INITIAL DECISION RELEASE NO. 399
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13745

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
EDWARD J. DRIVING HAWK, SR.	:	July 7, 2010
	:	

APPEARANCES: Timothy S. McCole for the Division of Enforcement, Securities and Exchange Commission.

Edward J. Driving Hawk, Sr., pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

INTRODUCTION

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on January 14, 2010, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that a judgment was entered against Edward J. Driving Hawk, Sr. (Driving Hawk or Respondent), on September 25, 2006, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 (Securities Act) and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder in SEC v. U.S. Reservation Bank & Trust, No. 2:02-cv-00581-EHC in the District of Arizona. Driving Hawk filed his Answer to the OIP on February 18, 2010.

On April 21, 2010, the Division of Enforcement (Division) filed a Motion for Summary Disposition (Motion), pursuant to Rule 250 of the Commission's Rules of Practice, seeking an order to permanently bar Respondent from association with any broker or dealer. Respondent filed an opposition to the Motion (Opposition) on May 11, 2010.[1]

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

[1] The Division's Appendix to its Motion will be cited as "(App. at ___.)," Driving Hawk's Opposition as "(Opp'n at ___.)," and the Prehearing Transcript from March 18, 2010, as "(Preh'g Tr. at ___.)."

OIP with respect to that respondent.[2] 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.

This Initial Decision is based on the Respondent's Answer to the OIP; the Division's Motion and accompanying Appendix; the Respondent's Opposition, and the Commission's public official records concerning Respondent, of which official notice is taken pursuant to Rule 323 of the Commission's Rules of Practice. There is no genuine issue with regard to any material fact, and this proceeding may be resolved by summary disposition, pursuant to Rule 250 of the Commission's Rules of Practice. Any other facts in Respondent's pleadings have been taken as true, in light of the Division's burden of proof and pursuant to Rule 250(a) of the Commission's Rules of Practice. All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

FINDINGS OF FACT

Driving Hawk has been permanently enjoined from violating the antifraud provisions of the federal securities laws—Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. (App. at 54-58.) The injunction was entered with the consent of Driving Hawk. (Id.) Based on the same facts that were included in the civil proceeding, Driving

[2] The Division was granted leave to file for summary disposition at a telephonic prehearing conference attended by the parties on March 18, 2010. (Preh'g Tr. at 6.)

Hawk also entered into a Plea Agreement in which he pled guilty to one count of conspiracy to commit mail and wire fraud in United States v. Driving Hawk, No. 2:06-cr-00181-ROS in the District of Arizona. (App. at 40-53.) On April 13, 2009, Driving Hawk was sentenced to a term of imprisonment of twelve months and one day and ordered to pay criminal monetary penalties of over $3.2 million. (App. at 31.) Driving Hawk has served the prison sentence and is required to pay monetary penalties in equal monthly installments of $500 for a period of thirty-four months, with the balance to be paid within 90 days prior to the expiration of supervision. (Id.) He has had no disciplinary history with the Commission prior to the injunctive action.

U.S. Reservation Bank & Trust (USRBT) was initially established as a Native-American financial institution to offer traditional banking services to Native Americans located on tribal reservations.[3] (App. at 10-11.) However, USRBT operated as an unauthorized bank. (App. at 9, 50.) After USRBT was unsuccessful in its original business enterprise, it turned to a strategy of accepting deposits from Native American tribal trust funds, which it could invest in order to obtain higher returns for the tribes, but USRBT never received any tribal funds. (App. at 11, 50.) Although Driving Hawk was a member of the Rosebud Sioux Tribe, he did not live or work on the Rosebud Sioux Reservation (Reservation) at any time during the period USRBT offered investments. (App. at 51.) Additionally, USRBT did not have any connection with South Dakota or the Reservation, except for a post office box maintained by Driving Hawk's relative. (Id.) USRBT also had an office located at the Salt River Pima-Maricopa Indian Community in Arizona (Salt River Community). (App. at 6.)

Driving Hawk was president of and controlled USRBT from at least May 1992 until February 2002. (App. at 6, 50.) Starting in March 2000, Driving Hawk devised an investment scheme using the issuance of securities by USRBT. (App. at 2, 10, 50.) The scheme combined the sale of a leveraged profit sharing agreement (LPSA) with a certificate of deposit (CD). (App. at 2-3, 13.) Investors were promised the greater of 20% of the profit from investments made under the LPSA or the interest from the CD. (App. at 3, 13.) According to USRBT's records, no profits or returns were made. (App. at 3.) In furtherance of the scheme, USRBT retained Global-Link Capital Markets, Ltd. (Global-Link), an unregistered broker, to solicit sales from private investors. (App. at 6, 11-12, 51.) Once Global-Link qualified the prospective investors, it introduced them to USRBT principals, including Driving Hawk, who provided additional written and oral information about the investment. (App. at 11-12.) Driving Hawk received $35,000 per month from investor deposits and used investors' funds for personal use. (App. at 51.) Driving Hawk raised approximately $78 million from at least 20 individual investors and investor groups. (App. at 2, 10.)

CONCLUSIONS OF LAW

Respondent has been permanently enjoined "from engaging in or continuing any conduct

[3] USRBT was a non-incorporated entity with its principal offices in Scottsdale, Arizona. (App. at 6.) USRBT was issued two business licenses, the first by the Rosebud Sioux Tribe in South Dakota on May 12, 1992, and the other by the Salt River Pima-Maricopa Indian Community in Arizona on November 9, 2001. (Id.) USRBT claimed in correspondence that its official place of business was the Rosebud Sioux Reservation in South Dakota. (App. at 51.)

or practice in connection . . . with the purchase or sale of any security" and convicted of a felony arising out of the conduct of the business of a broker within the meaning of Sections 15(b)(4)(B)(ii), 15(b)(4)(C), 15(b)(6)(A)(ii) and 15(b)(6)(A)(iii) of the Exchange Act. Further, Respondent's Plea Agreement admits his misconduct, which includes acting as an unregistered broker, within the meaning of Section 15(a) of the Exchange Act.

Section 3(a)(4) of the Exchange Act provides that the term "broker" means any person "engaged in the business of effecting transactions in securities for the account of others." A person may be found to be acting as a broker if he participates in securities transactions "at key points in the chain of distribution." Mass. Fin. Serv., Inc. v. Sec. Investor Prot. Corp., 411 F. Supp. 411, 415 (D. Mass. 1976), aff'd, 545 F.2d 754 (1st Cir. 1976), cert. denied, 431 U.S. 904 (1977). Driving Hawk participated in the sales process by engaging Global-Link, an unregistered securities broker, to sell or offer to sell USRBT securities. He further participated by providing written and oral information on USRBT's investment scheme directly to prospective investors as part of the solicitation process. Accordingly, as a result of the conduct underlying his injunction and felony conviction, I conclude that Driving Hawk was associated with a broker-dealer and participated in the fraudulent sale of securities.

The Commission determines sanctions pursuant to a public interest standard. See Section 15(b)(6) of the Exchange Act. The Commission considers factors including:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 80 SEC Docket 2812, 2814 (July 25, 2003). Finally, the Commission considers the extent to which the sanction will have a deterrent effect. Schield Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006).

In proceedings based on an injunction, the Commission examines the facts and circumstances underlying the injunction in determining the public interest. Melton, 80 SEC Docket at 2814. "An injunction, by its very nature, is predicated on conduct that . . . violate[s] laws, rules or regulations." Id. at 2822. The Commission considers an antifraud injunction to be particularly serious. Id. at 2823. The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. See Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

Respondent argues that the SEC lacks jurisdiction to bring an action against him, since USRBT was operating a financial institution licensed by the Salt River Community. (Opp'n at 1.) Respondent states that USRBT's office was located in the Salt River Community, subjecting it to the exclusive jurisdiction of the Salt River Community. (Id.) Respondent further argues that the Salt River Community found no laws were broken by him or USRBT. (Id.)

Section 27 of the Exchange Act gives federal courts exclusive jurisdiction over actions arising under the statute. The Salt River Pima-Maricopa Indian Community's Constitution subjects the Council of the Salt River Community's exercise of power to any limitations imposed by the statutes or Constitution of the United States. See CONST. art. V § 1 [Salt River Pima-Maricopa Indian Cmty.](1940). Respondent subjected himself to the jurisdiction of the federal courts through his appearance in the criminal and civil proceedings. Furthermore, Respondent consented to the jurisdiction of the federal court, as well as the SEC, in his Agreed Judgment. (App. at 54.) 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, such as this one. See Ted Harold Westerfield, 54 S.E.C. 25, 32 n.22 (1999).

Respondent's age or lack of disciplinary history does not mitigate the importance of sanctions. It is more important for public interest purposes to consider whether Respondent's occupation will present opportunities for future violations. Driving Hawk has shown no remorse or acknowledgement of his wrongdoing. He insisted that he has not violated the securities laws, despite his admission under the Plea Agreement. Furthermore, he instituted a scheme to intentionally defraud investors of over $78 million dollars for more than two years, until he was caught. It is clear that, if permitted, Driving Hawk intends to remain in the securities and financial industry, further supporting the decision to bar him.

IV. SANCTION

Driving Hawk will be barred from association with any broker or dealer.[4] This sanction will serve the public interest and the protection of investors, pursuant to Section 15(b) of the Exchange Act. It accords with Commission precedent and the sanction considerations set forth in Steadman. Driving Hawk's unlawful conduct of defrauding investors from millions of dollars was recurrent and egregious, extending over a period of more than two years. There are no mitigating circumstances.

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, Edward J. Driving Hawk, Sr., is BARRED from association with any broker or dealer.

This Initial Decision shall become effective in accordance with and subject to the

[4] The Commission has authority under Exchange Act Section 15(b) to sanction persons, such as Driving Hawk, who act as unregistered brokers. See Vladislav Steven Zubkis, 86 SEC Docket 2618 (Dec. 2, 2005) (unregistered associated person of an unregistered broker-dealer barred from association with a broker or dealer), recon. denied, 87 SEC Docket 2584 (Apr. 13, 2006).

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.

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Robert G. Mahony
Administrative Law Judge