

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2883/June 30, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16433

In the Matter of

ALBERT J. SCIPIONE

ORDER DENYING THE DIVISION'S
MOTION FOR SUMMARY DISPOSITION

On March 12, 2015, the Securities and Exchange Commission issued an Order Instituting Administrative Proceedings (OIP) against Albert J. Scipione, pursuant to Section 15(b) of the Securities Exchange Act of 1934. The OIP alleges that on November 18, 2014, Scipione pled guilty to one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 in *United States v. Scipione*, No. 14-cr-469 (M.D. Fla.) (Criminal Case). OIP at 2. The OIP further alleges that Scipione was sentenced to a prison term of 30 months followed by three years of supervised release, and ordered to make restitution in the amount of \$463,463.81. *Id.*

Although not alleged in the OIP as a basis for a sanction, on March 18, 2015, Scipione was permanently enjoined from future violations of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in *SEC v. Albert Joseph Scipione*, No. 14-cv-2886 (M.D. Fla.) (Civil Case). It appears that Scipione did not participate in the civil proceeding. Order, Civil Case, ECF No. 13 (Mar. 18, 2015).

Scipione was served with the OIP by April 29, 2015, at the federal correctional facility at Maxwell FPC, Montgomery, Alabama. Division of Enforcement's Affidavit of Service, Exs. A, B, filed May 8, 2015; *Albert J. Scipione*, Admin. Proc. Rulings Release No. 2681, 2015 SEC LEXIS 1922 (May 15, 2015). Scipione failed to file an Answer within twenty days of service as required. OIP at 2; 17 C.F.R. § 201.220. Only the Division attended the telephonic prehearing conference on May 14, 2015, at which it represented that it had not heard from Scipione in this proceeding and it always had problems communicating with him. Tr. 4.¹

On May 15, 2015, I set a summary disposition schedule. *Albert J. Scipione*, 2015 SEC LEXIS 1922. On June 5, 2015, the Division filed its amended motion for default and summary disposition (Motion), asking for permanent industry and penny stock bars, and attaching the complaint (Ex. A) and order (Ex. B) in the Civil Case, and the information (Ex. C), plea agreement (Ex. D), and judgment (Ex. E) in the Criminal Case.

¹ Citation is to prehearing conference transcript (Tr.).

Scipione's opposition was due on June 26, 2015. As of this date, Scipione has not filed an opposition.

Scipione is in default because he failed to file an Answer due within twenty days after service of the OIP, he did not respond to a dispositive motion within the time provided, he did not participate in the prehearing conference, and he has not otherwise defended the proceeding. 17 C.F.R. §§ 201.155(a), .220(f), .221(f). I therefore deem as true the OIP's allegations.

Conclusions

Exchange Act Section 15(b) authorizes the Commission to impose certain sanctions against Scipione if, in relevant part, (1) "at the time of the alleged misconduct, [he] was associated or was seeking to become associated with a broker or dealer"; (2) he was convicted of any offense specified in Section 15(b)(4)(B) within ten years of the commencement of this proceeding; and (3) such sanction would be in the public interest. 15 U.S.C. § 78o(b)(4)(B), (b)(6)(A). A broker is defined 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). The definition of a broker connotes "a certain regularity of participation in securities transactions at key points in the chain of distribution." *Mass. Fin. Servs., Inc. v. SIPC*, 411 F. Supp. 411, 415 (D. Mass. 1976). Courts assess a variety of factors to determine whether an individual was acting as a broker, including: whether a person (1) works as an employee of the issuer, (2) receives a commission rather than a salary, (3) sells or earlier sold the securities of another issuer, (4) participates in negotiations between the issuer and an investor, (5) provides either advice or a valuation as to the merit of an investment, and (6) actively (rather than passively) finds investors. *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011) (citations omitted).

According to the Division, in July and September 2012, Scipione and another person created an entity, Traders Café LLC, to act as a broker-dealer for day-trading customers. OIP at 1; Ex. D at 17. Scipione was a managing member of Traders Café and its supposed parent company. Ex. D at 17. To recruit day traders to engage in day-trading activities through Traders Café, Scipione falsely and fraudulently represented himself to be a successful day-trader and investor and Traders Café as a successful day trading firm. *Id.* at 18. Scipione emailed partnership agreements and/or branch partnership agreements to interested individuals that contained false and fraudulent representations about Traders Café and "wiring instructions, directing victim-investors to transmit investment funds purportedly needed to establish their day-trading accounts to a Wells Fargo Bank account in the name of Traders Café." *Id.* In response, \$318,741.74 was transmitted to Wells Fargo Bank accounts. *Id.* Scipione and another person also made false and fraudulent representations to a person to persuade him to invest \$155,000 in the operations of Traders Café. *Id.* at 19. Scipione, his co-conspirators, and Traders Café were not registered to conduct business in Florida and there was no proprietary trading platform, or other advertised features. *Id.*

Based off the Motion and the attached exhibits, I am unable to conclude that the requisite nexus has been satisfied between Scipione's activities and the statutory definition of broker. Though the Division addresses several of the factors above, it does so in a conclusory manner

and without citing to direct evidence that I may consider. Motion at 9-11; *see also Gary L. McDuff*, Exchange Act Release No. 74803, 2015 SEC LEXIS 1657, at *7 (Apr. 23, 2015) (default judgment does not constitute adequate basis for finding Respondent acted as a broker in a follow-on proceeding). The evidence adduced by the Division that I may consider in my analysis establishes that Scipione secured an investment in his purported day-trading business from *one* investor and that Scipione convinced others to wire money to his organization with the false promise of access to a nonexistent proprietary day-trading platform. Ex. D at 18-19.² Without more, neither scenario meets the definition of a “broker” under the Exchange Act.

Ruling

For these reasons, I DENY the Division’s motion for summary disposition. The Commission issued a directive in *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *9 (Dec. 5, 2014):

[T]he language of Rule 250(b) directing the law judge to either grant or deny the motion, together with the language in the OIP ordering “that a public hearing for the purpose of taking evidence on the questions set forth in [the OIP] shall be convened” suggests that, in the circumstances here, a law judge’s only alternative to granting the motion is to deny it and proceed with a hearing.

Further, to the extent the Division seeks sanctions based on Scipione’s default, the OIP’s allegation that Scipione established Traders Café “to act as a broker-dealer” is insufficient to find that Traders Café was a broker or dealer. OIP at 1 (emphasis added); *cf. Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012) (holding that although the law judge could deem as true the OIP’s allegations on default, “conclusory allegations” were insufficient to impose sanctions without further explanation).

Accordingly, I direct the Division to confer with correctional authorities at Maxwell FPC, Montgomery, Alabama, as to when Scipione can participate in a telephonic prehearing conference, at which we will decide a date and place for a hearing or some alternative means of resolving the proceeding. This information should be conveyed to my Office by July 8, 2015, and I will then issue an Order for the telephonic prehearing conference.

Scipione may move to set aside the default in this case. Rule of Practice 155(b) permits the law judge, at any time prior to the filing of the initial decision, or the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). A motion to set aside a default shall be made

² The plea agreement differentiates between individuals that Scipione solicited to open accounts with his company and the individual he solicited to invest in his company. *Id.* at 18-19. Moreover, while the evidence shows that Scipione established a company that purported to allow others to trade in securities, it does not establish that the company ever executed any trades on behalf of its clients. *Id.* at 18.

within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.*

Brenda P. Murray
Chief Administrative Law Judge