3-15601

FINRA, Department of Enforcement, Complainant v. Mitchell Fillet, Respondent,

Complaint No. 2008011762801

Dated: March 31, 2014

FINRA, regarding the allegation of securities fraud against Mitchell Fillet, continues to make statements and to use case citations that are either not applicable or have been outdated by the Supreme Court's landmark decision in the Telllabs case in 2007. FINRA also continues to ignore the facts of this case in order to obscure the real issues and to prevent a fair and equitable outcome of this matter.

One instance of proof is FINRA's continued citation of the DeKwiatowski case against Bear, Stearns, which is in their filing document twice, on Pages 19 and 20. Nowhere in their citations do they provide the information that this case was dismissed, rendering this case's use as prevailing law as useless to their case and harmful to Fillet's assertions of innocence. And FINRA also continues to use Supreme Court case citations that have been superseded by the landmark opinion in the Telllabs case.

Most importantly, FINRA continues to ignore the facts of this case. Finally they admit that they have the burden of proof of each claim of scienter with a preponderance of evidence but here again stating that they have provided a "preponderance of evidence" in keeping with the Tellabs decision only by ignoring the facts of the case. On Pages 13 and 15, in the footnotes, FINRA states that "Fillet recommended this investment to Malkin", but other than Malkin's foggy recollection of how he secured the term sheet and one meeting between Malkin and Fillet, FINRA has absolutely no proof that Fillet marketed this investment to Malkin. So here again, they violate the burden of proof placed on them by the Telllabs decision. Also, looking specifically at the dates of this accusation, Malkin testified that he received the term sheet on January 16, 2008, yet he did not loan Sloan any funds until February 21, 2008. Even though FINRA claims in their brief that Fillet used the telephone and the U.S. Mails to contact Malkin, they are incorrect and no truthful testimony supports their assertions. Fillet had only one instance of contact with Mr. Malkin, which was in Mr. Malkin's office in New York City. Mr. Malkin did not reach out to Fillet, nor to anyone else at Riderwood and NO ONE at Riderwood reached out to Mr. Malkin, by mail, phone or in person. FINRA makes direct references to testimony by Fillet that he spoke to Malkin after the initial meeting, but Fillet has no record of such testimony. (Page 18 of FINRA's brief). Here again, in trying to prove scienter on the part of Fillet, FINRA fails the burden of proof test.

FINRA finally characterizes Fillet as a "drafter of the document". But they ignore the fact that there were many drafters of this document, as Mr. Sloan and his lawyer and advisors, as well as Mr. Schmults, had the right of review and edit of this document. This is why it is possible that Peter Malkin was given a term sheet that described this transaction from any one of those people and without the approval or aid of Fillet or Riderwood.

It is important to note that Peter Malkin's sworn testimony wherein he could not remember who gave him the term sheet upon which he made a material reliance is in conflict with both Malkin's initial letter of complaint, and Fillet's sworn testimony that he positively DID NOT give the term sheet to Mr. Makin. On Page 17, in the footnotes on that page, FINRA again attempts to shift the burden of proof of this fraud on to Fillet and away from themselves, calling Fillet's claims "an incredible work of fiction". In fact, FINRA has not and cannot prove that Fillet ever gave Malkin the term sheet. On the 6th and 7th line of that page, FINRA states that Fillet knew Malkin had received the term sheet.

For the record, it must be noted that Fillet only knew Malkin had received the term sheet and all the other transactional documents because FINRA informed Fillet, in the course of their allegations against Fillet, that he had. Fillet had no knowledge of his receipt of any documentation regarding this transaction. Nor did Fillet or anyone at Riderwood have any knowledge of the loan Mr. Malkin made to CAC and Allan Sloan until weeks after the loan was made. Fillet specifically had changed Riderwood's role regarding Mr. Sloan to advisory ONLY and had prohibited the use of the term sheet for this transaction by internal and external parties. For that reason, neither Riderwood nor Fillet were entitled to any share of the Malkin loan as a fee. And to this point, FINRA cannot and has not pri=oduced any evidence that a fee was paid in connection with the Malkin loan. Also, Riderwood did not create a Private Placement Memorandum that would have been a companion document to the term sheet, had Riderwood launched an offering for this transaction which also provides proof that Riderwood's relationship with Sloan changed from the initial Engagement Agreement. The reason that another document was not created to define this change is that the initial engagement agreement contemplates the provision of advice along with other services.

Fillet's testimony states that Mr. Malkin did not participate in this offering, and was never a client of Riderwood's. It is apparent that he signed the documents sometime after he made the loan to Mr. Sloan's company CAC. He did not submit the documents for review or counter signature to either Riderwood nor to Mr. Sloan. This is where the State of New York has jurisdiction over this transaction. The note that Mr. Malkin signed that is the main document of this transaction is null and void unless countersigned by the borrower under the commercial laws of the State of New York. It is impossible to believe that Mr. Malkin who is both an experienced practicing lawyer in the State of New York and the principal of a FINRA member firm that is an expert in the creation of private notes such as this one, would not demand that his note be countersigned before or immediately after his loan This further defines FINRA's failure in proving a preponderance of evidence that Fillet committed securities fraud. Significantly, Mr. Malkin thought that The State of New York had jurisdiction over this transaction, as he did not make a claim in FINRA arbitration against Sloan, Fillet or Riderwood, which would have been expected. Instead, he utilized the court system in New York to pursue his claim. That case was eventually dismissed, further pointing out that FINRA has failed to provide a preponderance of evidence that Fillet committed securities fraud.

Finally, FINRA is creating a new type of securities fraud with which they have charged Fillet. The initial fees paid to Riderwood at the beginning of its relationship with Sloan (" $20,000 to $ 30,000) are the only fees ever paid to Riderwood or Fillet by Sloan. This was months before the Malkin loan to Sloan. It is an industry standard practice that a "money raiser" gets a percentage of the funds raised as a fee. This is especially true through the long history of securities fraud cases in America. That, in fact, is why people commit financial fraud, for the financial payoff. FINRA states that Fillet committed securities fraud in this case without any compensation whatsoever, and only with the hope of future gain. So now we have regular securities fraud and charitable securities fraud, where the perpetrator of the fraud does not seek payment for their fraudulent act. Surely, even FINRA can see how this fails the test of scienter and securities fraud regarding Fillet's actions and intent.

SUMMARY: FINRA states that Fillet's exemplary compliance record is immaterial. However, it materially speaks to Fillet's conduct over a very long period of time in the securities industry and his willingness to comply with all of the NASD's and FINRA's rules and regulations. Fillet has stated that he did not market any transaction to Peter Malkin, which is made believable in part by Malkin's testimony and in part by

Fillet's compliance record and lack of compensation. Further, once he found out that Allan Sloan had a problematic legal history, Fillet has testified that he told Sloan that Riderwood could not and would not market any transaction for him to an investor. In addition, Fillet prohibited Sloan from using the term sheet that Riderwood had prepared in contemplation of an offering. He also told Sloan on numerous occasions that he must expose his background to any potential investor or lender, which Sloan swore to Fillet that he had done, especially in the case of Peter Malkin. Other than Malkin's statement that he would not have made this loan had he known of Sloan's background, we have no proof that he was not fully aware of Sloan's legal history before he gave Sloan the check for $ 150,000.

It is apparent that for all of the above reasons, FINRA's claim of securities fraud against Mitchell Fillet falls upon itself for lack of substantiation and should be immediately dismissed with prejudice.

In the matter of mis-dating of annuity contracts, FINRA has taken the stance that Fillet's two-year suspension is appropriate given Fillet's actions, which FINRA terms "egregious", citing the Cohen complaint (EAF040063001) as proof of the application of FINRA's sanction guidelines. Nowhere in their use of the Cohen has citation does FINRA expose the fact that in this case Dennis Kaminski, the firms registered principal was in charge of a firm with 1200 registered brokers in 800 branch offices. This issue spanned hundreds of annuities over years of activity. Fillet's actions entail 11 annuity contracts over a very short period of time. Fillet's issue was a one-time error. It did not happen before the audit and did not happen after the audit. And when Fillet was originally confronted by FINRA , he was asked to admit to an infraction that was not obvious to Fillet at the time. In addition, Fillet had no other person to ask for advice and opinion regarding FINRA's allegations, as he was not represented by counsel. Surely, the Commission can understand that Fillet did not lie, but was confused by these allegations.

Once Fillet had the time and ability to analyze this claim by FINRA, it became apparent to him that he had mis-dated these annuity contracts, which is consistent with Fillet's testimony at both the original Hearing Panel and the NAC Hearing Panel.

Fillet admitted that he was wrong and in his testimony under oath, he even apologized. The only issue here is the severity of the sanctions against Fillet. One only needs to look at the Brown Brothers Harriman case to clearly see that Fillet is being prejudicially and punitively sanctioned by FINRA.

The following is the first paragraph from FINRA's own regulatory release regarding this action.

FINRA Fines Brown Brothers Harriman a Record $8 Million for Substantial Anti-Money Laundering Compliance Failures

Highest Fine Levied by FINRA for AML-Related Violations; Former AML Compliance Officer Also Fined and Suspended

WASHINGTON — The Financial Industry Regulatory Authority (FINRA) announced today that it has fined New York-based Brown Brothers Harriman & Co. (BBH) $8 million for substantial anti-money laundering compliance failures including, among other related violations, its failure to have an adequate anti-money laundering program in place to monitor and detect suspicious penny stock transactions. BBH also failed to sufficiently investigate potentially suspicious penny stock activity brought to the firm's attention and did not fulfill its Suspicious Activity Report (SAR) filing requirements. In addition, BBH did not have an adequate supervisory system to prevent the distribution of unregistered securities. **BBH's former Global AML Compliance Officer Harold Crawford was also fined $25,000 and suspended for one month**

It should be noted that Mr. Crawford as the engineer of a major AML violation which went on for four years and involved thousands of transactions including the violation of important Federal statutes and which included the non-filing of paperwork and the lack of supervisory reviews, received a one month suspension.

Clearly, this defines that the sanctions against Fillet are, indeed, "excessive and oppressive" (Page 32, Paragraph C).

[redacted]

[redacted]

Signed:

Mitchell Fillet