

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	Disciplinary Proceeding No. CAF030042
	:	
Complainant,	:	REMAND HEARING PANEL DECISION
	:	
v.	:	
	:	Hearing Officer - SW
FLORENCE SARAH POLLARD (CRD No. 2208895),	:	
	:	
Respondent.	:	Date: September 18, 2006
	:	

The National Adjudicatory Council ruled on appeal that Pollard violated NASD Conduct Rules 2460 and 2110, which prohibit the receipt of consideration for filing Form 211 applications. After the National Adjudicatory Council remanded the case to the Hearing Panel to determine appropriate sanctions, the Hearing Panel fined Pollard \$5,000 and suspended her for six months in a principal capacity.

Appearances

Rodney W. Turner, Esq., Senior Attorney, Washington, DC, and Joel T. Kornfeld, Esq., Senior Regional Attorney, Los Angeles, CA, for the Department of Enforcement.

Michael T. McColloch, Esq., Carlsbad, CA, for Respondent Florence S. Pollard.

DECISION ON REMAND

I. Procedural History

On August 15, 2003, the Department of Enforcement (“Enforcement”) filed a three-count Complaint against Respondents Equitrade Securities Corporation (“Equitrade” or the “Firm”), Kim Sang Carroll (“Carroll”), and Florence S. Pollard (“Pollard”).

Only count one of the Complaint contained allegations relating to Pollard, alleging that Pollard solicited or received payments from four issuers to prepare and file

Form 211 applications and publish quotations in their stock, in violation of NASD Conduct Rules 2460 and 2110.¹

Following the disciplinary hearing relating solely to Pollard, the Hearing Panel issued an order on August 27, 2004, granting Pollard's motion for summary disposition and dismissing the Complaint, based on a finding that Pollard did not receive any compensation or benefit, directly or indirectly, from filing the Form 211 applications.

On September 17, 2004, Enforcement appealed the Hearing Panel's decision to the National Adjudicatory Council ("NAC").

On December 30, 2005, the NAC issued an Amended Decision Ordering Remand. In its decision, the NAC (i) reversed the Hearing Panel's findings, (ii) granted Enforcement's motion for summary disposition, holding that Pollard's actions violated NASD Conduct Rules 2460 and 2110 because but for her actions Equitrade would not have received compensation for filing Form 211 applications in violation of Rule 2460, and (iii) directed the Hearing Panel to hold a hearing to determine appropriate sanctions for the violations. The NAC expressed no view on what sanctions would be appropriate.

II. Hearing Panel's Consideration on Remand²

At the Remand Hearing held on May 23, 2006, the Parties offered Pollard's updated CRD record as an additional exhibit labeled JX-10. Neither party provided any additional testimonial evidence. The Hearing Panel heard the Parties' oral arguments and considered the prior evidence.

¹ Count one of the Complaint also alleged that Equitrade solicited and received payments from 11 issuers to prepare and file Form 211 applications and publish quotations in their stock, in violation of NASD Conduct Rules 2460 and 2110. Equitrade and Carroll failed to file answers to the Complaint and, accordingly, default decisions were issued against them.

² Hereinafter, "Tr." refers to the transcript of the two-day Hearing held on April 26 and 27, 2004; "RTr." refers to the transcript of the Remand Hearing held on May 23, 2006; "CX" refers to Enforcement's exhibits; "RX" refers to Pollard's exhibits; and "JX" refers to the joint exhibits.

A. Background

In July 1999, Pollard became registered as a general securities principal with Equitrade. (JX-1, p. 5). Pollard worked out of the San Diego office of Equitrade as an independent contractor and received 75% of the commissions generated through purchases or sales of securities by her customers. (Tr. p. 388). Equitrade did not provide any other funds, services, or compensation to Pollard. (Tr. pp. 388, 395, 411).

Equitrade and its San Diego office derived a significant portion of their revenues from market making activities for stock listed on the OTC Bulletin Board and the Pink Sheets.³ (Tr. p. 386). Equitrade also entered into investment banking agreements (“IBA”) to provide specific services to certain issuers in return for a flat fee.⁴ (JX-2; JX-4; JX-6; JX-8).

In 1999 and 2000, Pollard as a registered principal of Equitrade executed IBAs, with the approval of Carroll, for at least three issuers: (i) Never Miss A Call, Inc.; (ii) Bidder Communications, Inc.; and (iii) Northern Ostrich Corp. (JX-4; JX-6; JX-8; Tr. pp. 299, 313-314). An earlier fourth IBA was executed using Pollard’s name, but without her consent or approval, for a fourth issuer, Great Bear Investments Inc. (collectively, the

³ A market maker is a firm that maintains a firm bid and offer price in a given security by standing ready to buy or sell at publicly quoted prices. Pink Sheets are printed by the National Quotation Bureau and are daily listings that contain quotations for thousands of over-the-counter stocks that are not listed on any of the major stock markets. These quotations are entered by dealers acting as market makers in the individual securities. See Glossary of Terms at <http://www.nasd.com/resources/glossary.asp>.

⁴ The services listed in the IBAs included “services . . . regarding . . . the public securities market, investor relations and other areas of investment banking as requested.” (JX-6, p. 2 at ¶ 3; JX-8, pp. 1, 2 at ¶ 3). Other services included: market intelligence; assistance with blue sky exemptions; assistance with S&P listing; and presenting the company to a registered SEC Edgar filing agent. (JX-2, p. 2, at ¶ 3a; JX-4, p. 2 at ¶ 3a). Equitrade charged a separate fee for presenting potential merger candidates to its customers. (JX-6, p. 2, at ¶ 4; JX-8, p. 2 at ¶ 4).

“Issuers”).⁵ (Tr. p. 293; JX-2). In connection with the execution of the IBAs, the Issuers each paid Equitrade \$5,000. (JX-2; JX-3; JX-4; JX-5; JX-6; JX-7; JX-8; JX-9).

Shortly after Equitrade received the fee, Pollard, as a registered principal of Equitrade, signed and submitted the Form 211 applications to NASD on behalf of Equitrade to make markets in the stock of the four Issuers. (CX-20; CX-28; CX-29; CX-39; CX-43; CX-44). The Form 211 is an application that an NASD member must submit to NASD prior to becoming a market maker in any non-Nasdaq stock, pursuant to NASD Market Place Rule 6740.⁶ (Tr. pp. 24-25). In addition to signing the Form 211 applications, in several instances, Pollard responded to deficiency letters written by the NASD staff regarding Equitrade’s Form 211 filings. (CX-13; CX-15; CX-17; CX-23; CX-31; CX-44; CX-46).

B. NAC’s Findings of Fact

The NAC specifically found that:

Pollard played a significant, if not indispensable, role in procuring the \$5,000 payments that the Firm received from the issuers. As a registered principal of Equitrade Securities, Pollard had the authority to submit Form 211 applications to NASD on behalf of the issuers. Pollard executed these applications in exchange for a \$5,000 fee that she requested and directed the issuers to send to the Firm. Moreover, Pollard served as the initial contact person, referring the issuers to Carroll. Pollard signed the IBAs and discussed the terms of the IBAs with the issuers. Pollard also signed the Form 211 applications and reviewed these applications before they were sent to NASD. Finally, Pollard served as the

⁵ Pollard discovered that her name had been signed to the Great Bear IBA during NASD’s investigation in 2002. (Tr. pp. 293-295).

⁶ NASD Market Place Rule 6740 requires a member firm to submit a Form 211 application to NASD’s Market Regulation Department for its review and determination that the member firm has demonstrated compliance with SEC Rule 15c2-11 before the member firm initiates or resumes quotation of a non-NASDAQ security in any quotation medium.

SEC Rule 15c2-11, promulgated under Section 15(c)(2) of the Securities Exchange Act of 1934, makes it unlawful for a broker or dealer to publish any quotations for a security in any quotation medium, unless such broker or dealer: (1) has in its possession certain specified information; (2) believes that the specified information is accurate in all material respects; and (3) believes that the sources of the specified information are reliable.

contact person for any follow-up work with NASD regarding the Form 211 applications. There is no evidence that the Firm provided Pollard's clients with any of the investment banking services described in the IBAs. Instead, the Firm simply filed a Form 211 application and became a market maker for the issuers who entered into the IBAs.

The NAC also stated that:

NASD requires that a firm filing a Form 211 application must have one of its principals attest to the accuracy of the information provided in the application. NASD's decision to require a registered principal to attest to such information in the Form 211 is an important attempt to bolster the reliability of the information contained in these forms and to prevent potential fraud in the quotation and trading of unlisted securities. We therefore reject the Hearing Panel's conclusion that Pollard's signing of the Form 211 applications in this case was a trivial task.

The NAC also held that:

As a principal in Equitrade's San Diego office, Pollard requested and accepted payment from the issuers on behalf of the Firm via the IBAs that she executed. Conduct Rule 2460 prohibits the acceptance of payment by an NASD member in exchange for filing a Form 211 application or making a market on behalf of an issuer, and applies equally to both members and persons associated with members who act to secure such payments. Consequently, we find Pollard liable under Conduct Rule 2460.

III. Sanction

There is no specific sanction for violating NASD Conduct Rule 2460. Pollard argued that the violation in this case was equivalent to the first time violation of "Passive Market Making Violations, NASD Conduct Rule 2110 and Regulation M," for which the Sanction Guidelines recommend a monetary sanction of \$5,000 to \$10,000 for a first offense.⁷ (RTr. p. 26).

Arguing that Pollard played a significant, if not indispensable, role in the Firm's violation of Conduct Rule 2460, Enforcement suggested that Pollard be suspended in all capacities for six months, fined \$20,000, and ordered to requalify as a general securities principal. In support of the above sanction, Enforcement referenced Pollard's prior 1996

⁷ NASD Sanction Guidelines, p. 63 (2006).

disciplinary history. Approximately 10 years ago, as part of a settlement for violation of the SEC penny stock rules, based upon 27 transactions in the stocks of four issuers over a period of approximately a year and a half, Pollard was suspended as a general securities principal for one and a half years, prohibiting from recommending penny stocks for two years, censured and fined \$8,500. (RTr. p. 13).

In evaluating Enforcement's recommended sanctions, the Hearing Panel noted that (i) the NAC focused on Pollard's failure as a registered principal, (ii) Pollard did not receive any portion of the \$20,000 paid by the four Issuers, and (iii) Pollard's prior misconduct, although very serious, occurred approximately 10 years ago, and Pollard's subsequent conduct did not demonstrate a pattern of disciplinary lapses.

The Hearing Panel, therefore, examined the general principles in assessing the appropriate sanction. The Hearing Panel considered the number of Form 211 applications that Pollard executed, the number of IBAs that she executed, and the period of time during which the conduct occurred.

The Hearing Panel also noted the lack of a number of aggravating factors. There was no evidence that Pollard created the IBA agreements or used them without the approval of the Firm. Instead, the IBA forms were already in use when Pollard joined Equitrade, and the IBA forms had been created and approved for use by the Firm's owners and the Firm's compliance department.

There was no evidence that the IBA agreements as written clearly violated NASD Rules. Instead, the deciding issue was that Equitrade did not provide the listed services to the Issuers.

The Hearing Panel also noted that Pollard was not an officer or owner of Equitrade and did not execute either the Form 211 applications or the IBA agreements for direct financial benefit.

In the absence of the above aggravating factors, and in an effort to tailor the sanctions to respond to the conduct at issue, the Hearing Panel finds that suspending Pollard in a principal capacity for six months and fining her \$5,000 is an appropriate sanction.⁸

IV. Order

Respondent Florence Sarah Pollard is fined \$5,000 and suspended for six months in a principal capacity. The Hearing Panel also orders Pollard to pay the \$1,157.21 costs of Hearing, which include an administrative fee of \$750 and Hearing transcript costs of \$407.21.

The sanctions shall become effective on a date determined by NASD, but not sooner than thirty days from the date this Remand Decision becomes the final disciplinary action of NASD, except that, if this Remand Decision becomes the final disciplinary action of NASD, Pollard's suspension shall commence at the opening of business on Monday, November 6, 2006, and conclude on May 5, 2007.⁹

HEARING PANEL.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
September 18, 2006

⁸ Enforcement recommended that Pollard be suspended in all capacities for six months, fined \$20,000, and ordered to requalify as a general securities principal.

⁹ The Hearing Panel considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

Copies to:

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