

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 50737 / November 24, 2004

Admin. Proc. File No. 3-11470

In the Matter of the Application of

PTR, INC.
1900 Market Street
Philadelphia, Pennsylvania 19103

and

DENNIS McBRIDE

For Review of Disciplinary Action Taken by the
PHILADELPHIA STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Violations of Exchange Rules

Failure to Ascertain Nature of Orders

Failure to Obtain Necessary Approvals for Material
Changes in Transactions

Conduct Inconsistent with Just and Equitable
Principles of Trade

Member organization of national securities exchange and its executive vice president failed to ascertain the nature of orders submitted to them for execution and, after execution of the orders, altered many of the order tickets, making material changes in the terms of those transactions without obtaining the requisite approval of all participants. Held, the exchange's findings of violation and the sanctions it imposed are sustained.

APPEARANCES:

Paula D. Shaffner and James C. Creel, III, of Saul Ewing LLP, for PTR, Inc. and Dennis McBride.

Robert A. Intartaglio, for the Philadelphia Stock Exchange, Inc.

Appeal filed: April 30, 2004

Last brief received: August 4, 2004

I.

PTR, Inc., a member organization of the Philadelphia Stock Exchange, Inc., and Dennis McBride, PTR's executive vice president, appeal from Exchange disciplinary action. The Exchange found that, during the period May 3 through July 19, 2001, McBride caused 86 orders to be represented to the trading crowd on the Exchange floor as public customer orders when in fact they were for the account of a broker-dealer. McBride was found to have violated Exchange Rule 1015(a)(vi) which requires that floor brokers make reasonable efforts to ascertain the nature of the orders submitted to them for execution. 1/ Pursuant to Exchange Rule 960.1(b), 2/ PTR was found liable for McBride's misconduct. The Exchange also found that respondents violated Exchange Option Floor Procedure Advice ("OFPA") F-5 when, after execution of the 86 orders, they altered

1/ The rule states: "Floor Brokers must make reasonable efforts to ascertain whether each order entrusted to them is for the account of a customer or a broker-dealer. If it is ascertained that the order is for the account of a broker-dealer, the responsible floor broker must advise the crowd of that fact prior to bidding/offering on behalf of the order or executing the order."

Rule 1015(a)(vi) protects the preferences accorded by the Exchange to public customer orders over broker-dealer orders. Thus, during the relevant period, Exchange options quotations were firm for public customer orders up to the Exchange's "disseminated size," while quotations were firm only to the extent of one options contract for broker-dealer orders. See Securities Exchange Act Rel. No. 47646 (April 8, 2003), 79 SEC Docket 3806. The record does not show that the orders at issue in this proceeding received any preferential treatment, and the Exchange did not make any such finding.

2/ Exchange Rule 960.1(b) provides that a member organization may be charged with an officer's violation "as though such violation were its own."

many of the order tickets, making material changes in the terms of those transactions without obtaining the signatures of all participants in the trades.

Based on these infractions, respondents were found to have violated Exchange Rule 707 by engaging in conduct inconsistent with just and equitable principles of trade. The Exchange censured respondents, fined them \$86,000, jointly and severally, and suspended McBride from Exchange membership or association with an Exchange member organization for a period of three months. We base our findings on an independent review of the record.

II.

A. During the relevant period, PTR conducted business on the Exchange as a floor broker. The 86 orders at issue in this proceeding were submitted to McBride for execution by Matthew Simsic who, at that time, was a trader and portfolio manager for Millenium Partners LP, a hedge fund. All of the orders that Simsic directed to McBride were placed through, and for the account of, MillenCo LP, Millenium's broker-dealer subsidiary, and were therefore broker-dealer orders. However, McBride caused the 86 orders to be represented to the trading crowd and executed as public customer orders. 3/

Respondents do not challenge the Exchange's finding that they violated Exchange Rule 1015(a)(vi). However, McBride advances two justifications for his conduct. He points first to his earlier course of dealing with Simsic. Prior to Simsic's association with Millenium, he was a vice president and trader at Bear Stearns Corporation, an Exchange member organization. While at Bear Stearns, Simsic used PTR as an executing broker for both public customer and broker-dealer orders. Since most of Simsic's orders were public customer orders, he and McBride had an understanding that every order that Simsic submitted to McBride should be treated as a public customer order unless Simsic stated otherwise. After Simsic moved to Millenium in April 2001, he did not specify the nature of his orders when he called McBride. According to McBride, he assumed that his prior understanding with Simsic was still in effect and, accordingly, treated Simsic's orders as public customer orders.

The second reason advanced by McBride for his conduct is that, when Simsic moved to Millenium, he told McBride that his new employer was a hedge fund. As Simsic testified at the hearing, almost all hedge funds trade as public customers. Only

3/ The printed letter "C" was circled on each of the 86 order tickets to indicate that the order was for the account of a public customer. Most of the orders were "delta neutral," meaning that an options trade was executed at the same time as an associated stock trade.

the peculiarity of Millenium's structure, i.e., the fact that it had a broker-dealer subsidiary, necessitated the treatment of Millenium's orders as broker-dealer orders. McBride assertedly believed that, as in the case of most hedge funds, Millenium's orders were public customer orders.

McBride's belief, whether or not it was reasonable, did not justify his failure to comply with Exchange rules. As noted, Rule 1015(a)(vi) requires that floor brokers make reasonable efforts to ascertain whether an order is for the account of a broker-dealer or a public customer. McBride made no such efforts. Although Simsic had changed his employment, McBride made no attempt to determine whether their prior understanding was still in effect. Nor did he make any other inquiry concerning the nature of the orders he was receiving from Simsic. The Exchange accordingly found that respondents violated Rule 1015(a)(vi), and we sustain that finding.

B. During the relevant period, Merrill Lynch Professional Clearing Corporation ("MLPCC") served as MillenCo's clearing agent. The Exchange assigned clearing number 735 to MLPCC, a number that was primarily used to clear broker-dealer trades but could also be used to clear the trades of public customers. McBride prepared, or directed his staff to prepare, order tickets for many of the 86 orders at issue that listed 233 as the clearing number. That number was assigned by the Exchange to Bear Stearns, and indicated that the order was for a Bear Stearns public customer. After these orders were executed, McBride or his staff changed the clearing designation on the order tickets from 233 to 735. Thus the trades cleared through the proper clearing agent, MLPCC.

OFPA F-5 requires that, before any change can be made in the material terms of a transaction, the signatures of all participants in the transaction must be obtained. Material changes include changes from public customer orders to broker-dealer orders. Respondents do not challenge the Exchange's finding that they violated OFPA F-5. McBride stated that, since he believed that MillenCo was a public customer, he considered that he was simply making a "public customer to public customer" change that, as the Exchange noted in its decision, does not require compliance with OFPA-5. According to McBride, he entered the Bear Stearns clearing number on order tickets in order to conceal Millenium's identity from competitors who he feared might try to take his customer's business away from him.

The Exchange found McBride's explanation of why he initially entered Bear Stearns' number unconvincing, but stated that, even if his explanation were true, it would not constitute a defense to the charged violation. It concluded that respondents violated OFPA F-5 since the order ticket changes materially altered the terms of the transactions in question, changing them from public customer trades to what in fact were broker-dealer trades, and respondents did not obtain the necessary participant signatures.

We agree with that conclusion, and we accordingly sustain the Exchange's findings of violation.

III.

Respondents argue that they did not engage in conduct inconsistent with just and equitable principles of trade. They assert that their violations of Exchange trading rules did not involve bad faith or unethical conduct, but resulted from a reasonable mistake as to the identity of their customer.

We have consistently held that violations of other Commission or self-regulatory organization rules and regulations, such as those at issue here, also constitute conduct inconsistent with just and equitable principles of trade. 4/ As we recently noted, such failures to comply with other regulatory requirements are by their very nature incompatible with just and equitable principles of trade. 5/ We accordingly sustain the Exchange's findings of violation.

IV.

Respondents argue that the Exchange imposed excessive sanctions for inadvertent violations that were the product of a reasonable mistake. They point out that there is no evidence that anyone was disadvantaged by their actions or that they received an unwarranted benefit. Respondents assert that the Exchange has assessed lesser sanctions for similar misconduct in other cases, and that they are being punished for litigating this matter and exercising their right of appeal to the Exchange's Board of Governors. McBride also asserts that his three-month suspension will likely result in a layoff of four PTR employees reporting to him, and will adversely affect his family's finances. 6/

4/ See, e.g., Chris Dinh Hartley, Securities Exchange Act Rel. No. 50031 (July 16, 2004), 83 SEC Docket 1239, 1244, and the cases cited in n.11; William H. Gerhauser, Sr., 53 S.E.C. 933, 942 (1998); Clinton Hugh Holland, Jr., 52 S.E.C. 562, 566 n.20 (1995), aff'd, 105 F.3d 665 (9th Cir. 1997) (Table).

5/ Chris Dinh Hartley, supra.

6/ Pursuant to Exchange Rule 960.9(b)(ii), the Exchange's Board of Governors may increase or decrease a sanction imposed by a Business Conduct Committee ("BCC") if the Board finds the sanction "arbitrary, capricious, or an abuse of discretion." The Board increased the length of McBride's suspension to three months from the one-week suspension assessed by the

(continued...)

We review sanctions imposed by an exchange to determine whether they are excessive or oppressive, or whether they impose an unnecessary or inappropriate burden on competition. 7/ Applying these standards, we do not consider that any reduction in sanctions is warranted.

We have consistently held that appropriate sanctions depend on the particular facts and circumstances of each case, and cannot be determined by the action taken in other cases. 8/ We note, moreover, that the Exchange decisions cited by respondents do not support their claim of disparate treatment. In one of the cases, the Exchange, in reducing the sanctions imposed, stressed the fact that the respondents were testing what they believed to be a misinterpretation of Exchange rules. 9/ The two other cases cited by respondents involve sanctions imposed pursuant to offers of settlement. We have repeatedly pointed out that lesser sanctions are normally assessed in settlements due to pragmatic considerations such as the avoidance of time- and manpower-consuming adversary litigation. 10/ The fact that the Exchange's

6/ (...continued)

BCC and the Board's Advisory Committee on Appeal, finding that the BCC and the Advisory Committee abused their discretion in assessing a lower sanction. Respondents seek to introduce into evidence an affidavit of McBride with respect to the adverse impact of that increase. The Exchange does not object to the admission of the affidavit, and we have determined to admit it into evidence.

7/ Section 19(e)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(e)(2). Respondents do not assert, and the record does not show, that the Exchange's action imposes an undue burden on competition.

8/ See, e.g., Stephen Michael Sohmer, Exchange Act Rel. No. 49052 (January 12, 2004), 81 SEC Docket 4066, 4085; John Montelbano, Exchange Act Rel. No. 47227 (January 22, 2003), 79 SEC Docket 1474, 1497. See also Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973).

9/ We recently reversed the Exchange's decision in that case, finding that the challenged Exchange rule was too ambiguous to warrant findings of violation against the respondents. Lek Securities Corp., Exchange Act Rel. No. 50324 (September 7, 2004), ___ SEC Docket ____.

10/ See, e.g., Anthony A. Adonnino, Exchange Act Rel. No. 48618 (October 9, 2003), 81 SEC Docket 981, 999, aff'd, No. 03-41111 (2d Cir. Sept. 22, 2004); Richard J. Puccio, 52 S.E.C. (continued...)

Enforcement staff stated on the record that it follows the policy of offering a settlement "discount" does not mean, as respondents argue, that respondents were punished for litigating this matter. Nor, contrary to respondents' further contention, do we read the decision of the Exchange's Board of Governors as evidencing an intent to punish respondents for exercising their right of appeal.

In imposing sanctions on respondents, the Exchange's Board stressed the fact that McBride had previously been disciplined for similar misconduct. In 1998, less than three years before the misconduct at issue here, the Exchange censured McBride and fined him \$1,500 for causing three broker-dealer orders to be represented to the trading crowd and executed as public customer orders. The Board noted that its Advisory Committee had concluded that the sanctions imposed on McBride for his prior violations "had little or no deterrent effect," and that "McBride pose[d] a significant risk of future violations unless subjected to a large fine," \$1,000 for each misrepresented order. The Board affirmed the imposition of the fine, but concluded that an increase in McBride's suspension from one week to three months was "especially necessary . . . where, in light of McBride's disciplinary history, he should have had an intimate familiarity with the requirements of Exchange Rule 1015(a)(vi), and exercised the affirmative diligence required to assure himself that the rule was not being violated."

We share the Exchange's concern. Despite the Exchange's prior action against him, McBride testified at the hearing that, at the time of the misconduct at issue, he did not consider it his obligation to find out whether the orders that Simsic was sending him were broker-dealer orders or public customer orders. The attitude displayed by McBride towards his regulatory responsibilities evidences a disturbing disregard for the standards that govern the conduct of securities professionals doing business on the Exchange. The Exchange was justified in serving notice with its sanctions that such an attitude cannot be tolerated if further violations are to be prevented. We conclude

that the sanctions imposed on respondents are neither excessive nor oppressive.

An appropriate order will issue. 11/

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

Jonathan G. Katz
Secretary

11/ 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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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 PTR, Inc. and Dennis
McBride be, and it hereby is, sustained.

By the Commission.

Jonathan G. Katz
Secretary