation, circumstances, and needs.

The record establishes that Koppel-Heath recommended all the transactions in question to Gottesman and Brown. Koppel-Heath admitted this fact in her answer to the complaint. Moreover, Gottesman testified that Koppel-Heath recommended all the transactions, and Koppel-Heath's testimony did not contradict this fact.

The complaint divided the transactions in question into four sets. The first set of transactions involves holding the First Australia Liquidity Fund for 47 days, selling approximately half of Gottesman and Brown's holdings in this fund, and purchasing nine mutual funds. Five of these mutual funds carried front-end sales loads of 42%, 42%, 22%, 4:%, and 4:%. The remaining four mutual funds had contingent deferred sales loads for early share redemptions. We find that the switches in this set were unsuitable because of the short holding period and the significant sales charges involved in purchasing the nine mutual funds.

The second set of transactions consists of purchasing approximately $39,999 of a Sears Government Investment Trust, selling it 88 days later, and purchasing two mutual funds. The purchase of the UIT included a sales load of 23% and the two mutual funds carried contingent deferred sales loads for early share redemptions. We find that the switches in set two were unsuitable because of the short holding period and the 23% sales charge paid to purchase the UIT.[6]

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[4] Although these three funds engaged in options transactions, the purpose of such transactions included hedging against declines in the value of securities in the portfolio or increases in the costs of securities to be acquired by the portfolio. Our finding as to riskiness is independent of and has no effect on our previous findings that each of these three investments was included in unsuitable switches as part of the first and second sets of transactions.

[5] Schedules B, C and D are all attached to this decision.

[6] Koppel-Heath claimed that she recommended this fund to Gottesman and Brown as a temporary measure, while Gottesman and Brown decided what to do with the funds. Based on the sales load, we find this short-term recommendation unsuitable.

The third set of transactions consists of purchasing $40,000 in a Unit Government Securities Income Fund, selling it 88 days later, and purchasing the Dean Witter Tax Exempt Securities Fund. The purchase of the UIT included a sales load of 12% and the purchase of the mutual fund included a front-end sales load of 22%. We find that the switches in set three were unsuitable because of the short holding period and the total sales charges paid by Gottesman and Brown.

The fourth set of transactions consists of purchasing $30,005 in the Dean Witter Government Securities Plus Fund, selling most of the holdings in that fund 137 days later, and purchasing the Colonial California Tax Exempt Trust Fund, a mutual fund. In selling most of the Dean Witter Government Securities Plus Fund, Gottesman and Brown paid a contingent deferred sales load of 5%. In purchasing the Colonial mutual fund, Gottesman and Brown paid a front-end sales load of 42%. We find that the switches in set four were unsuitable because of the combined sales loads of 92%, which Gottesman and Brown incurred over a relatively short period of time.

For these accounts, Koppel-Heath also did not rebut the presumption that these switches were unsuitable. Gottesman testified that she and Brown were essentially incapable of making their own investment decisions and relied on Koppel-Heath. Gottesman also testified that Koppel-Heath told her there were no sales charges associated with any of the transactions. In contrast, Koppel-Heath testified that Gottesman and Brown had the idea to switch investments and that she informed Gottesman and Brown about fees. We follow the DBCC's finding that Gottesman was the more credible witness. This conclusion is reinforced by the fact that Gottesman's testimony is essentially similar to Thrall's testimony that Thrall relied on Koppel-Heath and was told there would be no fees charged for the transactions.

Rights of Accumulation for Gottesman and Brown. Cause two also alleges that from February 13, 1990 to April 18, 1991, Koppel-Heath recommended to Gottesman and Brown purchases of mutual fund shares in eight different investment companies variously for the Gottesman/Brown Account and the Gottesman Account. Cause two alleges that Koppel-Heath failed to disclose rights of accumulation to Gottesman and Brown, thereby depriving them of significant sales charge discounts as detailed in Schedule C to the complaint.

A customer's investment of large amounts of money in a mutual fund over a relatively short period of time imposes an obligation on a registered representative to obtain the lowest possible price for the customer, including using Letters of Intent and obtaining rights of accumulation. See In re Harold R. Fenocchio, 46 S.E.C. 279, 282-83 (1976). NASD Notice to Members 94-16, discussed above, reminded members that recommending diversification among several mutual funds with similar investment objectives may not be in the best interests of a customer, especially if the customer is thereby deprived of a breakpoint.[7]

[7] Mutual funds generally discount commissions based upon the size of a customer's purchase. The levels at which the discounts become effective are called "breakpoints." The size

From August 28, 1990 through April 18, 1991, Gottesman and Brown purchased eight different mutual funds in a series of 20 purchase transactions in both the Gottesman/Brown account and the Gottesman account. The investment objective of these eight funds (collectively, the "California Tax Free Funds") was nearly identical, to provide income exempt from California personal tax by investing in municipal securities. The total amount Gottesman and Brown invested in the California Tax Free Funds was $571,018.

Each of the California Tax Free Funds incrementally reduced its sales load on purchases that reached thresholds of $100,000, $250,000 and $500,000. Gottesman and Brown, however, were not given the benefit of any of these rights of accumulation. If, as demonstrated in Schedule C, Gottesman and Brown had invested in only one of these funds, they would have paid sales charges of approximately $17,271, which is $7,700 less than what they actually paid.

The parties gave conflicting testimony on why Gottesman and Brown purchased eight different California Tax Free Funds. Gottesman testified that she relied "one-hundred percent" on Koppel-Heath in making investment decisions in her accounts. Gottesman also testified that Koppel-Heath told her there were no sales charges on Gottesman's investments. Koppel-Heath testified that Gottesman and Brown expressed a desire not to put more than $50,000 in any one investment. Koppel-Heath claimed that Gottesman and Brown "wanted to have different types of mutual funds in different mutual fund families that they could switch to."

The DBCC found Koppel-Heath's testimony implausible. We agree with this credibility determination. See Ornstein, 51 S.E.C. at 137. In addition, we agree with the DBCC's conclusion that Koppel-Heath had no reasonable grounds for believing that the California Tax Free Funds she recommended were suitable.

Procedural Issues

The DBCC Correctly Denied Koppel-Heath's Request To Continue the June 17, 1996 Hearing. Koppel-Heath contends that she was denied a fair hearing before the DBCC because her request for a continuance was denied by the DBCC. We find that the DBCC's ruling was not an abuse of discretion. The relevant facts regarding Koppel-Heath's request for a continuance are as follows.

On November 3, 1995, the DBCC issued and served the complaint on Koppel-Heath. On December 5, 1995, Koppel-Heath answered the complaint. At this time, Donald P. Wagner, Esq.

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of a single purchase may trigger a breakpoint. Customers may also be able to achieve breakpoints through the use of a Letter of Intent, which is a statement given to the fund by the customer that indicates the customer's intent to purchase a certain amount of shares over a 13-month period. Mutual funds also may give customers "rights of accumulation" when their aggregate purchases reach a certain level, which may trigger a breakpoint.

represented Koppel-Heath. On December 4, 1995, the DBCC notified the parties that it would conduct a hearing on January 17, 1995. The complaint also named a second respondent, Richard Francis Norris ("Norris"). In response to Norris' motion to continue the hearing, the DBCC rescheduled the hearing for February 14, 1996.

On February 6, 1996, H. Thomas Fehn ("Fehn") wrote to the District No. 2 attorney ("Staff Attorney") responsible for this case, advised that he was now representing Koppel-Heath, and requested a continuance of the hearing date to February 21 or dates thereafter. In this first request for a continuance, Fehn explained that he would be representing a party in an arbitration on February 14. Although the record is incomplete as to the immediate response, on April 18, 1996, the DBCC issued a Notice of Hearing that set a new hearing date of May 29, 1996. In the meantime, Norris submitted an Offer of Settlement that the DBCC approved, and the NBCC subsequently accepted on April 26, 1996. On May 9, 1996, Fehn made a second request to the Staff Attorney that the hearing be postponed until July 22 or later because Fehn was representing a party in an arbitration in Florida on May 29. On May 23, 1996, the Staff Attorney notified Fehn that the DBCC hearing panel had postponed the hearing until June 17, 1996, based on Fehn's assurance that he and Koppel-Heath would be available on June 17 and that they would request no further continuances.

On June 6, 1996, Fehn requested a third postponement of the hearing date, because Koppel-Heath's doctor recommended a delay. Fehn enclosed a copy of Dr. Kris V. Iyer's ("Iyer") note, which explained that: Koppel-Heath had a carcinoma of the thyroid; her thyroid medications had affected her heart; and additional tests and consultations were taking place. Iyer recommended that, under these circumstances, Koppel-Heath should avoid stress for two more months.

The DBCC denied Koppel-Heath's request to continue the June 17 hearing date. In a letter to the parties, the DBCC explained that it was concerned about Koppel-Heath's health and would make special arrangements so that Koppel-Heath could rest during a long break in the one-day hearing. The DBCC noted that the Staff Attorney opposed Koppel-Heath's request and stated that Koppel-Heath had, within the last two weeks, requested the opportunity to explain her story to NASD Regulation staff.

In NASD Regulation disciplinary proceedings, the DBCC has broad discretion in determining whether to grant a request for continuance, based upon the particular facts and circumstances presented. See In re Falcon Trading Group, Ltd., Exchange Act Rel. No. 36619 (Dec. 21, 1995), aff'd, 102 F.3d 579, 581 (D.C. Cir. 1996). In reviewing the denial of a motion for continuance, we ask whether the denial constituted "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." In re Richard W. Suter, 47 S.E.C. 951, 963 (1983) (quoting Morris v. Slappy, 461 U.S. 1, 11 (1983)).

We uphold the DBCC's ruling. Koppel-Heath's request for a continuance was based on the anticipated stress that Koppel-Heath would suffer if she participated in the hearing. The DBCC made arrangements to accommodate Koppel-Heath's condition and correctly balanced Koppel-Heath's request against Fehn's recent assurance that Koppel-Heath would be ready to

proceed on June 17 and Koppel-Heath's recent offer to discuss the case with NASD Regulation staff. In light of the ample time Koppel-Heath and Fehn had to prepare for the hearing, the DBCC was justified in refusing further continuances.

On appeal Koppel-Heath asserts that her medical condition prevented her from meaningfully assisting her attorney in preparing her case. This assertion lacks any contemporaneous support in the record. At the hearing, Fehn did not renew his request for a continuance. He did not claim that Koppel-Heath had been unable to assist him in preparing her defense. In fact, Fehn stated that Koppel-Heath would not need an extended break during the hearing. In addition, Koppel-Heath testified at the hearing and responded to the allegations regarding all the accounts at issue. Fehn based his request to continue the June 17 hearing only on Koppel-Heath's medical condition, not on a lack of preparedness to proceed with the hearing. Based on the record before it, the DBCC correctly denied the continuance request.

Koppel-Heath also requested a continuance of the October 9, 1997 NBCC subcommittee ("Subcommittee") hearing in this case.[8] Koppel-Heath claimed that her medical condition prevented her from attending the hearing. The Subcommittee denied the continuance request and Koppel-Heath and her counsel elected to participate in the hearing via telephone. We ratify the Subcommittee's ruling.

The DBCC's Decision Was Not Based on Impermissible Evidence. Koppel-Heath also makes the procedural objection that the DBCC hearing panel violated her rights when it improperly relied on an exhibit that the Staff Attorney did not offer into evidence. This asserted error has no supporting proof. The DBCC's rationale for its ruling is found in its written decision, which makes no reference to the exhibit in question, number 28. The DBCC did not discuss and certainly did not base any part of its decision on exhibit 28. The only reference to this exhibit occurred when one of the DBCC panel members asked Koppel-Heath if her accounts had a high rate of switching; however, the Staff Attorney pointed out that the exhibit to which the panel member had referred had been withdrawn. The panel member did not complete the question and did not pose it to Koppel-Heath. While the record establishes that the panel member reviewed and referred to this exhibit, we do not find the panel member's attempted question in the least improper. In any event the full DBCC, not the hearing panel, arrived at and issued the decision. We find that Koppel-Heath's assertion of an improper basis for the DBCC decision to be meritless.[9]

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[8] Koppel-Heath's Subcommittee hearing was previously set for the week of June 2, 1997. Prior to that date, Koppel-Heath moved for a 90-day continuance on the grounds that her medical treatments prevented her participation in the scheduled hearing. The Subcommittee granted Koppel-Heath's motion and rescheduled the appellate hearing to the week that included October 9, 1997.

[9] Although this point does not apply in this case, if there had been an actual procedural error committed by the DBCC, in certain circumstances, our de novo review of the record would "dissipate any harm that may have resulted from any such impropriety." In re

Request for Leave To Adduce Additional Evidence. On appeal, Koppel-Heath has applied for leave to adduce additional evidence. Koppel-Heath seeks to add to the record an affidavit that she signed on November 22, 1996, and two statements that discuss the handling of the Assistance League's account and the Gottesman and Brown accounts (the "Koppel-Heath Statements").[10]

Procedural Rule 9312 requires that parties seeking to introduce new evidence satisfy the burden of demonstrating that: (1) there was good cause for failing to adduce the evidence before the DBCC; and (2) the evidence is material to the proceeding. Rule 9312 also provides that the NBCC may, on its own motion, direct that the record on appeal be supplemented with such additional evidence as it may deem relevant.

Pursuant to our authority to supplement the record with evidence we deem relevant, we will add the Koppel-Heath Statements to the record. We find these documents relevant because they illustrate what Koppel-Heath claims she was unable to present to the DBCC hearing panel. Based on our preceding discussion, even if Koppel-Heath had presented all of this information to the DBCC hearing panel, our findings of suitability violations would be no different.

Sanctions

The DBCC imposed sanctions on Koppel-Heath as follows: censure; $25,000 fine for cause one; $25,000 for cause two; $64,493.13 fine for the total commissions that Koppel-Heath received in connection with all of the transactions (total fine of $114,493.13); 60-day suspension as a general securities representative; requirement to requalify by examination as a general securities representative; and assessment of costs of the DBCC proceeding.

As to the amount of Koppel-Heath's monetary sanction, we impose a $10,000 fine for

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Frank J. Custable, Jr., 51 S.E.C. 855, 862 (1993).

[10] Koppel-Heath has also requested leave to adduce a number of letters relating to Fehn's requests for a continuance of the DBCC hearing. We deny this request because the letters submitted either are already in the record or Koppel-Heath has failed to establish good cause for failing to enter the letters into the record before the DBCC.

Koppel-Heath made a second request for leave to adduce an additional group of documents on September 25, 1997. At the Subcommittee hearing, Koppel-Heath's attorney withdrew part of this second request, but argued that the Subcommittee should accept the balance of the documents. The Subcommittee denied this second request in its entirety because the documents submitted existed at the time of the DBCC hearing and Koppel-Heath did not establish good cause for failing to introduce them earlier. Nor did she establish that they were material. We ratify the Subcommittee's ruling.

cause one, a $10,000 fine for cause two and $39,021.31 as the fine for Koppel-Heath's commissions. The NASD Sanction Guidelines ("Guidelines")[11] for suitability call for a monetary sanction that includes the amount of any commissions, concessions or profits to the respondent. Our method of calculating the amount of Koppel-Heath's commissions differs from the DBCC. Unlike the DBCC, we find that Koppel-Heath's commission for a customer's initial investment should not be included as part of our fine. We have not found Koppel-Heath's initial investment recommendations unsuitable, but rather we have found the short-term switching recommendations unsuitable. Consequently, we compute the amount of Koppel-Heath's fine based only on the commissions she received on the subsequent investments, meaning the funds into which Koppel-Heath switched her customers. For the California Tax Free Fund purchases, we have included the full amount of Koppel-Heath's commissions because each recommendation was part of the violation. Our computation of the $39,021.31 fine is displayed in Schedule D, attached to this decision.

In imposing sanctions against Koppel-Heath, we have considered several factors enumerated in the Sanction Guideline on suitability. Koppel-Heath has no disciplinary history during her 13 years of registration with the Association prior to the DBCC decision in this case.

We find that the amount of commissions that Koppel-Heath received as a result of improper switching recommendations was $39,021.31; that, in connection with a settlement agreement with Dean Witter, the customers in this case received compensation; and that Koppel-Heath made a total of 12 unsuitable recommendations.[12]

Taking all of these factors into consideration, we set the amount of fine for cause one at $10,000, for cause two at $10,000 and for Koppel-Heath's commissions at $39,021.31. In addition, we find that Koppel-Heath should be suspended as a general securities representative for 30 days and must requalify by examination as a general securities representative following completion of her suspension. [13]

Accordingly, we order that Koppel-Heath be censured, fined $59,021.31, suspended from association with any member of this Association as a general securities representative for a period of 30 days, required to requalify by examination as a general securities representative before again acting in that capacity, and assessed $1,143 for the costs of the DBCC proceeding. The suspension will begin on a date to be set by the President of NASD Regulation, Inc.[14]

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[11] See Guidelines (1993 ed.) at 43 (Suitability).

[12] Koppel-Heath made seven unsuitable recommendations to the Assistance League and, as to Gottesman and Brown, she made four switching recommendations and one recommendation to purchase the California Tax Free Funds.

[13] We note that these sanctions are consistent with the applicable Guideline.

[14] 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.

On Behalf of the National Business Conduct Committee,

Joan C. Conley, Corporate Secretary

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.