

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 662/ January 10, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14081

In the Matter of	:	
	:	
JOHN P. FLANNERY, and	:	ORDER ON MOTIONS FOR LEAVE
JAMES D. HOPKINS	:	TO FILE MOTIONS FOR SUMMARY
	:	DISPOSITION
	:	

On September 30, 2010, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Section 21C of the Securities Exchange Act of 1934 (Exchange Act), Section 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 (OIP). Each Respondent has filed an Answer. A hearing is scheduled to begin on February 28, 2011.

On December 23, 2010, James D. Hopkins (Hopkins) filed a Motion for Leave to File Motion for Summary Disposition (Hopkins' Motion for Leave); Motion for Summary Disposition; Memorandum in Support of Motion for Summary Disposition (Hopkins' Memorandum); Affidavit of John F. Sylvia, Esq. in Support of Motion for Summary Disposition; Motion for Oral Argument; and Hopkins' Exhibits A-J.

On December 24, 2010, John P. Flannery (Flannery) filed a Motion for Leave to File Motion for Summary Disposition (Flannery's Motion for Leave); Motion for Summary Disposition; Memorandum in Support of Motion for Summary Disposition (Flannery's Memorandum); Affidavit of Peter M. Acton, Jr., in Support of Motion for Summary Disposition; and Flannery Exhibits 1-61.

On December 30, 2010, the Division of Enforcement (Division) filed its Opposition to Respondents' Motions for Leave to File Motions for Summary Disposition (Div. Opp.).

Flannery and Hopkins filed Replies on January 3, 2011 (Flannery's Reply and Hopkins' Reply).

RESPONDENTS' ARGUMENTS

Hopkins argues that summary disposition is appropriate as to all the allegations against him in this proceeding because the allegations in the OIP have no legal or factual basis. Hopkins' Memorandum at 1. Relying on the First Circuit decision in SEC v. Tambone, 597 F.3d 436 (1st Cir. 2010), Hopkins takes the position that summary disposition is appropriate because he did not (1) "make" any untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, a requirement for a violation of Exchange Act Rule 10b-5; and (2) "obtain money or property" by means of any untrue statement of a material fact or any omission to state a material fact necessary to make the statements made, in light of the circumstances in which they were made, not misleading, a requirement for a violation of Section 17(a)(2) of the Securities Act.¹ Hopkins' Memorandum at 6-26.

Buttressed by sixty-one exhibits, Flannery maintains that the OIP's allegations concern his conduct in connection with August 2, 2007, and August 14, 2007, letters, and that there is no legal basis for allegations that he violated the antifraud provisions because: he represents that he did not draft the August 2, 2007, letter; he only offered limited edits, which were revised by others; lawyers with knowledge of the facts approved both letters; neither letter offered securities for sale or solicited an offer or sale of securities; and he received no money or property as the result of either letter. Flannery's Memorandum at 3-10, 25-32.

Flannery maintains that he is entitled to summary disposition because the undisputed facts show that: (1) his involvement with the August 2, 2007, letter is insufficient to establish primary liability; (2) he did not act recklessly or negligently as to either letter; (3) he relied on the advice of counsel with respect to the August 14, 2007, letter and reasonably believed that every allegedly omitted fact had been disclosed; and (4) there is no evidence to support the alleged violation of Section 17(a) of the Securities Act. Flannery's Memorandum at 32.

The Division responds that Hopkins' position that granting a motion for summary disposition as to him will "avoid an unnecessary trial" is inaccurate because he does not request summary disposition as to the alleged violations of Exchange Act Sections 17(a)(1), (3). The Division notes that a hearing will still be required as to the facts underlying those allegations. Div. Opp. 1-2.

The Division argues that Respondents have not satisfied the burden established for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice (Rule 250), 17 C.F.R. § 201.250. Div. Opp. at 2-3. The Division notes that "rationales that justify prehearing summary disposition procedures under the Federal Rules of Civil Procedure do not apply equally to Commission administrative proceedings." Div. Opp. at 3 (quoting Commission's Rules of

¹ Contrary to his initial assertion, Hopkins acknowledges in his Reply that he does not currently seek leave to file a motion for summary disposition with respect to allegations that he violated Sections 17(a)(1) and (3) of the Securities Act. Hopkins' Reply at 1.

Practice, 60 Fed. Reg. 32738, 32768 (June 23, 1995)). According to the Division, Respondents have failed to establish good cause, the governing standard, and seek to stretch what was intended by Rule 250 far beyond the limited purpose it is designed to serve. Div. Opp. at 4.

The Division maintains that numerous material facts are in dispute and resolution of the allegations in the OIP involves mixed questions of fact and law. Div. Opp. at 3. The Division cites the existence of scienter, negligence, the extent Respondents were involved in certain communications, and their responsibility for allegedly misleading statements, as examples of issues that need to be determined. Id.

Hopkins' Reply argues that controlling legal precedent, citing Tambone, warrants entry of judgment in his favor on the allegations that he violated Securities Act Section 17(a)(2), Exchange Act Section 10(b)(5), and Exchange Act Rule 10b-5, as a matter of law. Hopkins' Reply at 1. Hopkins reserves the right to file for summary disposition on claims that he violated Securities Act Sections 17(a)(1) and (3).

Flannery's Reply is critical of the Division's claim that there are material facts in dispute without identifying them. Flannery's Reply at 1. Flannery contends that he has shown good cause to support consideration of his Motion for Summary Disposition. Id. Flannery repeats why his involvement with the August 2, 2007, letter, which he believes is uncontested, cannot support the alleged violations of Securities Act Section 17(a)(1), Exchange Act Section 10(b)(5), and Exchange Act Rule 10b-5. Flannery's Reply at 1-2; (citing Tambone; Wright v. Ernst & Young, LLP, 152 F.3d 169 (2nd Cir. 1998); SEC v. Wolfson, 539 F.3d 1249 (10th Cir. 2008)).

Flannery reiterates his arguments that the alleged violations of Securities Act Sections 17(a)(2) and (3) are based on one clause in the August 14, 2007, letter that the Division claims was misleading, that the clause at issue was inserted by another person, and was fully vetted, reviewed, and approved by lawyers and others in positions of authority. Flannery's Reply at 2. Flannery criticizes the Division for not addressing what he pointed out as legal deficiencies in the Division's allegations that he violated Securities Act Section 17(a). Flannery's Reply at 2. Flannery disagrees with the Division's position that his Motion for Summary Disposition does not come within the scope of Rule 250 because he seeks to dispose of all the allegations as to him. Flannery's Reply at 3.

RULING

The Commission's Rules of Practice permit a party to make a motion for summary disposition as to any or all of the allegations after a respondent has filed an answer and the Division has made documents available for inspection and copying. 17 C.F.R. § 201.250(a). Where, as here, the Division has yet to present its case in chief, a motion for summary disposition shall be made only with leave of the hearing officer. Id.

As an initial matter, I know of no guidance, and the parties have not cited any, as to what factors should be considered in granting leave to file a motion for summary disposition beyond that specified in the Comments to Rule 250 when adopted in 1995. "Such leave shall be granted only for good cause shown, and if consideration of the motion will not delay the scheduled start

of the hearing.” 60 Fed. Reg. at 32768. Common sense suggests that leave is appropriate where a motion for summary disposition is likely to succeed. “[A] hearing officer may grant the motion for summary disposition 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.” 17 C.F.R. § 201.250(b).

For the following reasons, I will deny Hopkins’ and Flannery’s Motions for Leave:

- The Commission has made clear that its summary disposition procedures are more limited than summary judgment under the Federal Rules of Civil Procedure because, unlike the typical private party litigation, the Commission, in authorizing an OIP, has generally had the benefit of a Wells submission and a pre-filing investigation conducted with the use of subpoenas. 60 Fed. Reg. at 32768. It is significant that neither Hopkins nor Flannery cite to any changes in the facts or applicable law that have occurred since the Commission authorized the OIP on September 30, 2010.² Moreover, the Commission recently noted that summary disposition is most appropriate in “follow-on” and Exchange Act Section 12(j) proceedings. Keefe, Remand Order at n.4, Exchange Act Release No. 61928 (Apr. 16, 2010).
- Granting Hopkins’ and Flannery’s Motions for Leave would likely unduly delay the February 28, 2011, hearing date because it would necessitate allowing time for a brief in opposition to the Motions for Summary Disposition by the Division, reply briefs by Respondents, and adequate time for a ruling on the merits of summary disposition. See 17 C.F.R. § 201.154(b). I conclude that granting Hopkins’ and Flannery’s Motions for Leave will impermissibly delay the scheduled start of the hearing.³ 60 Fed. Reg. at 32768.
- Summary disposition will not serve the efficiency-focused goals of Rule 250 because a hearing will nonetheless result. Even assuming Hopkins’ Motion for Summary Disposition is granted, a hearing will still be required as to the Division’s allegations that Hopkins violated Sections 17(a)(1) and (3) of the Securities Act. Hopkins’ Reply at 1.
- I am not persuaded that Respondents’ contention that Tambone, a First Circuit Court of Appeals decision, should be treated as binding precedent in this proceeding. The

² Respondents rely heavily upon Tambone. The OIP was issued on September 30, 2010, and Tambone was decided on March 10, 2010. It is reasonable to assume that the Commission was aware of Tambone when it issued the OIP and was not persuaded that Tambone precluded an inquiry on whether the allegations in the OIP are true, and, if so, whether they amounted to violations of Section 17(a) of the Securities Act, Section 10(b)(5) of the Exchange Act, and Exchange Act Rule 10b-5.

³ In an Order Following Prehearing Conference, October 29, 2010, “I agreed to the procedural schedule proposed by the parties on condition that no extensions will be permitted.”

Commission has nationwide authority encompassing all twelve regional circuits, and Respondents do not cite persuasive authority for their position.⁴ See, e.g., Hopkins' Memorandum at 14.

- Rule 250 requires that 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 noticed. Neither Hopkins nor Flannery, however, appear to accept the Division's factual allegations set out in the OIP. Finally, determining the merit of the alleged antifraud violations involves legal issues such as scienter and negligence, requiring a factual and legal analysis.
- Hopkins put forth a variety of factual assertions, which likely bear directly on the outcome of this proceeding. Hopkins' Memorandum 1-4, 12-14, 20-24. However, at this pre-hearing stage, there are no facts in evidence. For example, the OIP states that "Hopkins was responsible for drafting and updating offering documents and other communications about the Fund and related funds for investors and prospective investors." OIP at 4. Hopkins argues that this language makes clear, like the complaint in Tambone, that the Division's allegations are predicated on theories of "use" and "authorship." Hopkins' Memorandum at 11.

Hopkins alleges that there is no evidence of any "use" of two letters alleged to have contained material omissions, and that he did not sign or disseminate them. Hopkins' Memorandum at 12. He further states that "[t]he evidence that [he] 'used' the documents at issue is a hit-or-miss" and that with respect to fact sheets and presentation slides, the record is "murky at best." Id. But "murky" and "hit-or-miss" issues are best resolved in a hearing.

Still later Hopkins maintains that the Division "has not shown, and cannot show, that Mr. Hopkins 'actually made' – that is, that he 'caus[ed] the existence' – of any of the statements or omissions at issue." Hopkins Memorandum at 14. This statement by Hopkins is conclusory and premature; it is impossible to know at this stage whether these factual assertions or Hopkins' characterization of the Division's evidence are true because the Division has not presented its case. The OIP sets out allegations. There is no way of knowing whether the Division can prove those allegations by a preponderance of the evidence, the required standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981). Moreover, arguments about the applicability of Tambone will be appropriate when the facts of this particular situation are established.

⁴ The findings in Tambone appear driven by the particular facts that existed there. Furthermore, the "authorship" issue, which appears to be a significant issue in this proceeding, was not argued by the Commission on appeal. See Tambone, 597 F.3d at 441.

ORDER

For all the reasons stated, I DENY Hopkins' and Flannery's Motions for Leave to File a Motion for Summary Disposition, and I DENY Respondents' requests for oral argument.

Brenda P. Murray
Chief Administrative Law Judge