

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56613 / October 4, 2007

Admin. Proc. File No. 3-12416

In the Matter of the Application of

PERPETUAL SECURITIES, INC.,
YOUWEI P. XU,
and
CATHY Y. HUANG
1603 - 7300 Yonge Street
Thornhill, Ontario L4J7Y5
Canada

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Violation of Conduct Rules

Failure to Observe Just and Equitable Principles of Trade

Failure to Provide Requested Information

Former member of registered securities association and principals operated a securities business while firm's membership was suspended, and executive vice president responded to association's request for information untimely and incompletely. Held, association's findings of violations are sustained and sanctions it imposed are modified.

APPEARANCES:

Youwei P. Xu, for Perpetual Securities, Inc.

Youwei P. Xu, pro se.

Cathy Y. Huang, pro se.

Marc Menchel, Alan B. Lawhead, James S. Wrona, and Vickie R. Olafson, for NASD.

Appeal filed: September 13, 2006

Last brief received: February 5, 2007

I.

Perpetual Securities, Inc. ("Perpetual" or "the Firm"), a former NASD member, 1/ Youwei P. Xu, the Firm's President, Chief Executive Officer, principal, and part owner, and Cathy Huang, its Executive Vice President, Chief Financial Officer, Limited Principal -- Financial and Operations ("FINOP"), principal, and part owner 2/ (collectively "Applicants") appeal from NASD disciplinary action. 3/ NASD expelled the Firm from NASD membership for operating a securities business while suspended, in violation of NASD Conduct Rule 2110; 4/ barred Xu and Huang for violating NASD Rule 2110 by allowing the Firm to operate while suspended; and barred Huang for violating NASD Rules 8210 5/ and 2110 by failing to respond timely and fully to NASD requests for information. We base our findings on an independent review of the record. 6/

1/ The Firm filed a Form BDW withdrawing its membership on December 16, 2003.

2/ Xu and Huang are married to each other.

3/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 72 Fed. Reg. 42,190 (Aug. 1, 2007) (SR-NASD-2007-053). Because the disciplinary action here was taken before that date, we continue to use the designation NASD.

4/ NASD Conduct Rule 2110 obliges members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade."

5/ NASD Investigations Rule 8210 requires NASD members and associated persons to provide information and documents to NASD in the course of an investigation, among other events.

6/ Applicants have attached many pages of documents to each of their briefs. A substantial number of these are already in the record. With respect to the remainder, as a discretionary matter, we have decided to admit the documents.

Applicants have also filed three motions requesting that the Commission hear oral

(continued...)

II.

A. The Suspension Order

On November 14, 2000, a Perpetual customer won an arbitration award against the Firm. However, as of June 18, 2002, the Firm had not paid the award. On that date, NASD notified Perpetual that its membership would be suspended for failure to pay the arbitration award. ^{7/} Perpetual appealed the suspension (the "Suspension Proceeding"). On November 25, 2002, NASD's Office of Hearing Officers ("OHO") issued a decision (the "Suspension Order") finding that Perpetual had violated NASD Arbitration Rule 10330(h) by failing to pay the award and suspending the Firm's NASD membership until the award was paid.

OHO served the Suspension Order on the attorney who represented Perpetual in the Suspension Proceeding, Kevin Tung. Tung promptly applied to the Commission on November 29, 2002 for review of the decision and for a stay of the Suspension Order. ^{8/} OHO also sent copies of the Suspension Order to the Firm, although it sent them to an address in Forest Hills, New York that Applicants had previously notified the Central Registration Depository ("CRD") was no longer current and a post office box in Holmdel, New Jersey. When it became aware of its error, OHO sent an additional copy of the Suspension Order to the Firm at an updated street address in Holmdel, New Jersey by overnight courier and first-class mail. The record includes a Federal Express confirmation that the material was delivered to the Firm's Holmdel street address on December 3, 2002.

Applicants assert that, beginning in November 2002, the Firm had closed its New York office, and was in the process of shutting down. According to the Firm's records, however, between December 1, 2002, and January 14, 2003, Perpetual continued to transact both retail and proprietary securities business, even though its membership had been suspended. The record reflects that Applicants earned at least \$1,895 from securities business during the relevant period. According to Perpetual's clearing firm, during this time, Perpetual's customers used Perpetual's facilities to access the clearing firm's trading programs and could neither call nor

^{6/} (...continued)
argument in this proceeding. The Office of General Counsel, acting by delegated authority, denied the first two of these motions by order of December 19, 2006. Pursuant to Rule of Practice 451, 17 C.F.R. § 201.451, we have determined that the decisional process will not be significantly aided by oral argument.

^{7/} The Suspension Proceeding was commenced pursuant to Article VI, Section 3 of the NASD By-Laws and Procedural Rule 9510 et seq. On June 28, 2004, the rules relating to non-summary proceedings for failure to comply with an arbitration award were reenacted as Rule 9554.

^{8/} The Commission denied the stay and ultimately dismissed the appeal. See Perpetual Sec., Inc., 56 S.E.C. 1008 (2003).

access the clearing firm's internet trading programs directly. ^{9/} In a letter to NASD staff dated March 3, 2004, Huang stated that she had specific responsibility for "[a]rranging clients' orders through internet clearing firm's platform."

On January 14, 2003, during an NASD on-site audit, NASD staff informed Xu and Huang that NASD had suspended Perpetual's membership, whereupon Xu and Huang ceased operations and notified the Firm's clearing broker of the suspension. NASD reinstated Perpetual's membership in May 2003, after Perpetual satisfied the arbitration award. The NASD staff's audit exit letter in May noted that it appeared that the Firm had operated while suspended and stated that the staff had referred the matter to NASD's Department of Enforcement ("Enforcement") for possible disciplinary action.

B. The Information Requests

On February 19, 2004, in connection with the investigation of Perpetual's possible operation while suspended, NASD sent an information request pursuant to NASD Rule 8210 to Huang at the Firm's Holmdel, New Jersey post office box address listed in the CRD, as well as her home address listed in the CRD. NASD sought, by February 27, 2004, information about the Firm's employees, their duties, and their roles in appealing the Suspension Order to the Commission, as well as copies of the Firm's written supervisory procedures. On March 8, 2004, NASD received Huang's incomplete response, in which she answered some, but not all, of NASD's questions and failed to attach any documents. ^{10/} In her response, Huang listed the Holmdel, New Jersey post office box address as the return address on her response. Huang also listed the Holmdel, New Jersey post office box as her return address when she submitted an April 3, 2004, Wells statement on behalf of the Firm, Xu, and herself.

On March 18, 2004, NASD sent a second information request pursuant to Rule 8210 to the Holmdel, New Jersey post office box address seeking account and telephone records as well as additional information with a deadline of March 31, 2004. Huang did not respond. NASD sent Huang a third request on April 7, 2004, seeking most of the same information with a deadline of April 14, 2004. In a separate letter, NASD informed Huang that it had not received a response to the March 18, 2004 request.

Huang did not respond to either the March 18 or April 7 request until August 6, 2004, after NASD initiated this proceeding. Huang claimed that her response was delayed because the mail sent to the Holmdel, New Jersey post office box was forwarded to another address in

^{9/} Once the clearing firm was notified of the Firm's suspension, it allowed Perpetual's customers to call the clearing firm directly or to access its trading programs via the internet.

^{10/} For example, Huang did not provide responsive answers to NASD's questions regarding the circumstances under which the Firm decided to appeal the Suspension Order to the Commission or regarding the date of that decision.

Buffalo, New York that aggregated Applicants' mail and periodically forwarded it to them at their current address in Canada. As of February 16, 2005, the only address reflected in the CRD was the New Jersey post office box, not the Buffalo or Canadian addresses.

C. The Hearing Process

On June 29, 2004, Enforcement initiated these proceedings against Applicants by mailing a complaint to them at their CRD addresses. 11/ On September, 7, 2004 Applicants filed a timely answer and counter-complaint charging NASD staff with fraud and misconduct with respect to an alleged Firm net capital deficiency in December 2003, the service of the Suspension Order, and the initiation of this proceeding. 12/

Deputy Chief Hearing Officer David Fitzgerald scheduled a telephonic pre-hearing conference for September 23, 2004. The notice of hearing warned the parties that failure to appear could result in a default. By consent of the parties, the conference was rescheduled to October 21, 2004. On October 12, 2004, the Hearing Officer denied Applicants' motions to dismiss and to assert a counter-claim, as well as their request for discovery directed at their allegations of impropriety by NASD staff. The Hearing Officer concluded that OHO did not have authority to review allegations of misconduct by NASD staff and referred Applicants to NASD's Ombudsman. 13/

11/ Applicants argue that NASD's District Director for Region 9 initiated this proceeding and assert that he had "no standing to file a complaint[,] but he filed the complaint in this proceeding" for the purpose of "escap[ing] his misconduct." In accordance with NASD Rule 9212(a)(1), an Enforcement attorney signed the complaint at issue here, on behalf of Enforcement. The addition of the District Director's signature to the complaint does not affect the complaint's validity.

12/ Applicants asserted below and to us that NASD ordered the Firm to suspend its operations on December 15, 2003 because of a net capital deficiency. Applicants had thirty days from the filing of a notice of the action with the Commission under Section 19(d)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(d)(2), to raise objections to NASD's actions, which Applicants did not do. The record does not contain sufficient information to enable us to evaluate the alleged net capital deficiency.

13/ NASD created the Office of the Ombudsman, a position within NASD's Department of Internal Review, in 1996. NASD Notice to Members 96-45, NASD Appoints Ombudsman (July 1996). The Office of the Ombudsman provides a forum for members to voice their concerns of unfair practices or disparate treatment by the staff. NASD has stated that complaints regarding decisions made or actions taken by the staff that are "inconsistent, biased, or result in disparate treatment" may be directed to the Office of the Ombudsman. NASD Notice to Members 98-30, NASD Office of the Ombudsman Clarifies its Role (Mar. 1998).

