

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
FRANK L. CONSTANTINO	:	April 8, 2011
	:	
	:	

APPEARANCES: Edward G. Sullivan and Michael J. Adler for the Division of Enforcement, Securities and Exchange Commission.

Frank L. Constantino, pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

INTRODUCTION

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on September 15, 2010, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that on February 3, 2010, Frank L. Constantino (Constantino) was found guilty by the Superior Court of Cobb County, Georgia, of six counts of violations of the Georgia Securities Act, which involved the offer and sale of securities, and three counts of theft of investor funds, among other violations, in State v. Constantino, No. 09-9-5301-42. The Commission instituted this proceeding to determine whether these allegations are true and, if so, to decide whether remedial action is appropriate in the public interest. The Division of Enforcement (Division) seeks to bar Constantino from association with any broker or dealer.

On October 7, 2010, Constantino submitted his Answer to the Division, which was subsequently forwarded to this Office and the Office of the Secretary on October 26, 2010. At a telephonic prehearing conference on October 26, 2010, the parties agreed that the Division had provided Constantino a copy of its investigative file, pursuant to 17 C.F.R. § 201.230, and the Division requested leave to file a Motion for Summary Disposition (Motion), which was granted. (Preh'g Conf. Tr. at 4-6; Order of Oct. 27, 2010.)

The Division filed its Motion along with two exhibits on November 4, 2010. Exhibit 1 to the Motion is the uncontested Declaration of Michael J. Adler, with attachments containing: various records from the Financial Industry Regulatory Authority's Central Registration Depository (Exs. 1(a)-1(e)); an Order to Cease and Desist issued by the Missouri Secretary of State on Constantino and others in Granite Financial Services, Inc., No. CD-03-06 (Mar. 26, 2003) (Ex. 1(f)); two Orders issued by the Georgia Commissioner of Securities in 1996 and 1999 relating to investigations of wrongdoing by Constantino (Exs. 1(g)-(h)); and a record of Constantino's incarceration from the Georgia Department of Corrections (Ex. 1(i)). Exhibit 2 includes the following records from State v. Constantino: eleven pages of felony sentencing sheets, with an addendum outlining special probation conditions; the four-page Verdict; and the twenty-four-page General Bill of Indictment (Indictment). Official Notice is taken of the proceedings in Granite Financial Services, Inc., by the Georgia Commissioner of Securities, and in State v. Constantino. See 17 C.F.R. § 201.323. Constantino did not file a response or opposition to the Division's Motion.

Standards for Summary Disposition

After a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. See 17 C.F.R. § 201.250(a). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to 17 C.F.R. § 201.323. Id. A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. See 17 C.F.R. § 201.250(b).

The Commission has repeatedly upheld use of the summary disposition procedure in cases such as this one where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. See Jeffrey L. Gibson, 92 SEC Docket 2104, 2111-12 (Feb. 4, 2008) (collecting cases). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare." See John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002).

Findings of fact and conclusions of law made in the underlying action are immune from attack in a follow-on administrative proceeding. See Ted Harold Westerfield, 54 S.E.C. 25, 32 n.22 (1999) (collecting cases). The Commission does not permit a respondent to relitigate issues that were addressed in previous proceedings against the respondent. See William F. Lincoln, 53 S.E.C. 452, 455-56 (1998). Nor does the pendency of an appeal preclude the Commission from action based on a conviction. See Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.20 (2002). To the extent that Constantino's Answer raises such challenges, his collateral attack provides no basis for denying the Division's Motion.

There is no genuine issue with regard to any fact that is material to this proceeding. Constantino was found guilty of all six counts of securities law violations alleged against him, which involved the antifraud and registration provisions of the Georgia Securities Act; and he

was criminally convicted for those, and other, violations upon which this proceeding is based. Any other facts in his Answer have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

FINDINGS OF FACT

Constantino, age sixty-five at the beginning of this proceeding, was a resident of Marietta, Georgia. (Answer at 1.) He is currently incarcerated at the Georgia Diagnostic and Classification Prison located in Jackson, Georgia. (Id.; Preh'g Conf. Tr. at 3.) At various times from October 1981 through December 2002, which includes a portion of the time in which he engaged in the conduct underlying the indictment described below, Respondent was a registered representative with broker-dealers registered with the Commission. (Answer at 1; Mot. Exs. 1, 1(a)-1(c).)

The relevant counts of the Indictment in State v. Constantino alleged that Constantino made material misrepresentations and omissions in connection with the offer and sale of securities of several business ventures allegedly located in the country of Belize, offered and sold unregistered securities, and offered and sold securities while not being registered. (Answer at 1; Mot. Ex. 2 (Indictment at 4-9, 11, 13-14, 17-18).) On February 3, 2010, Constantino was found guilty of these relevant counts, and others, including six counts of violations of the Georgia Securities Act involving the offer and sale of securities and three counts of theft by taking an investor's funds. (Answer at 1; Mot. Ex. 2 (Verdict at 1-3).) On February 18, 2010, he was sentenced to twenty years in prison and ordered to pay restitution of \$2.5 million. (Answer at 1; Mot. Ex. 2 (felony sentencing sheets).)

The Indictment alleged that, in May 2002, in connection with his sale of "units" in Belize Development Trust II to a seventy-six year old woman, Constantino falsely stated that the investment was guaranteed, carried a substantial rate of return, and could not lose money. (Mot. Ex. 2 (Indictment at 5, 8, 13-14).) Additionally, it was alleged that the "units" of Belize Development Trust II were unregistered securities and that Constantino used at least some of the \$1.15 million received for this investment for his own personal use. (Mot. Ex. 2 (Indictment at 5, 7-8, 13-14).) In relation to the Belize Development Trust II offering, Constantino was found guilty of two counts of securities law violations, for antifraud and registration violations, and one count of theft. (Mot. Ex. 2 (Indictment at 13-14; Verdict at 2).)

Further, Constantino was found guilty of one count of securities antifraud violations and two counts of theft, which alleged that, in February and March 2003, in connection with his sale of "stock" in Caye International Bank to the same investor, then age seventy-seven, Constantino willfully omitted a material fact necessary to prevent misleading the investor and then unlawfully took for his personal use the \$500,000 she invested. (Mot. Ex. 2 (Indictment at 4, 7, 11-12; Verdict at 1).)

Finally, the Indictment alleged that, in May 2003, Constantino sold, to the same investor, "interests" in Belize Land Development Trust, which was to fund an investment in Plantation Marina and Yacht Club of Belize. (Mot. Ex. 2 (Indictment at 5-6, 8-9, 17-18).) The "interests"

were alleged to be unregistered securities, Constantino was not registered to sell securities in Georgia at that time, and he failed to disclose the material fact of the Missouri Cease and Desist Order, which found that he had made an untrue statement of material fact in connection with the sale of a security. (Id.) In connection with these allegations, Constantino was found guilty of two counts of securities registration violations and one count of antifraud violations. (Mot. Ex. 2 (Indictment at 17-18; Verdict at 2-3).)

In his Answer, Constantino attempts to relitigate the facts of the underlying criminal conviction, claiming that he was not selling “securities” and that he did not make any misrepresentations or omissions. (Answer at 1-2.) Additionally, his Answer notes that he is “in the process of appealing the court conviction.” (Answer at 2.) As stated previously, Constantino is barred from attacking findings of fact and conclusions of law made in the underlying proceeding. A jury was presented with evidence on the basis of which it found Constantino guilty of selling unregistered securities, without proper registration as a securities dealer or salesman; of making material omissions and untrue statements; and of theft of an investor’s funds. (Mot. Ex. 2.)

CONCLUSIONS OF LAW

In relevant part, Section 15(b)(6) of the Exchange Act, authorizes the Commission to impose remedial sanctions on a person associated with a broker or dealer at the time of the misconduct, consistent with the public interest, if the person has been convicted of any felony which involves the purchase or sale of any security or involves the theft or misappropriation of funds, within ten years of the commencement of the proceedings. See 15 U.S.C. §§ 78o(b)(4)(B), (b)(6)(A)(ii). At the time of his underlying misconduct, Constantino was associated with a registered broker-dealer, during part of the time at issue, and acted as a broker within the meaning of the Exchange Act, as he was “engaged in the business of effecting transactions in securities for the account of others,” 15 U.S.C. § 78c(a)(4)(A). As found above, he was convicted, in February 2010, of violations of the Georgia Securities Act and of theft of an investor’s funds, which he misappropriated for his own use.

The Public Interest

To determine whether sanctions under Section 15(b) of the Exchange Act are in the public interest, the Commission considers six factors: (1) the egregiousness of the respondent’s actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of the respondent’s assurances against future violations; (5) the respondent’s recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent’s occupation will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff’d on other grounds, 450 U.S. 91 (1981). No one factor is controlling. Conrad P. Seghers, 91 SEC Docket 2293, 2298 (Sept. 26, 2007). Remedial sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

The Commission has held that antifraud violations are “especially serious and subject to the severest sanctions under the securities laws.” Jose P. Zollino, 89 SEC Docket 2598, 2608

(Jan. 16, 2007). Absent evidence to the contrary, an individual who has been found guilty of securities fraud cannot be permitted to remain in the securities industry. See Brownson, 55 S.E.C. at 1028. Constantino has failed to present any evidence to the contrary; instead, he attempts, despite Commission precedent to the contrary, to relitigate issues surrounding his conviction. Regardless of his contentions, Constantino was convicted of securities fraud, violations of securities registration provisions, and theft; therefore, the appropriate focus of this proceeding is on the Steadman factors above.

The degree of harm caused by Constantino's actions is at least minimally quantified by the \$2.5 million that the court ordered in restitution. His violative conduct occurred over an extended period of time, included sales schemes involving multiple securities and several instances of theft. Not discussed above, Constantino's conduct was described as "a pattern of racketeering activity" and involved the exploitation of an elder person, for which he was also convicted of violating the Georgia Racketeer Influenced and Corrupt Organizations Act and for three counts of exploitation. (Mot. Ex. 2 (Indictment at 2-3, 12-13, 16; Verdict 1-2).) Seriousness of these violations is evident in the twenty-year prison sentence he was given. As such, Constantino's actions were egregious, recurrent, and demonstrate that he acted with a high degree of scienter.

Constantino has not admitted the wrongful nature of his conduct. In his Answer, he denies the allegations for which he was found guilty, claiming that he was not selling "securities" and this entire affair was merely a business disagreement. Likewise, he has made no assurances against future violations. Constantino's occupation, if he were allowed to continue it, would present opportunities for future violations, which is further evidenced by the fact that he committed the aforementioned felony violations after previous regulatory actions taken by the states of Missouri and Georgia. (Mot. Exs. 1(f)-1(h).) Further, as the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). In view of the Steadman factors in their entirety, an associational bar is necessary and appropriate in the public interest.

ORDER

IT IS ORDERED that the Division of Enforcement's Motion for Summary Disposition is GRANTED; and

IT IS FURTHER ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Frank L. Constantino is barred from association with any broker or dealer.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision pursuant to Rule 111 of the Commission's Rules of Practice. If a motion to

correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

Robert G. Mahony
Administrative Law Judge