

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No.8498/September 30, 2004

SECURITIES EXCHANGE ACT OF 1934
Rel. No.50474/September 30, 2004

Admin. Proc. File No. 3-11012

<p>In the Matter of JAMES F. GLAZA, D/B/A FALCON FINANCIAL SERVICES, INC. c/o Pickard and Djinis LLP 1990 M Street, NW, Suite 660 Washington, D.C. 20036</p>
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OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Alleged Participation in Sale of Unregistered Securities without Availability of an Exemption from Registration

Alleged Material Misstatements and Omissions in Connection with the Sale of Securities

Registered representative of registered broker-dealer is alleged to have sold unregistered securities when no exemption from registration was available and to have made material misstatements or omissions in connection with the sale of securities. On appeal, registered representative asserts that law judge's findings were based on stipulations that his hearing attorney fraudulently induced him to sign after the attorney had earlier fraudulently stated to the law judge the extent of attorney's authority to settle the matter. Held, proceeding remanded so that law judge may evaluate the merits of registered representative's arguments.

APPEARANCES:

Anthony W. Djinis, Paul J. Bazil, and Peter E. McLeod, of Pickard & Djinis LLP, for James F. Glaza, d/b/a Falcon Financial Services, Inc.

Polly A. Atkinson and Thomas D. Carter, for the Division of Enforcement.

Appeal filed: October 3, 2003

Last brief received: January 8, 2004

I.

James F. Glaza appeals from the initial decision of an administrative law judge. 1/ The law judge found that Glaza, while he was a registered representative of Northstar Securities, Inc., a registered broker-dealer, during 1999 and 2000 sold unregistered securities when no exemption from registration was available, in violation of Sections 5(a) and 5(c) of the Securities Act of 1933, 2/ and made material misstatements or omissions in connection with the sale of securities, in violation of Section 17(a) of the Securities Act 3/ and Section 10(b) of the Securities Exchange Act of 1934 4/ and Exchange Act Rule 10b-5. 5/ The law judge found that these violations occurred in connection with Glaza's participation in an offering of securities of a Nevada corporation called OnLine Power Supply, Inc. ("OnLine"). The law judge ordered that Glaza cease and desist from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5. The law judge also barred Glaza from association with any broker or dealer and from participating in any offering of a penny stock. In addition, the law judge ordered Glaza to pay disgorgement in the amount of \$780,131, plus prejudgment interest, and assessed a maximum third tier civil money penalty of \$110,000. This appeal followed. To the extent we make findings, we base our findings on an independent review of the record.

II.

The Commission issued an Order Instituting Proceedings ("OIP") on January 21, 2003, against James F. Glaza, d/b/a Falcon Financial Services, Inc. The OIP alleged that Glaza willfully violated Sections 5(a), 5(c), and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in

1/ James F. Glaza, d/b/a Falcon Financial Services, Inc.,
Initial Decision Rel. No. 235 (Sept. 8, 2003), 81 SEC Docket 245.

2/ 15 U.S.C. §§ 77e(a) and 77e(c).

3/ 15 U.S.C. § 77q(a).

4/ 15 U.S.C. § 78j(b).

5/ 17 C.F.R. § 240.10b-5.

connection with the offer, purchase, and sale of shares of OnLine. Glaza filed his Answer to the OIP in April 2003, in which Glaza denied in their entirety the allegations set forth in the OIP. A hearing before an administrative law judge was scheduled for July 7, 2003.

During a pre-hearing telephone conference on June 30, 2003, Glaza's then-attorney and counsel for the Division of Enforcement (the "Division") proposed that they submit to the law judge a document entitled "Stipulations of Fact and Conclusions of Law" ("Stipulations"), instead of holding a formal hearing. The parties would then submit written briefs on the amount of disgorgement and the civil money penalty to be paid by Glaza. The law judge agreed to this proposal, on the condition that counsel inform the law judge by noon on July 2, 2003, whether they had reached agreement on the Stipulations. If counsel did not meet this deadline, the hearing would proceed as planned.

During the pre-hearing telephone conference, Glaza's hearing attorney told the law judge, "I have conferred with my client this morning just to make sure that I was not overstepping my bounds. And he is certain, he said, I would be amenable to [submitting a written stipulation of facts and written briefs.]" The hearing attorney also said of Glaza during the telephone conference, ". . . he'll take the cease and desist and the bar from the industry, that's not the problem."

The Division and Glaza submitted the Stipulations to the law judge on July 3, 2003, together with five Division exhibits that the parties agreed to admit into evidence in the Stipulations. The Stipulations include nearly 100 factual stipulations on matters relating to Glaza's participation in the OnLine securities offering. Further, the Stipulations state that Glaza consented to: (i) orders that he cease and desist from any future violations of Sections 5 and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5; (ii) a bar from association with any broker or dealer; and (iii) a bar from participating in any offering of a penny stock. The Stipulations also provide that disgorgement and a third tier penalty were appropriate, with the amounts of such sanctions to be determined by the law judge.

Glaza and the Division subsequently submitted their briefs to the law judge. Glaza's brief, prepared and submitted by his hearing attorney, challenged the allegations set forth in the OIP. He also sought to introduce a number of exhibits with his brief. In his September 8, 2003, initial decision, the law judge refused to admit the exhibits that Glaza sought to introduce with his brief and noted specifically that Glaza could not depart from the Stipulations once he had agreed to them. The law judge found, based entirely on the Stipulations and exhibits filed and admitted with the Stipulations, that Glaza had committed the

violations alleged in the OIP. The law judge imposed the cease-and-desist order and the bar against Glaza set forth in the Stipulations. He also ordered Glaza to pay disgorgement in the amount of \$780,131, plus prejudgment interest, and a civil money penalty of \$110,000. The law judge based his determination of these amounts entirely on his analysis of the Stipulations and attached exhibits submitted by Glaza and the Division.

III.

On appeal, represented by new counsel, Glaza raises for the first time allegations that actions of his hearing attorney unfairly prejudiced him. Glaza claims that he never intended to stipulate to the facts or the relief set forth in the Stipulations and that he at all times intended to defend himself vigorously against the charges in the OIP. According to Glaza, his hearing attorney's statements to the law judge during the pre-hearing telephone conference that Glaza had authorized him to negotiate the Stipulations were entirely false. Because these allegations are raised for the first time here, they have not been subject to the evidentiary hearing and fact-finding process usually accorded allegations in a litigated matter. Our discussion below therefore does not reflect findings of fact, but merely sets forth the facts as claimed by Glaza.

In support of his claims, Glaza asserts, in an affidavit that is signed and sworn under penalty of perjury but is not notarized, that he first saw the Stipulations on the afternoon of July 1, 2003, and that he had never discussed the idea of entering into Stipulations with his hearing attorney before then. He claims that, on receiving the Stipulations, he told his hearing attorney that he was concerned that the Stipulations seemed to prevent him from making arguments in the future that would dispute the charges against him. Glaza claims that his hearing attorney told him that the Stipulations merely set forth the Division's case-in-chief against Glaza and that Glaza would have the opportunity to defend himself fully by means of written briefs to be submitted to the law judge.

Glaza claims that, when he expressed hesitation about signing the Stipulations, the hearing attorney yelled at Glaza for delaying the filing of the Stipulations and warned him that, if he did not sign the Stipulations and return them to the hearing attorney's office on the morning of July 2, 2003, the hearing would take place as planned, on July 7, 2003. Glaza further states that the hearing attorney told him during this conversation that ". . . he would only go . . . to the hearing if he absolutely had to, but was completely unprepared for trial and we'd get killed if he went."

In his affidavit, Glaza states that, before signing the Stipulations, he attempted to contact two attorneys, unaffiliated

with his hearing attorney, who specialize in securities law, in an effort to obtain their advice about the impact of the Stipulations. Glaza asserts that neither attorney was available when Glaza called and that he felt "browbeaten into signing the document immediately" by his hearing attorney. Therefore, according to Glaza, he proceeded to fax his signed copy of the Stipulations to the hearing attorney's office on the morning of July 2, 2003, before he succeeded in speaking to the two additional attorneys he contacted.

Glaza further maintains that these attorneys eventually did return his calls on July 2 and told Glaza that the Stipulations appeared to foreclose the possibility of Glaza presenting a defense in the future, as his hearing attorney allegedly told him he would be able to do. Signed and sworn affidavits from the attorneys, one of which is notarized, generally support Glaza's description of the chronology of these telephone calls and the nature of the advice rendered by the attorneys. Glaza states that, after he spoke to the other attorneys, he immediately contacted his hearing attorney to ask him not to submit the signed Stipulations to the law judge or, if they had already been submitted, to withdraw the submission. Glaza asserts that the hearing attorney then told Glaza that the Stipulations had already been sent to the law judge and could not be withdrawn and, further, that "signing the document was the correct thing to do in vigorously defending the case." 6/

Glaza contends that the actual reason his hearing attorney suggested that Glaza enter into the Stipulations was because the attorney was not prepared for the hearing and, as a result, sought to avoid it by telling the law judge that Glaza would stipulate to all relevant facts, as well as most of the relief and sanctions to be imposed on him. The hearing attorney had requested a delay of the hearing date from the law judge just weeks before the scheduled hearing date. This request was denied by the law judge.

Glaza argues that his hearing attorney was guilty of fraud on the tribunal by misrepresenting to the law judge the extent of the authority he claimed that Glaza had given him to enter into and negotiate the Stipulations. Glaza also claims that the hearing attorney was guilty of fraud on Glaza personally, by misrepresenting to him the nature and legal effect of the Stipulations at the time that he allegedly induced Glaza to sign them. Glaza argues that his hearing attorney's alleged lies to

6/ Although Glaza's affidavit suggests that this conversation took place on the afternoon of July 2, both the initial decision and the record indicate that the Stipulations were submitted on July 3. Glaza does not specifically identify this discrepancy as an issue.

him about the nature of the document amounted to both fraud in the execution and fraud in the inducement and, as a result, that the Stipulations are an unenforceable contract. Glaza further argues that the negotiation and execution of the Stipulations did not follow the procedure prescribed for settlement of administrative proceedings under the Commission's Rules of Practice and that this, along with the alleged one-sided nature of the Stipulations in favor of the Division, should have alerted the law judge that Glaza did not enter the Stipulations knowingly or voluntarily. Because the law judge's initial decision is based entirely on the Stipulations and exhibits filed and admitted with the Stipulations, Glaza contends that the decision is unsupportable and must be vacated. Glaza requests that an evidentiary hearing be scheduled to determine whether the charges in the OIP are true.

The Division opposes Glaza's request that the initial decision be vacated. The Division contends that no fraud existed, even if Glaza's statements about his hearing attorney's alleged misrepresentations are true, because Glaza could not have reasonably relied on those misrepresentations, a required element of a fraud claim. The Division also contends that the Commission and the Division would be harmed if Glaza were permitted to withdraw the Stipulations because the Division had been prepared to go to a hearing in July 2003, but told witnesses that the matter was resolved after submission of the Stipulations. Finally, the Division argues that the process of entering into and negotiating the Stipulations complied with the Commission's Rules, that the law judge has no obligation to second-guess the decisions of counsel, and that, in any event, the decision and sanctions were appropriate.

IV.

At the outset, we point out that stipulated facts serve important policy interests in the adjudicative process, including playing a key role in promoting timely and efficient litigation; such agreements should not be set aside without a showing of compelling circumstances. 7/ Our proceedings should provide a dependable process on which parties can base their expectations in performing their roles in the litigation. 8/ Nonetheless, we

7/ See, e.g. Waldorf v. Shuta, 142 F.3d 601, 615-16 (3d Cir. 1998) (noting the value that stipulated facts add to proceedings by promoting judicial efficiency and pointing out the importance of honoring stipulations in the absence of exceptional circumstances).

8/ We note that, with the Commission's adoption of amendments to its Rules of Practice, published in the Federal Register, (continued...)

have repeatedly emphasized our "obligation to ensure that our administrative proceedings are conducted fairly in furtherance of the search for the truth and a just determination of the outcome" 9/ and the importance of the "fairness and impartiality of the course of the proceeding." 10/ Our evaluation of the fairness and integrity of our proceedings is centered around "the unshakable foundation" that the search for truth is at the heart of the system's process. 11/ The sanctions that we impose on a respondent rest on the integrity of the fact-finding process. To the extent the Stipulations in this case were adduced into the record as evidence based on fraudulent or improperly coercive

8/ (...continued)
69 Fed. Reg. 13176 (2004), Rule 111, 17 C.F.R. 201.111, has been revised to require that motions of this kind, which claim a manifest error of fact in the initial decision, be directed to the law judge, rather than the Commission, within ten days of the initial decision.

9/ Clarke T. Blizzard and Rudolph Abel, Investment Advisers Act Rel. No. IA-2032 (Apr. 24, 2002), 77 SEC Docket 1515, 1517-18.

10/ Scattered Corp., 53 S.E.C. 948, 958 (1998).

11/ Blizzard, 77 SEC Docket at 1519, n.14 (citing United States v. Shaffer Equipment Co., 11 F.3d 450, 457 (4th Cir. 1993)).

conduct, the integrity of the Commission's processes and the legal conclusions based on them may have been undermined. 12/

On the record before us, Glaza's arguments that his hearing attorney committed fraud with respect to the Stipulations raise an issue that warrants further inquiry. Neither party has had an adequate opportunity to brief the issue fully, or to apply any legal standard to a fully litigated set of facts. A more well-developed record and a more thorough briefing of the issue by both Glaza and the Division is necessary in order to determine the merits of Glaza's allegations, and we accordingly have determined to remand this matter to the law judge. The law judge should have the opportunity in the first instance to review Glaza's allegations, to make credibility determinations, and to determine the impact of the allegations, insofar as they have a basis in fact, on the overall fairness and integrity of the proceeding. 13/

Accordingly, we remand this matter. 14/ We expect the law

12/ This is not a situation where the facts attacked are immaterial or relate to collateral matters.

13/ In addition to his fraud arguments, Glaza also argues that, because the Stipulations essentially constituted an offer of settlement that should have been submitted to the Commission pursuant to Commission Rule of Practice 240 and because the law judge knew that his hearing attorney had made an urgent request for a delay of the start date for the hearing, the law judge should have been alerted that Glaza did not knowingly or voluntarily enter into the Stipulations. Glaza contends that his continued efforts to defend himself against the charges set forth in the OIP, even after the submission of the Stipulations to the law judge, should have been an additional signal to the law judge that Glaza did not intend for the Stipulations to have the effect that the law judge gave them. Glaza contends that the law judge knew of, or was in reckless disregard of, Glaza's alleged unwillingness to enter into the Stipulations.

We are unpersuaded by Glaza's arguments. The law judge is under no obligation to second-guess tactical decisions made by counsel. While the Stipulations were unusual in their scope, there was nothing inherently improper in them. We also reject Glaza's suggestion that the law judge should have attempted to verify that Glaza understood the consequences of the Stipulations; in light of the fact that the issue was not raised, the law judge was reasonable in relying on the fact that Glaza signed the Stipulations to establish that he understood their impact on his case.

judge to determine whether there is a basis for Glaza's allegations concerning his hearing attorney's misconduct and to take whatever steps are appropriate based on that determination. We do not suggest any view as to the outcome.

An appropriate order will issue. 15/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID and ATKINS); Commissioner CAMPOS not participating.

Jonathan G. Katz
Secretary

14/ Glaza requested oral argument in this matter. Based upon our disposition of the case, we have determined that Glaza's request for oral argument should be, and it hereby is, denied.

15/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

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In the Matter of

JAMES F. GLAZA, D/B/A FALCON FINANCIAL SERVICES,
INC.

c/o Pickard and Djinis LLP
1990 M Street, NW, Suite 660
Washington, DC 20036

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

On the basis of the Commission's opinion issued this day, it
is

ORDERED that this proceeding be, and it hereby is, remanded
to the administrative law judge for action consistent with the
Commission's opinion.

IT IS FURTHER ORDERED that the Administrative Law Judge
shall make a determination on the validity of the Stipulations no
later than 120 days from the date of service of this Order. If
the Administrative Law Judge determines that the Stipulations are
invalid, then IT IS FURTHER ORDERED that the Administrative Law
Judge shall issue an initial decision no later than 300 days from
the date of service of this Order.

By the Commission.

Jonathan G. Katz
Secretary