INITIAL DECISION RELEASE NO. 281
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11537

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
RICHARD S. KERN	:	April 21, 2005
and CHARLES WILKINS	:	
	:	
	:	

APPEARANCES: Richard E. Simpson and Matthew D. Strada for the Division of Enforcement, Securities and Exchange Commission.

Eric W. Berry for Richard S. Kern and Charles Wilkins.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on July 7, 2004, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act).

The OIP alleges that Richard S. Kern (Kern) and Charles Wilkins (Wilkins) (collectively, Respondents) have been permanently enjoined from violating the securities registration and antifraud provisions of the federal securities laws. The Commission instituted this proceeding to determine whether these allegations are true and, if so, to decide whether remedial action is appropriate in the public interest. The Commission's Division of Enforcement (Division) seeks to bar Respondents from participating in an offering of any penny stock.

Procedural History of the Case

I found Kern and Wilkins in default for failing to file timely answers to the OIP (Order of Aug. 5, 2004), and I denied Respondents' motion to vacate the default (Order of Sept. 14, 2004). The Commission subsequently accepted Respondents' late-filed Joint Answer, set aside the default, and remanded for further proceedings (Commission Order of Feb. 1, 2005).

The Division notified Kern and Wilkins of the size and location of its investigative files and informed them when those files would be available for inspection and copying. I then

granted the Division leave to file a motion for summary disposition (Telephonic Prehearing Conference of Feb. 23, 2005; Order of Feb. 23, 2005). The Division filed its motion for summary disposition, a memorandum of law, and declarations with accompanying exhibits on March 8, 2005. Kern and Wilkins submitted their opposition, an appendix, and a motion to stay the proceeding on March 25, 2005. The Division filed its reply and a supplemental appendix on March 31, 2005. To the extent that the parties' pleadings exceed the page limit applicable to motions for summary disposition, relief from Rule 250(c) of the Commission's Rules of Practice is granted.

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 promptly to 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 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.

Findings of fact and conclusions of law made in a prior injunctive action are immune from attack in a follow-on administrative proceeding, such as this one. Ted Harold Westerfield, 54 S.E.C. 25, 32 n.22 (1999) (collecting cases).

FINDINGS OF FACT

The exhibits accompanying the Division's motion for summary disposition involve matters that may be officially noticed under Rule 323 of the Commission's Rules of Practice. Based on those exhibits (DX ___) and on Respondents' Joint Answer and opposition to summary disposition, the Division has established, and Kern and Wilkins have not contested, the following material facts.

Kern, age forty-nine, resides in Fort Lauderdale, Florida. He has been involved in several small business ventures with Wilkins. Wilkins, age sixty-eight, resides in Arizona. Wilkins has claimed to receive income from securities transactions through his small, closely held corporations. Wilkins also was in the business of assisting small corporations and shell corporations in becoming listed on the National Association of Securities Dealers' Over-the-Counter Bulletin Board system (NASD's OTC Bulletin Board) (Joint Answer).

On February 24, 2000, the Commission filed a civil injunctive action in the United States District Court for the Southern District of New York against Kern, Wilkins, and others (Joint Answer, DX 17). In its complaint, the Commission alleged that Kern and Wilkins violated Section 5 of the Securities Act of 1933 (Securities Act), Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder (Joint Answer, DX 17). As part of its action, the Commission requested an asset freeze, accounting, disgorgement, prejudgment interest, and civil penalties (Joint Answer).

The Commission's complaint alleged that, from April 1998 through January 1999, Respondents succeeded in listing the securities of three shell corporations on the NASD's OTC Bulletin Board for the specific purpose of attempting to merge the shell corporations with other corporations (DX 17). According to the complaint, Respondents prepared to sell the stock of the shell corporations by distributing the corporations' stock to family and friends, who held the securities for two years before the public listings of the shell corporations, and then re-gathering the stock from their family and friends (DX 17). The complaint also alleged that, using accounts in the names of certain entities owned or controlled by them, Respondents effected public sales of the securities of the shell corporations to entities owned or controlled by Respondents' co-defendant, Peter C. Lybrand (Lybrand), without registering their transactions with the Commission (DX 17). The complaint further alleged that Respondents aided and abetted a market manipulation by Lybrand in that they engaged in matched orders whereby they determined the amount, price, and timing of their sell orders in consultation with Lybrand (DX 17). The complaint charged that Respondents also transferred to Lybrand millions of shares of the shell corporations' securities through the corporations' transfer agent, without registering their transactions with the Commission (DX 17). Finally, the complaint alleged that, in January 1999, Respondents sold into the public market thousands of shares of the shell corporations without registering their transactions with the Commission (DX 17).

On October 2, 2003, the district court entered a final judgment against Kern, Wilkins, and others (Joint Answer, DX 1). The court permanently enjoined Kern and Wilkins from violating Sections 5(a) and 5(c) of the Securities Act and ordered them, jointly and severally, to pay disgorgement and prejudgment interest of $7,765,173 (Joint Answer, DX 1). The court also

ordered Kern to pay a civil penalty of $400,000 and Wilkins to pay a civil penalty of $300,000 (Joint Answer, DX 1).

On June 28, 2004, the district court entered final judgments of consent against Kern and Wilkins on the antifraud claim of the Commission's complaint (Joint Answer, DX 2, DX 3). The court permanently enjoined Kern and Wilkins from violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder (Joint Answer, DX 2, DX 3).

Kern and Wilkins have appealed the district court's order to the U.S. Court of Appeals for the Second Circuit (No. 03-6235). As of today, the appeal remains pending.

Respondents' Motion to Stay

Kern and Wilkins request the Commission to stay this administrative proceeding pending the outcome of their appeal of the underlying civil action before the Second Circuit. They argue that such a stay is "appropriate" because a decision by the Second Circuit "should be imminent" and a stay would conserve judicial resources.

Under longstanding Commission precedent, a pending appeal of an underlying injunction is not a valid reason for staying a follow-on administrative proceeding. See Joseph P. Galluzzi, 78 SEC Docket 1125, 1130 n.21 (Aug. 23, 2002); Jon Edelman, 52 S.E.C. 789, 790 (1996); Charles Phillip Elliott, 50 S.E.C. 1273, 1276 n.15 (1992), aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994). If Kern and Wilkins eventually succeed in having the underlying district court injunction vacated, they may then petition the Commission to reconsider any sanction imposed in this administrative proceeding. See Gary L. Jackson, 48 S.E.C. 435, 438 n.3 (1986); cf. Jimmy Dale Swink, Jr., 59 SEC Docket 2877 (Aug. 1, 1995).

The Commission was aware that Kern and Wilkins were litigating before the Second Circuit when it issued the OIP. It nonetheless decided to initiate this administrative proceeding and directed that an Initial Decision be issued within 210 days. Respondents do not explain how it would be possible to meet this deadline if a stay were to be granted.

Respondents' Opposition

Respondents defend on the ground that the injunction under Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 is not entitled to collateral estoppel effect in this proceeding because it resulted from a consent judgment, rather than a full trial on the merits. They also emphasize that they neither admitted nor denied the antifraud allegations of the Commission's complaint (DX 2, DX 3).[1]

[1] At an earlier stage of this proceeding, Respondents argued that the district court lacked jurisdiction to enter an injunction under Section 10(b) of the Exchange Act and Rule 10b-5 because, when the district court acted, exclusive jurisdiction of the underlying proceeding rested with the Second Circuit. Respondents have not pressed that argument in their opposition to summary disposition, and I decline to address it on my own motion.

The Commission has held that such consent judgments are entitled to collateral estoppel effect in follow-on administrative proceedings. See Marshall E. Melton, 80 SEC Docket 2812, 2822-26 (July 25, 2003) ("For purposes of consent injunctions that are agreed to and entered by a court after issuance of this opinion, we will construe the 'neither admit nor deny' language as precluding a person who has consented to an injunction in a Commission enforcement action from denying the factual allegations of the injunctive complaint in a follow-on proceeding before this agency."); Martin R. Kaiden, 54 S.E.C. 194, 208 n.39 (1999).

DISCUSSION AND CONCLUSIONS

Under Section 15(b)(6)(A) of the Exchange Act, the Commission may bar a person from participating in an offering of penny stock if (1) the person has been enjoined in connection with the purchase or sale of a security and, at the time of the misconduct alleged in the injunctive action, was participating in a penny stock offering; and (2) a bar is in the public interest. Ralph W. LeBlanc, 80 SEC Docket 2750, 2755-56 (July 30, 2003); Nolan Wayne Wade, 80 SEC Docket 2683, 2683-84 (July 29, 2003).

The Commission's complaint in the underlying injunctive action involved the securities of three issuers: Citron, Inc. (Citron), Polus, Inc. (Polus), and Electronic Transfer Associates, Inc. (ETA) (DX 17). At the relevant time, the prices of Citron, Polus, and ETA were posted on NASD's OTC Bulletin Board (DX 9-DX 11). For parts of the relevant time, all three stocks traded at less than $5.00 per share (DX 4-DX 7). In addition, each of the three issuers had net tangible assets well below $5 million (DX 9-DX 11). I find that the three securities were thus "penny stocks" within the meaning of Section 3(a)(51)(a)(iv) of the Exchange Act and Exchange Act Rule 3a51-1.

To determine whether penny stock bars against Kern and Wilkins are in the public interest, the Commission considers six factors: (1) the egregiousness of Respondents' actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of Respondents' assurances against future violations; (5) Respondents' recognition of the wrongful nature of their conduct; and (6) the likelihood that Respondents' occupations will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1980).

The district court characterized Respondents' violations as egregious, and found that the violations occurred "repeatedly and with regularity." SEC v. Lybrand, 281 F. Supp. 2d 726, 731 (S.D.N.Y. 2003). It further determined that Kern and Wilkins had not taken responsibility for their actions, but tried to blame others, while downplaying their own involvement in the misconduct. Id. The court expressed "substantial concern" over Respondents' lack of cooperation with the Commission with respect to the location of frozen assets, and it noted that both Respondents had previous brushes with law enforcement. Id. In Kern's case, the district court cited a 1994 consent injunction for franchising fraud. Id. In Wilkins' case, the court pointed to a guilty plea to mail fraud during the 1970s. Id. Although a violation of Section 5 of the Securities Act does not require proof of scienter, the district court imposed Tier 3 civil penalties against both Kern and Wilkins for the proven Section 5 violations. Id. Tier 3 civil penalties require findings that the underlying misconduct involved fraud, deceit, manipulation, or

deliberate or reckless disregard of a regulatory requirement and also resulted in substantial losses to others. Id. The district court found that the actions of Kern and Wilkins "easily satisfy[ied] the statutory requirements for the imposition" of Tier 3 penalties. Id.

The record in this administrative proceeding fully confirms the district court's analysis. Neither Respondent rules out a return to the penny stock industry, offers assurances against future violations, or recognizes the wrongful nature of the conduct at issue. Under the circumstances, I conclude that the likelihood of future violations is quite likely. The Division's request for penny stock bars will be granted in the public interest.

ORDER

IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted;
2. The telephonic status conference scheduled for April 25, 2005, is cancelled; and
3. Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Richard S. Kern and Charles Wilkins are each barred from participating in the offering of any penny stock.

This Initial Decision shall become effective in accordance with and subject to the 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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James T. Kelly
Administrative Law Judge