UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2152/December 19, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16165

In the Matter of DAVID SCOTT CACCHIONE	ORDER

On October 21, 2014, I granted leave to file motions for summary disposition. *See David Scott Cacchione*, Admin. Proc. Rulings Release No. 1929, 2014 SEC LEXIS 3948 (Oct. 21, 2014). The Division and Respondent both filed such motions. Respondent also moved *in limine* to exclude the Division's Declaration in support of its motion, on the basis that the Declaration impermissibly offered purported statements of Respondent's counsel from supposed settlement discussions, as evidence to establish Respondent's liability under Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). Section 203(f) provides, in part, that "[t]he Commission, by order, shall censure or place limitations on the activities of any person associated [or] seeking to become associated . . . with an investment adviser," in certain circumstances.

With respect to the motion *in limine*, the Commission disfavors the use of statements in settlement discussions as evidence of liability, as set forth in Federal Rule of Evidence 408, but allows its use for other purposes. *Robert D. Potts, CPA*, Securities Exchange Act of 1934 (Exchange Act) Release No. 39126, 1997 SEC LEXIS 2005, at *46 & n.59 (Sept. 24, 1997) (citing *Belton v. Fibreboard Corp*., 724 F.2d 500, 505 (5th Cir. 1984)). Thus, I will not rely upon any evidence covered by Federal Rule of Evidence 408 in determining Respondent's liability.

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 summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts of the pleadings of the party against whom the motion is made will be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323 of the Commission's Rules of Practice. 17 C.F.R. §§ 201.250(a), .323. As the Commission has noted, "Rule 56 of the Federal Rules of Civil Procedure does not govern Commission administrative proceedings, but cases construing it clarify the obligations a motion for summary disposition places on the party opposing it." *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL

294717, at *6 n.26 (Feb. 4, 2008), *pet. denied*, *Gibson v. SEC*, 561 F.3d 548 (2009). The party opposing summary disposition "must set forth specific facts showing a genuine issue for a hearing and may not rest upon mere allegations or denials in its submissions to the judge to create a genuine issue." *Id.*

Based on my review of the motions briefing, I have determined that the parties have raised a good faith dispute as to the nature and extent of the discussions between the Division and Respondent's counsel, and whether they are encompassed by Federal Rule of Evidence 408[1] – a dispute which may very well be illuminated by additional evidence (both in the form of testimony and documentation). With regard to the applicability to Federal Rule of Evidence 408, the parties differ as to whether there was any dispute as to the validity of the claim (which again may be illuminated by evidence), and whether the evidence is offered for establishing liability, as opposed to unrelated purposes. If, as the Division maintains, the evidence is offered "for the limited purpose of determining jurisdiction," it does not mean that it should nonetheless be disregarded for the purpose of establishing liability.[2] *Thomas v. Law Firm of Simpson & Cybak*, 244 F. App'x 741, 744 (7th Cir. 2007).

The dispute regarding these discussions is an important aspect of a broader good faith dispute of the material facts relating to whether Respondent is seeking to become associated with an investment adviser. The parties have set forth specific facts that demonstrate the need for a hearing. The dispute over whether Respondent is seeking to become associated with an investment adviser appears susceptible to development by evidence, such as the testimony of Respondent, others involved in Montara Capital Management LLC,[3] and any other percipient witnesses, as well as by further documentary evidence. The parties should have a full and fair opportunity to present evidence addressing the aforementioned issue, including but not limited to statements of Respondent's counsel in pre-filing discussions with counsel from the Division. *See* 17 C.F.R. § 201.320 (any relevant evidence may be admitted in Commission proceedings). On its face, the hearing would not appear to require the testimony of expert witnesses, but, in the event that the parties agree on the necessity of expert witnesses, they should notify this office by means of a joint motion as soon as possible, but no later than January 9, 2015. The Division's motion for summary disposition is accordingly denied.

Respondent's summary disposition motion is likewise denied. First, Cacchione contends that he is not seeking to become associated with an investment adviser, but this relates to the

[1] I have not predetermined whether there are other bases on which I should not rely on such evidence.

[2] While the Division insists that the discussions between counsel were offered to establish jurisdiction, the Commission presumptively has already made a determination of the existence of jurisdiction given that the OIP was filed. It is doubtful that I would have the authority to reassess jurisdiction in this scenario.

[3] There is also a real question whether Montara is, or ever was, an investment adviser. *See* 15 U.S.C. § 80b-2(a)(11).

same issues of disputed material facts discussed above, and will be addressed at the forthcoming hearing based on evidence.

Second, the doctrine of res judicata does not bar this action because the Commission could not have sought to bar Respondent from acting as an investment adviser in 2009, in connection with the Commission action pursuant to Exchange Act Section 15(b), File No. 3-13455, because it was not until July 2010 that the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), was signed into law and expanded the categories of associational bars authorized by Exchange Act Section 15(b)(6). Further, the present action is predicated on Cacchione's alleged conduct in 2014 to associate or seek to become associated with an investment adviser. The doctrine of "[*r*]*es judicata* does not preclude claims based on facts not yet in existence at the time of the original action." *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002).

Third, 28 U.S.C. § 2462 does not bar this action. Section 2462 has no application to an action, such as this, under Section 203(f) of the Advisers Act based on a criminal conviction described in Section 203(e)(2) or (3) because Section 203(f) has a specific ten-year statute of limitations for such actions. The question of Section 2462's applicability arises only when Congress has not provided a limitation period in the statute that authorizes the fine, penalty, or forfeiture. 28 U.S.C. § 2462 ("Except as otherwise provided by an act of Congress . . . . "); *see Gregory Bartko*, Exchange Act Release No. 71666, 2014 SEC LEXIS 841, at *33 (Mar. 7, 2014). Section 203(f) of the Advisers Act authorizes remedial relief against an individual associated or seeking to associate with an investment adviser who "has been convicted of any offense specified in paragraph (2) or (3) of subsection (e) of this section *within ten years* of the commencement of the proceedings under this section." 15 U.S.C. § 80b-3(f) (emphasis added). Section 203(f), therefore, provides a specific statute of limitations of ten years for an action based on offenses described in Section 203(e)(2) or (3). Final judgment in Cacchione's criminal proceeding was entered on October 13, 2009.[4] This action, instituted on September 25, 2014, therefore is timely under the time limitations set forth in Section 203(f).

Respondent's Motion *in Limine* is GRANTED IN PART, in that the Declaration of Cary S. Robnett will not be admitted as evidence of Respondent's liability.

The Division's and Respondent's Motions for Summary Disposition are DENIED.

I will hold an evidentiary hearing beginning on February 18, 2015, at a location to be determined, in the San Francisco Bay Area.[5] Each party will have at least one day to present its fact witness testimony and other evidence that address the following issues:

[4] Pursuant to 17 C.F.R. § 201.323, I take official notice of the docket sheet and record in *United States v. Cacchione*, No. 3:09-cr-296 (N.D. Cal.).

[5] Once this office has reserved a courtroom, I will issue an order informing the parties of the hearing location.

- The OIP's allegation that Mr. Cacchione is or is seeking to become associated with an investment adviser. *See* OIP at 2.

- Whether Montara is, or ever was, an "investment adviser" under Section 202(a)(11) of the Advisers Act, 15 U.S.C. § 80b-2(a)(11).

- The nature and extent of the discussions between counsel, as initially described in the Division's Declaration in support of its motion for summary disposition.[6]

No later than February 20, 2015, the Division will present any rebuttal witnesses, and the parties will deliver closing arguments. Following the hearing, the parties will be given the opportunity to submit post-hearing briefs.

I FURTHER ORDER the following prehearing schedule:

January 9, 2015:	Joint filing regarding expert testimony is due;
January 23, 2015:	The parties shall file witness lists and exhibits lists, and shall exchange, but should not file, pre-marked exhibits;
February 6, 2015:	The parties shall file prehearing briefs[7] and any objections to witnesses or exhibits; and all requests for issuance of subpoenas are due by this date;
February 18, 2015:	The hearing will commence at a venue to be determined in the San Francisco Bay Area.

Jason S. Patil
Administrative Law Judge

[6] I expect to hear from counsel who participated in these discussions on this subject.

[7] The parties shall file prehearing briefs in lieu of giving opening statements at the hearing.