INITIAL DECISION RELEASE NO. 269
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11647

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
MICHAEL I. NNEBE,	:	INITIAL DECISION
NELSON C. WALKER,	:	January 5, 2005
and HILDRETH J. FLEMING, JR.	:	

APPEARANCES: Joshua E. Levine and Alan Reifenberg for the Division of Enforcement, Securities and Exchange Commission

Michael I. Nnebe, pro se

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

The Securities and Exchange Commission ("Commission") issued an Order Instituting Proceedings ("OIP") on September 14, 2004, pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act").[1] On November 16, 2004, Division of Enforcement ("Division") counsel, Joshua E. Levine, served Michael I. Nnebe ("Nnebe") with the OIP at the Federal Correctional Institution in Fort Dix, New Jersey.[2] (Declaration of Joshua E. Levine.) The Division seeks to bar Nnebe from being associated with any broker or dealer pursuant to Section 15(b)(6) of the Exchange Act. (Oct. 5, 2004, prehearing conference transcript at 7.) Nnebe, who is pro se, filed a four-page Answer dated November 18, 2004, which does not deny most of the facts alleged in the OIP. (See Order Postponing Prehearing Conference (Nov. 30, 2004).) The Commission's Rules of Practice provide that any allegation in the OIP not denied in the answer shall be deemed to be true. See 17 C.F.R. § 201.220(c)

[1] On November 24, 2004, the Commission issued an Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b)(6) of the Exchange Act as to Respondent Fleming. See Exchange Act Release No. 50738 (Nov. 24, 2004). On December 21, 2004, I issued an Order Making Findings and Imposing Sanction by Default as to Respondent Walker. See Exchange Act Release No. 50899 (Dec. 21, 2004).

[2] Certified mail sent to the FCI Fort Dix did not provide evidence that Nnebe received the OIP. According to the Division, however, Nnebe knew there was a telephonic prehearing conference on October 5, 2004, and chose not to participate. (Oct. 5, 2004, prehearing conference transcript at 5.)

On December 21, 2004, the Division filed a Motion for Summary Disposition Against Michael I. Nnebe and Nelson C. Walker ("Summary Disposition Motion"), and a Motion to Exceed the Thirty-five-Page Limit, pursuant to Rules 154, 155(a), and 250 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.154, 155(a), 250. The Declaration of Joshua E. Levine in Support of the Summary Disposition Motion includes the following Exhibits:

> Exhibit A is the Complaint dated June 12, 2001, in SEC v. Nnebe, 01-Civ.-5247 (KMW) (S.D.N.Y.) ("Injunctive Action").
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> Exhibit B is an Amended Complaint dated August 30, 2002, in the Injunctive Action.
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> Exhibit C is an Order dated March 15, 2004, by United States District Judge Kimba M. Wood in the Injunctive Action.
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> Exhibit D is the Grand Jury Indictment in United States v. Nnebe, 01-Crim.-545 (S.D.N.Y.) (June 7, 2001).
>
> Exhibit E is the judgment sheet for Nelson Walker in United States v. Walker, 01-Crim.-545-02 (SAS) (S.D.N.Y.) (Aug. 19, 2002).
>
> Exhibit F is the judgment sheet for Michael Nnebe in United States v. Nnebe, 01-Crim.-545-01 (SAS) (S.D.N.Y.) (Aug. 28, 2002).

I take official notice of Exhibits A through D, and Exhibit F, pursuant to Rule 323.[3] See 17 C.F.R. § 201.323.

Nnebe, age forty-three, was the president, chief executive officer ("CEO"), and the principal shareholder of Fargo Holdings, Inc. ("Fargo"), from July 1997 through November 1999. (Exhibit C at 2.) During this time, Fargo had no legitimate business. (Id.) Fargo filed applications with the Commission in July 1997 and in August 1998 to engage in transactions exempt from registration pursuant to Rule 504 of Regulation D. (Exhibit A at 5.) According to sales material, Fargo was offering a maximum of two hundred thousand shares at $5 per share. (Exhibit A at 6.) No registration statement was ever filed for Fargo's stock and the stock was not exempt from registration. (Exhibit C at 2.) The OIP alleges that from October 1991 through July 1997, Nnebe was a registered representative associated with several broker-dealers registered with the Commission, including Meyers Pollock Robbins, Inc., and Hanover Sterling & Company, Ltd., and that he held Series 7, 24, and 63 licenses. (OIP at 1.)

Underlying Civil Action

[3] I do not take official notice of Exhibit E because the allegations against Nelson C. Walker have been resolved.

In the Injunctive Action, the district court judge granted the Commission's application for a default judgment finding:

> From at least July 1997 to at least November 1999, Nnebe raised at least $2 million from at least 118 investors through the fraudulent sale of Fargo stock;
>
> Nnebe prepared written offering memoranda containing false statements regarding Fargo's business, the use of the proceeds from the [Fargo] stock offering, and Fargo's corporate governance;
>
> Nnebe orally communicated false statements of material fact to investors regarding Fargo's business, Fargo's planned initial public offering, Fargo's planned listing on the NYSE or NASDAQ, and the risk of investing in Fargo; and
>
> Nnebe misappropriated more than $1.15 million in offering proceeds, which he used for personal expenses, including payments relating to his mortgage and credit card, his travel, his Rolls-Royce, and transfers to family and friends, including the other defendants.[4]

(Injunctive Action at 2-6.)

The court also found that: (1) Nnebe "knew that the written and oral statements attributable to [him] were materially false, or [he] acted in reckless disregard of the truth"; (2) Nnebe violated Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and (3) there was a substantial likelihood that Nnebe would violate the securities laws in the future. (Injunctive Action at 5-7, 10.) Based on these factual findings, the court (a) permanently enjoined Nnebe from future violations of these sections of the securities laws and rules, and from participating in any penny stock offering; (b) ordered Nnebe to pay a total of $2,407,996, consisting of $1,906,240.35 in disgorgement and $501,755.65 in prejudgment interest; and (c) ordered Nnebe to pay a civil penalty of $220,000. (Injunctive Action at 10, 13, 16, 18, 19.)

Criminal Conviction

The United States Attorney's Office for the Southern District of New York initiated a criminal action based on a Grand Jury Indictment entered on June 7, 2001, alleging the same misconduct as in the Injunctive Action. (Exhibit D, United States v. Nnebe, 01-Crim.-545 (S.D.N.Y.).) The judgment sheet signed by the district court judge on August 22, 2002, indicates that Nnebe pled guilty and was sentenced to sixty months' imprisonment on one count of conspiracy to commit securities fraud, and forty-nine months' imprisonment on one count of securities fraud, with the sentences to run consecutively. However, the order in the Injunctive Action states that Nnebe was convicted at trial on May 17, 2002. (Exhibit C at 10.) Further, the Summary Disposition Motion states that Nnebe was found guilty on May 16, 2002, after trial.

[4] Defendants in the Injunctive Action included the Respondents, and Steven S. Bocchino and Daniel M. Coyle, and relief defendant, Luis Colon, Jr. (Exhibit C.)

(Summary Disposition Motion at 5-6.) Nnebe was sentenced to three years of supervised release, and ordered to make restitution of $1,820,767, to over one-hundred investors, and pay an assessment of $200. (Exhibit F.)

Nnebe's Answer

Nnebe admits that he is serving a prison sentence for the actions that are the basis for the OIP. He maintains that: (1) a bar from association would subject him to double jeopardy and thus violates the Fifth Amendment to the United States Constitution; (2) the Commission tried and failed to impose an occupational restriction in both his criminal trial and his civil suit; (3) prior to 1997 and his involvement with Fargo, he had only one complaint as a registered representative, which was "comparatively honorable given some of the brokerage houses" where he worked as a principal; (4) he was not associated with a broker or dealer while he was at Fargo and his license expired during this period; and (5) when his sentence ends in 2010, he will be almost 50 years old and will "most certainly be deported back to Nigeria" so a bar is not necessary to protect the public. (Answer at 3.)

Ruling

Rule 250 of the Commission's Rules of Practice is appropriate because Nnebe has filed an Answer and the Division's file has been made available for inspection and review.[5] I GRANT the Summary Disposition Motion because there is no dispute that the material allegations in the OIP are true and the Division is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250. Section 15(b)(6) of the Exchange Act states that the Commission shall impose a sanction if it is in the public interest to do so, with respect to a person who has been enjoined from violations of the securities statutes where the person was associated with a broker or dealer at the time of misconduct. The statutory requirement of association with a broker or dealer is satisfied because Nnebe was associated with Fargo, which he represented to be a day-trading firm, among other things, and Nnebe and Fargo engaged in the business of effecting transactions in securities for the account of others and thus met the Exchange Act's definition of a broker and associated person.[6] See Exchange Act Sections 3(a)(4)(A); 3(a)(18).

The considerations that are relevant in making a public interest determination include the following factors, among others:

> [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.

[5] The record does not indicate that Nnebe sought the Division's file.

[6] In deciding the motion for summary disposition it is necessary to take as true Nnebe's factual assertion that while he was at Fargo his securities licenses were not with a registered broker or dealer. (Answer at 2.)

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); see also Joseph J. Barbato, 53 S.E.C. 1259, 1282 n.31 (1999); Donald T. Sheldon, 51 S.E.C. 59, 86 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995). The severity of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. See Berko v. SEC, 316 F.2d 137, 141-42 (2d Cir. 1963); see also Richard C. Spangler, Inc., 46 S.E.C. 238, 254 n.67 (1976); Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

The egregiousness of Nnebe's conduct is established by the fact that it caused: (1) a sentence of imprisonment for over nine years; (2) an order to disgorge over $1.9 million dollars; and (3) a permanent injunction against violations of the antifraud provisions of the securities statutes. Nnebe's high level of scienter is demonstrated by his blatantly illegal and fraudulent conduct that was the basis for the Injunctive Action and his criminal conviction. Nnebe's Answer does not evidence any recognition of his wrongful conduct. Finally, I note the judge's finding in the Injunctive Action that there is a "substantial likelihood" that Nnebe will violate the securities laws in the future noting that he "knowingly made numerous misrepresentations of material fact," and failed to appear to contest the allegations. (Injunctive Action at 9-10.)

Nnebe offers no support for his claim that barring him from association would subject him to double jeopardy. The Commission held in William F. Lincoln, 53 S.E.C. 452, 459 (Feb. 9, 1998), that "the Double Jeopardy Clause protects 'only against the imposition of multiple *criminal* punishments for the same offense'" citing Hudson v. United States, 522 U.S. 93, 99 (1997), and administrative proceedings have been held to be civil in nature. Moreover, the Commission regularly initiates administrative proceedings following determinations in civil and/or criminal cases on the same facts announcing:

> The fact that a person has been 'permanently or temporarily enjoined by order judgment, or decree of any court of competent jurisdiction' from violating the antifraud provisions has especially serious implications for the public interest. Based on our experience enforcing the federal securities laws, we believe that ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to revoke the registration of, or suspend or bar from participation in the securities industry, or prohibit from participation in an offering of penny stock, a respondent who is enjoined from violating the antifraud provisions.

Marshall E. Melton, 80 SEC Docket 2812, 2825-26 (July 25, 2003).

I also GRANT the Motion to Exceed the Thirty-five-Page Limit to allow review of the court documents that are included in the record by way of official notice. Based on the record evidence, I find it in the public interest to bar Nnebe from being associated with any broker or dealer.

Order

Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, I ORDER that Michael I. Nnebe be, and hereby is, barred from associating 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, 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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Brenda P. Murray
Chief Administrative Law Judge