

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 52858 / November 30, 2005

Admin. Proc. File No. 3-11796

In the Matter of the Application of

PAUL K. GRASSI, JR.
c/o Alfred Ferrer III, Esq.
Eaton & Van Winkle LLP
3 Park Avenue
New York, New York, 10016-2078

For Review of Action Taken by the
New York Stock Exchange, Inc.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY
PROCEEDING

Conduct Detrimental to the Interest or Welfare of the Exchange

Member of national securities exchange engaged in acts detrimental to the interest or welfare of the exchange when he obtained a blank prescription form from a medical office located on the Exchange's premises, paid another person to forge the form, and attempted to fill the prescription. Held, exchange's findings of violation sustained, but proceeding remanded for reconsideration of sanctions imposed.

APPEARANCES:

Alfred Ferrer III, of Eaton & Van Winkle LLP, for Paul K. Grassi, Jr.

Susan Light, Barry M. Hochhauser, and Kelli R. Stieh, for the New York Stock Exchange, Inc.

Appeal filed: January 18, 2005
Last brief received: April 18, 2005

I.

Paul K. Grassi, Jr., formerly a member of the New York Stock Exchange, Inc. ("NYSE" or "Exchange") and a floor broker associated with CIBC World Markets ("CIBC"), appeals from disciplinary action taken against him by the NYSE. The NYSE determined that Grassi engaged in acts detrimental to the interest or welfare of the Exchange, in violation of NYSE Rule 476(a)(7), ^{1/} when he obtained a blank prescription form from a medical office that was located on the Exchange's premises and that the Exchange made available to members and others, paid another person to complete the form and forge a doctor's name on the form, and then attempted to fill the prescription at a pharmacy located near the Exchange. The Exchange censured Grassi, and barred him for five years from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization, and barred him for an additional five years from Exchange membership, with the bars to run concurrently. Grassi appeals the NYSE's findings as well as the sanctions against him. We base our findings upon an independent review of the record.

II.

Grassi's Conduct

The facts in this matter are largely undisputed. Grassi entered the securities industry in November 1996 and was employed by CIBC as a floor broker from February 1998 until July 2002. In February 1998, the Exchange approved Grassi as a registered representative and, in February 2002, he became a member of the Exchange.

On May 1, 2002, Grassi was examined by a doctor at Comprehensive Health Services, Inc. ("CHS"). CHS is a corporation that provides health services to Exchange members, employees of members and member organizations, Exchange employees, and others through its clinic located on the Exchange's premises. Grassi suffered from chronic back pain and, during the May visit, a doctor wrote Grassi a prescription for Vicodin. Grassi testified that when he went to fill the prescription, he discovered that a blank prescription form was attached to the form that had been filled out by the doctor.

On June 10, Grassi returned to CHS complaining of back pain and a different doctor wrote Grassi another prescription for Vicodin. The doctor instructed Grassi to see his own physician and noted on Grassi's chart that no additional prescriptions for Vicodin would be written. On the evening of June 12, Grassi requested that an acquaintance complete the blank form that Grassi previously had obtained by writing a prescription for Vicodin and signing a CHS doctor's name to the form. Grassi paid the acquaintance approximately \$20 to complete the form and forge the doctor's name. The next day, Grassi attempted to fill the prescription at a pharmacy located near the Exchange. The pharmacist noticed that the signature was not that of

^{1/} NYSE Rule 476(a)(7) subjects to disciplinary sanctions those Exchange members and other specified entities and individuals found by the Exchange, pursuant to proceedings under the Rule, to have engaged in "acts detrimental to the interest or welfare of the Exchange."

the doctor in question and called CHS to inquire about the legitimacy of the prescription. CHS informed the pharmacist that the CHS doctor did not write the prescription.

Procedural History of NYSE Disciplinary Action Against Grassi

On December 2, 2003, an Exchange Hearing Panel (the "Hearing Panel") commenced a disciplinary hearing to consider allegations that Grassi's conduct with respect to the unauthorized prescription constituted conduct inconsistent with just and equitable principles of trade and acts detrimental to the interest or welfare of the Exchange. ^{2/} The Hearing Panel also examined allegations that Grassi failed to cooperate timely with the investigation conducted by the Exchange's Division of Enforcement. On December 3, 2003, the Hearing Panel unanimously found that Grassi had engaged in acts detrimental to the interest or welfare of the Exchange when he obtained the prescription form, caused it to be completed and signed, and presented the form to a pharmacy for the purpose of obtaining the unauthorized prescription. The Hearing Panel found that the Exchange's Division of Enforcement had not established that Grassi's actions constituted conduct inconsistent with just and equitable principles of trade or that he had failed to comply timely with the investigation. The Hearing Panel censured Grassi and barred him for five years from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization and barred him for an additional five years from Exchange membership. ^{3/}

Grassi filed a request for review with the NYSE's Board of Directors (the "Board"). In a decision dated June 28, 2004, the Board affirmed the Hearing Panel's findings with respect to guilt, but remanded the matter to the Hearing Panel to provide a detailed explanation of the factors it considered in its sanctions determination.

On July 12, 2004, the Hearing Panel issued a supplemental decision in which it detailed the reasons supporting its sanctions determination. On December 2, 2004, the Board again affirmed the Hearing Panel's finding of guilt, but it modified the sanctions imposed by the Hearing Panel so that the five-year bar from membership would run concurrently with the five-year plenary bar.

^{2/} The investigation by the Exchange's Division of Enforcement initially was based on Grassi's arrest and criminal charges brought by the New York District Attorney's office. The case against Grassi was adjourned in contemplation of dismissal, a procedure whereby a case is adjourned but remains open for six months in order for the court to monitor the defendant's behavior. It appears from the record that the case against Grassi was dismissed six months after the court adjourned the matter.

^{3/} Thus, the Hearing Panel imposed a five-year plenary bar on Grassi and an additional five-year bar from Exchange membership resulting in a total bar from Exchange membership of ten years.

III.

Grassi acknowledges that he obtained a blank prescription form from a medical office located on the Exchange's premises that provided services to Exchange members and employees, paid another person to complete the form and forge a doctor's name on the form, and then attempted to fill the prescription. However, Grassi argues that there is not a sufficient nexus between his conduct and the business of the Exchange to justify the sanctions imposed by the NYSE. He points out that the violation with which he is charged did not occur in connection with his employment at a NYSE member firm. He maintains that his alleged misconduct was unrelated to the business of the Exchange, did not relate to any of his duties or responsibilities on the floor of the Exchange, and did not impact any customer, employee, or member of the Exchange.

NYSE Rule 476(a)(7) provides that a member of the Exchange may be disciplined for "acts detrimental to the interest or welfare of the Exchange." The rule does not limit the Exchange's disciplinary authority to misconduct committed by a member in the course of its securities-related business. Rather, it encompasses any conduct by a member that is inconsistent with the specified standard. ^{4/} Nor must the Exchange find actual harm to a customer or member in order to establish a violation of NYSE Rule 476(a)(7). Rule 476 states broad ethical principles that implement the requirements of Section 6(b) of the Exchange Act ^{5/} which, among other things, empowers self-regulatory organizations to discipline their members for unethical behavior as well as violations of law. ^{6/}

In reviewing allegations that conduct is inconsistent with just and equitable principles of trade, we have held repeatedly that a self-regulatory organization's disciplinary authority is broad enough to encompass conduct that does not involve a security if that conduct reflects on a person's ability to comply with the regulatory requirements of the securities industry and to fulfill his fiduciary duties. ^{7/} We believe that this is equally true of acts detrimental to the

^{4/} See, e.g., Vincent Musso, 48 S.E.C. 1, 5 (1984).

^{5/} 15 U.S.C. § 78f(b).

^{6/} Cf. Jeffrey Michael Miller, 51 S.E.C. 1027, 1028-29 (1994) (sustaining NYSE disciplinary action for, among other things, providing a falsified letter to make it appear that the Exchange would pay a settlement in an unrelated matter); William Rembert, 51 S.E.C. 825, 826 n.3 (1993) (holding in an appeal of NASD disciplinary action that Section 15A(b)(6) of the Exchange Act empowers self-regulatory organizations to discipline their members for unethical behavior, as well as violations of law).

^{7/} Daniel D. Manoff, Securities Exchange Act Rel. No. 46708 (Oct. 23, 2002), 78 SEC Docket 2359, 2364 (addressing NASD's rule requiring associated person to observe high standards of commercial honor and just and equitable principles of trade); James A. Goetz, 53 S.E.C. 472, 477 (1998) (same); see also Ivan M. Kobey, 51 S.E.C. 204, 207 (1992) (holding that the NYSE had jurisdiction to determine whether the conduct of an employee of a member firm was fraudulent or inconsistent with just and equitable principles of trade even though the instruments involved in the transactions were

interests or welfare of the Exchange. The securities business depends heavily on the integrity of its participants. Grassi's actions in paying someone to forge a prescription slip and then using that prescription to attempt to obtain medication illegally calls into serious question his ability to comply with the fundamental requirements of candor and truthful representation required of persons employed in the securities industry.

Grassi next contends that the Exchange denied him a fair opportunity to defend the charges against him when it excluded evidence concerning what he alleges was inappropriate medical treatment from the CHS physicians made available to him by the Exchange. Grassi alleges that he was denied a fair hearing because the hearing officer precluded his expert witness from testifying about "the professional requirements for maintaining prescription documents and forms, the recognition of [Grassi's] Vicodin dependency by [a] doctor at CHS, and such doctor's failure to take appropriate steps once he recognized that dependency."

Grassi's contentions are without merit. He has failed to establish how the adequacy of his medical treatment by doctors at CHS is material to the charges against him. Grassi does not dispute that he engaged in the conduct alleged by the Exchange. He argues that, despite having committed this misconduct, he should not be found liable because the alleged inadequate medical treatment that he received prevented him from having the state of mind necessary to find a violation. With respect to state of mind, scienter is not required to find a violation of rules such as NYSE Rule 476 which enunciate broad ethical principles implementing the requirements of Section 6(b) of the Exchange Act: the most that is required is a finding of bad faith or unethical conduct. ^{8/} Thus, Grassi essentially is arguing that he did not act with the requisite bad faith and alleges that evidence with respect to the adequacy of his medical treatment would establish this fact.

The Hearing Officer refused to allow Grassi to obtain documents or introduce evidence concerning the adequacy of his medical treatment, but allowed Grassi to introduce testimony and documents regarding his "state of mind in causing a prescription to be written and causing

commodities and limited partnerships and not securities); DWS Securities Corp., 51 S.E.C. 814, 822 (1993) (holding that NASD's disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security).

^{8/} Rule 476(a)(7) states a broad ethical principle that implements the requirements of Section 6(b) of the Exchange Act. We have held that scienter is not required to establish a violation of such rules and that the most that is required is a finding of bad faith or unethical conduct. See Calvin David Fox, Exchange Act Rel. No. 48731 (Oct. 31, 2003), 81 SEC Docket 2017, 2020-21 (holding that with respect to conduct alleged to be inconsistent with just and equitable principles of trade in violation of Rule 476(a)(6), the NYSE need not establish that respondent acted with scienter, but must find that the respondent acted in bad faith or unethically); cf. Robert E. Kauffman, 51 S.E.C. 838, 839-40 (1993) (holding that a violation of NASD's rule prohibiting conduct inconsistent with just and equitable principles of trade does not require a finding that respondent acted with scienter, but requires a finding of bad faith or unethical conduct) aff'd, 40 F.3d 1240 (3rd Cir. 1994) (Table).

someone to sign a doctor's name without authorization." Over the objections of the Exchange's Division of Enforcement, the Hearing Panel permitted Grassi's expert witness to testify with respect to the effects of Vicodin and the possible state of mind of an individual addicted to Vicodin. Grassi, however, offered no exculpatory evidence with respect to his state of mind at the time of the events in questions. Moreover, Grassi testified that his conduct was "very inappropriate" and that he "knew it was wrong." In other words, he knew that by submitting the forged prescription he was acting unethically and in bad faith. This is all that is required to establish his violation of Rule 476(a)(7).

Grassi also asserts that prior contact by members of the Hearing Panel with the CHS doctor who testified on behalf of the Exchange's Division of Enforcement contributed to Grassi's asserted denial of an opportunity to fairly defend the charges against him. The Hearing Officer disclosed, on the record, that he and the members of the Hearing Panel previously had been treated by the witness. Grassi, however, never raised his claim of bias before the Panel. ^{9/} In any event, Grassi has failed to articulate the nature of the alleged bias. The CHS doctor testified that the signature that appeared on the prescription form in question was not his signature and that he did not knowingly provide a blank prescription form to Grassi. Given that Grassi does not dispute these facts, we do not see how the fact that members of the Hearing Panel previously had been treated by the doctor would have biased the Hearing Panel against Grassi. ^{10/}

IV.

The NYSE barred Grassi for five years from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization. Grassi argues that the sanctions imposed by the Exchange are oppressive and excessive and that it erroneously relied in setting the sanctions on comparisons to cases involving the taking of property of members, customers, or employees of the Exchange. The NYSE contends that the Hearing Panel engaged in a detailed analysis of Grassi's conduct and the mitigating factors that he raised including his relative youth. The NYSE argues further that the Hearing Panel concluded that Grassi's conduct fell short of misappropriation and, therefore, did not warrant that he be barred permanently. The Hearing Panel concluded that Grassi's conduct was analogous to cases where employees of member firms were found to have used funds

^{9/} Cf. Stephen Russell Boadt, 51 S.E.C. 683, 685 (1993) (holding in an appeal from NASD disciplinary action that an applicant must object to the composition of a hearing panel at a time when the alleged defect could have been remedied).

^{10/} Grassi states that the Exchange's 2002 letter notifying him of its investigation indicated only that the NYSE was investigating the possibility that Grassi was arrested and charged with forgery and criminal possession of stolen property. Grassi alleges, therefore, that the NYSE's jurisdiction is limited to the criminal proceeding and not the underlying events. This allegation is without merit. Nothing in the investigation letter purported to limit the NYSE's jurisdiction to the criminal proceeding. Moreover, the Exchange is not required in its initial notification letter to identify everything that it may find during the course of an investigation. The NYSE's letter was sufficient to put Grassi on notice that the conduct underlying the criminal case would be at issue in its investigation.

mistakenly deposited into an account or to have abused their expense accounts and warranted a similar sanction in order to protect the public interest.

Exchange Act Section 19(e) provides that we may cancel, reduce, or require the remission of a sanction if we find that it imposes an unnecessary or inappropriate burden on competition, or if it is excessive or oppressive. ^{11/} We have sustained the NYSE's findings of violation, but on the record before us, we are unable to evaluate fully the basis for the sanction imposed by the NYSE.

The appropriate sanction depends on the facts and circumstances of each particular case. ^{12/} In setting its sanctions, however, the Exchange relied on cases that each involve a finding of conduct inconsistent with just and equitable principles of trade, even though it found that the Exchange's Division of Enforcement had failed to establish that Grassi's actions constituted conduct inconsistent with just and equitable principles of trade and sustained only the violation with respect to conduct detrimental to the interest or welfare of the Exchange. ^{13/} Unlike the situation here, each of the cases relied on by the NYSE to support its choice of sanctions also involved other findings of violation. Moreover, the cases relied on by the Exchange involve abuse of expense accounts or use of funds mistakenly deposited into an account and, therefore, implicate the member's ability to handle other people's money more directly than the conduct at issue here.

Therefore, given that it appears that the Exchange has not addressed this type of misconduct in previous cases, the Exchange should specify what standard it is using to judge the seriousness of the violation and the appropriateness of the sanction. Specifically, the Exchange should articulate the elements of this type of misconduct and how those elements threaten the integrity and reputation of the Exchange. The Exchange also should explain how the sanction it chooses will serve to protect the integrity and reputation of the Exchange from harm in the future, including the extent to which the Exchange believes that sanction will deter similar misconduct on the part of Grassi and other members of the Exchange.

In addition, Grassi claims that there are a number of mitigating factors that justify a less severe sanction than the one imposed by the Exchange. These include his claims that his misconduct was an isolated incident that did not relate to any of his duties or responsibilities on the floor of the Exchange and did not directly impact any customer, employee, or member of the Exchange. We are unable to discern whether, or to what extent, the NYSE considered these facts

^{11/} Section 19(e)(2) of the Exchange Act, 15 U.S.C. § 78s(e)(2). Grassi does not claim, and the record does not show, that the NYSE's action has imposed an undue burden on competition.

^{12/} See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); Jonathan Feins, Exchange Act Rel. No. 41943 (Sept. 29, 1999), 70 SEC Docket 2116, 2131 n.36; Christopher J. Benz, 52 S.E.C. 1280, 1285 (1997), petition denied, 168 F.3d 478 (3d Cir. 1998) (Table).

^{13/} NYSE Rule 476(a)(6) prohibits conduct or proceeding inconsistent with just and equitable principles of trade.

in making its sanction determination. 14/ On remand, the Exchange should consider all of Grassi's mitigation claims and provide an explanation as to whether and to what extent it believes that these claims justify a reduction in the sanction imposed.

In light of the foregoing, we remand this matter for reconsideration of sanctions. On remand, the parties should more fully develop whether, under the circumstances of this case, the concurrent five-year bars are consistent with the purposes of the Exchange Act. In remanding, we do not intend to suggest any view as to the appropriate outcome.

An appropriate order will issue. 15/

By the Commission (Chairman COX and Commissioners GLASSMAN, ATKINS, CAMPOS and NAZARETH).

Jonathan G. Katz
Secretary

14/ The Exchange properly rejected Grassi's argument that these facts establish a lack of nexus between his conduct and the business of the Exchange so as to preclude a finding that he engaged in acts detrimental to the interest or welfare of the Exchange. See supra text accompanying notes 4-7. This does not mean, however, that these facts are irrelevant to a determination of the appropriate sanction.

15/ We have considered all of the contentions advanced by the parties. We have rejected or sustained these contentions 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

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 52858 / November 30, 2005

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For Review of Action Taken by the
New York 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 findings of violation made by the New York Stock Exchange, Inc. against Paul K. Grassi, Jr. be, and they hereby are, sustained; and it is further

ORDERED that the sanctions imposed by the New York Stock Exchange, Inc. on Paul K. Grassi, Jr. be, and they hereby are, remanded for reconsideration.

By the Commission.

Jonathan G. Katz
Secretary