

INITIAL DECISION NO. 306  
ADMINISTRATIVE PROCEEDING  
FILE NO. 3-10373

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of :  
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BEARCAT, INC., :   
PETER FINEBERG, : INITIAL DECISION  
SETH DIAMOND, : February 15, 2006  
SALVATORE DIAMBROSIO, :   
D&D SECURITIES, INC., :   
NICHOLAS DICICCO, :   
and DOMINIC DICICCO :

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APPEARANCES: Kingdon Kase and Amy J. Greer for the Division of Enforcement,  
United States Securities and Exchange Commission

Salvatore DiAmbrosio, pro se

BEFORE: Robert G. Mahony, Administrative Law Judge

**INTRODUCTION**

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) in this matter on December 5, 2000, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), and Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that Respondent Salvatore DiAmbrosio (DiAmbrosio) willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in a scheme to defraud Binary Traders, Inc. (Binary), by entering unauthorized trades in Binary's trading account.<sup>1</sup> The OIP also alleges that DiAmbrosio willfully aided and abetted and caused violations of Sections 15(b) and 17(a) of the Exchange Act and Rules 15b7-1, 17a-3, and 17a-4 thereunder. DiAmbrosio filed his Answer on January 17, 2001.

On March 10, 2005, DiAmbrosio was convicted of ten counts of wire fraud for his involvement in the scheme alleged in the OIP. United States v. DiAmbrosio, 04-CR-66-1 (E.D.

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<sup>1</sup> The Division of Enforcement (Division) has represented that all Respondents, except DiAmbrosio, have agreed to settlements and that the parties are resolving some minor issues relating to the settlement terms.

Pa.). On June 9, 2005, the district court sentenced DiAmbrosio to five years' probation and ordered restitution in the amount of \$2,100,000.

Pursuant to leave granted at the October 17, 2005, prehearing conference, and Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250, the Division filed a motion for partial summary disposition (Motion) on December 19, 2005, only as to DiAmbrosio. The Motion seeks a finding that DiAmbrosio violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5.<sup>2</sup> Based on DiAmbrosio's criminal conviction, the Division requests that I impose a cease-and-desist order, order DiAmbrosio to pay \$869,946 in disgorgement plus prejudgment interest, and bar DiAmbrosio from association with any broker or dealer. Motion at 1.

DiAmbrosio did not file an opposition to the Division's Motion. On January 31, 2006, I held a telephonic prehearing conference at which DiAmbrosio admitted that he received the Division's Motion. Prehearing Conference, January 31, 2006, Transcript at 8.

Rule 250(b) of the Commission's Rule of Practice, 17 C.F.R. § 201.250(b), requires the law judge to act "promptly" on a motion for summary disposition. This Initial Decision is based on: (1) DiAmbrosio's Answer to the OIP; (2) the Division's motion for partial summary disposition; and (3) the exhibits attached to the Motion.

The Division's exhibits are:

- Exhibit A: Indictment, United States v. DiAmbrosio, 04-CR-66-1 (E.D. Pa.), for ten counts of wire fraud.
- Exhibit B: Verdict Form, United States v. DiAmbrosio, 04-CR-66-1 (E.D. Pa. March 10, 2005).
- Exhibit C: Judgment, United States v. DiAmbrosio, 04-CR-66-1 (E.D. Pa. June 9, 2005).

After a respondent files an answer, a party may file a motion for summary disposition of any or all allegations in an order instituting proceedings. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted, pursuant to Rule 323 of the Commission's Rules of Practice. The administrative law judge may grant the motion if there is no genuine issue with regard to any material fact and the moving party is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(a)-(b).

In this proceeding, there is no genuine issue with regard to any material fact. All material facts that concern the activities for which DiAmbrosio was convicted were decided against him

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<sup>2</sup> The Division anticipates that it will address the remaining aiding and abetting claims and the issue of a civil penalty after it presents its settlement recommendations for the other Respondents to the Commission. Motion at 1 n.1.

in the criminal case. Any other facts in DiAmbrosio's Answer have been taken as true, pursuant to 17 C.F.R. § 201.250(a).

### **FINDINGS OF FACT**

D&D Securities, Inc. (D&D), operated a stock execution company on the floor of the Philadelphia Stock Exchange (PHLX), which executed traders' buy and sell orders of stock. Stock execution clerks, employed by D&D, received trade specifications from traders and caused the trades to be executed. Traders allowed stock execution companies to have electronic access to their trading accounts for stock executions to be placed in the accounts. When a D&D stock execution clerk submitted orders to execute a trade, the order was routed from the floor of the PHLX to D&D's clearing agent in New Jersey. After the trade was executed, the stock execution clerk provided an order ticket to the trader, which served as a receipt and informed the trader of the number and price at which the shares traded. Stock execution companies maintained error accounts that were used to correct mistakes made in filling orders. Exhibit A at 2-5.

Binary, D&D's primary client, was an options trading firm that also bought and sold shares of stock. The firm bought and sold on the floor of the PHLX to manage its position. Binary's traders communicated their buy and sell orders to D&D stock execution clerks, both orally and in writing. D&D stock execution clerks were then responsible for attempting to buy or sell the specified number of shares at the price or series of prices dictated by the order. Exhibit A at 3-4.

DiAmbrosio, age forty-three, served as a senior stock execution clerk for D&D from September 1, 1995, through November 24, 1999. Answer at 2. DiAmbrosio was also secretly associated with Bearcat, Inc. (Bearcat), an options trading firm that also bought and sold shares of stock. From April 1, 1999, through September 2, 1999, DiAmbrosio engaged in a scheme to defraud Binary. Exhibit A at 3-4, 7. As part of the scheme, DiAmbrosio effected fictitious, paired cross-trades of stock between the D&D error account and the Binary account or between the Bearcat trading account and the Binary account.<sup>3</sup> For example, he entered unauthorized cross-trades in which the Binary account purchased a block of stock from the D&D error account or the Bearcat trading account at a given price, and then another trade in which the Binary account sold the same block of stock back to the same account (the D&D error account or the Bearcat trading account) at a lower price. He also entered unauthorized cross-trades in which the Binary account sold a block of stock to the D&D error account or the Bearcat account at a given price and then another cross-trade in which the Binary account purchased the same block of stock back from the same account (the D&D error account or the Bearcat trading account) at a higher price. Exhibit A at 7-8. The scheme allowed Binary to maintain the same stock position and the trading to be undetected by Binary's Error Checker System. Exhibit A at 9.

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<sup>3</sup> Stock execution clerks executed cross-trades between two customers when they knew that one customer wished to buy and another wished to sell the same number of shares of a given stock at an agreed upon price. Exhibit A at 4.

As a result of this scheme, the Binary account sustained losses and the D&D error account and the Bearcat trading account realized gains. DiAmbrosio was compensated by D&D and Bearcat for entering the fictitious, paired cross-trades. D&D paid DiAmbrosio \$351,000 and Bearcat paid DiAmbrosio \$518,946. DiAmbrosio entered more than seventy-eight fictitious cross-trades in this manner, causing Binary to sustain direct losses totaling \$2,202,062.50. Exhibit A at 7-9.

On March 10, 2005, the United States District Court for the Eastern District of Pennsylvania convicted DiAmbrosio on ten counts of wire fraud for his involvement in this trading scheme. Exhibit B. On June 9, 2005, the district court sentenced DiAmbrosio to five years' probation, including twelve months of home detention, and ordered restitution in the amount of \$2,100,000. Exhibit C.

## CONCLUSIONS OF LAW

The OIP alleges that DiAmbrosio willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder by entering unauthorized trades in the Binary account, which defrauded Binary of over \$2 million. Section 17(a) of the Securities Act proscribes fraudulent conduct in the offer and sale of securities, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder proscribe fraudulent conduct in connection with the purchase and sale of securities. These provisions prohibit essentially the same type of conduct. See United States v. Naftalin, 441 U.S. 768, 773 n.4 (1979). The jurisdictional clauses under the antifraud provisions are given broad interpretation. See McDaniel v. United States, 343 F.2d 785, 787-88 (5th Cir. 1965); see also Reube v. Pharmacodynamics, Inc., 348 F. Supp. 900, 912 (ED. Pa. 1972); Ingraffia v. Belle Meade Hosp., Inc., 319 F.Supp. 537, 538 (ED. La. 1970).

The United States District Court for the Eastern District of Pennsylvania entered judgment and sentenced DiAmbrosio on June 9, 2005. Exhibit C. The criminal conviction establishes that DiAmbrosio engaged in fraudulent conduct in connection with the purchase and sale of securities. His use of the D&D order routing system satisfies the jurisdictional clauses of the antifraud provisions. Thus, he willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Further, “[i]t is well settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by judgment in the criminal case.” United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978); see also Joseph P. Galluzzi, 78 SEC Docket 1125, 1128 n.15 (Aug. 23, 2002).

## SANCTIONS

### A. Cease-and-Desist Order and Associational Bar

Section 8A(a) of the Securities Act and Section 21C(a) of the Exchange Act authorize the Commission to impose a cease-and-desist order on any person who “is violating, has violated, or is about to violate” any provision of the Securities Act, the Exchange Act, or the rules and regulations thereunder.

In pertinent part, Section 15(b)(6) of the Exchange Act permits the Commission to sanction persons associated with a broker or dealer, if it finds that the sanction is in the public interest and such persons have willfully violated the Securities Act, the Exchange Act, or the rules and regulations thereunder. Specifically, the Commission may censure a broker or associated person, place limitations on the activities or functions of such person, suspend such person for a period not exceeding twelve months, or bar such person from association with a broker or dealer. DiAmbrosio was associated with D&D, a broker-dealer, at the time of his misconduct.

I have already concluded that DiAmbrosio willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Therefore, I must now determine whether a cease-and-desist order and sanctions under Section 15(b)(6) of the Exchange Act are appropriate.

In determining whether a cease-and-desist order and sanctions under Section 15(b)(6) are appropriate, the Commission considers the following factors:

[T]he egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). No one factor controls. See SEC v. Fehn, 97 F.3d 1276, 1295-96 (9th Cir. 1996).

In addition to the Steadman factors, in determining whether to impose a cease-and-desist order, the Commission considers whether there is a risk of future violations, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings. KPMG Peat Marwick LLP, 54 S.E.C. 1135 (2001). The Commission explained that the Division must show some risk of future violations. However, it also ruled that such a showing should be "significantly less than that required for an injunction," and that, "absent evidence to the contrary," a single past violation ordinarily suffices to raise a significant risk of future violations. Id. at 1185, 1191.

DiAmbrosio's fraudulent conduct spanned several months. He entered more than seventy-eight unauthorized trades that caused Binary losses totaling over \$2 million, and, ultimately, resulted in his own substantial gains.

His criminal conviction established that he acted with a high degree of scienter. He has not provided assurances against future violations nor has he indicated that he appreciates the wrongfulness of his actions. Further, he did not file an opposition to the Division's Motion.

Given DiAmbrosio's relatively young age and prior experience in the securities industry, DiAmbrosio will have ample opportunity to secure employment within the industry if a bar from association is not imposed. In addition to a bar, a cease-and-desist order is necessary to ensure that

DiAmbrosio is more conscious of potential violations if he participates in the financial markets in the future.

Viewing the Steadman and KPMG factors in their entirety, I conclude that a cease-and-desist order and a bar from association with a broker or dealer are appropriate in the public interest. There are no mitigating circumstances in this case to warrant a lesser sanction.

### **A. Disgorgement**

Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act provide that the Commission may enter an order requiring disgorgement, including reasonable interest, in any cease-and-desist proceeding. Disgorgement is designed to deprive a wrongdoer of his ill-gotten gains and deter others from violating the securities laws. SEC v. First City Financial Corp., 890 F.2d 1215, 1230-1232 (D.C. Cir. 1989.) It returns the violator to where he would have been absent the misconduct. An order to disgorge a certain amount need only be a reasonable approximation of the profits causally connected to the violation. Id. at 1231-1232.

Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to the respondent to demonstrate clearly that the Division's disgorgement figure is not a reasonable approximation. SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995.) Any risk of uncertainty as to the disgorgement amount falls on the wrongdoer whose misconduct created the uncertainty. First City, 890 F.2d at 1232.

The Division seeks disgorgement in the amount of \$869,946, the total amount DiAmbrosio received in compensation from D&D and Bearcat for his involvement in the scheme. The Division also requests that I order DiAmbrosio to pay prejudgment interest. The indictment states that D&D paid DiAmbrosio \$351,000 and Bearcat paid DiAmbrosio \$518,946. At the prehearing conference I held on January 31, 2006, the Division agreed that the amount of disgorgement should decrease by any amount that DiAmbrosio has paid or will pay in the future towards the restitution ordered in the criminal case. Prehearing Conference, January 31, 2006, Transcript at 7, 10-11. DiAmbrosio did not file an opposition, and thus, does not oppose the disgorgement amount. DiAmbrosio will be ordered to disgorge \$869,946, plus prejudgment interest. For every dollar that DiAmbrosio pays in restitution the disgorgement principal he owes will decrease by one dollar.

### **ORDER**

Based on the findings and conclusions set forth above:

IT IS ORDERED that the Division of Enforcement's Motion for Partial Summary Disposition is GRANTED;

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Salvatore DiAmbrosio shall CEASE AND DESIST from committing or causing any violations or future violations of Section 17(a) of

the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder;

IT IS FURTHER ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Salvatore DiAmbrosio is BARRED from association with any broker or dealer; and

IT IS FURTHER ORDERED that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Salvatore DiAmbrosio shall disgorge \$869,946, plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600. Prejudgment interest is due from October 1, 1999, through the last day of the month preceding the month in which payment is made. The disgorgement principal will decrease by the amount of any payments that DiAmbrosio has made or will make towards restitution.

Should payment of disgorgement be made to the Commission, the payment shall be made by certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the U.S. Securities and Exchange Commission. The payment, and a cover letter identifying the Respondent and the proceeding designation, shall be delivered to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter and the instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Robert G. Mahony  
Administrative Law Judge