SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 49375 / March 8, 2004

Admin. Proc. File No. 3-11004

In the Matter of the Applications of

BEARCAT, INC.,
SETH DIAMOND, and
PETER FINEBERG

For Review of Disciplinary Action Taken by the

PHILADELPHIA STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Fraudulent Trading for an Account

Conduct Inconsistent with Just and Equitable Principles of Trade

Acts Detrimental to the Interest or Welfare of the Exchange

Trading in Account in Which Member Had an Interest

Reporting and Registration Violations

Failure to Supervise

Member of national securities exchange and its principals participated in employee's fraudulent trading scheme; allowed employee to trade in member's account without reporting trading to the exchange; failed to obtain consent of another member to employ the same individual; failed to supervise employee; and failed to register employee as an associated person. Held, exchange disciplinary action sustained.

APPEARANCES:

Charles B. Manuel, Jr., of Manuel & Jones, P.C., for Bearcat, Inc. and Seth Diamond.

Peter Fineberg, pro se.

Joseph H. Jacovini and Richard S. Kraut, of Dilworth Paxson LLP, for Philadelphia Stock Exchange, Inc.

Appeal filed: January 8, 2003
Last brief received: August 26, 2003

I.

Bearcat, Inc., Seth Diamond, and Peter Fineberg (collectively the "Bearcat Applicants") appeal from Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") disciplinary action. The PHLX found that the Bearcat Applicants violated Section 10(b) of the Securities Exchange Act of 1934, 1/ and Exchange Act Rule 10b-5 2/ because they knew or recklessly disregarded Salvatore DiAmbrosio's 3/ fraudulent activities in connection with trades that DiAmbrosio executed in a Bearcat trading account. The PHLX also found that this conduct was inconsistent with just and equitable principles of trade and constituted acts detrimental to the welfare of the Exchange in violation of PHLX Board of Governors Rules ("PHLX Rules") 707 and 708. The PHLX further found that the Bearcat Applicants violated PHLX Rules 604(d), 748, 751, 772, 773, and 783 because: they initiated purchases and sales in a trading account in which DiAmbrosio also shared an interest without the PHLX's approval; they knew that DiAmbrosio also was employed by another member of the PHLX, D&D Securities,

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1/ 15 U.S.C. § 78j(b).

2/ 17 C.F.R. § 240.10b-5.

3/ DiAmbrosio also was a party in the PHLX proceeding. DiAmbrosio neither appeared before the PHLX nor appealed to the Commission. The PHLX censured DiAmbrosio, fined him $1 million, and permanently barred him from membership or participation on the PHLX. See, Decision of the Board of Governors of the Philadelphia Stock Exchange, Enf. No. 00-11 (Dec. 13, 2002).

Inc. ("D&D"), 4/ and did not obtain D&D's prior written consent before permitting DiAmbrosio to effect transactions for Bearcat; Bearcat failed to supervise DiAmbrosio and did not have adequate written supervisory procedures or a system for applying such procedures; and they were responsible for DiAmbrosio's failure to file a Form U-4.

The PHLX censured the Bearcat Applicants, fined them $500,000 (jointly and severally), suspended Bearcat from membership or participation on the PHLX for a period of six months, and suspended Fineberg and Diamond from association with any PHLX member organization for a period of six months. As a condition of readmittance, the Bearcat Applicants are "required to certify to the Exchange that they have complied with the terms and conditions of [the PHLX] Decision." We base our findings on an independent review of the record.

II.

A. Background

From October 1995 through September 1999, Bearcat was a member organization of the PHLX and conducted a proprietary trading operation on the options floor of the PHLX. Diamond and Fineberg were both members of the PHLX, registered options traders, and served respectively as president and secretary of Bearcat.

During the relevant period, DiAmbrosio was employed as a stock execution clerk. 5/ The record reflects that D&D hired

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4/ D&D Securities, Inc. and its principals, Dominic DiCicco and Nicholas DiCicco (collectively the "D&D Applicants"), were parties in the PHLX proceeding and also appealed the PHLX's decision. The D&D Applicants settled with the PHLX and, on January 7, 2004, voluntarily withdrew their application for review that they had filed with the Commission. See Order Withdrawing Review Application and Dismissing Proceeding (Jan. 9, 2004).

Our findings with respect to the D&D Applicants are made solely for purposes of this proceeding against the Bearcat Applicants. E.g., James J. Pasztor, Securities Exchange Act Rel. No. 42008 (Oct. 14, 1999), 70 SEC Docket 2611, 2613 n.9.

5/ PHLX Rule 1090 defines a "stock execution clerk" as a person

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DiAmbrosio as a stock execution clerk around October 1995 and that prior to that time DiAmbrosio was employed as a stock execution clerk by another PHLX member firm. DiAmbrosio's largest customer was Binary Traders, Inc. ("Binary"). Binary was a PHLX member organization that conducted a proprietary trading operation on the options floor of the PHLX. Binary's orders made up approximately 85% of DiAmbrosio's business.

DiAmbrosio executed stock trades that Binary used to hedge Binary's options positions. Each morning before the opening of trading on the PHLX, DiAmbrosio received worksheets with orders from each Binary trader. DiAmbrosio entered Binary's limit orders into computer terminals before the opening of trading.

Marcie Anton, a Binary trader who was at the post with DiAmbrosio, recorded adjustments to Binary's stock positions when she received the execution copies of Binary order tickets. However, Anton did not record the prices of the executed trades. Binary also had a proprietary computer program called "Errorchecker," which compared the firm's stock positions recorded in its database with the electronic data file sent daily to Binary by its clearing firm. However, the Errorchecker program compared only stock positions. It did not compare trade execution prices.

B. DiAmbrosio's Relationship with the Bearcat Applicants

In 1995, Fineberg and Diamond hired DiAmbrosio to trade stock for Bearcat. 6/ Both Fineberg and Diamond had supervisory responsibility for DiAmbrosio. 7/ Fineberg and Diamond knew that

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who "functions as an intermediary in a transaction (A) consummated on the Exchange; (B) entered verbally for execution other than on the Exchange; or (C) entered into a third party system designed to execute transactions other than on the Exchange." A stock execution clerk is located on the options floor of the Exchange, is associated with an Exchange member, but is not eligible to effect transactions as a specialist, registered options trader, or floor broker.

6/ The Bearcat Applicants acknowledge that Bearcat hired DiAmbrosio in 1995, but, as discussed infra, they dispute which month this occurred.

7/ In late 1999, Both Diamond and Fineberg gave testimony
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DiAmbrosio had no prior experience as a trader. However, they also knew that DiAmbrosio was handling Binary's stock execution business. 8/

Bearcat maintained a firm trading account designated as the "606 Account." DiAmbrosio effected the trades he made for Bearcat through the firm's 606 Account. Other than Fineberg and Diamond, DiAmbrosio was the only Bearcat employee with access to the 606 Account. All other Bearcat traders had separate trading accounts.

DiAmbrosio was compensated by Bearcat with a 50/50 split of the profits generated from his trading activity. Each morning, Fineberg and Diamond would compare DiAmbrosio's trade tickets against the confirmation sheets that Bearcat received from its clearing agent in order to calculate DiAmbrosio's compensation. Fineberg and Diamond kept in a desk a handwritten ledger that recorded DiAmbrosio's daily profit or loss and the total amount he was owed and paid. The ledger was maintained on a cumulative basis, and Fineberg and Diamond deducted DiAmbrosio's trading losses from his gains so that DiAmbrosio received only a percentage of the net profit generated from his trading activity. DiAmbrosio's compensation was based upon this handwritten ledger.

Between 1995 and 1997, Bearcat paid DiAmbrosio in cash. Bearcat would submit a check request to its clearing agent for a check made payable to "cash." Fineberg would cash the check and

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before the Commission's staff in connection with the staff's investigation of these events. These transcripts were introduced in the PHLX proceeding. Bearcat's and Diamond's opening brief (which is adopted by Fineberg), cites to Diamond's November 1999 Commission investigative testimony that Diamond supervised Bearcat's option business but Fineberg supervised DiAmbrosio. However, in October 1999 Commission investigative testimony, when Diamond was questioned about who was responsible for monitoring DiAmbrosio's trades, he stated: "Well, I would say the responsibility was split between Peter [Fineberg] and I. We both were."

8/ The Bearcat Applicants dispute whether DiAmbrosio was an employee of D&D at the time that Bearcat hired him, but they do not dispute that DiAmbrosio was working as a stock execution clerk for a PHLX member firm when he became employed by Bearcat.

give the proceeds to DiAmbrosio. Starting in January 1998, Bearcat, at the suggestion of its accountant, began paying DiAmbrosio by check as a salaried employee. DiAmbrosio's compensation, however, continued to be calculated based on the handwritten ledger maintained by Fineberg and Diamond. Under this arrangement, Bearcat paid DiAmbrosio the following amounts: $34,822 in 1995; $47,550 in 1996; $183,600 in 1997; $523,921.40 in 1998; and $492,734.75 in 1999. 9/

The Bearcat Applicants did not notify the PHLX of DiAmbrosio's trading in the 606 Account until the PHLX conducted a cause examination of Bearcat in late 1999. Walter Smith, the Director of the PHLX Examination Department, testified that, prior to the PHLX's cause examination, PHLX had not been informed by Bearcat of DiAmbrosio's ability or right to trade in the 606 Account and had not been provided with a report of any kind indicating a profit-sharing arrangement between Bearcat and DiAmbrosio.

C. DiAmbrosio's Fraudulent Trading Activity

The PHLX charged that, from January 1, 1998 through September 9, 1999, DiAmbrosio engaged in a fraudulent trading scheme. As part of that scheme, DiAmbrosio made computer journal entries that reflected offsetting purchases and sales of securities. 10/ Most of the journal entry transactions were within the reported daily high/low range of prices for the particular stock and generally occurred within a one- or two-minute span. However, at the time of their entry, the trades were not executed at the then-current market price of the stock.

DiAmbrosio's journal entries transferred money from his customers to Bearcat and, thereby, to himself. The offsetting journal entries were always for the same number of shares of stock. Thus, after clearing, no stock actually had to be transferred, and no change appeared on the customers' stock position records. However, the amount of the profit and loss was debited and credited to the participants' accounts.

DiAmbrosio's scheme had two variations. The first was effected solely by journal entries. DiAmbrosio's journal entries

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9/ Of these amounts, $265,972 was paid in cash.

10/ None of the transactions appeared on the consolidated tape, and stock execution prices were not disseminated to the market.

reflected that a customer purchased (or sold) stock from (or to) Bearcat at a certain price. DiAmbrosio then made a second set of journal entries in which this customer sold (or purchased) the stock back to (or from) Bearcat at an inferior price. This resulted in a loss to the customer and a gain to Bearcat. 11/

Under the second variation, DiAmbrosio (1) executed an actual trade for Bearcat on either the New York Stock Exchange or the Nasdaq, and (2) entered journal entries through which Bearcat would buy (or sell) the stock with Binary or another of DiAmbrosio's customers. These transactions also resulted in Binary or another DiAmbrosio customer buying the stock from (or selling to) Bearcat at a price inferior to the one that Bearcat received in the market. In some instances, DiAmbrosio provided Binary with execution tickets showing a price that was actually the price that Bearcat received in the market trade rather than the price that Binary received in the journal entry transaction. 12/

Binary discovered DiAmbrosio's fraudulent trading activity on the morning of September 2, 1999, when Daniel Bigelow, a Binary principal, noticed that Binary had lost $55,000 on a previous day's trade in AOL stock. Bigelow was surprised by the loss because the only AOL options Binary held had expired in August. Without an AOL options position to hedge, Bigelow was puzzled why Binary had incurred this significant loss trading AOL

11/ For example, on June 11, 1999, Binary purportedly purchased 20,000 shares of Intel at 56 1/2 from Bearcat in the first set of journal entries. One minute later, DiAmbrosio made journal entries in which Binary sold to Bearcat 20,000 Intel shares at 54 1/2. These entries resulted in a transfer of $40,000 from Binary to Bearcat.

12/ For example, on June 11, 1999, DiAmbrosio gave Binary order tickets showing that throughout that day Binary made three purchases of Citicorp stock totaling 40,000 shares as follows: 1) at 10:04 a.m. Binary purchased 20,000 shares at 42; 2) at 12:48 p.m. Binary purchased another 10,000 shares at 42 9/16; and 3) at 2:59 p.m. Binary purchased a further 10,000 shares at 42 1/2. Each of these trades actually occurred on the New York Stock Exchange but for Bearcat's account, not Binary's account. That afternoon DiAmbrosio entered journal entries evidencing Binary's purchase from Bearcat's account of 20,000 shares of Citicorp stock at 43 1/4 and another 20,000 shares at 43 1/2. This resulted in a profit to Bearcat of $44,375.

stock. Binary ultimately determined that the AOL trade was entered by DiAmbrosio as part of a fraudulent scheme.

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A PHLX panel conducted hearings in this matter over seventeen days between June 7 and November 16, 2001. On December 13, 2002, the PHLX found that the Bearcat Applicants had engaged in various violations and imposed sanctions. However, the PHLX retained jurisdiction "for the sole and exclusive purpose of determining the amount of disgorgement, if any," following the completion of a then-pending NASD Arbitration. 13/

13/ On April 17, 2000, Binary initiated an arbitration proceeding against, among other entities, the Bearcat Applicants. On April 11, 2003, the arbitration panel awarded Binary compensatory damages against Bearcat (jointly and severally with DiAmbrosio) in the amount of $592,126.00

III.

A. Fraud and Unethical Conduct 14/

Exchange Act Section 10(b) and Exchange Act Rule 10b-5 provide that it is unlawful for any person, directly or indirectly, in connection with the purchase or sale of a security, to make an untrue statement of material fact, omit to state a material fact, use any device, scheme or artifice to defraud, or engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. PHLX Rules 707 and 708 provide that a PHLX member, member organization, or person associated with or employed by a member or member organization shall not engage in conduct inconsistent with just and equitable principles of trade, or in acts detrimental to the interest or welfare of the PHLX.

The record demonstrates that the Bearcat Applicants were substantial participants in DiAmbrosio's fraudulent activity. They knew that DiAmbrosio executed Binary's order flow as agent and therefore that DiAmbrosio had knowledge of the orders that Binary was placing at the time that DiAmbrosio was executing trades as principal for Bearcat's 606 Account. 15/ Fineberg and Diamond shared 50/50 in DiAmbrosio's trading profits. Diamond conceded that, "in hindsight," DiAmbrosio's knowledge of his client's positions would give DiAmbrosio an advantage in the marketplace when DiAmbrosio conducted trading on DiAmbrosio's own behalf. 16/ Diamond admitted that Bearcat had no procedures in

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14/ At the hearing, the Bearcat Applicants were jointly represented by counsel. On appeal, Bearcat and Diamond are jointly represented by counsel, but Fineberg appears pro se. Bearcat and Diamond filed opening and reply briefs, and Fineberg filed a one-page letter adopting as his argument the "reply briefs" filed by Bearcat and Diamond. Accordingly, we include Fineberg in our analysis of the arguments set forth by the remaining Bearcat Applicants.

15/ Diamond stated that it was common knowledge that Binary was DiAmbrosio's biggest customer and that Binary gave DiAmbrosio its stock execution orders.

16/ At the PHLX hearing, Diamond limited his testimony to identifying his personal financial statement and his liability for attorneys' fees. However, both Diamond's and Fineberg's investigative testimony (see supra note 7)

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place to prevent DiAmbrosio from using client information in this fashion. 17/

The Bearcat Applicants further participated in DiAmbrosio's scheme by financing his activities. Both Diamond and Fineberg admitted that, when they hired DiAmbrosio, they knew that he had no experience as a stock trader. They nonetheless gave DiAmbrosio discretionary authority (together with themselves) to trade in Bearcat's 606 Account. Unlike other Bearcat traders, DiAmbrosio traded large positions and risked significant amounts of Bearcat's capital. Both Fineberg and Diamond estimated that DiAmbrosio contributed approximately 25% of Bearcat's total revenue in 1997, 1998, and 1999. At the hearing, the Bearcat Applicants were unable to explain why they furnished him with Bearcat's funds.

The Bearcat Applicants sought to conceal DiAmbrosio's association with Bearcat. Neither Diamond nor Fineberg spoke to anyone at D&D about DiAmbrosio or informed D&D that DiAmbrosio was trading for Bearcat as required by PHLX Rule 751. 18/ In fact, Diamond warned several Bearcat employees not to reveal

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support the PHLX's findings of liability.

Fineberg provided investigative testimony to the staff in October 1999 and also testified at length during the hearing. At times, Fineberg's hearing testimony contradicted his investigative testimony. We believe Fineberg's 1999 testimony, being earlier in time, is entitled to more weight than his hearing testimony, especially in light of the fact that at no time prior to the hearing did Fineberg ever seek to correct or amend his earlier statement or the transcript from that interview. See, e.g., Allard v. Arthur Andersen & Co., 957 F. Supp. 409, 424 (S.D.N.Y. 1997) ("To the extent there is anything in [an individual's] testimony given after the lawsuit was filed, that conflicts with his words and deeds at the time the underlying events were ongoing, it is what he said and did earlier and not what he said later that deserves weight.").

17/ He gave an example of how DiAmbrosio hypothetically could use the information about his client's position to DiAmbrosio's own trading advantage.

18/ See discussion infra Section III.C.

DiAmbrosio's association with Bearcat because this information was not "for public knowledge." Although Diamond could not recall the dates of these conversations, he confirmed that "they took place" on multiple occasions. 19/ Diamond also acknowledged that, while he told Bearcat employees that DiAmbrosio's association should not become public, he made no similar suggestion that other traders' association with Bearcat should remain confidential.

In order to disguise further DiAmbrosio's association with Bearcat, DiAmbrosio was compensated differently than other Bearcat employees. DiAmbrosio's compensation was based on a hand-written ledger that Fineberg and Diamond kept in their desk. For the first three years of DiAmbrosio's association with Bearcat, he was paid in cash. No other Bearcat employee was paid in cash. Diamond confirmed that "in all his years" at the PHLX, he was not aware of any employee, other than DiAmbrosio, who was paid in cash by any member of the Exchange. DiAmbrosio continued to receive frequent cash payments from Bearcat until 1998 when Bearcat, at the suggestion of its accountant, placed DiAmbrosio on its payroll and began issuing monthly checks to him.

The Bearcat Applicants do not dispute that DiAmbrosio engaged in fraudulent activity. 20/ Rather, they argue that they did not violate Exchange Act Section 10(b), Rule 10b-5, or PHLX Rules 707 and 708 because "the requisite recklessness standard has not been met." 21/ In the Bearcat Applicants' view, they

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19/ One former Bearcat trader, Pablo Mariano, testified that, in early 1996, he asked Fineberg about DiAmbrosio's frequent visits to Bearcat's office. Fineberg admitted to Mariano that he gave DiAmbrosio "discretion to trade in my account." Mariano testified that, in a subsequent conversation, Fineberg stated that DiAmbrosio was "very good at what he does. But let's keep this conversation in this room. Let's keep it hush-hush."

20/ Although the Bearcat Applicants at various points in their brief couch DiAmbrosio's activity in terms of "alleged fraud" and "alleged theft", they also refer to DiAmbrosio as "the swindler," his activity as the "trading scandal," and state that "DiAmbrosio's illicit cross-trades were effected through D&D's equipment and facilities."

21/ We have previously held that, with respect to a charge that conduct was inconsistent with just and equitable principles

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"were not actually aware of DiAmbrosio's scheme and were not ignoring obvious red flags." They claim, among other things, that only a small percentage of DiAmbrosio's trades for Bearcat "were part of this scheme" and, thus, could not constitute a red flag. They further assert that these violative trades were not identifiable by Bearcat from the confirmation sheets it received daily from its clearing firm, and that "everyone including Binary trusted DiAmbrosio."

We are unpersuaded by the Bearcat Applicants' arguments that insufficient red flags existed to alert them to fraudulent activity and establish that they acted with scienter. While the Bearcat Applicants repeatedly stress that only "three percent of the trades" were part of a fraudulent scheme, their percentage calculation is flawed as they base this figure on a universe of trading activity spanning four years, not just the twenty months at issue.

Moreover, other indicia establish the Bearcat Applicants' scienter. The Bearcat Applicants hired DiAmbrosio as a trader, knowing he had no prior trading experience, knowing that he had access to Binary's trades. By splitting the profits of DiAmbrosio's trading, the Bearcat Applicants took advantage of that access. Diamond confirmed that DiAmbrosio, as a stock execution clerk, would be in a position to know what stocks his clients were trading. The Bearcat Applicants entrusted DiAmbrosio with large amounts of their capital. They took various actions to conceal DiAmbrosio's trading relationship and the profits they shared with DiAmbrosio. Accordingly, we find that the Bearcat Applicants acted with scienter. 22/

21/(...continued)
of trade, a self-regulatory organization need not find that the respondent acted with scienter. See, e.g., Calvin David Fox, Exchange Act Rel. No. 48731 (Oct. 31, 2003), 81 SEC Docket 2017.

22/ Scienter may be established through reckless conduct. Hollinger v. Titan Cap. Corp., 914 F.2d 1564 (9th Cir. 1990); Coastline Fin., Inc., Exchange Act Rel. No. 41989 (Oct. 7, 1999), 70 SEC Docket 2444. As a corporation, Bearcat acted with scienter through Fineberg and Diamond. See, e.g., Piper Capital Mgmt., Inc., Securities Act Rel. No. 8276 (Aug. 26, 2003), 80 SEC Docket 3594, 3608 n.30 (citing Rent-Way Sec. Litig., 209 F. Supp.2d 493, 522 (W.D. Pa. 2002) (fraud of officer or employee is imputable to
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We conclude that the Bearcat Applicants violated Exchange Act Section 10(b) and Rule 10b-5. We further conclude that the Bearcat Applicants violated PHLX Rules 707 and 708 by engaging in conduct inconsistent with just and equitable principles of trade and in acts detrimental to the interest and welfare of the PHLX.

B. Interest in the Bearcat 606 Account

PHLX Rule 772 provides that, without the prior approval of the Exchange, no member, while on the floor of the PHLX, shall initiate the purchase or sale of any security for any account in which he, his member organization, or a participant therein is directly or indirectly interested with any other person. PHLX Rule 773 proscribes the holding of any interest or participation in any joint account for buying or selling any security on the Exchange unless such joint account is reported to, and not disapproved by, the Exchange. PHLX Rule 783 requires in relevant part that each member, member organization, or participant report to the Exchange any financial arrangement entered into, either directly or indirectly, with, among others, any associated person of a member.

Without PHLX approval, the Bearcat Applicants permitted DiAmbrosio to initiate the purchase and sale of securities in Bearcat's 606 Account when DiAmbrosio had an interest in that account. The Bearcat Applicants argue that DiAmbrosio did not share any "interest" in the 606 Account, asserting that DiAmbrosio shared in only the profits from his own trades in the 606 Account. Noting that the remaining "profits and losses in the 606 account itself, after deducting all outlays including DiAmbrosio's payments, were shared by the partners in the firm," the Bearcat Applicants conclude that DiAmbrosio did not share an "interest" in the 606 Account within the meaning of PHLX Rules 772, 773, and 783.

However, Rule 772 forbids the purchase or sale of a security "for any account" in which the member is "directly or indirectly interested with any person . . . ." Rule 772 generally tracks the language used in Exchange Act Section 11(a). 23/ In determining whether a person has an interest in an account for

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22/(...continued)
corporation when committed within scope of employment and for corporation's benefit)).

23/ See 15 U.S.C. § 78k(a).

purposes of Exchange Act Section 11(a), we have held that, where a person shares the economic risks in another person's account, that person has an interest in that account. 24/ The fact that DiAmbrosio did not share in all the risks of all the trades in the Bearcat 606 Account does not defeat a finding that he had some interest in the account.

The language in Rules 773 and 783 is equally broad, proscribing the participation, directly or indirectly, by a PHLX member, member organization, partner, or stockholder in any joint account or financial arrangement, absent PHLX approval of such arrangement and the filing of mandatory reports. We further believe that DiAmbrosio's receipt of profits from the account constituted a participation in the 606 Account and was part of a financial arrangement. PHLX Rule 783 defines "financial arrangement" to include any "profit sharing arrangement."

DiAmbrosio (together with Diamond and Fineberg) was given direct access to, and discretionary trading authority over, the 606 Account. While the Bearcat Applicants argue that DiAmbrosio did not "share an interest" in the 606 Account, they concede that he had an interest "in his trades placed in that account" and that he "shared profits" of those trades. The Bearcat Applicants, of course, "shared" the profits of DiAmbrosio's trades as well, employing a 50/50 split of the profits to compensate DiAmbrosio. This profit-sharing arrangement constitutes an interest in the Bearcat 606 Account and a participation in its financial results. The Bearcat Applicants did not inform the PHLX of this arrangement or obtain the Exchange's consent as required by PHLX Rules 772, 773, and 783. Accordingly, we find that the Bearcat Applicants violated PHLX Rules 772, 773, and 783.

24/ See, e.g., Richard Kwiatowski, Exchange Act Rel. No. 48707 (Oct. 28, 2003), 81 SEC Docket 1858 (NYSE floor broker who effected trades in non-member firm's account, received a percentage of net trading profits, and was compensated only if the account generated a profit deemed to have an interest in the account); Edward McCarthy, Exchange Act Rel. No. 48554 (Sept. 26, 2003), 81 SEC Docket 603 (NYSE floor broker who effected trades in a non-member firm's account, exercised trading discretion, and received a percentage of net trading profits deemed to have an interest in the account).

C. Permitting DiAmbrosio To Effect Trades Without Notifying D&D

PHLX Rule 751 provides that "no member or participant organization shall take or carry an account or make a transaction in which an employee of another member or participation organization is directly or indirectly interested" absent written consent of the employer. If prior consent is obtained, the member must send duplicate reports and monthly statements of all transactions to the consenting employer.

During our staff's investigation, 25/ Diamond and Fineberg admitted that DiAmbrosio was employed by D&D at the time that Bearcat hired him. When asked if DiAmbrosio was working for another firm when Bearcat hired him to trade for Bearcat, Diamond stated "I believe it was D&D, at the time." Diamond confirmed he did not speak to anyone at D&D about DiAmbrosio's effecting transactions for Bearcat. A little later in the transcript, Diamond twice confirmed that he was aware that DiAmbrosio worked for D&D at the time that Bearcat hired DiAmbrosio.

25/ See supra note 7.

Fineberg's investigative testimony is equally clear that Bearcat hired DiAmbrosio when he was already employed by D&D. 26/ Fineberg continued throughout his investigative testimony to state his understanding that DiAmbrosio was employed by D&D prior to the time that Bearcat employed him.

The Bearcat Applicants now nonetheless argue that DiAmbrosio was employed by Bearcat before D&D hired him. They claim that Bearcat employed DiAmbrosio starting in April 1995, "six months prior to his association with D&D." Thus, in their view, D&D would have been required to get Bearcat's consent. The Bearcat Applicants assert that confirmation sheets from LIT Clearing Services, Inc. ("LIT"), Bearcat's clearing firm, evidence trades by, and payments to, DiAmbrosio starting on April 18, 1995. 27/

It is impossible to determine from the face of the LIT confirmation sheets that DiAmbrosio engaged in any of the listed trades. While the confirmation sheet for April 18, 1995 contains a reference to a check number 1202 in the amount of $900 paid to the order of "cash," nothing in the document indicates that the "cash" was compensation to DiAmbrosio. Other than Fineberg's claim at the hearing (which contradicted his investigative testimony) that this notation evidences an April 1995 payment to

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26/ The following exchange is illustrative:

Question: At what point in time did you become aware that Mr. DiAmbrosio was also employed by D&D?

Fineberg: Well, from the time he started the job there. I always knew he was working for D&D.

Question: Okay. So, when you hired him, you were aware that he was working for D&D?

Fineberg: Sure, I did.

27/ The PHLX did not determine the exact date that DiAmbrosio began his employment with Bearcat. Rather, the PHLX found that DiAmbrosio was employed "from at least October 1995," after DiAmbrosio's employment by D&D.

The Bearcat Applicants also do not provide an employment date for DiAmbrosio. Instead, they assert that April 18, 1995 is the date when DiAmbrosio first received compensation.

DiAmbrosio, the record is devoid of evidence to substantiate that DiAmbrosio began working for Bearcat in April 1995. 28/

The repeated, unequivocal statements of Diamond and Fineberg in their Commission investigative testimony demonstrate that the Bearcat Applicants knew that DiAmbrosio was also employed by D&D when they hired him. Because they did not obtain D&D's prior written consent to permit DiAmbrosio to effect trades for Bearcat, the Bearcat Applicants, either directly or pursuant to PHLX Rule 960.1(b), violated PHLX Rule 751. 29/

D. Failure to Supervise

PHLX Rule 748 requires each PHLX member firm to provide appropriate supervisory control and designate a principal "to assume overall authority and responsibility for internal supervision and control of the organization and compliance with securities laws and regulations." This rule also requires the establishment of "a separate system of follow-up and review to determine that the delegated authority and responsibility is being properly exercised." PHLX Rule 748(d) specifies that the

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28/ See supra note 16. The record contains a copy of the Form 1099 that Bearcat issued to DiAmbrosio which shows that Bearcat paid DiAmbrosio $34,822.00 in 1995. The record also contains a chart, prepared by Bearcat, which purports to show a series of cash distributions to DiAmbrosio, starting in April 1995, which total $34,822.00, based on checks written to "cash."

Although the chart is designed to demonstrate that DiAmbrosio began working for Bearcat in April 1995, we do not find it sufficient to counter other evidence in the record, including Fineberg and Diamond's investigative testimony, that establishes that DiAmbrosio was already employed by D&D at the time that Bearcat hired him. Moreover, while the underlying checks are not in the record, the undisputed testimony was that the checks did not show that the proceeds were compensation for DiAmbrosio.

29/ PHLX Rule 960.1(b) provides in relevant part that a partner, officer, director, or person employed by a member firm may be charged with any violation within the disciplinary jurisdiction of the PHLX that is committed by employees under that person's supervision "as though such violation were his own." A member firm may be charged with violations committed by associated persons.

standards for supervision are the reasonable discharge of duties and obligations "to prevent and detect, insofar as practicable, violations of the applicable securities laws and regulations . . . ." PHLX Rule 748(g) further requires members to establish, maintain, and enforce written supervisory procedures and a system for applying such procedures.

PHLX found that the Bearcat Applicants failed to supervise DiAmbrosio and provide proper procedures to effect that supervision. 30/ The Bearcat Applicants assert that they closely supervised DiAmbrosio's trading activity and that their supervisory procedures were adequate. They state that they maintained a ledger reflecting the dollar amount of all stock trades executed by DiAmbrosio, granted him "only limited authority to trade in the 606 account," daily compared DiAmbrosio's trade tickets against trade confirmation reports generated for the 606 Account, initially restricted the size of blocks of stock that DiAmbrosio could trade, and never permitted him to hold positions overnight. 31/

30/ As part of a routine PHLX examination in 1998, the PHLX examination department accepted a PHLX-prepared checklist as adequate written supervisory procedures from Bearcat. Fineberg testified at the hearing that he did not realize that, as a supervisor, he was required to establish, maintain, and enforce written supervisory procedures and a system for applying such procedures since the PHLX examination department indicated that Bearcat was in compliance with this requirement.

In this proceeding, the PHLX concluded that the checklist did not constitute adequate written procedures. However, because the PHLX 1998 examination report accepted the checklist as adequate, the PHLX declined to fine or sanction the Bearcat Applicants for a violation of PHLX Rule 748(g). PHLX did sanction the Bearcat Applicants for violating other subsections of Rule 748.

31/ The Bearcat Applicants blame Binary and D&D for failing to detect DiAmbrosio's fraudulent activity, stating that "only later" did the Bearcat Applicants discover that Binary was not daily reviewing trade tickets, and suggesting that D&D, as the execution firm, "could easily have uncovered DiAmbrosio's illicit cross-trades . . . ." We find this argument unpersuasive. Bearcat hid DiAmbrosio's association from both Binary and D&D. Moreover, under PHLX Rule 748,

(continued...)

The supervisory actions that the Bearcat Applicants claim they undertook do not support their assertion that they appropriately supervised DiAmbrosio. On the contrary, the Bearcat Applicants participated in DiAmbrosio's fraudulent trading scheme. As we have previously noted, "[p]articipating in misconduct is itself a supervisory failure." 32/ In this case, the Bearcat Applicants participated in DiAmbrosio's fraudulent conduct and took steps to conceal his actions. 33/ Thus, the Bearcat Applicants' violations of Exchange Act Section 10(b) and Rule 10b-5, as well as PHLX Rules 707 and 708, demonstrate that they did not discharge their duties in connection with their supervision of DiAmbrosio to prevent and detect, insofar as practicable, violations of applicable securities laws and regulations. 34/

Accordingly, we find that the Bearcat Applicants violated PHLX Rules 748(b), (d), and (g).

E. Registration of DiAmbrosio as an Associated Person

PHLX Rule 604(d) requires every person who is compensated by a member for trading securities for the member's account to file with the PHLX a Form U-4 (Uniform Application for Securities Industry Registration or Transfer). Pursuant to PHLX Rule 960.1(b), Bearcat, as DiAmbrosio's employer, and Diamond and Fineberg, as his supervisors, are responsible for DiAmbrosio's failure to file. 35/

The Bearcat Applicants claim that a Form U-4 was filed for DiAmbrosio. They note that a 1998 PHLX examination chart entitled "List of Officer [sic], Directors, Employees and Associated Persons as of March 31, 1998," has a checkmark next to

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31/(...continued)
Bearcat, not Binary or another firm, was responsible for supervising its associated persons.

32/ John Montelbano, Exchange Act Rel. No. 47227 (Jan. 22, 2003), 79 SEC Docket 1474, 1487.

33/ See discussion infra Sections III.A-C.

34/ See id. (a respondent may be both substantively responsible for a violation and a deficient supervisor with respect to the same misconduct).

35/ See supra note 29.

DiAmbrosio's name. According to the Bearcat Applicants, the chart evidences that a Form U-4 had been filed. 36/

We do not believe the examination chart is probative that Bearcat filed a Form U-4 for DiAmbrosio. The Bearcat Applicants did not produce a copy of the Form U-4 or any other evidence of its existence. Multiple witnesses testified that no such form was filed. Walter Smith, the director of the PHLX examination department, testified Bearcat did not file a Form U-4 for DiAmbrosio. Moreover, the Bearcat Applicants' assertion that a U-4 had been filed for DiAmbrosio is undercut by their testimony. At the hearing, Fineberg testified that LIT, Bearcat's clearing firm, would "fill out" Form U-4 filings for Bearcat and that he expected LIT to file DiAmbrosio's Form U-4 based on Fineberg's belief that LIT knew that DiAmbrosio was associated with Bearcat. However, Fineberg conceded that he never spoke with LIT, but should have, about the filing of a Form U-4 for DiAmbrosio, that "in retrospect" this was a mistake, and that the filing was "ultimately my responsibility." Diamond also admitted that neither Bearcat nor LIT had filed a Form U-4 for DiAmbrosio.

We find that the Bearcat Applicants violated PHLX Rule 604(d), through PHLX Rule 960.1(b). 37/

36/ The Bearcat Applicants accuse the PHLX prosecutor of having suppressed evidence by intentionally withholding a PHLX examination file that contained the examination chart and other information until the final day of the hearing. However, the prosecutor voluntarily brought the examination file to the hearing panel's attention before the close of the hearing.

37/ See supra note 29. The Bearcat Applicants request that the Commission order an independent investigation of the PHLX, the PHLX "Special Prosecutor," and Binary. By separate application, they request that the Commission supplement the record on appeal with documentation that they assert demonstrates prosecutorial misconduct. The Bearcat Applicants' requests and materials have been forwarded for review to the appropriate divisions within the Commission.

Because these requests are separate from this proceeding, the application to supplement the record is denied. See, e.g., Russell A. Simpson, 53 S.E.C. 1042, 1048, n. 12 (decision whether to institute a review of NASD based on respondent's allegations that the organization failed to

(continued...)

IV.

Exchange Act Section 19(e) 38/ governs our review of the sanctions imposed by a self-regulatory organization ("SRO"). If we find that the applicant has committed the violations found by the SRO, we will sustain the SRO's sanctions unless we further find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 39/ The appropriate sanctions depend on the facts and circumstances of each case. 40/

The Bearcat Applicants argue that a $500,000 fine is unprecedented and excessive. They base this argument on the premise that "other than DiAmbrosio, none of the respondents committed a single intentional act."

The Bearcat Applicants covertly employed DiAmbrosio, allowed him full discretion to trade in the 606 Account, and split with the proceeds of his trades with DiAmbrosio. While the Bearcat Applicants claim that they fulfilled their obligations and "were innocent of wrongdoing and guilty knowledge," the record demonstrates otherwise.

The Bearcat Applicants also disregarded PHLX regulatory requirements in connection with their employment of DiAmbrosio and his fraudulent trading activity. Fineberg, a former PHLX Board of Governors member, floor official, and former member of the finance committee, rules committee (two terms), and audit committee, knew or should have known the relevant rules. The admissions throughout Diamond's investigative testimony

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37/(...continued)
enforce its rules is a "separate matter" from the Commission's disposition of its review of the respondent's appeal of an NASD proceeding)

38/ 15 U.S.C. § 78s(e)(2).

39/ Id. The Bearcat Applicants do not argue that the sanctions against them impose an unnecessary or inappropriate burden on competition.

40/ Wendell D Belden, Exchange Act Rel. No. 47859 (May 14, 2003), 80 SEC Docket 699, 706 (citations omitted).

demonstrate that Diamond is equally culpable. 41/ The acts and omissions committed by the Bearcat Applicants directly or indirectly resulted in substantial losses to Binary, created a significant risk of loss to other persons, and resulted in substantial pecuniary gain to the Bearcat Applicants. We find that the sanctions imposed on them are neither excessive nor oppressive.

The Bearcat Applicants represent that Bearcat is defunct and Diamond is financially unable to pay disgorgement, interest, or penalty. At the hearing, Diamond submitted a personal financial statement and testified for the limited purpose of demonstrating an inability to pay any disgorgement, interest, or penalty. As part of his appeal, Diamond submitted additional financial information which he claims evidences his inability to pay. 42/

An applicant's ability to pay is but one factor to consider in determining whether a penalty is in the public interest. 43/ We have examined the financial statements submitted by Diamond.

41/ Fineberg's and Diamond's conduct is imputed to Bearcat. See, e.g., Piper Capital Mgmt., Inc., Securities Act Rel. No. 8276 (Aug. 26, 2003), 80 SEC Docket 3594, 3608 n.30 (citing Rent-Way Sec. Litig., 209 F. Supp.2d 493, 522 (W.D. Pa. 2002)).

42/ Fineberg states that he has "spent every penny [he has] defending [his] integrity." At the hearing, he submitted a statement of assets showing a positive net worth. Although he testified about mounting legal fees, he represented that he was committed to repaying to Binary those profits that Bearcat was not entitled to retain and, if necessary, would do so out of future earnings.

Fineberg did not argue before the PHLX that he was unable to pay a penalty. Moreover, he has not sought on appeal leave to introduce any updated financial information to support this assertion. We have previously held that a respondent carries the burden of demonstrating an inability to pay. E.g., Brian a. Schmidt, Securities Act Rel. No. 8061 (Jan. 24, 2002), 76 SEC Docket 2255, 2273. Accordingly, there is nothing in the record to support any reduction of monetary sanctions against Fineberg.

43/ E.g., Schmidt, 76 SEC Docket at 2273-74.

Even taking them at face value, 44/ we nonetheless find that the egregiousness of Diamond's conduct far outweighs any consideration of his ability to pay the civil penalty. 45/

In their brief Bearcat and Diamond alternatively request that we remand this proceeding to the PHLX with instructions to dismiss, or that we "substantially reduce the suspension and monetary penalties." Other than this single reference, the Bearcat Applicants do not address the six-month suspensions from membership, association, or participation on the PHLX imposed on Fineberg and Diamond, and the six-month suspension or participation with the PHLX imposed on Bearcat. We find that the suspensions are neither excessive nor oppressive.

An appropriate order will issue. 46/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, and CAMPOS), Commissioner ATKINS not participating.

44/ The information that Diamond provided is contradictory. At the hearing, Diamond represented that his net worth as of September 22, 2001 was $34,000. In his submission to the Commission, Diamond now claims that his net worth as of September 22, 2001 was negative $116,000, a difference of $150,000. Diamond provides no explanation for this significant discrepancy.

Diamond's disclosure of financial information is incomplete. For example, Diamond discloses that between September 1999 and the filing of his appeal, he withdrew hundreds of thousands of dollars from various bank accounts. It is not clear how Diamond distributed this money, but large sums apparently were transferred into trust accounts for his children, and used to "reimburse" his spouse. Diamond also represents that, to fund legal expenses, in 2001 he sold to his wife for "fair market value" his interest in their house. Diamond does not disclose whether any of his "reimbursement" payments were used by his spouse to "purchase" Diamond's interest in their house.

45/ E.g., Schmidt, 76 SEC Docket at 2273-74.

46/ We have considered all of the parties' contentions. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed in this opinion.

Jonathan G. Katz
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 49375 / March 8, 2004

Admin. Proc. File No. 3-11004

In the Matter of the Applications of

BEARCAT, INC.,
SETH DIAMOND, and
PETER FINEBERG

For Review of Disciplinary Action Taken by the

PHILADELPHIA STOCK EXCHANGE, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NATIONAL SECURITIES EXCHANGE

On the basis of the Commission's opinion issued this day, it is

ORDERED, that the disciplinary action taken by the Philadelphia Stock Exchange, Inc. against Bearcat, Inc., Seth Diamond, and Peter Fineberg be, and it hereby is, sustained.

By the Commission.

Jonathan G. Katz
Secretary