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SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51238 / February 22, 2005

Admin. Proc. File No. 3-11372

In the Matter of the Application of

MORTON KANTROWITZ
1900 Glades Road, Room 200
Boca Raton, Florida 33431

For Review of Action Taken by
NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - - REVIEW OF DENIAL OF
MEMBERSHIP CONTINUANCE APPLICATION

Registered securities association denied member's application to permit employment of individual subject to a statutory disqualification. Held, review proceeding is remanded.

APPEARANCES

Morton Kantrowitz, pro se.

Deborah F. McIlroy, for NASD.

Appeal filed: January 7, 2004

Last brief received: March 29, 2004

I.

Morton Kantrowitz appeals from the denial by NASD of an application by Great Eastern Securities, Incorporated ("Great Eastern" or the "Firm"), an NASD member firm, to employ him as a limited representative—corporate securities (Series 62). The application was necessary

because Kantrowitz is subject to a statutory disqualification, an injunction. We base our findings on an independent review of the record.

II.

Kantrowitz became subject to a statutory disqualification 1/ in 1969 as the result of the permanent injunction entered against him 2/ prohibiting him from further violations of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(a)(2) of the Securities Exchange Act of 1934 and Exchange Act Rules 10b-5 and 15c2-7. 3/ Kantrowitz consented to the entry of the permanent injunction without admitting or denying the allegations in the complaint.

The conduct underlying the injunction involved Kantrowitz's participation in a scheme in which Kantrowitz and others created the false appearance of a market for the stock of American Continental Industries ("ACI"). As a result, various lending institutions were induced to make loans totaling more than \$720,000 with ACI stock pledged as collateral for the loans. The loans subsequently defaulted. The complaint alleged that the two largest shareholders of ACI stock contacted registered representatives, including Kantrowitz, and convinced them to insert quotations in the pink sheets, published by the National Quotation Bureau, Inc., with an understanding that the traders would be protected against loss. Kantrowitz, at the time a vice president, director, 30% shareholder, and trader of a broker-dealer, inserted 45 to 50 quotations per day during the relevant time period.

In 1970, the Commission instituted administrative proceedings arising from the same facts. An administrative law judge found that Kantrowitz aided and abetted a fraudulent scheme by placing fictitious quotations for a stock in the pink sheets. The law judge determined that it was in the public interest to suspend Kantrowitz from association with any broker-dealer for three months. 4/ We declared the law judge's order final. 5/ NASD states that, in 1971, it

1/ Under Securities Exchange Act Section 3(a)(39), 15 U.S.C. § 78c(a)(39), a person is subject to a "statutory disqualification" if, among other things, "such person . . . is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4),"

Under NASD By-Laws, Article III, Section 4(h), a person is subject to a "disqualification" if, among other things, such person "is permanently or temporarily enjoined" NASD Manual at 1307 (Nov. 2003).

Under Article II, Section 3(b) of NASD's By-Laws, NASD may bar a person from becoming associated or continuing association with a member if such person is subject to a disqualification. NASD Manual at 1305.

2/ SEC v. American Cont'l Indus. (D.Md. 1969).

3/ 15 U.S.C. §§ 77q, 78j, and 78o, and 17 C.F.R. §§ 240.10b-5 and 15c2-7.

4/ Alessandrini & Co., 1971 SEC LEXIS 3975 (Dec. 10, 1971).

5/ Wellington Hunter dba Wellington Hunter Associates, Securities Exchange Act Rel. No.

approved Kantrowitz's application to return to the securities industry. The suspension was completed in 1972. Thereafter, Kantrowitz was associated with a broker-dealer until 1992.

In 1992, Kantrowitz pled guilty in New York state court to falsifying business records. ^{6/} Kantrowitz admitted that, while employed as a trader for Nash Weiss Securities, a member firm, he agreed to "park" securities for another broker-dealer which ultimately resulted in false entries in that broker-dealer's FOCUS report. Kantrowitz was sentenced to a one-year period of conditional discharge. This conviction ceased to be a statutory disqualification as of October 15, 2002. ^{7/}

Before the expiration of this statutory disqualification, three different member firms submitted MC-400 applications on behalf of Kantrowitz seeking to employ him. NASD denied these applications, and the Commission sustained the two denials that Kantrowitz appealed. ^{8/}

In the application now before us, Great Eastern proposes that Kantrowitz will function in a limited capacity. He will introduce potential customers to the Firm to buy or sell securities for their own accounts solely on an unsolicited basis. ^{9/} All accounts referred to Great Eastern by Kantrowitz would be reviewed by his supervisor. Although Kantrowitz will be listed on Great Eastern's new account form as the representative who introduced these new accounts, he would not perform any of the duties of a registered representative for the accounts. Upon acceptance of an account referred to Great Eastern by Kantrowitz, the Firm proposes to assign another qualified registered representative to carry out the duties with respect to the account. Kantrowitz's sole compensation from Great

9480 (Feb. 8, 1972), 1972 SEC Lexis 1300.

^{6/} People v. Morton Kantrowitz (Wakefield Financial Securities Case), Ind. No. 289/91 (S.Ct. N.Y.) (1992).

^{7/} Under Exchange Act Section 3(a)(39), 15 U.S.C. § 78c(a)(39), and under NASD By-Laws, Article III, Sections 4(g)(1)(i) and (ii), NASD Manual at 1307, a person is subject to a statutory disqualification if, among other things, he or she is convicted of a misdemeanor, within 10 years preceding the filing of any application for membership or association, arising out of the conduct of the business of a broker-dealer or involving the making of a false report.

^{8/} Morton Kantrowitz, Exchange Act. Rel. No. 44239 (May 1, 2001), 74 SEC Docket 2406 (noting that the proposed supervisor had left the member firm, and that firm had not amended its application to propose a new supervisor) and Morton Kantrowitz, 52 S.E.C. 721, 723 (1996) (stating that the "conviction at issue, while a misdemeanor, reflects poorly on Kantrowitz's integrity" and noting our earlier suspension).

^{9/} Kantrowitz also will place orders with Great Eastern to buy or sell securities for his own brokerage account at the Firm and for the brokerage accounts of his wife and step-daughter, if they grant appropriate trading authority. Kantrowitz states that this activity would not require registration. However he "listed this activity in the application in order to make complete disclosure of all of my contemplated activities at Great Eastern."

Eastern would be an override, no more than fifty cents per transaction, of the commissions earned from unsolicited transactions executed by the Firm for the accounts introduced by Kantrowitz. Kantrowitz would not have authority to hire any person, would not trade a firm proprietary account, and would not handle customer or firm funds or securities.

After reviewing Great Eastern's application, NASD's Department of Member Regulation ("Member Regulation"), by letter dated April 16, 2003, recommended denial of the application. In its recommendation, Member Regulation found that Kantrowitz had engaged in a pattern of fraudulent conduct and that it was not in the public interest to allow Kantrowitz to associate with Great Eastern in any capacity.

In December 2003, the National Adjudicatory Council ("NAC") denied Kantrowitz's application to associate with Great Eastern. Before the NAC, the Firm proposed that Craig Felty be Kantrowitz's supervisor. Felty has no disciplinary history and has experience in supervising disqualified persons. ^{10/} The NAC specifically found that the Firm's proposed heightened supervisory structure was "not inadequate." ^{11/} The NAC observed, based solely on Kantrowitz's commission of the two acts of securities-related misconduct, that Kantrowitz's regulatory history was so grave that he should not be permitted employment in the securities industry. In reaching its determination, the NAC stated that the standards set forth in the Commission decisions in Paul Van Dusen and Arthur H. Ross, ^{12/} discussed below, do not apply in determining whether to grant or deny the Firm's application. This appeal followed.

III.

The standards that govern our review of NASD's action are contained in Section 19(f) of the Securities Exchange Act of 1934. ^{13/} If we find that "the specific grounds" on which NASD based its action "exist in fact," that NASD's determination not to permit Kantrowitz's association is in accordance with its rules, that such rules were applied in a manner consistent with the purposes of the Exchange Act, and that NASD's action does not impose an undue burden on competition, ^{14/} we must dismiss Kantrowitz's appeal.

^{10/} Initially, Great Eastern identified Ernest Viola as Kantrowitz's responsible supervisor. Member Regulation also expressed concern about Viola's ability adequately to supervise Kantrowitz. Viola subsequently resigned from Great Eastern.

^{11/} The NAC also stated that it was not troubled by the Firm's regulatory history. In 2002, the Firm consented to a fine of \$7,500 in an Acceptance, Waiver and Consent for failing to comply with the reporting requirements of the Order Audit Trail System. In 2003 NASD issued a Letter of Caution to the Firm for failing to submit a copy of a response to an information request.

^{12/} Paul Edward Van Dusen, 47 S.E.C. 668 (1981) and Arthur H. Ross, 50 S.E.C. 1082 (1992).

^{13/} 15 U.S.C. § 78s(f).

^{14/} Kantrowitz does not claim, and the record does not support a conclusion, that NASD's action has imposed an undue burden on competition.

Here, the specific ground on which NASD based its determination, the statutory disqualification (the injunction), exists in fact, and NASD conducted its review of the application in accordance with its rules. However, because the NAC decision did not follow the standards set forth in Van Dusen and Ross in evaluating the application, we are unable to determine whether NASD applied its rules in a manner consistent with the purposes of the Exchange Act. We thus remand this matter to NASD for further consideration.

NASD contends that our holding in Van Dusen, in which we directed NASD to permit an individual's association, does not apply to this proceeding. NASD reasons that Van Dusen applies to matters in which the Commission has imposed a conditional bar (i.e. a bar granting a right to reapply for association after a specified period), and the application for association has been filed after the expiration of that period. In NASD's view, the Van Dusen analysis does not apply to Kantrowitz's 1969 injunction because it "included no right to reapply after a specified period of time." NASD also contends that the Commission did not weigh the requirements of the public interest, as it had in Van Dusen, when it imposed the three-month suspension on Kantrowitz in the related administrative proceeding.

Recently, in Reuben D. Peters, 15/ we stated that the analysis set forth in Van Dusen should be used when evaluating the application of a statutorily disqualified person who was also the subject of Commission administrative sanctions imposed under the Exchange Act. We further explained that our authority to impose any sanction pursuant to Exchange Act Section 15 requires that we make a public interest finding. The standard enunciated in Van Dusen provides that where the time period specified in a conditional bar order has expired and where no "new information" or additional misconduct has been raised, it is inconsistent with the remedial purposes of the Exchange Act to deny an application for reentry. 16/

As we also explained in Peters, Van Dusen noted that an applicant's reentry is not "automatic" after the expiration of a given time period. Instead, Van Dusen instructed NASD to consider other factors, such as, "other misconduct in which the applicant may have engaged, the nature and disciplinary history of the prospective employer, and the supervision to be accorded the applicant." 17/ Subsequently, in Ross, we noted that, if an applicant had engaged in additional misconduct which was similar to the misconduct underlying a bar order in which the time prohibiting application had passed, it was appropriate to consider both instances of misconduct "as forming a significant pattern" which might justify the denial of an application. 18/

15/ Reuben D. Peters, Exchange Act Rel. No. 51237 (Feb. 22, 2005), ___ SEC Docket ____, reconsideration denied, Exchange Act Rel. No. 51238 (Feb. 22, 2005), ___ SEC Docket ___. See also Harry M. Richardson, Exchange Act Rel. No. 51236 (Feb. 22, 2005), ___ SEC Docket __.

16/ Van Dusen, 47 S.E.C. at 671.

17/ Id.

18/ Ross, 50 S.E.C. at 1085 n.10.

We believe that the analysis in Peters applies here. Contrary to NASD's assertion, the law judge engaged in a lengthy analysis of the public interest in suspending Kantrowitz. We declared the law judge's decision final. Thus, Van Dusen and Ross require NASD to be guided by the public interest determination and the sanctions imposed when reviewing applications for reentry.

Because the NAC did not apply these standards, we are unable to determine whether the NAC properly considered the record before it. The NAC based its denial of Kantrowitz's application solely on the two instances of misconduct, the injunction and the state misdemeanor conviction. The NAC explicitly refrained from determining whether these two instances demonstrated a "significant pattern of misconduct" or otherwise indicated a reason to deny Kantrowitz's association.

Kantrowitz contends that NASD thereby has imposed a "two strikes and you're out" policy. Kantrowitz asserts that NASD based its denial of his reentry on the existence of the two instances of misconduct and ignored other factors, such as the limitations placed on his activities and the proposed supervisory scheme. As we emphasized in Van Dusen, the purpose of disciplinary actions is remedial rather than penal:

"Their imposition serves to deter both the particular respondents as well as others in the securities industry from committing violations of the securities laws. We have been cognizant of the importance of exercising the discretionary power reposed in us in this area in a manner that will afford investors protection without visiting upon the wrongdoers adverse consequences not required in achieving the statutory objectives." 19/

As indicated above, we are unable to conclude whether denial of association is consistent with the purposes of the Exchange Act. We note, however, while the 1992 conviction is no longer a statutory disqualification, it is additional misconduct that occurred after we imposed our 1972 suspension. We note further that, in justifying its denial of Kantrowitz's application, NASD asserts the importance of its ability to evaluate "appropriate business standards for its members [p]articularly in matters involving a firm's employment of persons subject to a statutory disqualification." 20/ Nevertheless, the NAC also stated that it had no objection to the supervision to be provided Kantrowitz or the regulatory history of the Firm. 21/

19/ Van Dusen, 47 S.E.C. at 671 (citation omitted).

20/ Halpert & Co., 50 S.E.C. 420, 422 (1990).

21/ Kantrowitz compares his application to that of Dennis Milewitz, 53 S.E.C. 701 (1998). In Milewitz, the applicant, already subject to a permanent injunction and a misdemeanor conviction, engaged in additional misconduct resulting in administrative proceedings. As here, by the time of our review, the ten-year statutory period making his conviction a disqualification had run. We remanded Milewitz's application for further consideration of the effect of the injunction on his application. On remand, NASD determined to permit Milewitz's association in spite of the injunction and the prior criminal conviction,

Thus, we remand the application to NASD for further consideration in accordance with this opinion. In remanding, we express no view as to the outcome.

An appropriate order shall issue. 22/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS, and CAMPOS).

Jonathan G. Katz
Secretary

SD99004, available at <http://www.nasdr.com/pdf-text/sddecisions/sd99004.pdf>, (NASD 1999). While NASD states that every NAC decision is based on the facts and circumstances before it, NASD failed to explain why Milewitz does not inform its analysis of Great Eastern's application or how Kantrowitz's situation differs from Milewitz's.

22/ 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
SECURITIES AND EXCHANGE COMMISSION
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ORDER REMANDING APPEAL FROM REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the proceedings on the application of Morton Kantrowitz be, and they hereby are, remanded to NASD for further proceedings consistent with that opinion.

By the Commission.

Jonathan G. Katz
Secretary