

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 04-186

February 1, 2005

GAIL PERRY-MASON
REGISTERED REPRESENTATIVE

* * *

Abused the trade correction process by causing the transfer of a trade at a price inferior to the prevailing market price, and caused the transfer of a trade with unrealized losses between customer's accounts – Censure and \$7,500 fine.

Appearances:

For the Division of Enforcement
Anthony J. Cavallaro, Esq.
Michael Krevor, Esq.
Richard R. Best, Esq.

For the Respondent
Mark L. Kowalsky, Esq.

* * *

An Exchange Hearing Panel conducted a hearing on charges brought by the Exchange's Division of Enforcement against Gail Perry-Mason a registered representative with Fahnestock & Co. Inc. (the "Firm"). Ms. Perry-Mason was charged with having:

- I. Engaged in conduct inconsistent with just and equitable principles of trade in that on one or more occasions, she abused the trade correction process by causing the transfer of a trade at a price to the transferee inferior to the prevailing market price.
- II. Engaged in conduct inconsistent with just and equitable principles of trade in that, on one or more occasions, she caused the transfer of a trade with unrealized losses between customers' accounts.
- III. Caused her member firm employer to violate Regulation 240.17a-3 and Regulation 240.17a-4 under the Securities Exchange Act of 1934 and Exchange Rule 440 in that she created one or more inaccurate correction request forms.
- IV. Violated Exchange Rule 408(a) in that on one or more occasions she exercised discretionary power in a customer's account without first obtaining written authorization of the customer.

- V. Engaged in conduct inconsistent with just and equitable principles of trade in that, on one or more occasions, she effected an unauthorized transaction in a customer's account.
- VI. Caused her member firm employer to violate Regulation 240.17a-3 and Regulation 240.17a-4 under the Securities Exchange Act of 1934 and Exchange Rule 440 in that she failed to timestamp one or more order tickets for purchases from an initial public offering.
- VII. Caused her member firm employer to violate Exchange Rule 401 in that she failed to retain an indication-of-interest list which she had created in connection with an initial public offering in which her member firm employer participated.

Ms. Perry-Mason submitted an Answer in which she admitted certain of the facts alleged in the Charge Memorandum and denied others. She denied the specific charges.

At the Hearing, the Division of Enforcement's motion to withdraw Charge VI was granted. Respondent moved to strike an argument raised in Enforcement's Pre-Hearing Brief that went beyond the charged conduct. The Brief alleged that Ms. Perry-Mason acted intentionally to avoid being personally responsible for certain account losses. She was not charged with this conduct in the Charge Memorandum. The Division of Enforcement declined the opportunity to seek an adjournment and amend the Charge Memorandum. The respondent's motion was granted and the Hearing Panel did not consider the argument that was objected to. At the end of Enforcement's case, the respondent moved to dismiss Charges IV and V. The Hearing Panel granted respondent's motion to dismiss Charge IV and denied her motion to dismiss Charge V. After the Hearing, the Hearing Panel found that:

Background and Jurisdiction

1. Gail Perry-Mason ("Perry-Mason") was born on December 4, 1962. She began her employment in the securities industry with Firm A in 1985 as an unregistered employee. Thereafter, she worked as an unregistered sales assistant with Firm B and Firm C.
2. As a result of the acquisition of Firm C, Perry-Mason became a sales assistant with Firm D, and subsequently she became registered with that firm in July 1988. Perry-Mason thereafter worked as a registered sales assistant and as a wire operator until she left Firm D in June 1990. Perry-Mason thereupon joined Firm E as a registered representative. She left that firm in November 1994 for a similar position at First of Michigan Corporation, which was subsequently acquired by, and merged into, Fahnestock & Co. Inc. (the "Firm"), now known as "Oppenheimer & Co. Inc." where she is currently employed.
3. By letter dated January 4, 2002, which Perry-Mason received, the Exchange notified Perry-Mason of its investigation into certain aspects of her conduct in connection with the initial public offering ("IPO") of XYZ.com, Inc. ("XYZ").

Correction Request Forms

4. The XYZ IPO was declared effective on or about June 15, 2000 (a Thursday) at a price of \$13 a share.
5. The XYZ stock did not, however, begin trading in the aftermarket until June 20, 2000 (a Tuesday), at which time it opened at \$8, and sold at a high of \$9.29688 and a low of \$7.25, and closed at \$7.375.

Transfer from S to U

6. During the pre-effective period of the XYZ IPO, among the customers who indicated interest in the offering to Perry-Mason was CS.
7. Perry-Mason created an order ticket as part of her indications-of-interest list showing an order by CS to purchase 100 shares of XYZ stock.
8. The XYZ IPO was delayed several months. During this time, CS told Ms. Perry-Mason that her employment situation had changed and she no longer had the money to purchase the 100 shares of XYZ, Ms. Perry-Mason failed to discard her order ticket from the batch of tickets.
9. When the XYZ IPO was declared effective, Perry-Mason accidentally submitted the ticket to her branch office's syndicate coordinator as an order to purchase 100 shares of XYZ stock for CS.
10. During the pre-effective period of the XYZ IPO, Perry-Mason spoke to a customer, JU, who was interested in purchasing shares of XYZ stock on the IPO.
11. Nevertheless, Perry-Mason failed to fill out an order ticket to represent JU's indication of interest.
12. When the XYZ IPO was declared effective, Perry-Mason failed to submit to the Firm an order ticket to purchase shares of XYZ stock for JU. On June 15, Ms. Perry-Mason realized that she had failed to submit an order for JU. This was the first and only IPO that Ms. Perry-Mason ever participated in. The Firm failed to give her adequate support and training to properly handle the IPO.
13. Ms. Perry-Mason was now aware that she had bought stock for a customer who no longer wanted to purchase it and failed to buy stock for a customer who wanted to purchase it. She called the syndicate department in New York to find out how to fix the two problems. They advised her to submit a trade correction form also known as a cancel and rebill form to correct both problems.
14. On June 20, 2000, Perry-Mason submitted to the Firm a Correction Request Form ("Correction Form") with respect to the 100 shares of XYZ stock that had been

purchased for the CS account. There were no guidelines as to how this form was to be prepared.

15. On the June 20, 2000 Correction Form, Perry-Mason stated that the “trade was purchased in the wrong account” and that it should have been purchased in a different account (the JU account), which was identified by number.
16. Ms. Perry-Mason used the Correction Form to rectify two distinct and unrelated errors. XYZ first traded in the late morning on June 20. It traded substantially below the offering price of \$13. However, the Division of Enforcement was not able to demonstrate to the panel that the form was submitted at a time when Ms. Perry-Mason knew or should have known of the drop in price.

Transfer from RZ to E

17. During the pre-effective period of the XYZ IPO, Perry-Mason attempted to add to her indications-of-interest list a filled-out order ticket for an indication of interest that she had received for 200 shares of XYZ stock for the custodial account of a customer named FRW, who was a minor.
18. Perry-Mason misspelled the customer’s name as RZ on the order ticket and entered an account number for an unrelated customer named CRZ.
19. When the XYZ IPO was declared effective, Perry-Mason submitted this order ticket to the Firm, and it resulted in the mistaken purchase of 200 shares of XYZ stock for the CRZ account.
20. The RW family wished to purchase a total of 500 shares of the XYZ IPO. They wanted to allocate 300 shares to one account and 200 shares to the FRW custodial account. Ms. Perry-Mason confused the order and purchased 500 shares in one account and attempted to purchase 200 more shares in the FRW custodial account. Instead she purchased 200 shares in the CRZ account.
21. After the RW family became aware of the allocation error they were satisfied to leave the 500 shares in their account and did not want to purchase an additional 200 shares for the custodial account.
22. During the pre-effective period of the XYZ IPO, Perry-Mason spoke to a customer, RE who was interested in purchasing shares of XYZ stock on the IPO.
23. Perry-Mason failed to fill out an order ticket to represent Ms. RE’s indication of interest. Another registered representative in the office also did business with RE but it was Ms. Perry-Mason’s responsibility to fill out this ticket and she didn’t.
24. When the XYZ IPO was declared effective, Perry-Mason did not have and thus failed to submit to the Firm an order ticket to purchase shares of XYZ stock for RE.

25. On July 7, 2000, Perry-Mason submitted to the Firm a Correction Form with respect to the 200 shares of XYZ stock that had been mistakenly purchased for the CRZ account.
26. On the July 7, 2000 Correction Form, as the “reason for error” Perry-Mason gave “wrong account number.”
27. Ms. Perry-Mason used the Correction Form to rectify two distinct and unrelated errors. In doing so, she was following the advice of the syndicate department as she understood it.

Transferring Trades with Unrealized Losses Between Customer Accounts

28. The June 20, 2000 Correction Form by means of which Perry-Mason caused the transfer of the purchase of 100 shares of XYZ stock from the account of CS to the account of JU gave a price of \$13 per share for the transaction being corrected, which was the public offering price when the IPO was declared effective on June 15, 2000.
29. As stated above, on June 20, 2000, the first day that XYZ shares traded in the aftermarket, the stock traded at a high of \$9.29688 and a low of \$7.25, and closed at \$7.375.
30. However, as noted above the Division of Enforcement did not meet its burden of proof that Ms. Perry-Mason knew or should have known of the drop in price. It is likely that the Correction Form was submitted before trading started. Therefore, Perry-Mason did not cause or intend the transfer of a trade at a price inferior to the prevailing market price or with unrealized losses with the June 20, 2000 Correction Form.
31. The July 7, 2000 Correction Form by means of which Perry-Mason caused the transfer of the purchase of 200 shares of XYZ stock from the account of CRZ to the account of RE gave a price of \$13 per share for the transaction being corrected, which was the public offering price when the IPO was declared effective on June 15, 2000.
32. In the period from June 20, 2000 to July 7, 2000, the XYZ stock never traded above \$9.29688, its high price on the first day of trading.
33. On July 7, 2000, XYZ stock traded at a high of \$7.125 and a low of \$7 and closed at \$7.062.
34. Thus, by transferring the 200-share purchase to RE at a price of \$13 on a day when the stock never traded higher than \$7.125, Perry-Mason caused RE to make a purchase which already had an unrealized loss, and was at a price inferior to the prevailing market price.

35. Ms. Perry-Mason was aware on July 7, 2000 that XYZ was trading at below \$13 a share. However, she was so targeted on getting RE the stock she wanted on the IPO that she developed tunnel vision and did not buy the stock at the market. She did not act with scienter. During this period her manager testified that she had serious family and health issues and was less focused. She was in fact less careful than she normally was.

The Indications-of-Interest List

36. Ms. Perry-Mason mailed prospectuses to many of her customers. She spoke to them months before the effective date. She continued to speak to them over the three months of delays in the XYZ IPO. From these activities she created her indication of interest list.
37. Her list consisted of names and other information on a legal pad. When she felt that she had a firm commitment she wrote an order ticket and attached it to the list. Some of the customers who expressed an interest were not recorded on the list.
38. An Exchange sales practice examiner who visited the branch was told by firm headquarters in New York that there was an indication of interest form that was in use at this time. However, neither the respondent, the regional compliance officer or the manager had seen or was aware of the form at that time. The method of list keeping that Perry-Mason did was typical of what other brokers at her Firm were doing in Michigan at that time.
39. The order tickets typically included, among other things, the customer's name, account number and number of shares.
40. In general, when Perry-Mason became aware that a customer was no longer a prospective purchaser of XYZ stock on the IPO, she discarded the filled-out order ticket from the assemblage of order tickets that was attached to the indications-of-interest list.
41. At or around the time that the XYZ offering became effective, approximately 39 filled-out order tickets were then clipped to Perry-Mason's call list. Perry-Mason sent these order tickets to her branch office's syndicate coordinator as orders to purchase shares of XYZ stocks.
42. One copy of each multi-part tickets was Perry-Mason's. She also had the hand written list and thus retained her indications of interest list.

Discretionary Power

43. At or about the time that the XYZ IPO became effective, Perry-Mason was in possession of filled-out order tickets for approximately 39 customers representing

indications of interest that she had received from them during XYZ's pre-effective period.

44. On the morning of June 15, 2000, Perry-Mason was informed by the Firm's syndicate department that the XYZ IPO was going to be effective that day.
45. Perry-Mason thereupon attempted to call the approximately 39 customers for whom she was holding filled-out order tickets representing previous indications of interest to buy XYZ stock on the IPO.
46. In those instances where Perry-Mason was successful in speaking to those customers, she confirmed that they intended to proceed pursuant to their earlier indications of interest.
47. In a number of instances Perry-Mason attempted to speak to one of the customers but was unsuccessful in her attempt to do so. In those cases, Perry-Mason left messages for the customers about the effectiveness of the XYZ IPO.
48. Whether or not she was successful in her attempt to speak to customers who had previously given indications of interest she submitted the previously completed order tickets. She believed that the tickets were consistent with the previously expressed indications of interest. Because of the lengthy delays in the IPO becoming effective, Ms. Perry-Mason often spoke with these customers numerous times about their continued firm interest in the IPO.
49. Ms. Perry-Mason's conduct did not constitute discretionary trading.

Unauthorized Transactions not Effected

50. Some customers that Ms. Perry-Mason did not speak with on June 15, 2000 may have changed their mind about purchasing the stock. However, either Ms. Perry-Mason did not know that or had mistakenly retained the order ticket.
51. The Division of Enforcement failed to prove that Ms. Perry-Mason knowingly or intentionally effected unauthorized transactions.

DECISION

The Hearing Panel, by unanimous vote, found Ms. Perry-Mason guilty of Charges I and II only as to the July 7, 2000 Correction Form. Even though Ms. Perry-Mason did not act with scienter or with adverse intent toward the customer, the transfer was in bad faith because it was not at the market price. The customer involved was made whole and Ms Perry-Mason paid the costs. The Hearing Panel, by unanimous vote, dismissed Charge IV at the end of Enforcement's case. Charge VI was withdrawn by Enforcement at the beginning of the Hearing. Finally, the Hearing Panel, also by unanimous vote found Ms. Perry-Mason not guilty of Charges III, V and VII. In preparing the trade correction forms, Ms. Perry-Mason followed what she understood was the

guidance from the syndicate department in New York. In order to engage in discretionary or unauthorized trading one must be aware and intend to so act. Ms. Perry-Mason did not meet that test. Every mistake by a registered representative does not become a disciplinary violation. Finally, Ms. Perry-Mason did retain an indication-of-interest list as that list was understood in her brokerage community.

PENALTY

In view of the above mentioned findings, and considering the specific circumstance of this case including her lack of experience with IPO's and her limited support and training, the Hearing Panel determined that Ms. Perry-Mason be censured and fined \$7,500. In imposing this penalty, the Hearing Panel considered that the Firm had precluded her from participating in future IPOs.

For the Hearing Panel

Vincent F. Murphy – Hearing Officer

Panelists:

James K. Belding

Norman A. Samson