

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-12747

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
December 18, 2007

SECURITIES & EXCHANGE COMMISSION  
MAILED FOR SERVICE

DEC 18 2007

FIRST CLASS

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In the Matter of :  
:   
MARIA T. GIESIGE : ORDER DENYING RESPONDENT'S  
: MOTION FOR PARTIAL SUMMARY  
: DISPOSITION

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The Securities and Exchange Commission (Commission) initiated this proceeding with an Order Instituting Proceedings (OIP) on September 5, 2007, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act), and Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that Respondent Maria T. Giesige (Giesige), as a registered representative, willfully violated Sections 5(a), 5(c), and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in connection with the offer, purchase, and sale of shares of Carolina Development Co. (Carolina or the company) from October 2005 through January 2006. Giesige filed her Answer on October 10, 2007. A hearing is scheduled for February 5, 2008. On November 1, 2007, the Division of Enforcement (Division) filed a Motion for Summary Disposition and Giesige filed a Motion to Dismiss.<sup>1</sup> The Division and Giesige also filed responses to the motions on November 21, 2007.<sup>2</sup> For the reasons stated below, Giesige's motion is denied.

### Standard 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.

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<sup>1</sup> Although captioned as a Motion to Dismiss, Giesige's motion will be treated as a motion for partial summary disposition, pursuant to Rule 250 of the Commission's Rules of Practice. The Division's Motion for Summary Disposition will be addressed in a separate order.

<sup>2</sup> Citations to the Division's and Giesige's motions and responses will be noted as "(Div. Mot. at \_\_\_)," "(Resp. Mot. at \_\_\_)," "(Div. Opp. at \_\_\_)," and "(Resp. Reply at \_\_\_)," respectively.

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.

### **Discussion**

Giesige's Motion asserts that the OIP, instituted, in part pursuant to Sections 203(f) and 203(k) of the Advisers Act, improperly alleges violations of that Act and that the OIP and the Division improperly seek to bar her from association with any investment adviser. (Resp. Mot. at 1.) Giesige bases her argument on the fact that the allegedly improper conduct occurred while she was an associated person with a broker-dealer, not an investment adviser. (Resp. Mot. at 1-2.) Accordingly, she contends that any such violations, if proven, could only constitute violations of the Securities Act or the Exchange Act, and that a bar from association with any investment adviser would amount to an impermissible "collateral bar." (Resp. Mot. at 2.)

The thrust of Giesige's argument is that, during the relevant time period, from October 2005 to January 2006, she only serviced clients as a registered representative of a broker-dealer, never acting as an investment adviser and never receiving any compensation for investment advice. (Resp. Mot. at 3.) She notes that she did not become a registered investment adviser until April 2007. (Answer at 5; Resp. Mot. at 3; Resp. Mot. Ex. C.) Giesige further represents that she has not received any complaints in her capacity as an investment adviser and that no complaints were alleged in the OIP. (Resp. Mot. at 3.) Lastly, she contends that there are no allegations in the OIP that she was an investment adviser or that she was acting as an investment adviser. (Resp. Mot. at 3-4.)

The Division opposes Giesige's motion by arguing that she acted as an investment adviser and was associated with an unregistered investment adviser during the relevant time period. (Div. Opp. at 2.) Specifically, the Division alleges that Giesige made material misrepresentations and/or omissions to clients of her unregistered investment advisory firm regarding restrictions (or a lack thereof) on Carolina stock, an initial public offering by the company, and an audit of the company's financial statements. (Div. Opp. at 2-3; Div. Mot. Ex.

C at 27-29, 39-42; Div. Mot. Ex. A at ¶ 5.)<sup>3</sup> The Division further alleges that she induced investors to buy shares of Carolina stock and received compensation for those sales. (Div. Opp. at 3; Div. Mot. Ex. C at 45-6.) “From October 2005 through January 2006, [Giesige] sold approximately \$1.5 million of Carolina shares to approximately fifty investors.” (OIP at 2; Div. Mot. Ex. C at 31.)<sup>4</sup> The OIP alleges that many of these investors were clients of her state-registered investment adviser. (OIP at 2.) The Division notes that she does not provide any evidence in support of the assertion that she did not receive any income from acting as an investment adviser. (Div. Opp. at 3.). Thus, the Division contends that Giesige acted as an unregistered investment adviser or was associated with an unregistered investment adviser, and is therefore subject to the Advisers Act. (Div. Opp at 3-4.)

Section 203(f) of the Advisers Act provides in part:

The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds . . . that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (5), (6), (8), or (9) of subsection (e) of this section.

15 U.S.C. § 80b-3(f).<sup>5</sup> “No language in [this] provision remotely suggests that its application is limited to ‘registered’ investment advisers.” Teicher v. SEC, 177 F.3d 1016, 1018 (D.C. Cir. 1999). “[The Commission’s] authority to proceed under Section 203(f) . . . does not rest on whether or not an entity or individual has registered . . . . It does rest on whether or not an entity or individual in fact acted as an investment adviser.” Alexander v. Stein, 52 S.E.C. 296, 298-300 (1995). An investment adviser is “any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.” 15 U.S.C. § 80b-2(a)(11).

Although Giesige was not a registered investment adviser until April 2007, the OIP and the Division allege facts, which, if true, may establish that she acted as an unregistered investment adviser and/or was associated with an unregistered investment adviser during the relevant time period, and, consequently, may subject her to the Advisers Act.

### **Ruling**

Based on the foregoing, I find that there are genuine issues of material fact as to whether or not Giesige was an unregistered investment adviser or was associated with an unregistered

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<sup>3</sup> Division’s Motion Exhibit A is the Declaration of Thomas A. Seaman, dated November 1, 2007.


<sup>4</sup> Division’s Motion Exhibit C is the Deposition of Maria T. Giesige, dated June 13, 2006, in SEC v. Carolina Dev. Co., Civil No. (SACV06-172AHS (MLGx)).

<sup>5</sup> Section 203(k) authorizes the Commission’s cease-and-desist power under the Advisers Act. 15 U.S.C. § 80b-3(k).

investment adviser.<sup>6</sup> Accordingly, Giesige is not entitled to partial summary disposition as a matter of law. 17 C.F.R. § 201.250(b).

**Order**

IT IS ORDERED, pursuant to Rule 250(b) of the Commission's Rules of Practice, 17 § 201.250(b), that Respondent Maria T. Giesige's Motion to Dismiss is DENIED.

  
Robert G. Mahony  
Administrative Law Judge

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<sup>6</sup> Since there are genuine issues of material fact, this Order need not address Giesige's argument that the OIP and the Division are seeking a "collateral bar." However, the OIP alleges that Giesige willfully violated provisions of the Securities Act and the Exchange Act, which, if true, may subject her to regulation and potential sanctions under the Advisers Act. See 15 U.S.C. 80b-3(e)(5), (f). Since material facts pertaining to these allegations are also in dispute, Giesige is certainly not entitled to partial summary disposition as a matter of law.