3-15601

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

Complaint No. 2008011762801

Dated: January 29, 2014

FIRST MOTION: Motion to Dismiss the Charge of Securities Fraud, violation of Section 10b of The Securities Exchange Act of 1934, in the matter of Peter Malkin.

SECOND MOTION: Motion to Reduce the Severity of the Sanctions Levied Against Mitchell Fillet in the matter of the misdating of variable annuity contracts.

The First Motion: Motion to Dismiss the charge of Securities Fraud brought against Mitchell Fillet by The Department of Enforcement of FINRA:

FINRA improperly determined that I, Mitchell Fillet, committed securities fraud. That determination was contrary to the undisputed facts as well as clear and well-established law. That determination must, therefore, be reversed and the charges against me dismissed. Factually, there is no dispute as to the following dispositive facts:

1) I, as President of a member organization, The Riderwood Group, Inc., drafted a Private Placement Memorandum ("PPM") that was for internal use only until it had been reviewed by our client's attorney and was further reviewed and approved by Riderwood. This document contained certain preliminary, forward-looking statements.
2) I never authorized the dissemination of this draft PPM to any prospective investor and I never gave it to any third party, including, specifically, Peter Malkin.
3) After conducting additional due diligence regarding our client company and its senior officer, Allen Sloan, I explicitly withdrew from this engagement and additionally advised Mr. Sloan that he should not for any purpose use the preliminary PPM that I had drafted.

I cannot be held responsible if Mr. Sloan or any of his associates, contrary to my explicit directions, disseminated our draft PPM to investors or otherwise used it to his advantage for any purpose without my permission and against my stated wishes. Essential factual elements necessary to prove the securities charge against me do not exist.

An objective legal analysis reveals substantial flaws in FINRA's determination against me. There is no proof of scienter, no proof of loss causation and no proof that any investor, in making a determination to invest in Mr. Sloan's venture, relied upon any misrepresentation of fact made by me , other than a letter with no factual support written by Peter Malkin.

As background for my petition for dismissal of these charges, it must be understood that Mitchell Fillet and his firm, The Riderwood Group, Inc. never sought to defraud Peter Malkin. Riderwood's role, which was initially to organize and market a Private Placement for Mr. Sloan's venture (which explains the draft Term sheet), was changed verbally to solely advise Allen Sloan, even though the original Engagement Agreement contemplated Riderwood organizing and marketing some sort of fund raising campaign for Mr. Sloan's venture. The original agreement was verbally changed when, in the course of due diligence prior to the proposed fund raising campaign, various elements of Sloan's background came to light due to Riderwood's investigation into Sloan's background. This information caused

Riderwood to specifically change its relationship with Mr. Sloan. Therefore, there was no time that Fillet authorized the dissemination of the Term Sheet for the planned transaction to any investor, including, specifically Peter Malkin. The document was in draft form and being reviewed by numerous parties. Therefore, any one of the reviewers had the ability to share the document with Peter Malkin. Under oath, Mr. Malkin conveniently could not remember who supplied him with the Term Sheet, and could not say with certainty that it was Fillet. Here again, the decision of the Supreme Court in Tellabs v. Maktor, bears on whether Fillet acted with the requisite scienter due to the lack of proof that Fillet give the term sheet to Malkin and proceeded to lure him in to this investment. The fact that the document did not state "Draft" on the cover of the document is meaningless, yet it is held in great import by FINRA, as they have shifted the burden of defending the claim of "scienter" on to Fillet instead of it remaining on the Claimant (FINRA) who has the burden of proof to show "cogent and compelling evidence" of Riderwood's/Fillet's intent to commit fraud .

Two previous FINRA sponsored hearings totally ignored many important facts that, when taken in to account, show that the inference of scienter is non-existent, as defined in the Supreme Court ruling.

1) It was five weeks in between the only time that Fillet met with Malkin and the day that Malkin invested in the Sloan transaction.
2) Fillet never met with nor spoke to Peter Malkin after that initial meeting.
3) The initial meeting was relatively short, lasting approximately 30 minutes.
4) Neither Fillet nor anyone at Riderwood organized or arranged the meeting with Peter Malkin.
5) This meeting was arranged by Allen Sloan.
6) Fillet testified that he told Allen Sloan that he must tell Peter Malkin about his background.
7) Sloan informed Fillet that he met with Malkin several times during the intervening five week period.
8) Sloan told Fillet that he had fully and completely discussed his background with Peter Malkin and that Malkin was sympathetic with his desire to recover his life through this transaction.
9) The check that Peter Malkin wrote to fund his loan to Allen Sloan was NOT written in compliance with the Term Sheet that someone gave to Peter Malkin.
10) No one at Riderwood ever received or even facilitated the collection of these funds.
11) No one at Riderwood was paid for this alleged activity of defrauding Peter Malkin.
12) The documentation that Peter Malkin offered as proof of his reliance on and use of the Term Sheet were all signed and held by Malkin after Malkin gave his check to Allen Sloan.
    a. FINRA completely ignores the fact that Peter Malkin, as a FINRA registered person had an obligation to report to his compliance officer that he was going to become a customer of The Riderwood Group, Inc. and invest in one of Riderwood's offerings. Yet, as the principal officer of a FINRA member firm, he failed to receive this approval prior to investing, clearly showing that he well knew he was NOT a customer of Riderwood's and was making no reliance (material or otherwise) on writings and advice of The Riderwood Group, Inc. and specifically Mitchell Filet.
    b. FINRA totally ignores the very important point that the note that Peter Malkin supposedly signed at the time of his loan to Allen Sloan, thus defining his involvement in the Riderwood transaction, was not reviewed by anyone at Riderwood nor by any one of Allen Sloan's employees or associates including his

corporate counsel. NOR WAS IT PROPERLY COUNTER SIGNED, THEREBY PROVING THAT THE FUNDS WERE RECEIVED UNDER THE AUTHORITY OF THE NOTE.

c. The note that Malkin signed was not counter-signed by anyone authorized to do so at either Riderwood or Allen Sloan's company. Therefore, under the Uniform Commercial Code of New York State, whose laws are supervisory in this matter, as so stated in the note, the note is NULL AND VOID.
d. Under Section 108 of the Uniform Commercial Code of the State of New York, this loan to Allen Sloan is defined as a financial asset and not a security. Therefore, it does not come under the jurisdiction of The SEC and FINRA.

13) It is impossible to believe that Peter Malkin, who spends virtually all of his time writing this type of note in New York State (where he is a member of the Bar and a principal of a FINRA member firm whose sole focus is to create Private Real Estate investments), would not seek to have his note properly counter-signed, thus making it binding on the borrower, even if it had to be counter-signed many days or months after his funds were received.
14) Malkin's attempt to have Sloan prosecuted for his role in this transaction and his default on the loan (as termed in Malkin's filings in the Courts of New York City) was dismissed in a court of law.

In direct opposition to the written opinion of The Supreme Court of The United States in Tellabs v. Maktor, rendered in 2007, in order to prevail in a securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934, a plaintiff must allege and prove "with overwhelming evidence" that the defendant acted with scienter. The Private Securities Litigation Reform Act of 1995 previously added the requirement that a plaintiff must plead facts giving rise to a "strong inference" of scienter. This means that the Plaintiff's evidence must be substantially more compelling that the Defendant's to the point of overpowering any evidence offered by the Defendant in defense of his actions. It is clear that in the course of the two previous hearings, FINRA pushed the responsibility of defending against the claim of scienter on Fillet, when, in fact, they, as claimant, had the burden of proof to offer overwhelming evidence to support their claim. (*Tellabs, Inc. v. Makor Issues & Rights, LTD** (21 June 2007), a case that was decided by an overwhelming majority of the Justices).

IF ALL OF THE FACTS OF THIS CASE ARE CONSIDERED, IT IS CLEAR THAT TFINRA'S EVIDENCE IS NOT OVERWHELMNG AND DOES NOT MEET THE CURRENT DEFINITION OF SCIENTER. IN FACT, IT WAS NON-EXISTANT IN THIS CASE.

To support their claim against Fillet, FINRA offers several case citations. Those citations are as follows:

1) Basic Inc. v. Levinson, 1988
2) DeKwiatkowski v. Bear, Stearns & Co., 2002
3) Joseph Abbondante, Release 53006, 2006
4) Dane S. Faber, 57 SEC 297, 306, 2004
5) SEC v. Hasho SDNY, 1992
6) Richard H. Morrow, 53 SEC 772,781 (1998)
7) Department of Enforcement v. Cipriano, Complaint No. C07050029 (2007)

Here again, FINRA attempts to take advantage of Fillet's appearance Pro Se, his lack of legal education and experience, and his lack of resources, as ALL OF THESE CASE CITATIONS PREDATE THE IMPORTANT SUPREME COURT DECISION OF TELLABS, INC. V. MAKOR ISSUES & RIGHTS, which was a landmark

decision regarding the definition of scienter and the burden of proof of scienter and the ability to defend against such a claim. And one important claim (DeKwiatkowski) was reversed on appeal.

Though the citation of Janus Capital Group v. First Derivative Traders is both contemporary (2011) and seemingly has weight in this matter, as it was a decision of the 4th Circuit of the U.S. Court of Appeals, in fact this case supports Fillet's claim for dismissal, as this case speaks to "material misstatements made in a prospectus". Irrespective of the fact that Malkin was given a Term Sheet by someone other than Fillet or Riderwood, there was not a material misstatement in that document. Even though FINRA points to wording that they misinterpret as trying to portray Sloan's venture as being in operation, there was no data offered by Riderwood to Malkin that would imply or prove that any of Sloan's companies were in operation, And Malkin well knew that the first planned location of Sloan's venture was Greenwich, Connecticut and that facility had not been leased nor even had renovations planned when he made his personal loan to Sloan, as he lives in Greenwich and is an expert in the Greenwich, Connecticut real estate market. So he well knew that Sloan's operation was to occur in the future and was subject to Sloan's ability to acquire all of the funds necessary to fund Sloan's plans, which was a sum of approximately $ 5,000,000.

The meaning of scienter under this law has been highly controversial since the enactment of the PSLRA. In 2007, the United States Supreme Court issued a decision in which it clarified what was to be understood as a "strong inference". In *Tellabs, Inc. v. Makor Issues & Rights, LTD* (21 June 2007), by an 8-1 ruling, the Court defined the standard that the plaintiff should meet in order to proceed with a securities fraud litigation: a complaint must show "cogent and compelling evidence" of scienter. There is no such evidence in this case.

It is important to again define how Malkin's claim of "material reliance" fails all tests of reasonableness which further undermines FINRA's claim of scienter. Also, it should be noted that all through the two previous hearings, the burden of proof of a defense against the claim of scienter was forced on Fillet by the two FINRA organized and sponsored hearings. Yet, it is plainly stated by The Supreme Court of The United States in Telllabs v. Makor, that the burden of proof is on the plaintiff (claimant) who is FINRA and further that in order to meet the "strong inference" test of the nation's highest court, FINRA must show "cogent and compelling evidence" which has to be more powerful and compelling than the evidence offered by the Defendant, Fillet. This could only be the case by the two hearing panels ignoring the factual statements and evidence offered by Fillet in his defense.

Specifically, this is why the fact that even though Alan Sloan received $ 150,000 from Peter Malkin, he did not pay anyone at Riderwood for the alleged services of marketing this transaction to Peter Malkin is so important. This fact has been made clear by FINRA's extensive examination of Riderwood's books and records, including its checkbook, as well as sworn testimony of Mitchell Fillet. That Riderwood would market a transaction to anyone, and, in the process commit securities fraud and forgo a fee of at least $ 7,500 (5%) is impossible to believe and clearly defines the failure of a "strong inference" of scienter.

For all of the above reasons, the charge of Securities Fraud against Mitchell Fillet must be dismissed.

SECOND MOTION: Motion to reduce the severity of the sanctions levied against Mitchell Fillet in the matter of the misdating of variable annuity contracts.

Both hearing panels took this matter to be of equal or greater import as the charge of securities fraud. Yet the charge of securities fraud has far greater import both within and outside of the financial services industry. This can easily be deduced by the sanction levied against Fillet for this violation.

There is no doubt of the fact that Fillet miss-dated eleven (11) variable annuity contracts for seven customers. However, Fillet did not lie to FINRA and no one at Riderwood, Fillet included, benefited from this activity. Of even greater importance is the fact that there is no instance of customer harm from this activity. No customer of Riderwood suffered any additional costs or lower income from their investment in these securities.

FINRA's attempt to make it seem as if Fillet lied to FINRA in the course of sworn testimony in a hearing panel regarding this matter, must be examined in light of Fillet's exemplary compliance record over a period of almost 30 years prior to this incident as well as the fact that Fillet came to Philadelphia to FINRA's office voluntarily and without representation of counsel. In addition, when asked for guidance in the preparation or review of information to prepare for this meeting, Fillet was told that he should not prepare or review any of his files, and that he was not told the subject of the investigation.

It is easy to see that Fillet, when first asked about the dating of the variable annuity contracts would deem them to have been properly reviewed and dated.

Now that it is clear that Fillet made errors in his review and dating of these contracts, one must review FINRA's sanctions to see that the two year ban from industry registration is overly severe. Review of FINRA's sanctions from 2011 to present clearly shows that without any harm to a customer, it is usual and customary for the registered person to receive a sanction of 10 to 30 days.

This two year sanction is the result of FINRA's attempt to portray Fillet as a criminal needing severe penalties as retribution for the two alleged crimes that he committed (Securities Fraud and miss-dating of annuity contracts). In fact, nothing could be further from the truth. Fillet has an enviable record of complying with FINRA regulations over an extended period of time. And even in this instance, Fillet did not act with malice or intent for personal or corporate gain.

Therefore, it is reasonable to substantially reduce the time frame for a ban from industry employment to a significantly shorter period of time.