ADMINISTRATIVE PROCEEDING
FILE NO. 3-6599

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
COSENTINO & DEFELICE, INC.
ELIZABETH BAMBERG, et al.

INITIAL DECISION

February 12, 1988
Washington, D.C.

David J. Markun
Administrative Law Judge

ADMINISTRATIVE PROCEEDING
FILE NO. 3-6599

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of COSENTINO & DEFELICE, INC. ELIZABETH BAMBERG, et al.	INITIAL DECISION

APPEARANCES: Scott H. Rockoff, Jeffrey Plotkin, Edwin H. Nordlinger, Esqs., New York Regional Office, for the Division of Enforcement.

Philip H. Kalban, Esq., Parker Chapin Flattau & Klimpl, New York New York, for the Respondent.

BEFORE: David J. Markun
Administrative Law Judge.

I. THE PROCEEDING

This public administrative proceeding was instituted by an order of the Commission dated December 19, 1985 ("Order") pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. §78o(b), 78s(h)), naming Cosentino & DeFelice ("C&D") a registered broker-dealer, Edward DeFelice ("E. DeFelice"), president and director of C&D, Joseph Cosentino ("Cosentino"), vice president, treasurer and secretary of C&D, Richard DeFelice, comptroller and registered representative of C&D, and Elizabeth Bamberg ("Bamberg", or "Respondent"), a registered representative of C&D, as respondents.

The Order alleged that respondents wilfully violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and that C&D wilfully violated, and the other respondents wilfully aided and abetted C&D's violations of, Section 15(c)(1) of the Exchange Act and Rule 15c1-2 thereunder, during the period December 1983 to April 1984 (the "relevant period"), in connection with C&D's sole underwriting of the initial public offering of the shares of Leadville Mining and Milling Corporation ("Leadville").

The Order directed the holding of a hearing to determine whether the Division's allegations were true, to afford respondents the opportunity to establish any defenses, and to determine what, if any, sanctions may be appropriate in the public interest.

On May 22, 1987, the Commission issued Findings and Orders [1/] Imposing Remedial Sanctions based upon settlement offers as respects all respondents other than Respondent Bamberg.

A two-day hearing respecting the charges against Respondent Bamberg was held in May 1987, in New York, N.Y., after which the parties filed proposed findings of fact, conclusions of law, and supporting briefs.

The findings and conlcusions herein are based upon the record and upon the demeanor of the various witnesses. The standard of proof applied is that requiring proof by a preponderance of the evidence. [2/]

1/ Exchange Act Releases Nos. 24497 and 24498, May 22, 1987, 38 SEC DOCKET 762 et seq. The charges against the other respondents included alleged violations of various "back office" provisions of the securities laws that were not alleged to have been violated by Bamberg.

2/ Steadman v. S.E.C., 450 U.S. 91, 101 S.Ct. 999 (1981).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Respondent.

Respondent Bamberg was employed as a registered representative by C&D from June 1980 to September 1985. During the relevant period (December 1983 to April 1984) she was employed full time with C&D. However, during such period she worked most of the time from her home, spending only about 3 to 4 hours a week at the D&C office.

B. The Leadville Underwriting and Respondent's Participation In It.

In December 1983 C&D became the sole underwriter of the initial public offering of common stock of Leadville Mining and Milling Co. ("Leadville"). C&D's underwriting was undertaken on a best efforts minimum 10,000,000 shares or none basis, with a 20,000,000 share maximum. The initial public offering price of the stock was set at 15 cents per share.

Respondent Bamberg was allotted a 1.8 million share portion of the available Leadville shares to distribute among her interested customers. 3/

3/ Her allotment was increased successively from an initial 1 million shares to 1.5 million to 1.8 million at her requests, but her request for still more shares was not granted.

In January 1984, prior to her taking indications of interest from her customers, Bamberg learned from Edward DeFelice ("E. DeFelice"), the president of C&D and the person in charge of its retail sales, that the principals of C&D were concerned that following the closing of the initial public offering there should be a strong aftermarket in the Leadville shares. Bamberg was made aware that the principals of C&D were concerned that the "frustration" they felt after a prior initial public offering (in Houston Oil and Energy)[4/] was followed by a very weak aftermarket in that stock, should not be experienced again with respect to the current offering of Leadville.

E. DeFelice instructed Bamberg and others that to ensure a strong aftermarket in Leadville stock they should endeavor to have their customers who would be purchasing Leadville, or at least selected customers, to dedicate from 1/3 to 1/2 of the dollar value of their intended investment in Leadville to purchases in the aftermarket. Leadville was expected to be a "hot issue".

4/ Bamberg was not allotted any shares in Houston Oil; Leadville was her first participation in an initial public offering.

E. DeFelice instructed Bamberg to get separate checks to cover the aftermarket purchases at the same time she obtained checks for the I.P.O., i.e. prior to the closing. Bamberg asked E. DeFelice what aftermarket price she should utilize in discussing aftermarket purchases with her customers and getting checks from those who wanted to buy. E. DeFelice told her he expected Leadville to open in the aftermarket at 1/4 or 3/8 and then go up very quickly to 50 cents. Bamberg understood this to mean that even if the stock opened at less than 50 cents it would move to that level so quickly that shares would not be available to her customers at less than 50 cents in the aftermarket.

Beginning in February 1984 and in accordance with her discussions with E. DeFelice, Bamberg followed a procedure of asking her interested customers how much money they wanted to invest in the Leadville initial public offering. After getting that indication, she would tell the customers that she could only get them a given number of shares at the initial offering price of 15 cents a share because she had a limited allotment of shares that she had to spread out among all her interested customers, and that if they wished to purchase additional Leadville shares they would have to purchase the shares in the

aftermarket. To customers who expressed an interest in aftermarket purchases, Bamberg indicated that she expected the stock to open at 1/2 or 3/8 but move very quickly to 50 cents and that it would be the 50 cent price at which aftermarket shares would be available to them.

Of the seventy customers to whom Bamberg sold Leadville stock at the 15 cent I.P.O. price, 20 customers decided to buy additional shares in the aftermarket. Of these 20 customers, about a half tendered two separate checks prior to the closing on March 19, 1984 of the I.P.O. to cover the I.P.O. and aftermarket purchases, respectively, while the other half of those 20 customers submitted a single check (again prior to the closing, of course) to cover both the I.P.O. and the aftermarket purchases of Leadville stock.

In early March 1984, prior to the closing on March 19th, Bamberg simultaneously filled out all or most of the order tickets covering her customers' purchases of Leadville stock in both the initial public offering and in the aftermarket, as respects those customers who bought in the aftermarket. Bamberg left the trade dates blank, to be filled in later, on the aftermarket order tickets, and either filled in the price at 50 cents or filled in the number of shares based on a 50 cents per share calculation on such order tickets.

When the underwriting was closed on March 19, 1984, there were approximately 17.5 million shares sold, or 2.5 million short of the maximum that could have been sold. This shortfall resulted, apparently, from a failure of some expected sales through broker-dealers in London to come through. Bamberg learned of this failure to sell the 20 million shares she had been expecting to be sold from Cosentino, either on the day of the closing or very shortly thereafter. She testified that she felt "rather numb" and "very surprised" upon learning this, but that it was by then too late for her to accommodate at the I.P.O. price of 15 cents her customers who had expressed their desire and sent in their checks to purchase in the aftermarket after being advised that they could not be given more shares at 15 cents.

The record indicates that a total of 58 C&D customers were induced, prior to the closing, to provide funds for the purchase of Leadville shares in the aftermarket. Of these 58 purchasers, 20 were customers of Bamberg. Of the remaining 38 purchasers, 37 were customers of the "D&C" house account, i.e. the account used by E. DeFelice and Cosentino. The registered representative for the other purchasers was R. DeFelice.

As respects all of the foregoing aftermarket sales, the record establishes that Bamberg and the others involved made extensive use of the telephones and the mails in connection therewith.

Of the firm-wide 58 prearranged aftermarket purchases induced as described above, 15 were executed by C&D on March 20, 1984,[5/] the second day of aftermarket trading, and 21 were interspersed over the succeeding interval until April 23, 1984, when 22 orders were executed. Thus, D&C and its principals had prearranged for and carried out aftermarket purchases of Leadville at 50 cents a share over a period of some five weeks. The purpose and clearly evident result of these purchases was to create the appearance of a strong and maintained market for Leadville shares at a premium of 233% over the initial public offering price. The fraudulent and manipulative purpose and intent of the prearranged aftermarket purchases is quite clearly evident from the prefixed 50 cent price, the manner of spreading out the aftermarket purchases over a 5 week period, and the circumstance, already mentioned above, that about 2.5 million available shares remained

---

5/ Dates mentioned in this and the next paragraph are trade dates, not settlement dates.

unsold at the closing of the initial public offering on March 19, 1984. Nobody at C&D attempted to reallocate the funds that customers had supplied in advance for aftermarket purchases at 50 cents to the purchase of unsold 15 cent shares from the initial public offering.

The aftermarket purchases for Bamberg's twenty customers were executed at 50 cents between March 20, 1984 and April 23, 1984,[6/] a five week period. Bamberg testified that the timing of these aftermarket purchases was up to Cosentino and that she had no advance knowledge of or control over the timing of the sales or the price.

Respondent Bamberg testified without contradiction that following the closing of the public offering she contacted each of her customers who had indicated a desire to purchase Leadville stock in the aftermarket and who had money in their accounts for that purpose to confirm whether they still desired to purchase the stock. About a half dozen of her customers who had changed their minds were given refunds.

It is significant that in her testimony about recontacting her customers about their continued interest in aftermarket purchases of Leadville stock, there is no

---

6/ See footnote 5.

mention of a discussion of price. This further confirms the conclusion reached herein that both Bamberg and her customers were operating under the understanding, from the outset, that the aftermarket price would be 50 cents. Additionally, it is significant that in her testimony about recontacting customers after the closing to confirm their continued desire to purchase in the aftermarket, there is no indication that Bamberg bothered to inform the customers that some 2.5 million shares of the initial public offering maximum had remained unsold at the time of the closing or that Cosentino, not she, had entire control over the timing of the aftermarket purchases, or that C&D was spreading the aftermarket purchases over a five week period. These were all material facts for a customer deciding whether he still wanted to go through with his aftermarket purchases. Bamberg's "excuse" that she was denied access to the necessary C&D records and information does not justify her dereliction since if she lacked necessary information she should not have solicited the sales or the reconfirmations.

The Division seeks a "tie in" finding that Bamberg told customer R.B. that as a precondition to being allowed to purchase $1,500 worth of Leadville stock he would be required to purchase an additional 50% more in dollar

amount ($750) at a price of 50 cents in the aftermarket. Customer R.B. was called as a witness by the Division at the hearing. His testimony on the point at issue here was at best confused and confusing. Moreover, his testimony on the point contradicted testimony he had given much earlier during the investigative phase. Additionally, his testimony is not corroborated by that of any other witness or any other evidence. Accordingly, I do not credit R.B.'s testimony as supporting the Division's requested finding.

The Division also seeks a "tie in" finding that Bamberg "intimated" to customer L.C.C. that he could buy Leadville shares in the initial public offering at 15 cents per share only if he also bought shares in the aftermarket at 50 cents per share. Customer L.C.C. testified during the investigative phase preceding this administrative proceeding but died prior to the hearing herein. The transcript of his investigative testimony was received in evidence over Respondent's objections, and the propriety of having received it in evidence has been extensively briefed and argued by the parties in the post-hearing briefs and in Respondent's related motion. Having considered fully all of these briefs, motion, and arguments, I conclude that my receipt into evidence of the L.C.C.

investigative transcript, taken under oath in an investigation ordered by the Commission, was entirely correct on the basis of the numerous grounds urged by the Division in support of its admission.[7/] It does not follow, however, that it would be appropriate to base the finding requested by the Division of a tie-in requirement on the L.C.C. investigative transcript. A tie-in finding would be very critical to a finding of scienter that is required to be made under certain of the securities laws under which Bamberg is charged. I therefore conclude that due process considerations militate against my basing the tie-in finding requested by the Division upon the investigative transcript alone under the circumstances presented by this record. Accordingly, I have not read or given any consideration to the L.C.C. transcript.[8/] In this connection, I note that the Division urges only that the transcript would show that Bamberg "intimated" rather than expressed directly and clearly what is sought to be established. Moreover, as already noted, there is

---

7/ See, for example, Richardson v. Perales, 402 US 389, 409, 91 S.Ct. 1420, 1437 (1971).

8/ I do not strike the transcript from the record, against the possibility that the views of reviewing authorities may differ from mine.

no other credited evidence tending to corroborate the purported intimation. In these circumstances I conclude that the requested finding of a tie-in requirement is not supported by the record.

As already concluded herein, the record establishes that C&D and its principals, as charged, intentionally, and with scienter, conceived and carried out a scheme to manipulate and artificially maintain the aftermarket price of the Leadville stock.

Respondent Bamberg contends that in her involvement in the sales of Leadville stock she was merely following instructions of her superiors who used her as an "unwitting tool", was uninstructed in and ignorant of the law, owed no fiduciary obligation to her customers, acted without scienter, and did not act negligently. Respondent further argues that the "wilfullness" requirement in Section 15(b)(4)(D) of the Exchange Act under which she is charged requires a showing of scienter, citing In re Carter-Johnson, [1981 Transfer Binder] CCH Fed. Sec. L. Rep. ¶82,847 (1981).

The parties are in agreement that to establish a violation of Section 17(a)(1) of the Securities Act or of Section 10(b) of the Exchange Act or Rule 10b-5 thereunder

scienter must be found. Scienter, may be established by a showing of "recklessness", or "severe recklessness,"

> " . . . which is [usually] limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it. Shivangi v. Dean Witter Reynolds, Inc. [Current] Fed. Sec. L. Rep. (CCH) ¶93,364 at 96,879 (5th Cir., Aug. 27, 1987).

While the question is a close one, I conclude, on the basis of my observation of Respondent Bamberg in her testimony at the hearing, her evident candor when examined during the investigative phase preceding the institution of this administrative proceeding, her lack of participation in any prior initial public offering, and on the entire record, that the record herein does not support a finding of scienter on the part of Respondent in connection with her violations, even under the recklessness criteria. I do not find that she intentionally or recklessly set out to cheat, defraud, or deceive her customers even though she clearly through her negligence and failure to conform with her fiduciary responsibilities to her customers contributed to the manipulative scheme conceived and carried out by C&D and its principals.

I therefore find that Respondent Bamberg wilfully violated Sections 17(a)(2) and 17(a)(3) of the Securities Act. Contrary to Respondent's argument, a finding of wilfulness does not require a finding of scienter. As the United States Court of Appeals for the Second Circuit stated in Hanly v. Securities and Exchange Commission, 415 F.2d 589, 595-6 (2d Cir. 1969), brokers and salesmen are "under a duty to investigate; and their violation of that duty brings them within the term 'willful' in the Exchange Act." All that is required to support a finding of willfulness under the securities laws is proof that a respondent acted intentionally in the sense that he was aware of what he was doing and either consciously, or in careless disregard of his obligations, knowingly engaged in the activities which are found to be illegal. 9/

Recapitulating only a few of the more salient findings made herein, it is clear that Bamberg was grossly negligent in her representations and actions or inactions in connection with her sales of Leadville stock.

9/ Arthur Lipper Corp. v. S.E.C., 547 F.2d 171; 180 (2d Cir. 1976) cert. denied, 434 U.S. 1009 (1978); Hanly v. Securities and Exchange Commission, 415 F.2d 589, 595-6 (2d Cir. 1969); NEES v. Securities and Exchange Commission, 414 F.2d 211, 221 (9th Cir. 1969); Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 109-10 (2d Cir. 1967); Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (2d Cir. 1965).

To begin with, Bamberg knew from the outset, before she began taking indications of interest, that C&D intended to insure a strong aftermarket in Leadville stock, and this should have put her on notice to be wary of the means to be followed for doing so.

Secondly, Bamberg had no reasonable or proper basis for telling her customers that the aftermarket price would quickly go to 50 cents and that that was the price at which aftermarket shares would be available to them. Bamberg was not entitled to rely upon E. DeFelice's statements that such was the course the aftermarket price of Leadville would take. Indeed, his flat predictions should have caused her to question the basis for them. While Bamberg's relative inexperience saves her from a finding of scienter, it does not save her from findings of gross negligence.

Thirdly, as found herein, when Bamberg reconfirmed with her customers that they still wanted to purchase in the aftermarket, there were a number of material facts she neglected to inform them of, and those omissions constituted gross negligence.

Lastly, Bamberg failed to monitor the timing and price at which her customers' aftermarket purchases, which were spread over a five week period, were effected. This, again, was grossly negligent.

In light of my conclusion that the record does not support a finding of scienter against Bamberg, I conclude that, given the generally applicable tests for aider and abettor liability, the record herein does not support the charge that Bamberg aided and abetted C&D's violations of Section 15(c)(1) of the Exchange Act and Rule 15c1-2 thereunder.

C. Conclusions of Law.

In general summary of the foregoing conclusions of law, it is concluded that during the relevant period from December 1983 to April 1984 Respondent Bamberg wilfully violated Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933.

III. THE PUBLIC INTEREST

In determing what sanctions, if any, it is appropriate to apply in the public interest, it is necessary for the Commission, among other factors, to " . . . weigh the effect of . . . action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally." 10/

10/ Arthur Lipper Corporation, Securities Exchange Act Release No. 11773 (October 24, 1975) 8 SEC DOCKET 273, 281. Although the reviewing court in Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 184-5 (2nd Cir. 1976) reduced the Commission's sanctions on its view of the facts, it recognized that deterrence of others from violations is a legitimate purpose in the imposition of sanctions.

The Division recommends that Respondent be barred from association with a broker or dealer in any capacity with a right to reapply after two years in a nonsupervisory and nonproprietary capacity.

Respondent urges that if any sanction is warranted it should be limited to a censure and that any sanction imposed should be "significantly less" than the 6 month suspension imposed upon R. DeFelice as the result of a settlement offer.

In light of my findings herein that Respondent's violations resulted from gross negligence rather than being based upon findings that she acted with scienter, and taking into account the various mitigative factors urged by Respondent, including the fact of her inexperience in initial public offerings and some indications in the record that the principals of the firm were to an extent "using" her, 11/ I consider that the period during which Respondent needs to be denied employment can be appreciably reduced from that recommended by the Division. On the other hand, it is clear, as the findings in this proceeding demonstrate, that a return by Respondent to the securities

---

11/ There is some indication that C&D "steered" a few customers to Bamberg who might just as well have wound up in the C&D "house" account.

industry following an imposition of a sanction should be subject to proper and adequate supervision. The teaching of the findings herein is that great damage can result to customers and to the public interest generally where violations stem from gross negligence and inattention to fiduciary responsbility even though there are no findings that Respondent acted with scienter.

I conclude, based upon these considerations and the entire record, that a bar is indicated, so that supervisory and other limitations may be imposed, but that reapplication after four months would be appropriate and sufficient in the public interest.

IV. ORDER

Accordingly, IT IS ORDERED as follows: Respondent Elizabeth Bamberg is hereby barred from association with any broker or dealer: Provided, however, that after a period of 4 months she may reapply for such association in a non-supervisory and nonproprietary capacity upon a showing that she will be adequately supervised.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice, 17 CFR §201.17(f).

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each

party who has not, within (15) days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party. 12/

David J. Markun
Administrative Law Judge

February 12, 1988
Washington, D.C.

12/ All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein they have been accepted, and to the extent they are inconsistent therewith they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein it is not credited.