

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65569 / October 14, 2011

Admin. Proc. File No. 3-14396

In the Matter of the Application of

MICHAEL PICOZZI III
c/o Timothy A. Valliere, Esq.
Smith Valliere PLLC
75 Rockefeller Plaza, 21st Floor
New York, New York 10019

For Review of Disciplinary Action by

PCX Equities, Inc.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE – REVIEW OF DISCIPLINARY
PROCEEDINGS

Practice and Procedure

Alleged Failure to Cooperate with Request for Information

Former registered representative of former member firm of former national securities exchange was barred for failure to answer a notice of summary determination concerning alleged failure to cooperate with exchange's request for information. *Held*, exchange's findings of violations and sanctions it imposed are *set aside*, with exchange's successors' consent, where record contains limited evidence regarding the proceeding.

APPEARANCES:

Timothy A. Valliere, of Smith Valliere PLLC, for Michael Picozzi III.

Ivan Kline, of Friedman & Wittenstein, for NYSE Euronext and NYSE Regulation, Inc.

Appeal filed: May 17, 2011
Last brief received: September 9, 2011

I.

Michael Picozzi III, formerly associated with Andover Brokerage ("Andover"), a former PCX Equities, Inc. ("PCX") member firm, seeks review of PCX disciplinary action. The PCX found that Picozzi and Andover failed to respond to a Notice of Summary Determination (the "Notice of Summary Determination"), which the PCX entered against Picozzi and Andover after they failed to respond to a PCX complaint alleging that they had failed to respond to information requests in connection with an investigation.¹ The PCX censured and permanently barred Picozzi and Andover from association with any PCX member or member organization. Picozzi now petitions the Commission to vacate the PCX's summary determination. The PCX's successors in interest, NYSE Euronext and NYSE Regulation, Inc. (collectively, the "NYSE"), do not oppose Picozzi's petition, noting the limited evidentiary record and the time elapsed.² We base our findings on an independent review of the record.

II.

Picozzi was the founder and sole owner of Andover. On or about January 6, 2003, the PCX opened an investigation (the "Investigation") of possible market manipulation related to twenty-six transactions executed on November 1, 2002 involving shares of Tenet Healthcare Corp. ("THC"). The PCX mailed Picozzi and Andover, at Andover's address, a First Request for Information on January 14, 2003. Picozzi states in a declaration filed under penalty of perjury with the Commission that he "do[es] not recall ever seeing the initial PCX information request letter."³

¹ As outlined in the Notice of Summary Determination, PCX Rule 10.4(b) states that respondents who fail to answer a complaint shall be considered to have admitted the complaint's charges, and PCX Rule 10.4(c) states that the PCX Business Conduct Committee may make a summary determination and may impose a penalty as to such charges that respondents failed to answer.

² As result of mergers, the PCX no longer exists as a national securities exchange. An indirect subsidiary of NYSE Euronext is the successor in interest.

³ Picozzi filed a motion to introduce declarations by him and Daniel G. Viola, Andover's former general counsel, pursuant to Rule 452 of our Rules of Practice. 17 C.F.R. § 201.452. Rule 452 requires a movant to show reasonable grounds for failure to adduce such evidence previously and that the additional evidence is material. Picozzi asserts that, because he was unaware of the PCX's proceedings, he has not yet had an opportunity to respond to PCX's allegation or to introduce any evidence. NYSE does not oppose Picozzi's motion. We believe that Picozzi's motion satisfies the requirements of Rule 452 and therefore admit the declarations.

During this time, Picozzi was negotiating with SunGard Data Systems ("SunGard") for the sale of substantially all of Andover's assets, which sale was completed on March 3, 2003. Picozzi states that the PCX information request did not appear on any schedule of Andover's purchase agreement with SunGard and that he "had no basis to believe that Andover had any outstanding regulatory issues or requests for information that were not being addressed when I sold nearly all of Andover's assets to SunGard."

After the sale, SunGard controlled Andover's former office space, and a SunGard subsidiary (Assent LLC) operated Andover's former business. According to Picozzi, Assent's general securities principal would have handled any incoming mail to the address. In his declaration, Picozzi states that, although the PCX sent several additional request for information to Andover's address, "[n]o one at Assent informed me about any of the post-sale PCX mailings."

On October 23, 2003, the PCX filed a complaint against Andover and Picozzi (the "Complaint"), charging them with violating PCX Rule 10.2(d) for failing to furnish information and testimony requested by PCX, thereby obstructing a PCX regulatory investigation (the "Proceeding").⁴ The PCX mailed the Complaint to Picozzi, care of Andover Securities, LLC, but Picozzi states that no one forwarded the Complaint to him and that he "never saw it until 2010." After Picozzi and Andover failed to respond, the PCX issued the Notice of Summary Determination on October 25, 2004, censuring and permanently barring Picozzi and Andover from association with any PCX member or member organization, with the provision that, if Picozzi and Andover "fully cooperated" with PCX within three months after issuance of the Notice of Summary Determination, "the permanent bar would be lifted and an appropriate sanction for obstructing the investigation be imposed." Neither Picozzi nor Andover ever responded to the Notice of Summary Determination, and Picozzi now states that "I never saw a single one of these [PCX] mailings until 2010."

As a result of the sale of Andover to SunGard, Picozzi was subject to a five-year non-competition agreement. After the agreement expired, Picozzi decided to re-enter the securities industry in early 2010, at which point he claims to have learned of the PCX bar. Picozzi now petitions the Commission to vacate the default summary determination. The NYSE does not oppose his petition.⁵

⁴ As outlined in the Notice of Summary Determination, PCX Rule 10.2(d) prohibited Equity Trading Permit Holders (of which Andover was one) from impeding or delaying a regulatory investigation regarding possible violations or refusing to furnish testimony, documentary materials, or other information requested by the PCX during one of its investigations. Failure to furnish such information or materials was considered to be obstructive of an inquiry or investigation.

⁵ Picozzi also asks us to "expunge" his CRD (Central Registration Depository) record, but we see no basis for doing so. We assume that FINRA will update Picozzi's CRD

(continued...)

III.

The record contains few details about what occurred during the PCX's investigation or the PCX's attempts to serve documents on Picozzi. The evidence essentially consists of Picozzi's uncontradicted declaration that he did not see the PCX's Notice of Summary Determination, the Complaint, or other PCX mailings until 2010. Picozzi also declares that, had he been aware of the PCX's Complaint and Notice of Summary Determination, he would have responded to them. He also asserts that the information PCX sought during the Investigation was readily available and would have shown that he had not engaged in improper conduct in connection with the THC transactions. Picozzi argues that it is now "utterly disproportionate" for him to be barred from the industry for failing to respond to a complaint he never saw.

The NYSE does not oppose Picozzi's petition. The NYSE explains that "there is uncertainty" about whether Picozzi received notice of the Complaint or Notice of Summary Determination before 2010. "Because of that uncertainty," the NYSE states that it has "reason to believe that Picozzi did not in fact deliberately obstruct or impede the Investigation, and did not have the opportunity to defend himself in the Proceeding." The NYSE adds that, "given the passage of time, the [NYSE] likely cannot now as a practical matter determine whether Picozzi, or even Andover for that matter, engaged in any improper conduct in connection with the trading that was the subject of the Investigation."

Given the unique facts of this case, including the lack of evidence surrounding the PCX's attempts to serve Picozzi with the Notice of Summary Determination and the NYSE's statement that it does not oppose Picozzi's petition, we believe it is appropriate to set aside the PCX's findings of violations and sanctions.⁶ In reaching this conclusion, we emphasize that our decision regarding Picozzi's petition turns on the particular circumstances of this case and in no

⁵ (...continued)

record to reflect our decision in this matter. We also note that Picozzi initially moved for oral argument in this matter, but withdrew that request when he learned that NYSE did not oppose his petition.

⁶ *Cf. Roger B. Johnson*, 50 S.E.C. 1164, 1165-66 (1992) (declaring a default summary judgment issued by the PCX to be "null and void" where respondent asserted that he never received the complaint that the PCX had improperly served).

way diminishes established precedent that a respondent's lack of awareness of official regulatory correspondence is not a defense where evidence shows that the regulatory entity properly sent correspondence to the address that the respondent provided to the regulatory agency.⁷ An appropriate order will issue.⁸

By the Commission (Commissioners WALTER, AGUILAR, and PAREDES);
Chairman SCHAPIRO not participating.

Elizabeth M. Murphy
Secretary

⁷ See, e.g., *Dennis A. Pearson, Jr.*, Securities Exchange Act Rel. No. 54913 (Dec. 11, 2006), 89 SEC Docket 1627, 1638 (noting that "[i]t is the responsibility of NASD members and their associated persons to keep NASD apprised of any changes in their addresses, and a failure to respond to NASD in connection with an investigation . . . is not excused by that person's having temporarily moved from the address listed in the CRD"); *Warren B. Minton, Jr.*, 55 S.E.C. 1170, 1177 n.15 (noting that associated persons have "a continuing duty to notify the [NASD] . . . of [their] current address, and to receive and read mail sent to [them] at that address" (quotation omitted)).

⁸ We have considered all of the parties' contentions. 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
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ORDER SETTING ASIDE DISCIPLINARY ACTION OF NATIONAL SECURITIES
EXCHANGE

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

ORDERED that the disciplinary action taken by PCX Equities, Inc. against Michael Picozzi III be, and hereby is, set aside.

By the Commission.

Elizabeth M. Murphy
Secretary