

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
: INITIAL DECISION
SCOTT B. GANN : September 9, 2008
:
:

APPEARANCES: Toby M. Galloway, J. Kevin Edmundson, and Michael D. King for
the Division of Enforcement, Securities and Exchange
Commission.

Randall G. Walters of Walters, Balido & Crain, LLP, and Chris
Peirce of Tucker, Taunton, Snyder, & Slade, P.C., for Respondent.

BEFORE: Robert G. Mahony, Administrative Law Judge.

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on April 17, 2008, 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 OIP alleges that on April 4, 2008, the U. S. District Court for the Northern District of Texas entered a final judgment, permanently enjoining Scott B. Gann (Gann or Respondent) from violating Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. The Commission instituted this proceeding to determine whether these allegations are true and, if so, to decide whether remedial action is appropriate in the public interest. The Division of Enforcement (Division) seeks to bar Gann from association with any broker or dealer or investment adviser.

The Division has provided evidence that Gann was served with the OIP on April 23, 2008, and he filed an Answer on April 28, 2008. At a telephonic prehearing conference on May 8, 2008, I granted the Division's request for leave to file a motion for summary disposition (Prehearing Conference Transcript at 8; Order of May 9, 2008). The Division filed its Motion for Summary Disposition, a supporting Memorandum of Law, and accompanying exhibits on May 23, 2008 (Motion). Gann submitted his Response to Motion for Summary Disposition on June 5, 2008. The Division submitted a Reply Brief in Support of Motion for Summary Disposition on June 13, 2008. The parties presented oral arguments on their filing via telephone on June 25, 2008.

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 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.

Findings of fact and conclusions of law made in the underlying injunctive action are immune from attack in a follow-on administrative proceeding. See Ted Harold Westerfield, 54 S.E.C. 25, 32 n.22 (1999) (collecting cases). To the extent that Gann's Answer and Response raises such challenges, his collateral attack provides no basis for denying the Division's Motion.

FINDINGS OF FACT

Gann is forty-two years old. (Answer at 1). From December 2001 through April 2004, he was a Senior Vice President and registered representative in the Private Client Group of

Southwest Securities, Inc. (Southwest). (Answer at 1). He holds the Series 7, 63, and 65 licenses. (Answer at 1).

On January 10, 2005, the Commission filed a civil action against Gann and George B. Fasciano (Fasciano), another former Southwest broker, in the U.S. District Court for the Northern District of Texas. (Ex. A, Motion; SEC v. Gann, No. 05-CV-0063, 2008 WL 857633, at *1 (N.D. Tex. March 31, 2008)). The complaint alleged that from February 2003 to September 2003, Gann and Fasciano defrauded hundreds of mutual fund companies and the funds' shareholders by engaging in deceptive market timing practices. (Ex. A, Motion at 1). It alleged that, in furtherance of the market timing scheme, Gann disguised his identity by establishing numerous broker identification numbers, disguised the identity of his trading client by opening multiple accounts on the client's behalf, divided trades among trading accounts to avoid detection by the mutual funds, and made use of various branch identification numbers to mask trading activity. (Ex. A, Motion at 1). According to the complaint, the fraudulent scheme allowed Gann to place trades that otherwise would have been rejected. (Ex. A, Motion at 1-2). Gann continues to deny the allegations in the civil complaint. (Answer at 2). At present, Gann is employed by a brokerage firm in Dallas. He does not engage in mutual fund trading. (Aff. of Scott B. Gann, June 5, 2008).

The district court held hearings from January 9-11, 2008, and issued its Memorandum Opinion and Order on March 31, 2008. Gann, 2008 WL 857633, at *1. The district court determined that Gann violated Exchange Act Section 10(b) and Rule 10b-5 thereunder. Id. at *11. It enjoined Gann from committing future violations of the securities laws, ordered that he disgorge \$56,640 in ill-gotten gains plus prejudgment interest, and assessed a third-tier civil penalty in the amount of \$50,000 against him. Id. at *11-12. The district court entered a final judgment against Gann on April 4, 2008. (Ex. C, Motion).

In support of his ruling, the district court found that Gann structured trades in such a way as to circumvent mutual funds' safeguards against market timing. Gann and Fasciano received a block notice from a mutual fund ten days after they began placing market timing trades for their client. Gann, 2008 WL 857633, at *5. Despite receipt of several such notices, Gann and Fasciano continued to place trades for their market timing client. To effectuate the trades, they used multiple client account numbers and changed branch identification numbers for their client's trades though they remained at Southwest's downtown location. Id. at *6. One mutual fund, whose prospectus stated that it did not allow market timing, blocked trades from specific client account numbers. In response, Gann and Fasciano continued to place market timing trades with the fund, rotating registered representative numbers and account numbers to avoid the block. Id. at *7. The court found no evidence that any of the mutual funds gave Gann permission to place market timing trades after sending block notices. Id. In all, Gann and Fasciano executed approximately 2,500 trades for the market timing client, garnering sixty-nine block notices from thirty-four mutual fund families. Id. at *8.

The court concluded that Gann's trading practices with the mutual fund companies were material misrepresentations made in the course of purchasing securities. Though Gann insists he did not intend to deceive the mutual funds with which he traded, the court found Gann's assertion lacked credibility. The court points to Gann's willingness to trade around the block notices as evidence of his scienter. Id. at *10-11.

CONCLUSIONS OF LAW

Under Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) of the Exchange Act, the Commission may impose a remedial sanction on a person associated with a broker or dealer, consistent with the public interest, if the person has been permanently or temporarily enjoined from engaging in any conduct or practice in connection with the purchase or sale of securities. Under Sections 203(e)(4) and 203(f) of the Advisers Act, the Commission may impose a remedial sanction on a person associated with an investment adviser, consistent with the public interest, if the person has been permanently or temporarily enjoined from engaging in any conduct or practice in connection with the purchase or sale of securities.

Gann was associated with Southwest, which was registered as a broker-dealer and as an investment adviser at the time of Gann's underlying misconduct. The district court has entered a permanent injunction, pursuant to Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

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. No one factor is controlling. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). 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).

The Commission has held that "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest sanctions under the securities laws." Jose P. Zollino, 89 SEC Docket 2598, 2608 (Jan. 16, 2007). "[O]rdinarily, and in the absence of evidence to the contrary, it will be in the public interest to . . . bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions." Marshall E. Melton, 56 S.E.C. 695, 713 (2003). Gann has failed to present any "evidence to the contrary."

The district court found that Gann engaged in a market timing scheme from February until September of 2003. According to the court's findings, Gann employed multiple client account numbers, registered representative numbers, and a different branch identification number to circumvent mutual funds' blocks and obscure his client's market timing trades. He facilitated thousands of market timing trades. Gann's actions occurred over a seven month period. Thus, I find that his actions were egregious and recurrent.

The district court found Gann acted with a high degree of scienter. The court pointed to multiple block letters from mutual funds companies which Gann knew about, and his actions were taken to avoid further detection by the mutual fund companies. Thus, I find that Gann acted with a high degree of scienter.

Gann has not admitted the wrongful nature of his conduct, and maintains that he did not intend to deceive the mutual fund companies by his actions. He has made assurances against future violations. However, continued employment in the securities industry will present Gann additional opportunities to violate securities laws.

Viewing the Steadman factors in their entirety, I conclude that associational bars are necessary and appropriate to protect the public interest.

ORDER

Based on the Findings and Conclusions set forth above:

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, Scott B. Gann is barred from association with any broker or dealer; and

It Is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Scott B. Gann is barred from association with any 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. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the 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. 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 unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

Robert G. Mahony
Administrative Law Judge