

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58802 / October 17, 2008

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2803 / October 17, 2008

Admin. Proc. File No. 3-12832

In the Matter of

JUSTIN F. FICKEN
c/o Gary G. Pelletier
Denner Pellegrino, LLP
Four Longfellow Place, 35th Floor
Boston, Massachusetts 02114

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Injunction

Former associated person of registered broker-dealer and investment adviser was permanently enjoined from violating antifraud provisions of the federal securities laws. Held, it is in the public interest to bar Respondent from association with any broker, dealer, or investment adviser.

APPEARANCES:

Gary G. Pelletier and Brad Bailey, of Denner Pellegrino, LLP, for Justin F. Ficken.

Frank C. Huntington, for the Division of Enforcement.

Appeal filed: March 13, 2008
Last brief received: September 23, 2008

I.

Justin F. Ficken, an associated person of Prudential Securities, Inc. (PSI), formerly a broker-dealer and investment adviser registered with the Commission, appeals from a decision of an administrative law judge. The law judge barred Ficken from association with any broker, dealer, or investment adviser based on Ficken's injunction from violations of the antifraud provisions of the federal securities laws. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

This administrative proceeding is based on an injunctive proceeding brought by the Commission against Ficken and others in the United States District Court for the District of Massachusetts in November 2003, alleging that they had used fraudulent and deceptive practices to help their customers engage in "market timing" of mutual fund shares. 1/ On August 14, 2007, the district court granted the Commission's motion for summary judgment against Ficken. 2/ On September 13, 2007, the court entered a final judgment against Ficken, permanently enjoining him from violations of Section 17(a) of the Securities Act of 1933, 3/ Section 10(b) of the Securities Exchange Act of 1934, 4/ and Exchange Act Rule 10b-5. 5/ The district court also ordered Ficken to disgorge \$589,854, including prejudgment interest. Ficken has appealed the district court's final judgment to the United States Court of Appeals for the First Circuit. 6/

The district court found that, sometime between 2000 and 2001, Ficken became affiliated with a brokerage team at PSI led by Martin Druffner (the "Druffner Group"). The court determined that, from January 2001 to September 2003, the Druffner Group, including Ficken,

1/ Market timing is a "trading strategy in which traders rapidly buy and sell mutual fund shares to exploit brief discrepancies between the official stock prices used to determine[] the value of the mutual fund shares, and the prices at which those stocks are actually trading." SEC v. Druffner, 517 F. Supp. 2d 502, 506 (D. Mass. 2007).

2/ Druffner, 517 F. Supp. 2d at 502.

3/ 15 U.S.C. § 77q(a).

4/ 15 U.S.C. § 78j(b).

5/ 17 C.F.R. § 240.10b-5.

6/ SEC v. Ficken, No. 07-2532 (1st Cir. Oct. 24, 2007). In addition, on September 15, 2008, Ficken pled guilty to criminal charges, including two counts of securities fraud, arising from the same conduct at issue in the Commission's underlying civil injunctive action. United States v. Ficken, No. 1:07-cr-10427-PBS (D. Mass. Sept. 15, 2008).

utilized various fraudulent practices to help their clients engage in market timing. The court found that Ficken "misrepresented the nature of his and the Druffner Group's transactions to the mutual funds" whose securities they were buying and selling. 7/ The court further found that the Druffner Group used a total of 13 different broker numbers (called "FA" numbers, for "financial advisor" numbers) and over 170 brokerage accounts to carry out numerous market timing transactions, despite the fact that the Druffner Group had only five clients. Many "of those fictitious FA numbers and accounts were registered individually or jointly under Ficken's name." 8/ The court also found that the accounts that the mutual funds blocked to prevent market timing "were replaced by new accounts many of which were registered under Ficken's name." 9/ In light of this evidence, the court concluded that Ficken "clearly misrepresented the nature of his and the Druffner Group's transactions to the mutual funds." 10/

The court determined that Ficken's misrepresentations were material because, "[h]ad it not been for such misrepresentations, the mutual funds would not have allowed the [market timing] transactions undertaken by [Ficken]." 11/ In support of this finding, the court noted that the record showed that mutual funds had asked PSI repeatedly to forbid Ficken and his co-defendants from engaging in their market timing activities 12/ and that mutual funds had endeavored to prohibit rapid transactions within individual accounts in order to stop market timing. However, these efforts were defeated by the defendants' use of multiple FA numbers and accounts which concealed the true identities of the defendants.

7/ Druffner, 517 F. Supp. 2d at 508.

8/ Id.

9/ Id.

10/ Id.

11/ Id. at 508-09.

12/ As an example of the mutual fund companies' efforts to stop Ficken and the Druffner Group's market timing activities, the court cited to an August 9, 2001 email that Hartford Mutual Funds sent to Ficken "informing him he could not open new accounts place trades, or receive trail commissions after September 10, 2001." Id. at 509. The email stated:

We have sent you warnings that your trading behavior violates the policies and procedures established by The Hartford Mutual Funds, and we have terminated your exchange privileges on more than one occasion. Despite the warnings and terminations, you simply close one account and open another account. And, you continue to violate our prohibitions on market timing.

Id.

The court further found that Ficken acted with scienter. The court found that the record contained "ample evidence indicating that [Ficken's] actions were intentionally geared toward evading detection by the mutual fund managers." ^{13/} The court determined that Ficken engaged in his market timing activities, despite receiving numerous emails from mutual fund representatives directing him and his co-defendants to stop these activities. The court also observed that the email communications between Ficken and his clients advising them on ways to avoid detection reflected Ficken's awareness of his misrepresentations to the mutual funds. ^{14/} The court concluded that an injunction was proper because Ficken had "engaged in fraudulent activities over an extended period of time;" his "violations were flagrant, deliberate and part of a pattern;" and they were "motivated by the prospect of financial gain." ^{15/}

On September 26, 2007, we instituted this administrative proceeding against Ficken. On February 20, 2008, the law judge granted the Division of Enforcement's motion for summary disposition and barred Ficken from association with any broker, dealer, or investment adviser. ^{16/} The law judge found that, based on the district court's findings, Ficken's conduct was "egregious and recurrent" and evidenced a "high degree of scienter." Moreover, the law judge found that Ficken had not admitted the wrongful nature of his conduct, nor had he made any assurances against future violations. The law judge further noted that the bar would serve the public interest as Ficken's "continued employment in the securities industry will present Ficken additional opportunities to violate securities laws." This appeal followed.

III.

Under Exchange Act Sections 15(b)(4) and (6) ^{17/} and Advisers Act Sections 203(e) and (f), ^{18/} we may impose sanctions on a person associated with a broker, dealer, or investment adviser, consistent with the public interest, if, among other things, the associated person has been permanently enjoined from engaging in any conduct or practice in connection

^{13/} Id.

^{14/} For example, the court noted that, on November 29, 2002, Ficken sent an email to a market-timing customer with several recommendations, including the purchase of \$40,000 of Pioneer mutual funds through two accounts, explaining that, "Pioneer doesn't monitor trades under \$25,000 so I figure we can do \$20,000 in both accounts." Id. at 509.

^{15/} Id. at 513.

^{16/} Justin F. Ficken, Initial Decision Rel. No. 345 (Feb. 20, 2008), 92 SEC Docket 2627.

^{17/} 15 U.S.C. §§ 78o(b)(4) and (6).

^{18/} 15 U.S.C. §§ 80b-3(e) and (f).

with the purchase or sale of securities. Ficken does not dispute that a permanent injunction has been entered against him.

In determining the appropriate remedial sanction, we are guided by the following factors:

[T]he 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. 19/

We have stated "that conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws." 20/ "Fidelity to the public interest" requires a severe sanction when a respondent's misconduct involves fraud because the "securities business is one in which opportunities for dishonesty recur constantly." 21/ Moreover, "ordinarily, 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." 22/ Based on a consideration of the relevant factors, and all of the circumstances in this case, we find that the public interest requires that Ficken be barred.

The district court found that Ficken, "motivated by the prospect of financial gain, engaged in fraudulent activities over an extended period of time." From January 2001 until September 2003, Ficken registered multiple fictitious mutual fund trading accounts under his FA number, facilitating thousands of fraudulent market timing trades. As the district court noted, "[u]sing a multitude of FA numbers and accounts was a method of concealing the true identities of the defendant and the Druffner Group. Had it not been for such misrepresentations, the mutual funds

19/ Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

20/ Robert Radano, Investment Advisers Act Rel. No. 2750 (June 30, 2008), __ SEC Docket ____, ____, n.76; Jose P. Zollino, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2608; Marshall E. Melton, 56 S.E.C. 695, 713 (2003). As we emphasized in Radano, supra, "fraud violations typically warrant the most severe sanctions."

21/ Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

22/ Melton, 56 S.E.C. at 713. As we noted in Melton, 56 S.E.C. at 710, "an antifraud injunction can, in the first instance, indicate the appropriateness in the public interest of revocation of registration or a suspension or bar from participation in the securities industry."

would not have allowed the transactions undertaken by [Ficken]." 23/ We, accordingly, find that Ficken's actions were both egregious and recurrent.

We further find that Ficken acted with a high degree of scienter. As the district court concluded, "[t]he record contains ample evidence indicating that [Ficken's] actions were intentionally geared toward evading detection by the mutual fund managers." 24/ Ficken sent numerous emails to his market timing clients advising them on ways to avoid detection by the mutual fund companies. He received several letters and emails from the mutual fund companies demanding that he stop his market timing activities. 25/ The district court found that Ficken's violations were "motivated by the prospect of financial gain." 26/

Ficken argues that he was a relatively minor participant in the scheme who unfairly received a harsher sanction than that imposed on other individuals who were "far more culpable" than he, either by virtue of their seniority or the extent of their activities. For example, Ficken compares his situation to that of Charles Sacco, a former registered representative of A.G. Edwards & Sons, Inc., who settled an administrative proceeding concerning his market timing activity, consenting to an order barring him from association with a broker, dealer, or investment adviser with a right to reapply after two years. 27/ Ficken contends that his alleged conduct "did not compare with that of Charles Sacco" because Sacco, "the king of financial account numbers" and the "dean of market timing" at A.G. Edwards, executed "far more trades than Ficken ever did." Ficken also compares his sanction to that of John S. Peffer, a registered PSI representative and co-defendant in the underlying injunctive action. Peffer consented to the entry of a final judgment in the underlying action. He also settled an administrative proceeding, consenting to an order barring him from associating with a broker, dealer, or investment adviser with a right to reapply after three years. 28/ Ficken argues that he should not receive a harsher sanction than

23/ 517 F. Supp. 2d at 508-09.

24/ Id. at 509.

25/ See Jeffrey L. Gibson, Exchange Act Rel. No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2109, appeal filed, No. 08-3377 (6th Cir. Apr. 3, 2008) (finding an associated person's actions to disguise his misconduct from investors was evidence that the person acted with scienter).

26/ 517 F. Supp. 2d at 513.

27/ Charles A. Sacco, Exchange Act Rel. No. 55693 (May 2, 2007), 90 SEC Docket 1572.

28/ John S. Peffer, Exchange Act Rel. No. 52962 (Dec. 16, 2005), 86 SEC Docket 3078.

Peffer, who was a supervisor at PSI, and who committed a "similar number of trades using multiple FA numbers." 29/

Ficken's arguments are without merit. It is well established that the determination of the appropriate sanction depends on the facts and circumstances of each case and is not dependent on the sanctions imposed in other cases. 30/ Moreover, parties that settle disciplinary proceedings often receive less severe sanctions than those who do not. 31/ Accordingly, we reject Ficken's contention that we should reduce his sanction based on sanctions imposed in settlements with other market-timing participants.

Ficken also faults the law judge for ignoring the Division's "bad faith . . . in targeting him simply because he lacked the financial wherewithal to propose a satisfactory monetary settlement offer" in the underlying injunctive proceeding. He asserts that, while PSI "bought its way out of an indictment by agreeing to pay \$600 million into the government's coffers, the individual PSI

29/ The Division counters that the Ficken team's market-timing activities were more extensive than that engaged in by Sacco and Peffer and that Ficken received a larger financial benefit from his market-timing activities than did the others. The Division also argues that Ficken "cherry-pick[ed]" the cases he cited to make his argument, while "ignor[ing] the fact that several other registered representatives in market timing cases (including Ficken's two teammates) have also received bars from association with a broker-dealer or investment advisor without any [right to reapply after a period of time]."

30/ See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); Geiger v. SEC, 363 F.3d 481, 488 (D.C. Cir. 2004) (stating that "[t]he Commission is not obligated to make its sanctions uniform . . . [and the Court] will not compare [a] sanction to those imposed in previous cases"); Radano, __ SEC Docket at ____ n.76.

31/ Schon-Ex, LLC, Exchange Act Rel. No. 57857 (May 23, 2008), __ SEC Docket __, __ n. 24. See also Phlo Corp., Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1113 n.84 (noting that "the rationale for the imposition of lower sanctions in settled proceedings is, at least in part, that settlement lets the Commission avoid time-consuming adversary proceedings and the concomitant expenditure of staff resources"); Philip A. Lehman, Exchange Act Rel. No. 54660 (Oct. 27, 2006), 89 SEC Docket 536, 550 (pointing out that sanctions imposed in settled proceedings may understate the sanctions imposed in litigated cases "because settled sanctions reflect pragmatic considerations such as the avoidance of time-and-manpower-consuming adversarial litigation"); Richard J. Puccio, 52 S.E.C. 1041, 1045 (1996) (noting that "respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings") (citation omitted).

brokers targeted in the criminal probe "could not bribe the government with hundreds of millions of dollars to escape prosecution" and thus "did not have the buyout option that PSI did." 32/

Ficken has offered no evidence to support his assertion that the Division acted in bad faith. The Commission is not required to accept any settlement offer in one of its proceedings. 33/ Moreover, this is not the appropriate forum for challenging the propriety of the Division's conduct in connection with a potential settlement of the injunctive action. Such a challenge should have been brought before the district court and, if necessary, appealed. 34/

Ficken's actions constituted "an egregious abuse of the trust placed in him as a securities professional." 35/ Moreover, Ficken's failure to acknowledge the wrongful nature of his actions or to show remorse indicates that there is a significant risk that, given the opportunity, Ficken would commit further misconduct in the future. Absent a bar, he could seek to reenter the securities industry through an association with another broker, dealer, or investment adviser.

32/ Ficken's assertion relates to a global civil and criminal settlement reached between Prudential Equity Group, LLC (PEG), the successor to PSI, and the United States Attorney's Office for the District of Massachusetts, the Commission, the Massachusetts Securities Division, NASD, the New Jersey Bureau of Securities, the New York Attorney General's Office and the New York Stock Exchange. Under the settlement, PEG agreed to pay a total of \$600 million: \$270 million to a distribution fund administered by the Commission for the benefit of those harmed by the fraud; \$325 million as a criminal penalty to the U.S. Department of Justice; and \$5 million as a civil penalty to the Massachusetts Securities Division. See SEC Press Release 2006-145, Prudential to Pay \$600 Million in Global Settlement of Fraud Charges in Connection With Deceptive Market Timing of Mutual Funds; Commission Also Charges Four Individuals with Fraud (Aug. 28, 2006), <http://www.sec.gov/news/press/2006/2006-145.htm>.

33/ See A.J. White & Co. v. SEC, 556 F.2d 619, 625 (1st Cir. 1977) (in rejecting contention that it was improper for Commission to decline to accept petitioners' settlement offers, the court stated that "[l]itigants are never required to accept settlement offers").

34/ James E. Franklin, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713-14, petition denied, 2008 U.S. App. LEXIS 15246 (D.C.Cir. 2008) (per curiam); Harold F. Harris, Exchange Act Rel. No. 53122A (Jan. 13, 2006), 87 SEC Docket 362, 3701.

35/ John S. Brownson, 55 S.E.C. 1023, 1029 (2002) (respondent barred based on his conviction for conspiracy to commit securities fraud).

Accordingly, under the circumstances, we have determined that barring Ficken serves the public interest and is remedial. 36/

An appropriate order will issue. 37/

By the Commission (Chairman COX and Commissioners CASEY, WALTER, and PAREDES); Commissioner AGUILAR not participating.

Florence E. Harmon
Acting Secretary

36/ See Gibson, 92 SEC Docket at ____ (respondents in follow-on case barred based on antifraud injunction); Michael Batterman, 57 S.E.C. 1031 (2004) (same); Michael T. Studer, 57 S.E.C. 890 (2004) (same); Nolan Wayne Wade, 56 S.E.C. 748 (2003) (same); Christopher A. Lowry, 55 S.E.C. 1133 (2002) (same). Ficken does not assert that any factors mitigate his misconduct and we do not find any support in the record for a claim of mitigation.

37/ 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.

UNITED STATES OF AMERICA
before the
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ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Justin F. Ficken be, and he hereby is, barred from association with any broker, dealer, or investment adviser.

By the Commission.

Florence E. Harmon
Acting Secretary