

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

In the Matter of :
 :
DAVID A. ZWICK : INITIAL DECISION
 : October 25, 2007
 :
 :

APPEARANCES: Michael S. Sommer for Respondent David A. Zwick

Arthur S. Lowry and Matthew D. Strada for the Division of
Enforcement, Securities and Exchange Commission

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

The U.S. Securities and Exchange Commission (Commission) instituted this proceeding by an Order Instituting Proceedings (OIP) on May 22, 2007, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). David A. Zwick (Zwick) was served with the OIP on June 11, 2007. (June 14, 2007, prehearing conference Tr. at 4.) The OIP required an Answer within twenty days of service of the OIP. (OIP at 2.) Zwick represented he would file an answer at the telephonic prehearing conference held on June 14, 2007, and he submitted a one-page Answer dated June 28, 2007. (June 14, 2007, prehearing conference Tr. 11-12.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Motion for Summary Disposition

I allowed the Division of Enforcement (Division) to file a Motion for Summary Disposition (Motion), pursuant to Rule 250 of the Commission's Rules of Practice, which it did on July 20, 2007. (June 14, 2007, prehearing conference Tr. 12.) The Motion has three exhibits: Motion Exhibit A is the Complaint that the Division filed on April 21, 2003, in SEC v. Zwick, No. 03 Civ. 2742 (JGK), 2007 U.S. Dist. LEXIS 19045 (S.D.N.Y.) (the civil action); Motion Exhibit B is the Opinion and Order of the Court filed in the civil action on March 16, 2007; and

Motion Exhibit C is the Final Judgment in the civil action entered May 1, 2007.¹ Zwick filed a two-page response to the Motion on August 2, 2007, noting that his request for a postponement had been denied so that his opposition was on the grounds that the relief sought was not supported by the evidence and the judgment in the civil action was the result of erroneous rulings. The Division filed a Reply Brief on August 10, 2007, reiterating its position that Zwick does not, and cannot, dispute that he was permanently enjoined from violating the anti-fraud provisions of the Securities Act of 1933 (Securities Act) and the Exchange Act and that consideration of all the factors used to determine the public interest weighs in favor of imposition of an associational bar.

It is uncontested that in a Final Judgment entered on May 1, 2007, the United States Court for the Southern District of New York permanently enjoined Zwick from future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. Zwick does not deny the factual allegations in the OIP. (June 14, 2007, prehearing conference Tr. 11.)

Zwick's position that the Final Judgment entered against him in the underlying civil action was in error and the Commission should take no action in this proceeding until the Court of Appeals rules on his appeal is untenable. The Commission has held consistently that an appeal of an underlying permanent injunction is not grounds for delaying an administrative proceeding. Jose P. Zollino, 89 SEC Docket 2598, 2601 n.4, 2007 SEC Lexis 85, at *7 n.4 (Jan. 16, 2007) (quoting Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002)); Citadel Securities Corp., 82 SEC Docket 3249, 3253, 2004 SEC Lexis 949, at *8 (May 7, 2004) ("an injunction is the act of a court of competent jurisdiction, and the fact that an appeal is taken does not affect the injunction's status as a statutory disqualification."); Charles Phillip Elliott, 50 S.E.C. 1273, 1277 n.17 (1992) (citing C.R. Richmond & Co., 46 S.E.C. 412, 414 n.11 (1976) (upholding statutory disqualification based on injunction under appeal) (finding statutory disqualification based on conviction which had been appealed), aff'd 36 F.3d 86 (11th Cir. 1994) (per curiam). See also Robert J. Sayegh, 52 S.E.C. 1110, 1112 (1996) (upholding disqualification based on injunction during pendency of petition for rehearing stating that existence of petition "would not alter the 'factual' existence of the injunction 'and its public interest implication.'")

I make the following findings of fact based on the evidence of record. (Motion Exhibits A-C.) Zwick, age 41, resides in Fort Lauderdale, Florida. In 1998 and 1999, Zwick was a principal of Suncoast Capital Group, Ltd. (Suncoast), a firm he co-founded in 1993 and a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act. (Answer; Motion Exhibit B at 4, 6.) Zwick was also a senior official at the firm and Chief Compliance Officer. (Motion Exhibit B at 16.) Zwick held a one-third interest in a general partnership that owned 66.5 percent of Suncoast. (Answer; Motion Exhibit B at 4.)

The Commission's complaint in the civil action alleged that Zwick, while associated with Suncoast, participated in a scheme with a salesperson he supervised that provided kickbacks to a bond trader employed by New York Life Insurance Company (New York Life). (Motion

¹ I GRANT the Division's request and take official notice of Motion Exhibits A through C. 17 C.F.R. § 201.323

Exhibits A, B at 4.) In exchange for these kickbacks, Suncoast received a flow of securities transactions from New York Life, often at prices that favored Suncoast at the expense of New York Life. In many of these transactions, Suncoast charged New York Life “off-market” prices that were not reasonably related to prevailing market prices. Zwick received significant compensation from Suncoast as a result of the New York Life transactions. The complaint further alleged that Zwick failed to disclose that Suncoast paid these kickbacks to the trader at New York Life in exchange for the flow of business and favorable prices. (Motion Exhibit A at 7-8.)

Following a three-week trial, a jury found that Zwick violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by participating in a fraudulent scheme to provide bribes, kickbacks, and items of value to obtain trades, and, in addition, that he violated the same provisions by aiding and abetting the fraudulent scheme of others. (Motion Exhibit B at 4, 14-15.) On May 1, 2007, after the jury rendered its verdict, the District Court entered a Final Judgment by which it:

- (a) permanently enjoined Zwick from future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5²;
 - (b) found Zwick liable for disgorgement of \$161,539.58 representing profits gained as a result of his fraudulent conduct, together with prejudgment interest in the amount of \$138,609.64 for a total of \$300,149.22; and
 - (c) ordered Zwick to pay a civil money penalty in the amount of \$75,000.
- (Motion Exhibit C.)

Sanctions

Section 15(b)(6) of the Exchange Act provides that the Commission may assess a sanction where a person associated with a broker-dealer at the time of the misconduct has been found to have willfully violated provisions of the securities statutes or has been enjoined from violating provisions of the securities statutes, if it is in the public interest to do so. In making a public interest determination, the Commission considers:

[T]he egregiousness of the [respondent’s] actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the [respondent’s] assurances against future violations; the [respondent’s] recognition of the wrongful nature of his conduct; and the likelihood that the [respondent’s] occupation will present opportunities for future violations.

SEC v. Steadman, 603 F.2d 1126, 1140 (5th Cir. 1979); Orlando Joseph Jett, 82 SEC Docket 1211, 1260-61 (Mar. 5, 2004); KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1183-84 (2001), reh’g denied, 55 S.E.C. 1 (2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002).

² On April 13, 2007, Judge John G. Koeltl ordered the Final Judgment that was entered on May 1, 2007. (Motion Exhibit C.)

Zwick's conduct is especially reprehensible given his position as a Suncoast principal and its chief compliance officer. Zwick participated in both the bribery scheme and the excessive mark-up scheme conducted by others from January 1998 into 1999; he acted to hide his illegal activities and he instructed the salesperson he supervised to continue, but keep quiet about, her unlawful trades after a coworker complained about them. (Motion Exhibit B at 7, 16.) The District Court's conclusions following consideration of factors almost identical to those in Steadman are persuasive. (Motion Exhibit B at 15.) Among other things, the District Court found that (1) Zwick's conduct "was egregious" and "involved fraud, deceit, manipulation, and deliberate disregard of regulatory requirements," and "resulted in substantial losses to New York Life"; (2) that Zwick's conduct "was deliberate and occurred repeatedly over the course of more than a year;" and (3) that Zwick "acted with a high level of scienter." (Motion Exhibit B at 16, 21.) Zwick did not acknowledge his participation in the fraud either to the District Court or in this administrative proceeding, and he has made no representations regarding future violations of the securities laws. (Motion Exhibit B at 16.)

The Commission has stated that:

In considering the factors, we recognize that conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws.

The fact that a person has been "permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction" from violating the antifraud provisions has especially serious implications for the public interest. Based on our experience enforcing the federal securities laws, we believe that ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to revoke the registration of, or suspend or bar from participation in the securities industry, or prohibit from participation in an offering of penny stock, a respondent who is enjoined from violating the antifraud provisions.

Marshall E. Melton, 56 S.E.C. 695, 713 (July 25, 2003).

The evidence and the case law described above show that it is in the public interest to bar Zwick from association with a broker or dealer.

Order

Based on the findings and conclusions stated, I GRANT the Division's Motion for Summary Disposition because there are no issues of material fact and the Division is entitled to summary disposition as a matter of law. 17 C.F.R § 201.250.

I ORDER that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, David A. Zwick is barred from association with any broker or dealer.

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 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 motion to correct 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.

Brenda P. Murray
Chief Administrative Law Judge