

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
: INITIAL DECISION
PHILLIP J. MILLIGAN : August 24, 2009
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APPEARANCES: Jack Kaufman and Bohdan S. Ozaruk for the Division of Enforcement, Securities and Exchange Commission.

Phillip J. Milligan, pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on May 22, 2009, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that on April 29, 2009, the federal district court for the Eastern District of New York entered a final judgment, permanently enjoining Phillip J. Milligan (Milligan or Respondent) from violating Section 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. 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 Milligan from association with any broker or dealer.

The Division has provided evidence that Milligan was served with the OIP, and he filed an Answer on June 16, 2009. At a telephonic prehearing conference on June 18, 2009, I advised Milligan of his right to inspect and copy the Division's investigative file in this matter, which he advised he did not need to do, and granted the Division leave to file for summary disposition. (Prehearing Conference Transcript at 7-10; Order of June 19, 2009.) The Division filed its Motion for Summary Disposition (Motion) on July 10, 2009, and a Declaration of Bohdan S. Ozaruk with accompanying exhibits in support of its Motion (Decl.) on July 13, 2009. Milligan submitted an Opposition to the Motion (Opposition) on August 10, 2009. The Division submitted a Reply to Milligan's Opposition on August 13, 2009.

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.

The Commission has repeatedly upheld use of the summary disposition procedure in cases such as this one where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. See Jeffrey L. Gibson, 92 SEC Docket 2104, 2111-12 (Feb. 4, 2008) (collecting cases), aff'd, Gibson v. SEC, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare." See John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002), pet. denied, 66 Fed. Appx. 687 (9th Cir. 2003).

Milligan's Answer attacks the allegations contained in the OIP, and seeks to relitigate facts in the underlying civil proceeding. The basis of Milligan's contention is that the findings of fact in the civil injunction which serve as the basis for this administrative proceeding were, in

turn, based on facts admitted in his criminal plea to one count of wire fraud. He argues that the facts from his criminal guilty plea were never actually litigated. His argument fails because “a guilty plea is an admission of all the elements of a formal criminal charge” and a waiver of the right to litigate that charge. McCarthy v. United States, 394 U.S. 459, 466 (1969). Further, “[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 (2nd Cir. 1978) (citations omitted). Thus, even though the facts underlying Milligan’s civil injunction were derived from his plea allocution, he is still bound by those facts in later litigation. See SEC v. McCaskey, No. 1:98 CV-06153 (SWK), 2001 WL 1029053 at *3 (Sept. 6, 2001). Under Commission precedent, 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). The Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against him. See James E. Franklin, 91 SEC Docket 2708, 2713 (Oct. 12, 2007); John Francis D’Acquisto, 53 S.E.C. 440, 444 (1998); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn.6-7 (1997). To the extent that Milligan’s Answer and Opposition raise such challenges, his collateral attack provides no basis for denying the Division’s Motion.

Milligan also points to his pending appeal of the underlying injunction as reason to delay the Commission from bringing the instant action. However, the pendency of an appeal does not provide a basis to preclude the Commission from taking action based on an injunction. See Franklin, 91 SEC Docket at 2714 n.15; Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002); Jon Edelman, 52 S.E.C. 789, 790 (1996). Finally, Milligan’s assertion of a statute of limitations defense fails because the limitations period for the instant action did not begin to run until the district court entered its final judgment on April 29, 2009. See Michael J. Markowski, 74 SEC Docket 1537, 1539-40 (Mar. 20, 2001).

There is no genuine issue with regard to any fact that is material to this proceeding. The magistrate judge engaged in an extensive analysis of the facts admitted as part of Milligan’s guilty plea, and concluded that the facts supported summary judgment as to Milligan’s civil violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. (Decl. Exs. 2 at 4-8, 3.) The district court judge adopted the magistrate judge’s finding in total. (Decl. Ex. 3.) Milligan has been permanently enjoined from future violations of the federal securities laws in the civil case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

FINDINGS OF FACT

Milligan founded J.P. Milligan & Co. (J.P. Milligan), a broker-dealer registered with the Commission, in 1993. (Answer at 1.) He was the sole owner and president of the company. (Id.) In 1997, Milligan was indicted on multiple counts including securities fraud, conspiracy to commit securities fraud, and wire fraud. (Id. at 2.) In 1998, Milligan pleaded guilty to one count of wire fraud related to his involvement in the sale of stock of Pilot Transport, Inc. (Pilot). (Id.);

see United States v. Milligan, No. 1:97-cr-0663-RJD (E.D.N.Y. Dec. 15, 1998). As part of the plea process, Milligan admitted that from January 1993 to September 1996, he agreed with other to have J.P. Milligan recommend the sale of Pilot shares to the public. (Decl. Ex. 2 at 1.) During that period, J.P. Milligan made numerous sales of Pilot shares to thirteen customers. (Id. at 7, 10.) Milligan expected to be compensated for his part in the sale of Pilot shares, and his compensation agreement was not disclosed to the purchasers. (Id.) Milligan admitted he received compensation as a result of the Pilot scheme. (Id. at 7.) The district court found Milligan received \$93,600 in compensation for his sale of Pilot shares, and that he tried to mask his gains by transferring them to the account of another company. (Id. at 10.) All these actions prove that Milligan acted with a high degree of scienter, according to the district court. (Id.)

On the basis of the foregoing, the district court found that Milligan had committed securities fraud, violating Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. (Id. at 6-8.) The district court enjoined Milligan from future violations of those federal securities laws. (Decl. Ex. 6 at 1-2.) It also ordered Milligan to disgorge \$93,600 in ill-gotten gains and \$144,430.49 in prejudgment interest. (Id. at 2.) Finally, the district court assessed a civil penalty in the amount of \$100,000 against Milligan. (Id. at 4.)

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. At the time of the activity described above, Milligan was associated with J.P. Milligan, which was a broker-dealer registered with the Commission.

The Public Interest

To determine whether sanctions under Section 15(b) of the Exchange 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). Milligan has failed to present any "evidence to the contrary."

Milligan's actions were egregious and recurrent. He misled thirteen investors over a three-year period, receiving thousands of dollars from kickbacks by selling them bogus shares. He acted with scienter, contriving a scheme to disguise the kickbacks. Milligan's assurances against future violations consist of his assertion that he has abandoned the securities industry, but his current and future occupation is unclear. His knowledge of the securities industry does present opportunity for future re-entry to that arena. He does not recognize the wrongful nature of his conduct, as he still maintains his innocence and that his actions did not harm investors.

Viewing the Steadman factors in their entirety, I conclude that an associational bar is appropriate in the public interest.

ORDER

Based on the Findings of Fact and Conclusions of Law set forth above:

It is ORDERED that the Division of Enforcement's Motion for Summary Disposition is GRANTED; and,

It is FURTHER ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Phillip J. Milligan 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. 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