UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 61967 / April 23, 2010

Admin. Proc. File No. 3-13623

In the Matter of the Application of PENNMONT SECURITIES and JOSEPH D. CARAPICO c/o Lynanne B. Wescott The Wescott Law Firm P.C. 239 South Camac Street Philadelphia, PA 19107-5609 For Review of Disciplinary Action Taken by the PHILADELPHIA STOCK EXCHANGE, INC.	ORDER GRANTING MOTION TO DISMISS APPLICATION FOR REVIEW

I.

On September 4, 2009, PennMont Securities ("PennMont") and its general partner, Joseph D. Carapico (together, "Applicants"), both suspended members of the Philadelphia Stock Exchange, Inc. ("PHLX" or the "Exchange"),[1] filed a "Request for Consideration of Appeal Out of Time Pursuant to Rule 420(b)" with the Commission.[2] In that request, Applicants asked the

[1] On July 24, 2008, PHLX was acquired by the NASDAQ OMX Group, Inc. and renamed NASDAQ OMX PHLX, Inc. *See* Press Release, NASDAQ OMX Group, NASDAQ OMX Group to Complete Acquisition of the Philadelphia Stock Exchange (July 24, 2008), *available at http://ir.nasdaqomx.com/releasedetail.cfm?ReleaseID=324143*. Because the disciplinary action taken here was instituted before that date, the Exchange's prior corporate name is used herein.

[2] PennMont later moved for issuance of a Commission order directing PHLX to request a stay of its collection action against PennMont in Pennsylvania state court for the legal

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Commission to review "the suspension by PHLX of PennMont and Carapico on March 10, 2008" based on Applicants' failure to pay legal fees and expenses assessed by PHLX against Applicants pursuant to PHLX Rule 651. The fees and expenses had been incurred by the Exchange in connection with its defense of litigation initiated by Applicants. Applicants argue that their appeal is timely. In the alternative, Applicants assert that their appeal should be considered because of the presence of "extraordinary circumstances," as provided in Commission Rule of Practice 420(b), which permits an exception to the thirty-day filing deadline where such circumstances exist.[3]

On October 29, 2009, the Exchange filed a "Motion to Dismiss Application for Review" asserting, among other things, that Applicants have not established the presence of extraordinary circumstances and therefore failed to satisfy the requirement for an extension of the filing deadline. For the reasons set forth below, we have determined to grant PHLX's motion to dismiss Applicants' application.

II.

The legal fees and expenses at issue in this case arise from extensive litigation that was initiated by Applicants against PHLX more than ten years ago. This litigation began in 1998, when Applicants sued PHLX and its then-Board of Governors in the Court of Common Pleas for Philadelphia County, Pennsylvania, objecting to certain proposed ownership and structural changes pursued by the Exchange at that time (the "1998 Action").

On August 5, 2004, PHLX adopted Rule 651, a fee-shifting provision, pursuant to its rule-making authority.[4] Rule 651 provides, in relevant part, that:

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[2] (...continued)
fees and expenses at issue, which motion the Commission denied. *PennMont Sec.*, Admin. Proc. File No. 3-13623, Order (Sept. 28, 2009).

[3] Commission Rule of Practice 420(b) states that applications for review of a self-regulatory organization's "final disciplinary sanction" must be filed with the Commission "within 30 days after the notice of the sanction is filed with the Commission and received by the aggrieved person applying for review," and the Commission "will not extend this 30-day period, absent a showing of extraordinary circumstances." 17 C.F.R. § 201.420(b).

[4] Pursuant to Section 19(b) of the Securities Exchange Act and Rule 19b-4 thereunder, Rule 651 became effective upon filing. 15 U.S.C. § 78s(b); 17 C.F.R. § 240.19b-4; *Philadelphia Stock Exchange, Inc. Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Legal Fees Incurred by the Exchange*, Securities Exchange Act Rel. No. 50159 (Aug. 5, 2004), 83 SEC Docket 1768.

> any member, [or] member organization . . . who fails to prevail in a lawsuit or other legal proceeding instituted by such person or entity against the Exchange or any of its board members . . . and related to the business of the Exchange shall pay to the Exchange all reasonable expenses, including attorneys' fees, incurred by the Exchange in the defense of such proceeding . . . .

On October 7, 2004, after Rule 651 had been in effect for approximately two months, the Pennsylvania state court awarded PHLX summary judgment in the 1998 Action and dismissed all of Applicants' claims against the Exchange and its Board of Governors. PennMont appealed. In 2006, the Pennsylvania Superior Court affirmed the ruling of the Court of Common Pleas and, in the same year, the Supreme Court of Pennsylvania refused to review the decision.[5]

On November 1, 2007, the Exchange, pursuant to Rule 651, tendered an invoice (the "Rule 651 Invoice") to Applicants for $925,612.20 in legal fees and expenses incurred by PHLX in defending the 1998 Action, which included fees and expenses incurred by PHLX prior to the enactment of Rule 651.[6] PennMont objected to the Rule 651 Invoice and sought injunctive relief from the United States District Court for the Eastern District of Pennsylvania to thwart the Exchange's collection efforts.[7]

As the District Court considered PennMont's request for injunctive relief, the Exchange's three-member Special Committee to Review Delinquencies and Payments (the "Special Committee")[8] scheduled a telephone hearing that was convened on December 19, 2007.[9]

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[5] *Carapico v. Phila. Stock Exch., Inc.*, 897 A.2d 513 (Pa. Super. Ct. 2006) (affirming summary judgment for defendants), *alloc. denied*, 906 A.2d 1196 (Pa. 2006).

[6] The Exchange later reviewed its payments of fees and expenses in the 1998 Action and reduced the amount of fees and expenses at issue to $913,963.38.

[7] Members of the Exchange maintain accounts with the National Securities Clearing Corporation ("NSCC") to facilitate the collection of fees owed to the Exchange. The Exchange had informed PennMont of its intention to debit the amount set forth in the Rule 651 Invoice from PennMont's NSCC account if PennMont refused to pay.

[8] One of the members of the Special Committee was a named party in the 1998 Action.

[9] The Special Committee also set a briefing schedule, responded to inquiries by Applicants about the formation, composition, and governance of the Special Committee, and conducted the telephone hearing after providing forty days' notice to Applicants. In lieu of submitting briefs to the Special Committee, Applicants submitted the motion for preliminary

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Applicants did not participate in the hearing. PHLX states that it sent Applicants' counsel the call-in information for the hearing via facsimile, although Applicants' counsel insists that she never received the call-in information. The chair of the Special Committee noted at the hearing that "the Exchange representatives made every effort, indeed multiple efforts to secure [Applicants' counsel's] attendance at the meeting," including "double checking with [Applicants' counsel's] office" at the time of the hearing.

On the same day, the Special Committee issued an order (the "Special Committee Order") upholding the Rule 651 Invoice and declaring that the Special Committee Order was the "final action by the Exchange in this matter."[10] The Special Committee Order provided further that if PennMont or Carapico did not pay the Rule 651 Invoice or agree upon a payment schedule with PHLX within thirty days (*i.e.*, by January 18, 2008), their Exchange memberships would be suspended.[11] PHLX's legal counsel sent Applicants' counsel a letter on December 27, 2007 indicating that PHLX "assume[d] that [Applicants] will appeal the suspensions to the Securities and Exchange Commission." On January 4, 2008, Applicants' counsel sent PHLX a letter asking PHLX to explain "any rights of appeal, the time frames and how time is counted, and to which organization" with respect to the Special Committee Order. On January 7, 2008, PHLX responded to Applicants' counsel, advising that the Special Committee Order constituted a final action by PHLX and directed Applicants' counsel to Securities Exchange Act Section 19(d) and

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[9] (...continued)
injunction and brief in support of subject matter jurisdiction filed by PennMont in the District Court proceeding.

[10] *PennMont Sec.*, Order of Special Comm. to Review Delinquencies and Payments (Bd. of Governors Special Comm. Dec. 19, 2007).

[11] On January 3, 2008, the Special Committee issued an opinion summarizing the rationale underlying the Special Committee Order (the "Special Committee Opinion"). *PennMont Sec.*, Opinion of Special Comm. to Review Delinquencies and Payments (Bd. of Governors Special Comm. Jan. 3, 2008). In the Special Committee Opinion, the Special Committee noted that:

> Rule 651 was properly adopted and correctly applied. The Rule was adopted by the Exchange after due notice to all affected parties and was approved by the SEC. Counsel for the appellants submitted a comment in the proceedings which objected to the adoption of the Rule recognizing that it would apply to them should it be adopted. The SEC nevertheless approved the Rule. Further, there was no basis in the Rule to conclude that it should not be applicable in a case, such as this, brought by parties who were both members and shareholders. Finally, the applicable case law on retroactivity makes clear that it is appropriate to apply Rule 651, which is a fee-shifting provision, to pending matters (internal citation omitted).

Commission Rule of Practice 420, which contain the filing requirements for appeals of any "final disciplinary sanction" imposed by self-regulatory organizations ("SROs") such as PHLX.[12] These provisions provide for Commission review of such SRO sanctions if the appealing party files with the Commission a petition for review within thirty days after notice of the sanction is filed by the SRO with the Commission and received by the party. On January 9, 2008, PHLX filed with the Commission and served on Applicants a notice of the Special Committee Order.[13]

On January 18, 2008, PHLX adjourned Applicants' suspension until the District Court ruled on PennMont's motion for a preliminary injunction and sent a copy of an amended Special Committee Order to Applicants' counsel reflecting such adjournment (the "Amended Special Committee Order"). On February 12, 2008, the District Court denied PennMont's motion for injunctive relief and dismissed the case for failure to state a claim.[14] On March 10, 2008, PHLX suspended Applicants' memberships with the Exchange.[15] PennMont appealed the District Court

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[12] 15 U.S.C. § 78s(d); 17 C.F.R. § 201.420.

[13] The notice again notified Applicants that "Section 19(d)(1) of the Securities Exchange Act of 1934 and SEC Rule of Practice 210.420 provide guidance for appeals of determinations by SROs." That same day, PHLX's legal counsel filed a response to PennMont's motion for a preliminary injunction in the District Court proceeding outlining the exclusive jurisdiction of the Commission with respect to the review of a "final disciplinary sanction" of a member of an SRO.

[14] *PennMont Sec. v. Frucher*, 534 F. Supp. 2d 538, 542 (E.D. Pa. 2008).

[15] Applicants note that, although they were notified of their suspensions and excluded from PHLX's trading floor at this time, the Exchange continued to list Applicants as active members of the Exchange on PHLX's website until at least September 29, 2009. PHLX also continued to bill PennMont for its trading permit on the Exchange through at least October 25, 2009, and PennMont continued to pay PHLX for its trading permit on the Exchange through at least August 2009. PHLX did not explain why it continued to bill PennMont for its trading permit on the Exchange while PennMont was a suspended membership firm.

On April 4, 2008, the Exchange filed a collection action against PennMont in Pennsylvania state court for the amount of the Rule 651 Invoice, and on October 5, 2009 the Pennsylvania state court granted PHLX's motion for summary judgment and ordered Applicants to pay the adjusted amount of the Rule 651 Invoice plus interest. *NASDAQ OMX PHLX, Inc. v. PennMont Sec.*, March Term 2008, No. 5995, slip op. (Pa. Ct. Com. Pl. Phil. Co. Oct. 5, 2009). On October 23, 2009, the Pennsylvania state court denied PennMont's motion for reconsideration and rejected PennMont's request for a stay pending resolution of this application for review. *NASDAQ OMX PHLX, Inc. v. PennMont Sec.*, March Term 2008, No. 5995, Order (Pa. Ct. Com.

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decision to the United States Court of Appeals for the Third Circuit, which vacated and remanded with orders to dismiss the District Court's order on August 17, 2009, finding that there was no subject matter jurisdiction to consider PennMont's claims because PennMont had failed to seek Commission review of PHLX's action before appealing to the courts.[16] This appeal followed.

III.

Applicants contend that their application for review of the Special Committee Order is timely.[17] We disagree.

Commission Rule of Practice 420(b) is clear – applications for review of a self-regulatory organization's "final disciplinary sanction" must be filed with the Commission "within 30 days after the notice of the sanction is filed with the Commission and received by the aggrieved person applying for review." The Special Committee Order, which on its face stated that it was the "final action by the Exchange in this matter," constituted the requisite "final disciplinary sanction." As we held in *Richard B. Feinberg*, a Special Committee's action is a "final

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[15] (...continued)
Pl. Phila. Co. Oct. 23, 2009), *aff'd*, 2009 Phila. Ct. Com. Pl. LEXIS 251 (Pa. Ct. Com. Pl. Phila. Co. Nov. 19, 2009).

There is no indication that PHLX has sought reimbursement for expenses incurred subsequent to the dismissal of the 1998 Action.

[16] PennMont filed a petition with the Third Circuit for an en banc rehearing of the decision and to enjoin PHLX's collection action, which was denied on September 17, 2009. *PennMont Sec. v. Frucher*, 586 F.3d 242 (3d Cir. 2009), *reh'g en banc denied*, ___ F.3d ____ (3d Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 2054 (2010).

[17] Applicants filed a motion with the Commission on November 20, 2009 to introduce eight exhibits into the record for Applicants' appeal out of time. The exhibits include a copy of PHLX's rule regarding late charges, invoices from PHLX through October 25, 2009 for PennMont's trading permit on the Exchange, and various other documents. Commission Rule of Practice 452 permits the submission of additional evidence upon the motion of a party, provided that such motion "show[s] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." Although Applicants could not have adduced certain of the exhibits before the Special Committee, Applicants have failed to demonstrate that the exhibits are material to our determination of whether extraordinary circumstances exist to justify their appeal out of time pursuant to Commission Rule of Practice 420(b). Consequently, Applicants' request for inclusion of the exhibits in the record for this case is denied.

disciplinary sanction" if it (i) makes a determination of wrongdoing (*i.e.*, that respondent did not pay the Rule 651 invoice at issue), and (ii) imposes a sanction (*i.e.*, that respondent be suspended if he failed to pay the amount set forth on the Rule 651 invoice at issue).[18] The Special Committee Order satisfies this standard because it included a finding that Applicants did not pay the Rule 651 Invoice, and it imposed a suspension on Applicants if they did not either pay the Rule 651 Invoice or reach agreement with PHLX on a payment schedule within thirty days. Consequently, Applicants had thirty days from January 9, 2008 to file their application for review (*i.e.*, thirty days from when PHLX filed with the Commission and served on Applicants a notice of the Special Committee Order). Having failed to do so, their application for review is untimely.

We reject Applicants' contention that the Amended Special Committee Order was PHLX's "final disciplinary sanction" in this matter, and that PHLX's failure to file the Amended Special Committee Order with the Commission tolled the thirty-day filing period. The Amended Special Committee Order did not materially alter the disciplinary sanction imposed by the Special Committee Order. It merely stayed the sanction. In addition, we note that Applicants received the Amended Special Committee Order and were unquestionably aware that their suspensions commenced on March 10, 2008. Under these circumstances, we find that the Amended Special Committee Order did not displace the Special Committee Order as the "final disciplinary sanction" that commenced the thirty-day time period for Applicants to file an application for review.[19]

We also reject Applicants' alternative contention that the time period for them to file their application for review of the Special Committee Order did not begin to run until either (i) the Third Circuit issued its August, 17, 2009 decision finding no subject matter jurisdiction, (ii) PHLX amended its books and records after September 28, 2009 to reflect Applicants'

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[18] Exchange Act Rel. No. 59577 (Mar. 13, 2009), 95 SEC Docket 15118, 15122.

[19] *See MFS Sec. Corp.*, 56 S.E.C. 380, 387 n.13 (2003) (stating that "we have previously held that the failure of an SRO to file the required notice [under Exchange Act Section 19(d)] does not prevent Commission review" (citing *William J. Higgins*, 48 S.E.C. 713, 717 (1987)), *aff'd*, 380 F.3d 611 (2d Cir. 2004); "[Exchange Act] Section 19(d)(2) grants the Commission the authority to review any SRO action 'with respect to which a self-regulatory organization is required . . . to file notice . . .' whether or not such notice is filed"); *see also Todd and Co.*, 47 S.E.C. 242, 244 n.7 (1980) (holding that where "Applicants argued that NASD failed to file proper notice of its action against them, as required by Section 19(d)(1) of the Securities Exchange Act and the rules thereunder . . . we fail to see how they were in any way prejudiced"). Even if the thirty-day filing deadline ran from the date of the Amended Special Committee Order or the date Applicants' suspensions commenced, Applicants' application is still substantially untimely.

suspensions, or (iii) PHLX ceased billing PennMont for its trading permit.[20] Exchange Act Section 19(d) and Commission Rule of Practice 420 start the running of the thirty-day time period for the filing of an application for review from the Exchange's filing the "final disciplinary sanction" with the Commission and Applicants' receipt of it. Thus, Applicants' contentions about the pendency of the Third Circuit proceeding and the Exchange's failure to correct its books, records and billing are not relevant.

IV.

Alternatively, Applicants argue that the extraordinary circumstances of this case justify our consideration of their appeal regardless of whether they satisfied the thirty-day filing deadline. We disagree with Applicants and find that the requisite extraordinary circumstances are not present, requiring dismissal of their appeal as untimely.

A. Applicants Have Not Demonstrated that "Extraordinary Circumstances" Beyond Their Control Caused the Delay

Pursuant to Rule 420(b), the Commission may, in the exercise of its discretion, hear an otherwise untimely application only if "extraordinary circumstances" are present. Courts have recognized that strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief.[21] As we have repeatedly stated, "parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed."[22] For this reason, the "extraordinary circumstances" exception is to be

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[20] Applicants contend that PHLX had "not completed the suspension process, thus tolling the time to request review by the SEC, making PennMont's request to the SEC timely."

[21] *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992) ("Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality."); *see also In re Bushnell*, 273 B.R. 359, 369 (Bankr. D. Vt. 2001) (rejecting untimely appeal and acknowledging that the certainty created by appellate deadlines is essential to expedient resolution of appeals and an even playing field for all parties); *cf. French Hosp. Med. Ctr. v. Shalala*, 89 F.3d 1411, 1420 (9th Cir. 1996) (noting "policy of finality embodied in [agency's] appeal deadline"); *In re GAC Corp.*, 640 F.2d 7, 8 (5th Cir.1981) ("The time requirements contained in [the federal appellate rule for taking an appeal] derive from the need for finality of judgments and an end to litigation.").

[22] *Edward J. Jakubik, Jr.*, Exchange Act Rel. No. 61541 (Feb. 18, 2010), __ SEC Docket ___, ___ (quoting *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1098 n.10 (1998)); *see also Robert M. Ryerson*, Exchange Act Rel. No. 57839 (May 20, 2008), 93 SEC Docket 6058, 6061.

narrowly construed and applied only in limited circumstances.[23] To do otherwise would thwart the very clear policies of finality and certainty underlying the thirty-day filing deadline set forth in Exchange Act Section 19(d) and Rule of Practice 420(b).

We believe that an extraordinary circumstance under Rule of Practice 420(b) may be shown where the reason for the failure timely to file was beyond the control of the applicant that causes the delay. In construing what constitutes extraordinary circumstances, we have looked to analogous areas of federal law involving deadlines, including the judicial doctrine of "equitable tolling" of filing deadlines.[24] Under this doctrine, federal courts may excuse an untimely filing where the party has been pursuing his rights diligently but some extraordinary circumstance beyond the party's control – such as attorney misconduct or mental incapacity – prevented the party from making a timely filing.[25] Even when circumstances beyond the applicant's control give rise to the delay, however, an applicant must also demonstrate that he or she promptly arranged for the filing of the appeal as soon as reasonably practicable thereafter.[26] An applicant

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[23] *Cf. In re Home & Family, Inc.*, 85 F.3d 478, 481 (10th Cir. 1996) (discussing analogous "unique circumstances" exception for untimeliness in bankruptcy proceedings and explaining that "it is a disfavored doctrine that is to be applied only in 'carefully limited circumstances'" (*quoting Senjuro v. Murray*, 943 F.2d 36, 37 (10th Cir. 1991))).

[24] *Wallace v. Kato*, 549 U.S. 384, 396 (2007) ("Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs."). We also consider the meaning of "extraordinary circumstances" as used in Section 208(a)(2)(D) of the Immigration Nationality Act, which permits tolling of the filing deadline for applications for asylum where the petitioner can show "extraordinary circumstances related to the delay in filing." 8 U.S.C. § 1158(a)(2)(D). Such circumstances include serious illness or mental disability, legal disability, ineffective assistance of counsel, and the death or serious illness or incapacity of the petitioner's legal representative or a member of the petitioner's immediate family. 8 C.F.R. § 208.4(a)(5). As indicated below, Applicants have not identified these kinds of circumstances in this case.

[25] *See, e.g., Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Baldayaque v. United States*, 338 F.3d 145, 152-53 (2d Cir. 2003); *Spitsyn v. Moore*, 345 F.3d 796, 798-801 (9th Cir. 2003); *Fahy v. Horn*, 240 F.3d 239, 244-46 (3d Cir. 2001).

[26] Our decisions have rejected applications for review where applicants did not act promptly in pursuing their appeals. *See, e.g., Ryerson*, 93 SEC Docket at 6064 (holding that extraordinary circumstances did not exist where, among other things, NASD "did not cause the fourteen-month delay between the issuance of the [underlying] opinion and the filing of the petition before [the Commission]," but rather the delay "resulted from [applicant's] deliberate choice not to appeal . . ."); *Larry A. Saylor*, Exchange Act Rel. No. 51949 (June 30, 2005), 85

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whose application is delayed as a result of extraordinary circumstances remains under an obligation to proceed promptly in pursuing appellate recourse.

It is undisputed that no circumstances beyond Applicants' control led to their failure to timely file an application for review. Applicants were notified of their right of appeal to the Commission four times by PHLX (including a response by PHLX on January 7, 2008 to a letter by Applicants' counsel asking for PHLX to provide "any rights of appeal, the time frames and how time is counted, and to which organization"). Despite this, Applicants elected to pursue their objections in the federal courts rather than filing an application for review with the Commission. Having made this election, Applicants cannot complain at this stage about the consequences of their choices.[27]

B. Applicants Have Not Demonstrated Any Other Extraordinary Circumstances

Rather than demonstrate delay caused by circumstances beyond their control, Applicants simply argue that various procedural and substantive issues raised by their application – arguments they could have raised well over one year ago – present extraordinary circumstances warranting review of their untimely application. We believe that the measure of whether an untimely application presents an extraordinary circumstance is not simply the relative weight of the arguments presented on appeal – otherwise, the "extraordinary circumstances" requirement would be read out of Commission Rule of Practice 420. We do not intend here to catalogue every extraordinary circumstance that might lead the Commission to exercise its discretion to hear an appeal filed out of time.[28] While we reserve the right to hear an untimely appeal in our

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[26] (...continued)
SEC Docket 3118, 3124-25 (dismissing application for review citing "[applicant's] thirty-two year delay in filing an appeal of NASD action taken after a proceeding in which he participated, and of which he admits being apprised immediately"); *but see David L. Turpinseed*, 48 S.E.C. 689, 689 n.1 (1987) (accepting application for review filed twenty days late by exercising "the discretion granted us by Section 19(d)(2) of the Securities Exchange Act").

[27] *See supra* note 26; *see also Jakubik*, __ SEC Docket ___ (granting motion to dismiss petition for review filed five years after petitioner notified of SRO's final disciplinary sanction).

[28] See, e.g., *MFS Sec. Corp.*, 56 S.E.C. at 382-94 (accepting appeal from action taken by the New York Stock Exchange ("NYSE") that was filed almost three years late because (i) the United States Court of Appeals for the Second Circuit "asked for the Commission's views as to whether the NYSE's actions comported with the Exchange Act and the NYSE's rules" and (ii) "MFS's application present[ed] novel facts and legal issues," but making clear that, despite
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discretion,[29] as discussed below, none of the legal issues raised here present, in our view, extraordinary circumstances warranting review.

- Contrary to Applicants' assertion that "no administrative procedures were in place" at PHLX for Applicants to contest the Rule 651 Invoice, the administrative procedures implemented by the Special Committee appear to have been consistent with the routine adjudicatory procedures of the Exchange and to have resulted in no unfairness towards Applicants.

- Applicants' argument that PHLX should have raised Rule 651 as a counterclaim in the 1998 Action instead of initiating the Special Committee proceeding raises a question of state law that does not qualify as a critical legal issue warranting our review.

- Applicants' argument that a member of the Special Committee should have been disqualified is foreclosed because Applicants failed to raise this objection during the Exchange proceeding.[30]

- Contrary to Applicants' assertion, Rule 651 does not impose any requirement that the Special Committee Order must set forth an explicit determination regarding the reasonableness of the fees and expenses.

- With respect to Applicants' arguments regarding the enactment of Rule 651, we have previously upheld the Rule 651 adoption process (finding that Rule 651 was "consistent with existing precedent and [presented] no novel issues"),[31] and have

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[28] (...continued)
accepting the untimely appeal, the Commission "[g]enerally would reject such an application as untimely" and stating that "[o]ur action should not be viewed as indicating that we will accept other applications under similar circumstances").

[29] *Id.*

[30] *See, e.g.*, *Stephen R. Boadt*, 51 S.E.C. 683, 685 (1993) (holding that where an applicant did not object to the composition of a hearing panel before such hearing panel, "[w]e are therefore not required to consider this objection because he failed to present it to the [hearing panel] at a time when it could have been remedied, if appropriate").

[31] *Lawrence Gage*, Exchange Act Rel. No. 54600 (Oct. 13, 2006), 89 SEC Docket 279, 288.

upheld Rule 651 as applied to lawsuits "relating to the business of the Exchange."[32]

- Contrary to Applicants' assertions, Rule 651 is not vague.[33]

- Contrary to Applicants' assertions, we find no indication that PHLX used Rule 651 to penalize Applicants for challenging Exchange management decisions, or that the application of Rule 651 by PHLX in this case was inconsistent with state law within the meaning of the Exchange Act.[34]

- Contrary to Applicants' assertions, in *Richard B. Feinberg* we held that "[n]othing in [Rule 651] suggests that [respondent's] membership status must have played a role in the suit."[35]

- With respect to Applicants' assertion that Rule 651 requires PHLX to submit evidence that it paid the legal fees and expenses at issue, the plain language of Rule 651 only requires that such fees and expenses have been "incurred by the Exchange."

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[32] *Feinberg*, 95 SEC Docket at 15118.

[33] By its express terms, it applies to "[a]ny member, member organization . . . or person associated with any of the foregoing who fails to prevail in a lawsuit or other legal proceeding instituted by such person or entity against the Exchange or any of its board members, officers, committee members, employees, or agents, and related to the business of the Exchange." It further requires that any such person or entity "pay to the Exchange all reasonable expenses, including attorneys' fees, incurred by the Exchange in the defense of such proceeding . . . ." *See Heath v. SEC*, 586 F.3d 122, 140 (2d Cir. 2009) (sustaining NYSE disciplinary action based on violation of "just and equitable principles of trade" rule, holding that the Due Process Clause in the United States Constitution requires that "laws be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and noting that the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe") (quoting *Perez v. Hoblock*, 368 F.3d 166, 174-76 (2d Cir. 2004)).

[34] *But see Bus. Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990) (holding that the Commission exceeded its statutory authority under the Exchange Act in barring a stock exchange from listing common stock with restricted voting rights because the applicable rule "directly interfere[d] with the substance of what the shareholders may enact" under state law).

[35] 95 SEC Docket at 15123 n.13.

- Finally, with respect to Applicants' contention that Rule 651 was impermissibly applied retroactively by PHLX, resolution of this issue turns in substantial part on the proper application of state law under the particular facts of this matter.[36] For that reason, we find that it does not present the type of critical legal issue that could potentially rise to the level of an extraordinary circumstance that might necessitate taking an appeal filed well over a year past its due date.[37]

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[36] Although the United States Supreme Court has admonished against the application of laws and rules retroactively absent a very clear expression in the provision otherwise, in *Bradley v. Sch. Bd. of Richmond*, the Court permitted the application of a newly enacted fee-shifting provision to litigation that was already ongoing absent the requisite clear expression. 416 U.S. 696 (1974). In *Landgraf v. USI Film Prods.*, the Court offered two explanations to reconcile this apparent tension. First, the Court stated that "[a]ttorney's fee determinations . . . are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" 511 U.S. 244, 277 (1994) (quoting *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 451-52 (1982)). The logic of this distinction would similarly apply to the facts of this matter. Second, the Court stated that *Bradley* did not present a retroactivity issue "because the prior availability of a fee award, and the likelihood that fees would be assessed under pre-existing [equitable] theories," meant that "the new fee statute simply 'd[id] not impose an additional or unforeseeable obligation' upon the school board." *Id.* at 278 (quoting *Bradley*, 416 U.S. at 721).

It is unclear from the record whether this second distinction is present under the particular facts of this matter, and thus it is unclear whether or not the result in *Bradley* would carry over if Applicants had filed a timely application. Here, PHLX argues that Applicants contractually agreed "to abide by the . . . rules and regulations of the Exchange (which . . . shall be deemed to include *any dues, fees, and other charges imposed by the Exchange*), in each case *as they have been or shall be from time to time amended*," PHLX By-Laws Art. XII, § 12-9(a), and knew that they could be subject to assessment for the Exchange's legal fees in defense of the 1998 Action under Pennsylvania's Dragonetti Act. *Citing* 42 Pa. C.S. § 8351, *et. seq.* (imposing liability against a "person who takes part in the procurement, initiation or continuation of civil proceedings against another" for "wrongful use of civil proceedings" if "[t]he proceedings have terminated in favor of the person against whom they are brought").

[37] We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

V.

In sum, the Applicants' application for review was untimely and they have not established that extraordinary circumstances that might otherwise counsel in favor of our reviewing the application.

Accordingly, it is ORDERED that the Philadelphia Stock Exchange, Inc.'s motion to dismiss the application for review filed by PennMont Securities and Joseph D. Carapico be, and it hereby is, GRANTED.

By the Commission.

Elizabeth M. Murphy
Secretary