INITIAL DECISION RELEASE NO. 391
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13481

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
DAVID G. GHYSELS,	:	December 11, 2009
KENNETH E. MAHAFFY, JR., and	:	
LINUS N. NWAIGWE	:	
	:	

APPEARANCES: Jack Kaufman and William Finkel for the Division of Enforcement, Securities and Exchange Commission.

Susan C. Wolfe of Hoffman & Pollack LLP for David G. Ghysels.

Andrew J. Frisch for Kenneth E. Mahaffy, Jr.

Linus N. Nwaigwe, pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with its Corrected Order Instituting Administrative Proceedings (OIP) 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) on May 21, 2009. Service of the OIP was accomplished on David G. Ghysels (Ghysels), Kenneth E. Mahaffy, Jr. (Mahaffy), and Linus N. Nwaigwe (Nwaigwe) (collectively, Respondents) in a manner that complies with Commission Rule of Practice 141(a)(2)(i). All Respondents filed Answers. The Division of Enforcement (Division) has made its documents available for inspection and copying. See 17 C.F.R. § 201.230.

The OIP alleges that, on April 22, 2009, Respondents were found guilty on one count of conspiracy to commit securities fraud in the United States District Court in the Eastern District of New York (underlying criminal proceeding). United States v. Mahaffy, No. 05-CR-613 (JG). At a June 10, 2009, prehearing conference, I granted the Division leave to file a motion for

summary disposition. (Prehearing Conference Transcript at 5-6; Order of June 11, 2009.) On July 9, 2009, the Division filed its Motion for Summary Disposition and a Memorandum of Law in Support of Its Motion for Summary Disposition against Respondents (Motion) and Declaration in Support of Motion for Summary Disposition with the following five exhibits: (1) Fifth Superseding Indictment, dated October 16, 2008, in the underlying criminal proceeding; (2) Verdict Sheet, dated April 22, 2009, in the underlying criminal proceeding; (3) Answer of Respondent David G. Ghysels (Ghysels Answer), which includes a Memorandum of Law in Support of his Motion for Entry of a Judgment of Acquittal Under Rule 29 or for a New Trial Under Rule 33 of the Federal Rules of Criminal Procedure (Ghysels Motion); (4) Answer of Respondent Kenneth J. Mahaffy, Jr. (Mahaffy Answer); and (5) Answer of Respondent Linus N. Nwaigwe (Nwaigwe Answer) (Div. Decl.).

On August 17, 2009, Mahaffy filed a Response to Motion for Summary Disposition (Mahaffy Opposition) and Declaration with the following exhibit: April 20, 2009, transcript of jury instructions given in the underlying criminal proceeding retrial (Mahaffy Decl.). On August 18, 2009, Ghysels filed a Memorandum of Law in Opposition to the Division of Enforcement's Motion for Summary Disposition (Ghysels Opposition) and Declaration with the following exhibits: (A) Verdict Sheet, dated May 10, 2007, in the underlying criminal proceeding;[1] and (B) Excerpts from the Government's summation at the retrial of Count One in the underlying criminal case (Ghysels Decl.). To date, no opposition to the Division's Motion has been filed by Nwaigwe. The Division filed its Reply Brief in Support of its Motion on August 31, 2009.

B. 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.

[1] The criminal case against Respondents resulted in two trials. Initially, Respondents were tried on various counts of securities fraud, wherein all were found "not guilty," as reflected in the May 10, 2007, Verdict Sheet. (Ghysels Decl. Ex. A.) At that time, the jury was unable to reach a verdict on the count of conspiracy to commit securities fraud and thus, a retrial was ordered resulting in a guilty verdict, as reflected in the April 22, 2009, Verdict Sheet. (Div. Decl. Ex. 2.)

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 a 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).

Respondents' Answers attack the allegations contained in the OIP and seek to relitigate facts in the underlying criminal proceeding. Each Respondent denies he took part in the conduct underlying the one count of conspiracy. (Ghysels Answer at 1; Mahaffy Answer at 2; Nwaigwe Answer at 2.) "It 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). To the extent that Respondents' Answers and Ghysels and Mahaffy's Oppositions raise such challenges, their collateral attacks provide no basis for denying the Division's Motion.

This Initial Decision is based on the parties' filings of July 9, August 17 and 18, and August 28, 2009, and attachments thereto; Respondents' Answers to the OIP; and relevant public official records, of which official notice is taken pursuant to 17 C.F.R. § 201.323. Any facts in Respondents' pleadings have been taken as true, in light of the Division's burden of proof and 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.

II. FINDINGS OF FACT

Ghysels

Between March 2001 and March 2003, Ghysels was employed as a registered representative in the Palm Beach, Florida, office of Lehman Brothers, Inc. (Lehman). (Ghysels Answer at 1.) From approximately April 2003 to May 2005, Ghysels was employed as a

registered representative with Citigroup in its Boca Raton, Florida, office. (Id.) Ghysels was subsequently employed at Geoffrey Richards Securities Corp. in Delray Beach, Florida. (Id.) Therefore, from at least March 2001 through May 2005, Ghysels was associated with a registered broker-dealer and investment adviser. (Id.) He has held a Series 7 license since November 1983. (Id.)

Mahaffy

From at least 1997 through 2005, Mahaffy was associated with a registered broker-dealer and investment adviser. (Mahaffy Answer at 1-2.) Mahaffy was employed as a registered representative at the Garden City, New York, office of Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), from approximately December 8, 1997, through February 19, 2003, and at the Melville, New York, office of Smith Barney, a brokerage unit of Citigroup Global Markets, Inc. (Citigroup/Smith Barney), between February 19, 2003, through sometime in 2005. (Mahaffy Answer at 1.) Mahaffy has held a Series 7 license since March 1997. (Id.) Mahaffy was a foreign exchange trader between January 1981 and January 1997. (Mahaffy Answer at 2.)

Nwaigwe

Nwaigwe served as a compliance officer of A.B. Watley (Watley), a day trading firm registered with the Commission as a broker-dealer, from October 2001 through sometime in 2004. (Nwaigwe Answer at 1.) Nwaigwe has a Series 7 license. (Id.)

Underlying Conduct

Respondents knowingly or intentionally agreed to a plan to defraud Merrill Lynch, Citigroup/Smith Barney, or Lehman (together, brokerage houses) of the intangible right to honest services of their employees and of property in the form of confidential information, by means of materially false pretenses, in connection with the securities of an issuer whose securities are registered under the Exchange Act. (Mahaffy Decl. Ex. A at 2576-83 (jury instructions).) More specifically, Nwaigwe, as an employee of Watley, agreed with Ghysels and Mahaffy, employees of Merrill Lynch, Citigroup/Smith Barney, or Lehman, to have the brokerage houses' squawk box information transmitted into Watley's offices, thereby depriving the brokerage houses of the honest services of their employees and of confidential business information included within the transmissions over the squawk boxes. (Id.)

On April 22, 2009, after a trial that began on March 30, 2009, the jury found Respondents guilty of one count of conspiracy to commit securities fraud, a felony, in the United States District Court in the Eastern District of New York. (Div. Decl. Ex. 2; Press Release, The United States Attorney's Office, Eastern District of New York, Three Former Managers at A.B. Watley Group, Inc., Two Former Merrill Lynch Stockbrokers, and a Former Lehman Brothers Stockbroker Convicted in "Squawk Box" Securities Fraud Conspiracy Case (Apr. 22, 2009) available at http://www.justice.gov/usao/nye/pr/2009/2009apr22.html.) On December 3, 2009, Mahaffy was sentenced to two years in prison; Ghysels was sentenced to three years' probation; and Nwaigwe was sentenced to twelve months and a day in prison; each defendant was also

ordered to forfeit the gross proceeds of his crime.[2] Press Release, The United States Attorney's Office, Eastern District of New York, Three Former Managers at A.B. Watley Group, Inc., A Former Merrill Lynch Stockbroker, and a Former Lehman Brothers Stockbroker Sentenced in "Squawk Box" Securities Fraud Conspiracy Case (Dec. 4, 2009) available at http://www.justice.gov/usao/nye/pr/2009/2009dec04.html.

III. CONCLUSIONS OF LAW

This proceeding was instituted pursuant to Exchange Act Section 15(b) and Advisers Act Section 203(f). These Sections authorize the Commission, in conjunction with Exchange Act Section 15(b)(4)(B)(ii) and Advisers Act Section 203(e)(2)(B), to sanction associated 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 [or] dealer." 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 if it is in the public interest. 15 U.S.C. §§ 78o(b)(6)(A), 80b-3(f). The evidence shows that Ghysels, Mahaffy, and Nwaigwe were associated persons convicted, within ten years of the commencement of this proceeding, of conspiracy to commit securities fraud, a felony arising out of the conduct of the business of a broker or dealer. Such convictions provide grounds for the Administrative Law Judge to sanction Respondents if it is in the public interest.

To determine whether sanctions under Section 15(b) of the Exchange Act or 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).

Respondents' conduct was egregious and recurrent as they were found guilty of a felony, conspiracy to commit securities fraud, by participating in a criminal scheme, over an extended period of time, to defraud brokerage houses of property and honest services. Mahaffy and Ghysels wrongfully permitted Nwaigwe, and other day traders, to listen to transmissions made over squawk boxes, violating their duties to the brokerage houses and contrary to the interests of their employers and clients. (Div. Decl. Ex. 1 at 6-7.) Such transmissions contained references to orders to buy/sell quantities of stock large enough to affect the market price of the affected stock. (Id.) Each Respondent was ultimately sentenced to prison or probation and ordered to forfeit the gross proceeds of his crime. As stated previously, Respondents continue to deny the allegations ultimately resulting in their felony convictions. Ghysels further argues that the

[2] On December 3, 2009, the court additionally denied Respondents' motions for acquittal and for new trial and Mahaffy's motion to dismiss. Minute Entry, Mahaffy, No. 05-CR-613 (JG).

government provided evidence that his association with the Watley defendants lasted a total of forty days. (Ghysels Opposition at 3.) However, engagement in a criminal conspiracy over the course of forty days is more appropriately characterized as recurrent conduct rather than isolated. Such conduct involved a high degree of scienter, as knowing participation in the scheme is a required showing for this conspiracy charge. No Respondent has recognized the wrongfulness of his conduct and, thus, has not provided any assurances against future violations. It is unclear whether Respondents remain in the securities industry but, absent a bar, the risk of Respondents' future violations is strong, as nothing would preclude them from reentering the industry, if they are not already there.

An associational bar is consistent with Commission precedent in litigated administrative proceedings based on a respondent's conviction involving fraud. See, e.g., Joseph P. Galluzzi, 55 S.E.C. 1110 (2002); Brownson, 55 S.E.C. 1023; Ted Harold Westerfield, 54 S.E.C. 25 (1999); Ira William Scott, 53 S.E.C. 862 (1998); Victor Teicher, 53 S.E.C. 581 (1998), aff'd in part and rev'd in part, 177 F.3d 1016 (D.C. Cir. 1999), cert. denied, 529 U.S. 1003 (2000); William F. Lincoln, 53 S.E.C. 452 (1998); Meyer Blinder, 53 S.E.C. 250 (1997); Benjamin G. Sprecher, 52 S.E.C. 1296 (1997); Ahmed Mohamed Soliman, 52 S.E.C. 227 (1995). "Absent extraordinary mitigating circumstances, such an individual cannot be permitted to remain in the securities industry." Brownson, 55 S.E.C. at 1027. There are no extraordinary mitigating circumstances in this case to warrant a lesser sanction.

IV. 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, David G. Ghysels, Kenneth E. Mahaffy, Jr., and Linus N. Nwaigwe are 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, David G. Ghysels and Kenneth E. Mahaffy, Jr., are 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, 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