SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 52106 / July 22, 2005

Admin. Proc. File No. 3-11000r

In the Matter of the Application of

KO SECURITIES, INC.,
2416 32nd Avenue West
Seattle, Washington 98199

and

TERRANCE Y. YOSHIKAWA
3417 West Commodore Way
Seattle, Washington 98199

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION-- REVIEW OF DISCIPLINARY PROCEEDING

Sanctions for Affirmative Determination Violation

On remand to registered securities association for reconsideration of sanctions imposed with respect to short sale affirmative determination violation, association reaffirmed sanctions including disgorgement of applicants' profits. Held, sanctions imposed by association are sustained.

APPEARANCES:

Terrance Y. Yoshikawa, pro se and for Ko Securities, Inc.

Marc Menchel, Alan Lawhead, and Leavy Mathews III, for NASD.

Appeal filed: January 21, 2005
Last brief received: April 25, 2005

I.

Applicants Ko Securities, Inc. ("Ko"), a former registered broker-dealer and former NASD member, and Terrance Y. Yoshikawa, a former associated person, founder, president, and sole shareholder of Ko, appeal from NASD disciplinary action taken after we remanded the matter to it. In their original appeal, Applicants sought review of an NASD November 13, 2002 decision ("NASD 2002 Decision") that found that Applicants (1) executed short sales without making the requisite affirmative determination 1/ that they could obtain securities to cover the sales if necessary, and (2) failed to maintain adequate records for those short sales. 2/ The NASD 2002 Decision imposed a fine of $147,450.81 on Applicants for the affirmative determination violation and an additional fine of $15,000 on Ko for the recordkeeping violations. In our September 26, 2003 Opinion ("Commission 2003 Opinion") 3/ reviewing the NASD 2002 Decision, we sustained NASD's findings of the affirmative determination and recordkeeping violations, sustained the sanction imposed for the recordkeeping violations, but remanded for reconsideration of the sanctions imposed for the affirmative determination violation. 4/ On remand, NASD, in a December 20, 2004 decision ("NASD 2004 Decision"), imposed the same sanctions it had imposed in the NASD 2002 Decision for the affirmative determination violation. Applicants now appeal from the NASD 2004 Decision. To the extent we make findings, we base them on an independent review of the record.

1/ NASD Conduct Rule 3370(b)(2)(B) requires a member, prior to effecting a short sale for its own account, to "make[] an affirmative determination that the member can borrow the securities or otherwise provide for delivery of the securities by the settlement date."

2/ Applicants effected eighty-two short sale transactions involving 58,600 shares of stock, which generated $539,463.39 in profits. Yoshikawa allocated $394,012.58 of those profits among fourteen customer accounts, $135,644.15 to Ko's account, and $9,806.66 to his own account.

3/ Ko Securities, Inc. and Terrance Y. Yoshikawa, Securities Exchange Act Rel. No. 48550 (Sept. 26, 2003), 81 SEC Docket 584, petition denied, No. 03-74297 (9th Cir. 2005) (unpublished opinion).

4/ Yoshikawa appealed the Commission 2003 Opinion to the United States Court of Appeals for the Ninth Circuit. In an unpublished memorandum opinion issued February 11, 2005, the Ninth Circuit denied Yoshikawa's petition for review, finding, among other things, that the Commission properly interpreted the NASD rule requiring an affirmative determination prior to making a short sale and that substantial evidence supported the Commission's finding that Yoshikawa did not make the requisite affirmative determination. Yoshikawa v. SEC, 122 Fed. Appx. 364, 365 n.3 (9th Cir. 2005).

II.

The NASD 2002 Decision imposed a fine of $147,450.81 on Applicants, jointly and severally, for the affirmative determination violation. NASD calculated the amount of that fine by assessing a $2,000 base fine for a "first action" and adding to it the $145,450.81 in profits that Applicants realized in their own accounts from the short sales. 5/ The Commission 2003 Opinion remanded the NASD 2002 Decision for reconsideration of those sanctions. The Commission 2003 Opinion found that, because NASD "did not make a finding that [Applicants'] misconduct was willful, and specifically determined that this was not an egregious case with respect to the affirmative determination violation . . . NASD's basis for adding [Applicants'] profits to the [$2,000] fine [was] unclear." 6/ The Commission 2003 Opinion instructed NASD to clarify the basis for adding the $145,450.81 in Applicants' profits to the $2,000 base fine for the affirmative determination violation, in light of the fact that NASD did not make a finding that Applicants' misconduct was willful but did make a specific finding that the misconduct was not egregious.

On remand, NASD imposed the same $147,450.81 fine imposed on Applicants previously for the affirmative determination violation. The NASD 2004 Decision found that specific findings of willfulness or egregiousness regarding the affirmative determination violation were not necessary for NASD to impose a fine that included the amount of Applicants' financial benefit from those short sales, but nonetheless concluded that Applicants' misconduct was willful. NASD further identified aggravating factors supporting the amount of the original fine. Specifically, NASD identified the significant amount of money involved and Applicants' demonstrated "indifference to NASD's regulatory authority" with respect to the affirmative determination requirements.

III.

Pursuant to Exchange Act Section 19(e), 7/ we must sustain NASD's sanctions unless we 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

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5/ The $145,450.81 amount is the sum of the $135,644.15 in profits that Ko realized and the $9,806.66 in profits that Yoshikawa realized from the short sale violation.

6/ The applicable NASD Sanction Guidelines advise that, "in egregious cases or those with evidence of willful misconduct, consider adding the amount of the short-selling customer's 'transaction profit' to the fine for the executing member and/or associated person." NASD Sanction Guidelines (2001 ed.) at 70. The NASD Sanction Guidelines define "transaction profit" as "the profit that the short-selling customer realized." Id. at 70 n.3.

7/ 15 U.S.C. § 78s(e).

competition. 8/ The NASD Sanction Guidelines for short sale violations, including violations of NASD Conduct Rule 3370, recommend a fine of $1,000 to $2,000 for a first action. 9/ Those short sale violation guidelines also advocate increasing the recommended fine amount "by adding [to the fine] the amount of a respondent's financial benefit" as provided in General Principle No. 6 of the NASD Sanction Guidelines ("General Principle No. 6 "). 10/ General Principle No. 6 advises that, where the respondent "obtained a financial benefit from [the] misconduct," NASD "may require the disgorgement of ill-gotten gain by fining away the amount of some or all of the financial benefit derived, directly or indirectly" by the respondent, where appropriate "to remediate misconduct." 11/

The NASD 2004 Decision first examined the issue not addressed in the NASD 2002 Decision of whether Applicants' conduct was willful. The NASD 2004 Decision held that a finding of willfulness was not necessary to impose a fine that included Applicants' profits, but concluded that Applicants' violations here were willful because Applicants knew when they executed the short sales that their clearing firm would not loan them shares to cover the short sales. 12/

NASD also identified aggravating factors supporting its decision to add the amount of Applicants' financial benefit to the fine for the affirmative determination violation. Specifically, NASD considered the size and character of the short sale violation and the amount of the profits generated. 13/ Applicants' eighty-two short sales during the period at issue,

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8/ Id. Applicants do not claim, nor does the record show, that NASD's sanctions impose an unnecessary or inappropriate burden on competition.

9/ NASD Sanction Guidelines at 70.

10/ Id. at 70 n.1.

11/ Id. at 7. General Principle No. 6 defines the term "financial benefit" to include "profits, . . . or other benefits received by the respondent, directly or indirectly, as a result of the misconduct." Id.

12/ Applicants argue that NASD's finding in the NASD 2004 Decision that their misconduct was willful is a reversal of NASD's earlier finding, in the NASD 2002 Decision, that there was no evidence of willful misconduct, and that the later finding was made solely to justify the amount of the "extraordinary fine." The NASD 2002 Decision made no such finding. Rather, the NASD 2002 Decision noted that the Hearing Panel found that the misconduct was not willful. The NASD 2002 Decision did not specifically agree with the Hearing Panel's finding, stating only that the case was not egregious.

13/ See NASD Sanction Guidelines at 10. The "number, size, and character of the

(continued...)

deemed a single violation by NASD, involved a significant volume of stock - - 58,600 shares. These transactions generated nearly $540,000 in profits for Applicants and their customers, $145,450.81 of which were attributable to Applicants.

Another aggravating factor identified by NASD was Applicants' unwillingness to take necessary steps to ensure their compliance with the affirmative determination requirements. Noting that Applicants had received a Letter of Caution just weeks before the incident at issue admonishing them for their failure to record correctly affirmative determinations they had obtained, and that Applicants admitted they were unclear about their obligations to obtain affirmative determination in general, NASD concluded that Applicants intentionally refused to seek NASD advice on compliance with the affirmative determination requirements.

In assessing the significance of these factors on its sanctions determinations, the NASD 2004 Decision looked to governing authority concerning disgorgement of profits. We have previously affirmed NASD policy permitting "disgorgement . . . to the NASD to deprive the wrongdoer of his ill-gotten gains." 14/ We also have held that "disgorgement should be ordered in all cases in which the NASD can identify direct financial gain obtained by a wrongdoer as a result of his or her wrongful activities." 15/ We have stated further that the "remedy of disgorgement is intended to force wrongdoers to give up the amount by which they were unjustly

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13/ (...continued)
transactions at issue" is one of the principal considerations enumerated under the NASD Sanction Guidelines which "should be considered in conjunction with the imposition of sanctions." Id. at 9 and 10. Depending on the facts of the particular case, a principal consideration could be either an aggravating or a mitigating factor. In this case, NASD identified the number, size, and character of the transactions at issue as an aggravating factor, which, according to the NASD Sanction Guidelines, would support an increase in the recommended fine for the violation at issue.

14/ Order Approving Proposed Rule Change, Exchange Act Rel. No. 25760 (May 27, 1988), 41 SEC Docket 18 n.1.

15/ Michael David Sweeney, 50 S.E.C. 761, 768 (1991). See also Sacks Inv. Co., Inc., 51 S.E.C. 492, 499 n.31 (1993) (stating that "disgorgement is the preferred sanction, where possible, and 'should be ordered in all cases in which NASD can identify direct financial gains obtained by a wrongdoer' . . . .") (internal citations omitted); Adams Secs., Inc., 51 S.E.C. 311, 315 n.21 (1993) (asserting that NASD should order disgorgement where it can identify direct financial gain obtained by a wrongdoer as a result of his or her wrongful activities); Century Capital Corp., 50 S.E.C. 1280, 1285 n.13 (1992) (same), aff'd, 22 F.3d 1184 (D.C. Cir. 1994) (Table); F.B. Horner & Assocs., Inc., 50 S.E.C. 1063, 1068 n.19 (1992) (same), aff'd, 994 F.2d 61 (2d Cir. 1993) (per curiam).

enriched." 16/ NASD concluded that, based on our consistent endorsement of its disgorgement policy, the fact that Applicants knew they did not have the requisite affirmative determination when they made the short sales, the significant volume of the trades, the amount of profits involved, and Applicants' disregard of regulatory requirements, Applicants should be made to disgorge their financial benefit of $145,450.81.

IV.

Applicants reiterate their arguments, advanced in their original appeal, on the merits of the affirmative determination violation. Applicants are precluded from relitigating the merits of the case here. 17/ In denying Yoshikawa's petition for review of the Commission 2003 Opinion, the Ninth Circuit held that the Commission 2003 Opinion properly interpreted the NASD rule requiring an affirmative determination prior to making a short sale, that substantial evidence supported the Commission's finding that Yoshikawa did not make the requisite affirmative determination, that it is not a defense that others in the industry engaged in the same conduct, and that there was no merit to Yoshikawa's claim of selective prosecution. The Ninth Circuit ruling is the law of this case. 18/ Moreover, the findings of the Commission 2003 Opinion were not remanded to NASD, are not now before the Commission, and are not within the scope of the remand. We will not revisit those findings. 19/

Applicants contend that the fine for the affirmative determination violation should be limited to $2,000 because the misconduct should be treated as a "first instance" of violation. As

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16/ Sweeney, 50 S.E.C. at 768. See also Patten Secs. Corp., 51 S.E.C. 568, 579 (1993) (asserting that "[d]isgorgement requires a respondent to surrender the gains derived from his misconduct so that he does not profit from his violations.").

17/ See Donald R. Gates, 54 S.E.C. 292, 299 (1999).

18/ The law of the case doctrine generally holds that once an appellate court decides an issue, the decision will be binding on all subsequent proceedings in the same case. See, e.g., Key v. Sullivan, 925 F.2d 1056, 1060 (7th Cir. 1991); City of Cleveland v. Federal Power Comm'n, 561 F.2d 344 (D.C. Cir. 1977). See also George Salloum, 52 S.E.C. 208, 216 n.37 (1995) (explaining the law of the case doctrine). Applicants' latest arguments do not depend on newly discovered evidence or an intervening change in the governing law and are not, therefore, within an exception to the law of the case doctrine. Compare Key, 925 F.2d at 1061 (identifying exceptions to the law of the case doctrine).

19/ See, e.g., Nicholas T. Avello, Exchange Act Rel. No. 51633 (Apr. 29, 2005), __ SEC Docket __ (asserting that the Commission's decision in an earlier appeal by respondent was final and "any objections to it [would] not be heard now."); Bruce Martin Zipper, 52 S.E.C. 240, 242 (1995) (refusing to revisit finding of respondent's earlier appeal).

discussed above, NASD's finding of willfulness and the aggravating factors justify the additional fine amount.

Applicants also argue that no remedial purpose is served by adding the amount of their financial benefit to the fine because their misconduct was not willful. As we discussed above, the NASD 2004 Decision concluded that Applicants' misconduct was willful because they effected the short sales at issue despite having been informed by their clearing firm that it would not loan them shares to cover the short sales. Under such circumstances, if Applicants were permitted to walk away from their affirmative determination violation with $145,450.81 in profits and only a $2,000 fine, the fine could not be expected to act as much of a deterrent to future violations. 20/

Applicants assert that NASD was motivated to add the amount of Applicants' profits to the $2,000 fine because of the sizable amount of those profits. They argue that NASD should not be permitted to "rewrite" the NASD 2002 Decision so as to justify the amount of the fine on remand. The NASD 2004 Decision does not alter the NASD 2002 Decision in any way. It merely amplifies the basis for the affirmative determination sanctions, as NASD was directed by us to do in the Commission 2003 Opinion, to enable us to appropriately perform our review. 21/

Accordingly, we find that the sanctions imposed on Applicants by NASD in the NASD 2004 Decision are neither excessive nor oppressive, and we sustain them. An appropriate order will issue. 22/

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

Jonathan G. Katz
Secretary

20/ See Robert Tretiak, Exchange Act Rel. No. 47534 (Mar. 19, 2003), 79 SEC Docket 3166, 3186.

21/ See John P. Goldsworthy, 53 S.E.C. 576, 580 (1998); Robert A Grunburg, 52 S.E.C. 398, 404 (1995); Stephen R. Flaks, 46 S.E.C. 891, 895 n.8 (1977).

22/ We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the sanctions imposed by NASD on Ko Securities, Inc. and Terrance Y. Yoshikawa for the affirmative determination violation be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary