INITIAL DECISION RELEASE NO. 413
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13986

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
	:	January 19, 2011
ERIC S. BUTLER	:	
	:	
	:	

APPEARANCES: David S. Stoelting and Eric M. Schmidt for the Division of Enforcement, Securities and Exchange Commission.

Paul T. Weinstein of Emmet, Marvin & Martin, LLP, for Eric S. Butler.

BEFORE: Robert G. Mahony, Administrative Law Judge.

The Securities and Exchange Commission (Commission) issued its Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 (OIP) on July 30, 2010. The OIP alleges that, on January 22, 2010, Eric S. Butler (Butler or Respondent) was sentenced to five years imprisonment, with three years supervised release, and ordered to pay a $5 million fine and forfeit $250,000. It alleges that Butler was convicted by a jury on August 17, 2009, of one count of conspiracy to commit securities fraud, one count of securities fraud, and one count of conspiracy to commit wire fraud. In addition, the OIP alleges that Butler is subject to a federal court civil proceeding in which the Commission seeks to enjoin him from future violations of the federal securities laws. The Commission instituted this proceeding to decide whether remedial action is appropriate in the public interest. The Division of Enforcement (Division) seeks to bar Respondent from association with any broker, dealer, or investment adviser.

The undersigned held a prehearing conference on August 30, 2010, in which counsel for the Division and Respondent appeared. Respondent's counsel agreed to accept service of the OIP on behalf of Respondent. (Prehearing Conf. Tr. 9.) The Division moved for leave to file a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, leave was given, and a scheduling order was issued.[1] (Prehearing Conf. Tr. 4-5, 14-15; Order of

[1] The Division intends to rely on the adjudication of the criminal matter as the basis for its motion for summary disposition.

August 31, 2010.) Respondent was advised of his right to inspect and copy the Division's investigative file, pursuant to Rule 230 of the Commission's Rules of Practice. (Prehearing Conf. Tr. 10-13.)

Respondent filed an Answer to the OIP on September 15, 2010. The Division filed its Motion for Summary Disposition against Respondent Eric S. Butler and Supporting Memorandum of Law, and a Declaration of Eric M. Schmidt with fourteen exhibits on September 24, 2010 (Motion). Butler filed his Memorandum of Law in Opposition to the Division's Motion for Summary Disposition, and a Declaration of Paul T. Weinstein with twelve exhibits on October 29, 2010 (Opp'n). The Division filed a Reply Memorandum of Law in Support of Motion on November 5, 2010 (Reply).[2] Official notice has been taken of the public official records concerning Butler's criminal proceeding. See 17 C.F.R. § 201.323.

The Standards for Summary Disposition

Rule 250(a) of the Commission's Rules of Practice provides that, after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. 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 noted pursuant to Rule 323 of the Commission's Rules of Practice.

Rule 250(b) of the Commission's Rules of Practice requires the hearing officer to promptly grant or deny the motion, or to defer decision on the motion. The 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.

In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party. See Felix v. N.Y. City Transit Auth., 324 F.3d 102, 104 (2d Cir. 2003); O'Shea v. Yellow Tech. Svcs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999); Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon the mere allegations or denials of its pleadings. At the summary disposition stage, the hearing officer's function is not to weigh the evidence and

[2] I will cite to the Division's Motion as "(Div. Mot. at __.)," to Butler's Opp'n as "(Opp'n at ___.)," and to the Division's Reply as "(Reply at ___.)"

determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. See Anderson, 477 U.S. at 249.

Butler argues that this proceeding is not ripe for Summary Disposition because the Division is not entitled to assert the collateral estoppel effect from his underlying criminal conviction. (Opp'n at 21-32.) However, "[i]t is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978) (citations omitted). Likewise, the Commission does not permit a respondent to relitigate issues that were addressed in a previous criminal proceeding against him. See Joseph P. Galluzzi, 55 S.E.C. 1110, 1115 (2002); Ted Harold Westerfield, 54 S.E.C. 25, 32 n.22 (1999). To the extent that Butler's Opposition raises such challenges, their collateral attacks provide no basis for denying the Division's Motion.

FINDINGS OF FACT

Butler, thirty-nine, is a resident of New York, New York. (Answer at 1.) Beginning in November 2003 to August 2007, and during the time of the misconduct underlying the civil and criminal cases against him, Butler was an employee of Credit Suisse Securities (USA) LLC (Credit Suisse). (Id.) In his Answer, Butler denies being a registered representative at Credit Suisse and denies that Credit Suisse was registered with the Commission as a broker-dealer and investment adviser during the time of his employment. (Id. at 1-2.) I take official notice of Credit Suisse's Form ADV on file with the Commission, which demonstrates that Credit Suisse was registered with the Commission as an investment adviser during Butler's time there. I also take official notice of Credit Suisse's Form BD, which demonstrates that Credit Suisse was registered with the Commission as a broker-dealer during Butler's time there. Finally, based on Butler's registration with the Financial Industry Regulatory Authority, I find that Butler was a registered representative at Credit Suisse during the time of his employment. (Div. Mot. Ex. A.)

Butler admits that he was convicted in the underlying criminal matter and sentenced as the OIP alleges. (Answer at 3.) He timely appealed, and his matter is pending before the United States Court of Appeals for the Second Circuit. (Id.) He vigorously denies any wrongdoing. (Opp'n at 34.)

Butler was indicted, along with a co-defendant, by a federal grand jury on April 14, 2009. (Div. Ex. B.) The indictment alleged that Butler was employed as a broker in Credit Suisse's Corporate Cash Management Group from November 2003 to September 2007. (Id. at 2.) Butler earned commission income by selling auction rate securities (ARSs)[3] to clients. (Id. at 2-3.) According to the indictment, in November 2004, Butler began marketing ARSs secured by federally guaranteed student loans to potential clients as a liquid, low-risk cash management instrument. (Id. at 1-3.) Butler described these ARSs as easily converted to cash at the ARSs

[3] ARSs are debt instruments with long maturities for which interest rates are set at auctions held at regular intervals via auction. A type of ARSs is asset-backed securities, secured by some underlying asset such as federally guaranteed student loan notes or collateralized debt obligations that contained mortgages, including subprime mortgages. (Div. Ex. B at 1-2.)

auction which occurred every twenty-eight days. (Id.) The indictment alleged that Butler immediately, without the knowledge or consent of the companies for which he was investing, began purchasing other types of ARSs, including ARSs that were secured by collateralized debt obligations (CDOs) invested in mortgages. (Id. at 3-4.) The indictment additionally alleged that Butler sent emails or directed others to send emails to his clients that hid the fact that he was investing their funds in different types of ARSs than he had originally marketed to them. (Id. at 4.) When the market for mortgage-backed CDOs collapsed in August 2007, the ARSs secured by those mortgage-backed CDOs became unsellable and Butler could not return the money he had invested to his clients. (Id.)

On August 17, 2009, a jury found Butler guilty of one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371, one count of securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, and one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. (Div. Mot. Ex. C.) On January 22, 2010, Butler was sentenced to five years imprisonment on each count to run concurrently, three years supervised release on each count to run concurrently, ordered to pay a $5 million fine and to forfeit $250,000. United States v. Butler, No. 1:08-cr-00370-JBW (E.D.N.Y.) The judgment and sentence were entered by the district court on February 9, 2010. (Div. Mot. Ex. E.)

CONCLUSIONS OF LAW

This proceeding was instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The Commission is authorized, in conjunction with Exchange Act Section 15(b)(4)(B)(ii) and Advisers Act Section 203(e)(2)(B), to sanction individuals, as here relevant, convicted within ten years of the commencement of this proceeding of a felony that "arises out of the conduct of the business of a broker, dealer, [or] investment adviser." See 15 U.S.C. §§ 78o(b)(4)(B)(ii), 80b-3(e)(2)(B). Specifically, the Commission may censure an associated person, place limitations on the activities or functions of that person, suspend that person for a period not exceeding twelve months, or bar that person from association with a broker or dealer or investment adviser. See 15 U.S.C. §§ 78o(b)(6)(A), 80b-3(f).

The Commission has held that a jury verdict constitutes a conviction for purposes of Exchange Act Section 15(b)(6). See Alexander Smith, 22 S.E.C. 13, 20-21 (1946) ("Section 15(b) was drafted to enable the Commission to consider whether a person whose honesty and integrity have been seriously impugned should be barred from the securities business. . . . In this context it is clear that when there has been a verdict . . . there is a 'conviction' contemplated by the statute as the starting point for an inquiry into the fitness of the person involved to engage in the securities business.") Smith additionally stated, "[t]he nature of the sentence imposed . . . [is] important only as indicating the court's view of the gravity of the offense and as bearing on whether the public interest requires exclusion from the securities business." Id. at 21. Thus, the August 17, 2009, jury verdict finding Butler guilty of conspiracy to commit securities fraud, securities fraud, and conspiracy to commit wire fraud provides grounds for the administrative law judge to sanction him if it is in the public interest. Because Butler meets the statutory predicates for imposing a remedial sanction, I dismiss his First, Second, Third, Fourth, and Fifth Affirmative Defenses accordingly. (Answer at 4.)

In his Sixth Affirmative Defense, Butler asserts that the instant proceeding is barred by double jeopardy. (Id.) Because this administrative proceeding is civil, not criminal, in nature, that affirmative defense is dismissed. See Kornman v. SEC, 592 F.3d 173, 188 (D.C. Cir. 2010)(citations omitted). In his Seventh Affirmative Defense, Butler asserts, "The Commission has not adequately made its investigative file available to Respondent for inspection and copying, pursuant to Rule 230 of the Commission's Rules of Practice." (Answer at 5.) At the August 30, 2010, prehearing conference counsel for Respondent admitted that he had received notice of his client's right to inspect and copy the Commission's investigative file. (Prehearing Conf. Tr. 10-11.) Moreover, counsel for Respondent agreed to the briefing schedule adhered to by the parties during the course of the prehearing conference. (Id. at 14-16.) During the prehearing conference, the undersigned invited counsel for Respondent to apprise him if difficulties arose during his attempts to inspect and copy the investigative file (id. at 13); and, since the filing of Respondent's Answer counsel for Respondent has not at any time advised the undersigned of any difficulty in exercising his client's right to inspect and copy the Commission's investigative file. Therefore, I find Butler has waived his Seventh Affirmative Defense.

The Public Interest

To determine whether sanctions under Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act are in the public interest, the Commission considers six factors: (1) the egregiousness of the respondent's actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). No one factor is controlling. See Conrad P. Seghers, 91 SEC Docket 2293, 2298 (Sept. 26, 2007). Remedial sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

Butler's conduct was egregious and recurrent as he was found guilty of three felonies, including conspiracy to commit securities fraud and securities fraud. He actively engineered a scheme to invest clients' funds in assets riskier than those which he told his clients he would invest in, and manipulated documents to cover it up. Consistent with a vigorous defense, Butler continues to deny the allegations ultimately resulting in his felony convictions. However, a jury found that Butler engaged in a criminal conspiracy over the course of several years, indicating recurrent conduct. Such conduct involved a high degree of scienter, as knowing participation in the scheme is a required showing for this conspiracy charge. Butler has provided some assurance against future violations by stating that he does not intend to work in the securities industry. However, absent a bar, the risk of Respondent's future violations is strong, as nothing would preclude him from reentering the industry.

An associational bar is consistent with Commission precedent in litigated administrative proceedings based on a respondent's conviction involving fraud. See Galluzzi, 55 S.E.C. at 1121. "Absent extraordinary mitigating circumstances, such an individual cannot be permitted to

remain in the securities industry." John S. Brownson, 55 S.E.C. 1023, 1027 (2002). There are no extraordinary mitigating circumstances in this case to warrant a lesser sanction.

ORDER

IT IS ORDERED that the Division of Enforcement's Motion for Summary Disposition is granted;

IT IS FURTHER ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Eric S. Butler is BARRED from association with a broker or dealer; and

IT IS FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Eric S. Butler is BARRED from association with an investment adviser.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Robert G. Mahony
Administrative Law Judge