STATE OF INDIANA
OFFICE OF THE SECRETARY OF STATE
SECURITIES DIVISION

IN THE MATTER OF:	)	
	)	Cause No. 11-0055 CD
CAL-TERRA PARTNERS, LLC,	)	
JERRY MALCOLM,	)	
TONY ALLEN ANDERSON,	)	
AND EQUITY TRUST COMPANY,	)	
	)	
Respondents.	)	

ORDER ADOPTING HEARING OFFICER'S DETERMINATIONS OF UNDISPUTED MATERIAL FACTS AND CONCLUSIONS OF LAW, AND JUDGMENT AND FINAL ORDER

Pursuant to due notice to all parties, a hearing on the Cross Motions for Summary Judgment was conducted on August 2, 2011, by Hearing Officer O. Wayne Davis, duly appointed by Chris Naylor, Indiana Securities Commissioner ("Commissioner"), in the conference room of the Indiana Securities Division, 302 West Washington Street, Room E111, Indianapolis, Indiana. Cynthia Lee, Enforcement Attorney, represented the Indiana Secretary of State's Office – Securities Division ("Division"). Respondent Equity Trust Company was represented by Anne N. DePrez and Howard Groedel. The Commissioner hereby adopts and incorporates the determinations of undisputed material facts and conclusions by the Hearing Officer and now enters the following Findings of Fact, Conclusions of Law, Judgment and Final Order.

BACKGROUND

This case arose out of a 2008 investment by Daniel L. Mattison on behalf of an individual retirement account ("IRA") for his benefit. The investment was in shares of

Cal-Terra Partners, LLC. The Indiana Securities Division has brought this civil enforcement action against Cal-Terra and its representatives, Jerry Malcolm and Tony Allen Anderson, for sale of an unregistered security and for securities fraud in violation of the Indiana Uniform Securities Act, Ind. Code §§ 23-19-1-1 *et seq.* (the "Indiana Act"). The Division has also named Equity Trust Company, the custodian for Mr. Mattison's IRA, as a respondent. The Division's sole claim against Equity Trust is found in Count Three of its Amended Complaint, alleging that Equity Trust acted as a broker-dealer as that term is defined in Ind. Code § 23-19-1-2(3) in connection with Mr. Mattison's purchase of Cal-Terra shares and that Equity Trust's failure to register with the Division as a broker-dealer violated Ind. Code § 23-19-4-1(a).

Both Equity Trust and the Division have moved for summary judgment on Count Three. Equity Trust argues that the undisputed material facts establish that Equity Trust, as a matter of law, is not a broker-dealer, both because it is not in the business of effecting transactions in securities for the account of others and because it is subject to the exclusion from the definition of broker-dealer for banks. The Division argues that, to the contrary, not only do the undisputed facts demonstrate that Equity Trust falls within the general definition of broker-dealer, but it does not fall within the bank exclusion.

DETERMINATIONS OF UNDISPUTED MATERIAL FACTS

Equity Trust

1. Equity Trust is a trust company chartered by the South Dakota Division of Banking, and since February 2003 has been authorized under the Internal Revenue Code of 1986 to serve as a passive, non-discretionary custodian for self-directed IRAs. [Dea Affidavit ¶ 3.]

2. Equity Trust is subject to the supervision and examination of the banking regulatory authorities of South Dakota, where it is chartered, and of Ohio and Texas. [*Id.* ¶ 5.]

3. As a passive IRA custodian, Equity Trust does not offer any investment advice; instead, each customer acknowledges, in writing, that he alone is responsible for selecting the investments in his IRA. [*Id.* ¶ 7.]

4. If an Equity Trust customer makes an investment through his IRA, Equity Trust's role consists of sending funds and certain paperwork to the issuer of the security, or to a securities brokerage firm if the securities are listed or traded on a public market, as and when the customer directs. [*Id.* ¶ 8.]

5. Equity Trust's compensation as an IRA custodian is derived solely from set-up fees for new accounts, annual account maintenance fees based on the value of the customer's overall account, and fees for certain specified services. [*Id.* ¶ 9.]

6. An Equity Trust customer incurs fees in connection with securities transactions only if he elects certain options for payment. The Equity Trust Direction of Investment Form gives four options for manner of payment: by wire for a $30 fee; by cashier's check for a $30 fee plus $18 for overnight delivery; by regular check and overnight delivery for an $18 fee; and by regular check sent by regular mail for no charge. [Ex. D to Mattison Affidavit at 2, Box 5.] Equity Trust's compensation is not determined by the number or dollar amount of securities transactions. [Dea Affidavit ¶ 9.]

7. Equity Trust does not solicit or receive any referral fees or other form of payment for directing customers to securities brokers. [*Id.*]

8. Equity Trust also does not, and did not in connection with Mr. Mattison and Cal-Terra:

(a) assist issuers in structuring prospective securities transactions [Dea Affidavit ¶ 23];

(b) help issuers identify potential purchasers of securities [*Id.*];

(c) screen potential participants in securities transactions for creditworthiness [*Id.*];

(d) solicit securities transactions (including advertising) [*Id.*];

(e) assist or participate in negotiations between issuers and investors [*Id.*];

(f) evaluate the merits of investments or give advice relating thereto [*Id.*];

(g) route or match orders for the execution of securities transactions [*Id.*];

(h) issue securities transaction confirmations [*Id.*].

Mr. Mattison and His Investment in Cal-Terra

9. Mr. Mattison resides in Indiana for six months out of the year and in Florida for six months out of the year. [Mattison Affidavit ¶¶ 4-5.]

10. In 2008, Mr. Mattison received a phone call from someone who identified himself as Tony Allen, an employee of Cal-Terra Partners LLC. [Mattison Affidavit ¶ 8.] During that call, Mr. Allen solicited Mr. Mattison to invest in Cal-Terra, making various representations as to the nature of the investment and the type of return he could expect on the investment. [Mattison Affidavit ¶¶ 9-13.]

11. As a result of Mr. Allen's statements, Mr. Mattison decided to invest in Cal-Terra. [Mattison Affidavit ¶ 17 & Ex. C.]

12. Mr. Allen sent Mr. Mattison a subscription agreement form pursuant to which Mr. Mattison subscribed to 250 shares of Cal-Terra for $250,000. [Mattison Affidavit ¶ 23 & Ex. C.] Mr. Mattison completed that subscription agreement form on November 10, 2008 and returned the completed form to Cal-Terra. [Mattison Affidavit ¶¶ 23-24 & Ex. C].

13. That same day (November 10, 2008), Cal-Terra welcomed Mr. Mattison by letter as a Cal-Terra shareholder and issued 250 shares of Cal-Terra to Mr. Mattison, sending the certificate representing such shares to Mr. Mattison with the welcoming letter. [Unopposed Supplementation of the Record, filed August 15, 2011, Ex. H & I.]

14. The $250,000 that Mattison wished to use to pay for the shares of Cal-Terra was in a retirement account held at UBS Financial Services, Inc., a non-party to this case. [Mattison Affidavit ¶ 17.]

15. Mr. Allen sent Mr. Mattison an Equity Trust Roth Individual Retirement Account Application and an Equity Trust Account Transfer form, to open a new IRA at Equity Trust and to transfer the $250,000 from his UBS account to his new IRA at Equity Trust. Mr. Mattison completed those documents on November 10, 2008 and returned them to Cal-Terra. [Mattison Affidavit ¶¶ 19-22 & Ex. A & B.] In the Account Transfer form, Mr. Mattison elected that the transfer be made using the Express Transfer Service at a cost of $50, as opposed to Normal Processing which was free. [Ex. B to Mattison Affidavit at 1.]

16. Mr. Mattison's and Equity Trust's responsibilities were set out in the IRA Account Agreement that was part of the Individual Retirement Account Application. It provided that Mr. Mattison had "exclusive responsibility and control over the investment

of the assets," and that Equity Trust was "acting solely as a passive custodian to hold Roth IRA assets." The agreement went on to state: "It is not [Equity Trust's] responsibility to review the prudence, merits, viability or suitability of any investment directed by [Mr. Mattison]" and "Equity Trust shall be under no obligation or duty to investigate, analyze, monitor, verify title to, or otherwise evaluate any investment directed by [Mr. Mattison]." [IRA Account Agreement, § 9.05(a)-(b), attached as Dea Affidavit App. C.]

17. Mr. Allen also sent Mr. Mattison an Equity Trust Direction of Investment form, which Mr. Mattison completed and returned to Cal-Terra on November 18, 2008. [Mattison Affidavit ¶¶ 25-26 & Ex. D.] In that form, Mr. Mattison instructed Equity Trust to send $250,000 to Cal-Terra and to hold the Cal-Terra shares in Mr. Mattison's IRA. [Ex. D to Mattison Affidavit at 2, Boxes 3 & 5.] The form gave four options for manner of payment: by wire for a $30 fee; by cashier's check for a $30 fee plus $18 for overnight delivery; by regular check and overnight delivery for an $18 fee; and by regular check sent by regular mail for no charge. [*Id.* at 2, Box 5.] Mr. Mattison chose the option of paying by cashier's check with overnight delivery. [*Id.*]

18. The November 18, 2008 Direction of Investment form included acknowledgments by Mr. Mattison that "Equity Trust Company has not solicited, recommended or sold this investment," that Equity Trust "does not endorse this investment," [*id.* at 3, Box 10] and that "I alone am responsible for the selection, due diligence, management, review and retention of all investments in my account" [*id.* at 4].

19. On November 25, 2008, fifteen (15) days after Mr. Malcolm completed the Cal-Terra share subscription materials, Equity Trust accepted the appointment as

successor custodian for Mr. Mattison and requested the transfer of the $250,000 from UBS as instructed by Mr. Mattison. [Equity Trust's Answer to Amended Complaint ¶ 25 and Ex. B to Mattison Affidavit at 2.]

20. On or about December 12, 2008, Equity Trust received the $250,000 transfer from UBS and, pursuant to Mr. Mattison's written instruction in the Direction of Investment form, on or about December 23, 2008 sent a $250,000 cashier's check to Cal-Terra. [Dea Affidavit ¶ 16; Ex. B to Burgess Affidavit at 11-12 of 16; *accord,* Complaint ¶ 22 (alleging December 23, 2008).] Equity Trust subsequently acted as custodian for the 250 shares of Cal-Terra on behalf of Mr. Mattison's IRA. [*See* Ex. E to Mattison Affidavit.]

21. Equity Trust's sole compensation with regard to Mr. Mattison's IRA were the following fees:

2008:

- November 2008 - $50 new account setup fee;
- November 2008 - $50 express transfer fee;
- November 2008 - $700 new account maintenance fee;
- December 2008 - $10 cashier's check fee;
- December 2008 - $18 for overnight shipping fee;

2009:

- December 2009 - $600 annual maintenance fee;

2010:

- March 2010 - $50 late fee

[Dea Affidavit ¶ 16; Division Brief at 10 (citing discovery responses).] The annual account maintenance fees are based on the value of the account. [Division Brief at 25 (citing discovery responses).] None of the Equity Trust employees received any commission or securities transaction-based compensation in connection with Mr. Mattison's investment in Cal-Terra. [Dea Affidavit ¶ 16.]

22. Other than delivering the check and acting as custodian for the 250 shares, Equity Trust had no contact with Cal-Terra in connection with Mattison's investment. [Dea Affidavit ¶ 16.] Equity Trust did not

(a) solicit, recommend, or discuss the merits of any potential investment by Mr. Mattison in Cal-Terra [id.];

(b) help Cal-Terra identify any potential investors [id. ¶ 17];

(c) screen any potential investors for Cal-Terra, including Mr. Mattison [id. ¶ 18];

(d) solicit anyone else to invest in Cal-Terra [id. ¶ 19];

(e) participate in any negotiations between Mr. Mattison and Cal-Terra [*id.* ¶ 20]; or

(f) advise Cal-Terra regarding the structure or nature of Mr. Mattison's investment [id. ¶ 21].

23. To the extent any of the foregoing determinations of undisputed fact are conclusions of law, they are hereby entered as additional conclusions of law. Any conclusions of law, to the extent they constitute determinations of undisputed fact, are hereby incorporated as additional determinations of undisputed fact.

24. These determinations of undisputed facts relate only to Equity Trust and the Division. Cal-Terra and Messrs Allen and Malcolm were not parties to the motion for summary judgment briefing and thus are not bound by the same.

CONCLUSIONS OF LAW

1. Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 710 IAC 4-12-13; Ind. Trial Rule 56(C). A factual issue is material if it bears on the ultimate resolution of a relevant issue. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). A factual

issue is genuine if it cannot be conclusively foreclosed by reference to undisputed facts. *Id.* "As a result, despite conflicting facts and inferences on some elements of a claim, summary judgment may be proper where there is no dispute or conflict regarding a fact that is dispositive of the claim." *Id.*

Equity Trust Is Not Engaged in the Business of Effecting Transactions for the Account of Others.

2. The Division contends that Equity Trust was engaged in the business of effecting transactions in securities for the accounts of others in connection with Mr. Mattison's investment in Cal-Terra without being registered or exempt from registration, as a broker-dealer in Indiana in violation of Ind. Code §23-19-4-1(a). [Amended Complaint ¶ 54.] "Broker-dealer" as defined in the Indiana Act, subject to certain exceptions, includes "a person engaged in the business of effecting transactions in securities for the account of others." Ind. Code § 23-19-1-2(3).

3. Both Equity Trust and the Division have cited to case law and SEC no-actions letters interpreting the definition of broker under section 3 of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(4)(A)[1] in arguing their positions. Reliance on SEC no-action letters and case law interpreting the federal statutory definition of "broker" is appropriate in light of the fact that the Indiana and federal statutory language are virtually identical.

4. In determining whether a person is engaged in the business of effecting securities transactions, both the courts and the SEC look at the extent to which a person is involved in the chain of distribution of securities and weigh a number of factors. *See, e.g., SEC v. Kramer*, Case No.: 8:09-cv-455-T-23TBM, 2011

[1] Defining "broker," subject to certain exceptions, as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A).

U.S.Dist.LEXIS 38968, at *46 (M.D. Fla. Apr. 1, 2011); *Transfer Online, Inc.*, 2000 WL 719802 (SEC No Action Letter, May 3, 2000).

5. Indicia of broker activity include:

(a) Negotiating the terms of a securities distribution;

(b) Analyzing the financial needs of the issuer of the securities;

(c) Discussing the details of the securities purchase transaction;

(d) Recommending an investment in the securities;

(e) Assisting an issuer to structure a prospective securities offering or transaction;

(f) Helping an issuer identify potential purchasers of securities;

(g) Screening potential purchasers of securities;

(h) Soliciting securities transactions (including advertising); and

(i) Participating in the securities order-taking or order-routing process, for example, by taking transaction orders from customers.

Kramer, 2011 U.S.Dist.LEXIS 38968, at *46; *see also SEC v. Hansen,* 1984 U.S. Dist. LEXIS 17835, at *26 (S.D.N.Y. Apr. 6, 1984) (listing six factors); *Transfer Online, Inc.*, 2000 WL 719802, at *1. Other indicia have included the receipt of transaction-based compensation. *Hansen,* 1984 U.S. Dist. LEXIS 17835, at *26.

6. The courts have held that, in general, the presence of a single factor alone will not be determinative of whether a person falls within the statutory definition of broker; instead, broker status is not usually found to exist unless multiple factors are present. *Kramer*, 2011 U.S.Dist.LEXIS 38968, at *60-61 n.54 (rejecting SEC-advocated single-factor, transaction-based compensation test); *see also SEC v. Benger,* 2010 U.S. Dist. LEXIS 21985, at *33-34 (N.D. Ill. Mar. 10, 2010) (defendant was broker where only

relationship with clients was funneling money and securities through his escrow account and defendant received as commission the greater of $5000 per sale or 1% of the gross proceeds of any sale); *BondGlobe, Inc.*, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 140 (Feb. 6, 2001) (SEC would not issue no-action letter where requester accepted fees for communicating orders among broker-dealers and conducted auctions); *Hansen*, 1984 U.S. Dist. LEXIS 17835 (defendant was broker where he advised investors on the merits of the securities, received 15% of any sale of securities, and was an "active and aggressive finder of investors").

7. As reflected in the determinations of undisputed fact, it is not only evident, but the Division does not dispute, that many of the indicia of broker activity are not present here. There is no claim that Equity Trust negotiated the terms of the Cal-Terra offering, analyzed Cal-Terra financial needs, discussed the details of the Cal-Terra offering, assisted Cal-Terra to structure the offering or identified or screened potential purchasers. Nor is there any claim that Equity Trust solicited Mr. Mattison to make the investment or even communicated with Mr. Mattison until well after he had made his investment decision.

8. The Division, however, contends that Equity Trust's actions in connection with Mr. Mattison's investment in Cal-Terra – accepting the Direction of Investment form, sending the check to Cal-Terra pursuant to that form and serving as custodian of the Cal-Terra shares -- constituted the acceptance of a securities order and the effecting of a securities transaction, one of the indicia of broker activity.

9. These actions do not constitute participation in the order-taking process or the effecting of a securities transaction. An order contemplates a purchase or sale to be

effected in the future. *See, e.g.*, 710 IAC 4-7-3(b) (referring to orders "given or received for the purchase or sale of securities"); FINRA Rule 7410(j) ("order" means in pertinent part any instruction to effect a transaction in an equity security listed on the Nasdaq Stock Market or an over-the-counter equity security). Since Mr. Mattison had entered into the investment for Cal-Terra shares on November 10, 2008, neither Equity Trust's subsequent acceptance of the Direction of Investment form dated November 18, 2008, the delivery of the cashier's check to Cal-Terra on December 23, 2008, nor the serving as custodian of the Cal-Terra shares constitute the acceptance of an order [Mattison Affidavit ¶¶ 23-24 & Ex. C; Amended Complaint ¶¶ 30-31]. Nor do Equity Trust's actions constitute the effecting of a securities transaction. The securities transaction at issue here -- Mr. Mattison's purchase of the Cal-Terra shares – was effected on November 10, 2008, when Mr. Mattison signed the subscription agreement. *See, e.g., Bormann v. Applied Vision Systems, Inc.*, 800 F. Supp. 800, 811 (D. Minn. 1992) (the sale of securities occurred when plaintiff executed subscription agreement, committing himself to the purchase, not when the issuer accepted the agreement). That was the same day Cal-Terra had issued and mailed the shares (also dated November 10, 2008) to Mr. Mattison, welcoming him as a shareholder. Because the purchase had already been made, there was no securities transaction left to occur. Accordingly, Equity Trust's actions did not constitute the acceptance or routing of a securities order or the effectuation of a securities transaction.

10. The Division also contends that Equity Trust engaged in broker activity by preparing and sending a trade confirmation to Mr. Mattison with respect to his investment in the Cal-Terra shares. The document to which the Division refers,

however, is a quarterly account statement for the three month period ending September 30, 2010, almost two years after Mr. Mattison's purchase of the Cal-Terra shares. *See* Division's Brief at 4 (citing to Ex. E to Mattison Affidavit). While the security being held in the IRA is reflected, there is no trade reflected or confirmed in that document. There is no evidence that Equity Trust issued trade confirmations for Mr. Mattison or for anyone else.

11. The Division also argues that Equity Trust received transaction-based compensation in connection with Mr. Mattison's investment in Cal-Terra, another indicia of broker activity. Its argument is two-fold: first, that the fees charged by Equity Trust for preparing a certified check and delivering that check by overnight service (both requested by Mr. Mattison) constitute transaction- based compensation; and second, because Equity Trust may have made a profit on the annual account fees paid by Mr. Mattison, those fees too constitute transaction-based compensation.

12. The certified check and overnight courier fees charged to Mr. Mattison did not constitute transaction-based compensation of the type considered to be an indicia of broker activity. When the courts or SEC discuss transaction-based compensation as reflecting broker status, they are referring to compensation that results from securities transactions. *See, e.g., Herbruck, Alder & Co.,* 2002 SEC No-Act. LEXIS 598, at *4 (May 3, 2002) (referring to a broker as "an entity that receives *securities* commissions or other transaction-based compensation *in connection with securities-based activities*"), *quoted in* Division's Brief at 21; Exchange Act Release No. 34-22205, 1985 SEC LEXIS 1182, at *17 (July 1, 1985) (referring to "monetary profit above cost-recovery *for brokerage execution services*"), *quoted in* Division Brief at 21.

13. As previously noted, the securities transaction had already occurred when Equity Trust received Mr. Mattison's account application materials and Direction of Investment form. Accordingly, the check and overnight courier fees were not tied to a securities transaction. Moreover, even if the transaction had not already occurred, the check and courier fees were still not the result of a securities transaction. They were instead the result of Mr. Mattison's decision to send a certified check by overnight courier to Cal-Terra. Mr. Mattison could have made any number of securities transactions without paying any fee to Equity Trust – there was no charge for regular checks sent by regular mail. Similarly, Mr. Mattison would have incurred the very same fees if he had instead asked Equity Trust to send a certified check overnight to pay for a non-security, such as for a farm, another IRA-eligible investment.

14. As for the annual account fees charged by Equity Trust, although the SEC did 25 years ago express concern about banks profiting on administrative fees in a release for an SEC rule subsequently rescinded, that was in the context of fees "based, at least in part, on the anticipated volume of securities trading the bank engages in on behalf of the account." Exchange Act Release No. 34-22205, 1985 SEC LEXIS 1182, at *17, *quoted in* Division Brief at 21. Any variation in the annual fee at Equity Trust, however, is based on the size of the account not on the amount of securities trading volume in that account. Accordingly, the annual account fees charged to the Mattison account also do not qualify as transaction-based compensation, regardless of how much profit Equity Trust might make on them. A person receives transaction-based compensation if its fee is based upon the execution of a securities transaction and/or the number of securities transactions generated. *BD Advantage, Inc.,* 2000 SEC No-

Act. LEXIS 953, at *4 (Oct. 11, 2000.)

15. The foregoing conclusions are consistent with the rationale for making transaction-based compensation a hallmark of broker activity. Transaction-based compensation gives the recipient a "salesman's stake" in securities transactions against which regulation is thought to be needed to protect the consumer. *See, e.g., Herbruck, Alder & Co.,* 2002 SEC No-Act. LEXIS 598, at *4. Here, Equity Trust had no salesman's stake. Indeed, Equity Trust would make more money the fewer the number of securities transactions in any given account because Equity Trust would incur less administrative costs.

16. The Division has also argued that Equity Trust solicits securities transactions, another indicia of broker activity, citing to pages from the Equity Trust website that refer in part to the ability to use a self-directed IRA to invest in a variety of different assets. While noting that an Equity Trust IRA can be used to invest in or hold various asset classes – some of which, such as real estate and tax liens, are not even securities – may be the solicitation of customers and their accounts, it does not constitute the solicitation of securities transactions. Indeed, as noted earlier, Equity Trust had a financial motive to discourage, rather than encourage, securities transactions by its account holders.

17. The final indicia of broker activity claimed by the Division is that Equity Trust handled funds. There is no dispute that Equity Trust handled Mr. Mattison's $250,000. However, arranging for the transfer of proceeds to pay for Mr. Mattison's investment is an administrative or ministerial act, and standing alone, does not cause Equity Trust to be a broker, *Kramer*, 2011 U.S.Dist.LEXIS 38968, at *60-61 n.54; see

also *Radiation Dynamics, Inc. v. Goldmuntz,* 464 F.2d. 876,891 (2d. Cir. 1972). Even if the ministerial nature of the act is ignored, the existence of a single indicia is insufficient to confer broker status. *Kramer*, 2011 U.S.Dist.LEXIS 38968, at *60-61 n.54.

18. The Division has argued that the consent order in the SEC administrative proceeding *In the Matter of Transcorp Pension Services, Inc., 1996 SEC LEXIS 1531 (June 4, 1996)* supports its position that Equity Trust acted as a broker in connection with Mr. Mattison's investment. The underlying facts as disclosed in the *Transcorp* consent order are distinguishable from the facts in this matter. First, in *Transcorp,* the SEC order, which represented a settlement reached by the SEC and Transcorp, specifically states that Transcorp charged a minimum fee in connection with each securities transaction. Mr. Mattison would have been able to have Equity Trust send the funds for his investment in Cal-Terra without having to pay any fee. Furthermore, in the *Transcorp* order, the SEC held that Transcorp would send an "application" along with the investment funds to the issuer for the investment. Mr. Mattison had made the investment and signed the Cal-Terra subscription materials almost six weeks prior to the delivery of the funds to Cal-Terra by Equity Trust. For the foregoing reasons, the *Transcorp* order does not support a finding that Equity Trust engaged in the business of effecting securities transactions in this matter.

19. Accordingly, Equity Trust is not engaged in the business of effecting securities transactions for the account of others.

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Equity Trust Claims for the Bank Exclusion from the Act's Definition of Broker.

20. Equity Trust also claims that it does not qualify as a broker-dealer because Equity Trust qualifies as a "bank" and the Indiana Act excludes banks from the definition of broker-dealer. Under the Act, "bank" is defined as

> Any other banking institution, whether incorporated or not, doing business under the laws of a state ... a substantial portion of the business of which consists of ... exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the Comptroller of the Currency under [12 U.S.C. §92a], and which is supervised and examined by a state ... agency having supervision over banks, and which is not operated for the purpose of evading this article.

Ind. Code § 23-19-1-2(2)(C).

21. It is undisputed that Equity Trust does business under the laws of South Dakota and other states. The Division acknowledges that the South Dakota Division of Banking supervises and audits Equity Trust. Division Brief at 40. There is no suggestion that Equity Trust is operated to evade the Indiana Act, particularly in light of the fact that it is not in the business of effecting securities transaction for the accounts of others.

22. The point of contention on whether Equity Trust meets the Ind. Code § 23-19-1-2(2)(C) definition of a bank is whether it exercises fiduciary powers similar to those permitted of national banks under 12 U.S.C. §92a. As the Division points out, Equity Trust disclaims a general fiduciary role such as acting as an investment adviser or trustee.

23. 12 U.S.C. § 92a provides that the Comptroller of the Currency may permit banks to act "in any other fiduciary capacity in which . . . trust companies . . . are permitted to act under the laws of the State in which the national bank is located."

allows a trust company to act as a "custodian . . . and in such capacity, take and hold property for safekeeping and act as general or special agent . . ." SDCL § 51A-6-29(1).

24. While this case raises interesting questions about the Act's bank definition, the record is not sufficient to base such determinations.

The Division's Policy Arguments Cannot Overcome the Statutory Language

25. The Division asserts that finding Equity Trust to be a broker-dealer will protect Indiana consumers. The Division argues that, if Equity Trust had been registered in Indiana as a broker, it would have had a duty to investigate Cal-Terra and would have discovered that the Cal-Terra shares were not registered for sale in Indiana and were not subject to any exemptions from registration. The Division's arguments do not affect the conclusions.

26. First, changes to the Indiana Act must be directed to the General Assembly, not to a hearing officer. As discussed above, under the Indiana Act, Equity Trust does not qualify as a broker-dealer.

27. Second, the Division has no regulation or policy statement which would extend the Act to cover the facts of this case. To do so in the context of an enforcement proceeding would be unfair and would flout the rules requiring public notice and consideration of comments from the public before changing the settled application of existing law by administrative agencies.

28. Finally, the Division has pointed to no law or rule requiring broker-dealers to do due diligence on a security in connection with an unsolicited trade. While FINRA Rule 2310, the so-called suitability rule, does require a broker to make a determination as to the suitability of an investment for a specific customer, that rule only applies to

as to the suitability of an investment for a specific customer, that rule only applies to trades recommended by the broker. FINRA Rule 2310(a) ("In recommending to a customer the purchase, sale or exchange of any security . . . . ") It is undisputed that Equity Trust did not recommend the Cal-Terra investment to Mr. Mattison. Accordingly, even if Equity Trust had been a broker-dealer, it would have not been required to conduct due diligence.

JUDGMENT AND FINAL ORDER

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, the Commissioner now Orders, Adjudges, and Decrees the following

A. Equity Trust's Motion for Summary Judgment is hereby GRANTED, in part.

B. The Division's Motion for Summary Judgment is DENIED.

C. The Administrative Complaint and Cease and Desist Order entered on February 21, 2011, and amended on July 1, 2011, shall be dismissed completely as to Respondent, Equity Trust Company, only.

D. All actions taken are in the public interest.

ENTERED at Indianapolis, Indiana this 21ST day of February, 2012.

OFFICE OF THE INDIANA
SECRETARY OF STATE

CHRIS NAYLOR
SECURITIES COMMISSIONER