

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11247

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 17, 2005

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FIRST CLASS

In the Matter of	:	
	:	ORDER DENYING MOTION TO
STEVEN WISE and	:	DISMISS CLAIM FOR CIVIL
VLADLEN "LARRY" VINDMAN	:	MONETARY PENALTIES

The Securities and Exchange Commission (Commission) commenced this proceeding on September 5, 2003, pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act). The hearing as to Respondent Vladlen "Larry" Vindman (Vindman) is scheduled to commence on February 22, 2005.¹

On January 24, 2005, Vindman filed a motion to dismiss (Motion) the Division of Enforcement's (Division) claim for civil monetary penalties. The Division filed an opposition to Vindman's motion (Opposition) on January 31, 2005. On February 7, 2005, Vindman filed a reply to the Opposition (Reply).

ARGUMENTS

A. Respondent Vindman

Vindman argues that his Seventh Amendment right to a jury trial will be violated if an administrative law judge finds him liable for securities law violations and imposes a civil monetary penalty. Motion at 1. Vindman, citing Tull v. United States, 481 U.S. 412 (1987), argues that the Seventh Amendment guarantees his right to jury determination of whether he is liable for securities law violations and associated civil monetary penalties. Motion at 2-4.

Vindman maintains that he is not registered with the Commission, which would subject him to the Commission's administrative proceedings. Reply at 6. Vindman contends that Stephen M. Cutler (Cutler), Director of the Division of Enforcement, testified before Congress that the Commission can only bring administrative proceedings for civil monetary penalties against individuals who are directly regulated by the Commission, such as brokers, dealers, or

¹ Respondent Steven Wise settled this proceeding with the Commission. See Steven Wise, Securities Act Release No. 8526, Exchange Act Release No. 51077 (January 25, 2005).

investment advisers. Motion at 6. Vindman asserts that Cutler admitted that the Commission can only file a civil proceeding against a non-regulated/non-registered entity. Motion at 6.

Vindman acknowledges that one could interpret that Sections 15(b)(6) and 21B of the Exchange Act permit an administrative law judge to impose monetary penalties for misconduct during a penny stock offering, but argues that such an interpretation would violate Vindman's Seventh Amendment right to a jury trial. Reply at 2. Vindman contends that he did not submit to the jurisdiction of the Commission, by way of registration, in return for the benefits of registration. Reply at 3-4. Vindman submits that the securities regulatory system includes licensing, education and testing for those involved in the industry, and participation in the rule-making and enforcement processes. Reply at 3-4. Vindman adds that unlike those who are unregistered, registered persons submit to regulation by the Commission. Reply at 5-6. Vindman asserts that permitting the Commission to bring enforcement actions against both registered and unregistered individuals, based on a remote connection to the industry, will completely nullify the Seventh Amendment's guarantee of the right to a jury trial. Reply at 6.

B. Division of Enforcement

The Division argues that civil penalties may be imposed in administrative proceedings against an unregistered person. Opposition at 1. The Division asserts that Vindman concedes in his motion that a regulated person could be subject to a monetary penalty imposed by an administrative law judge. Opposition at 2. Section 15(b)(6) of the Exchange Act, the Division submits, allows the Commission to bar a person from participating in a penny stock offering if that person has been found liable for violations of the Securities Act or Exchange Act, and such bar is in the public interest. Opposition at 4. The Division contends that Vindman participated in an offering of penny stock when he acted as a promoter. See Section 15(b)(6)(C); Opposition at 4. Section 21B(a) of the Exchange Act, the Division asserts, allows the Commission to impose a civil monetary penalty in a proceeding instituted pursuant to Section 15(b)(6). Opposition at 5.

The Division, citing Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1976), argues that in cases in which "public rights" are being litigated, the Seventh Amendment does not prohibit Congress from assigning the adjudicative function to an administrative forum with no jury. Opposition at 7-10.

The Division also contends that Vindman's reliance on Cutler's testimony is inapposite, maintaining that Cutler's testimony related to a legislative proposal designed to grant the Commission new authority to impose civil monetary penalties in cease-and-desist proceedings. Opposition at 6. The Division asserts that Section 21B(a) of the Exchange Act already grants the Commission authority to impose civil monetary penalties in administrative proceedings brought pursuant to Section 15(b)(6) of the Exchange Act. Id. at 6-7. The Division maintains that in this proceeding, it seeks a cease-and-desist order pursuant to Section 8A of the

Securities Act and 21C of the Exchange Act as well as a penny stock bar and civil monetary penalties pursuant to Sections 15(b)(6) and 21B(a) of the Exchange Act. Id.

ANALYSIS

Section 15(b)(6)(A) of the Exchange Act allows the Commission to bar any person from participating in an offering of penny stock when that person has willfully violated the Securities Act or Exchange Act while participating in a penny stock offering, if the Commission finds that such bar is in the public interest.

Section 15(b)(6)(C) of the Exchange Act states that the term “person participating in an offering of penny stock” includes “any person *acting as any promoter* . . . or other person who engages in activities with a broker, dealer, or issuer for purposes of issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.” (emphasis added).

Section 21B(a) of the Exchange Act states that in any proceeding “instituted pursuant to Section 15(b)(4), 15(b)(6), . . . against any person,” the “Commission or the appropriate regulatory agency may impose a civil penalty” if the Commission finds that the person has willfully violated any provision of the Securities or Exchange Acts.

The Seventh Amendment to the United States Constitution provides that “in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.”

In Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1976), the Supreme Court held that Congress may create a new cause of action in the government for civil penalties enforceable by an administrative agency without violating the Seventh Amendment. In Atlas, the Court explained that Congress enacted the Occupational Safety and Health Act (OSHA), which created a new statutory duty to avoid maintaining unsafe or unhealthy working conditions. Id. at 444. According to the Court, the Act permitted the government to seek abatement orders and civil penalties for violations. Id. The Secretary of Labor proposed civil penalties and orders to abate pertinent hazards against the petitioners for violations of the Act. Id. at 447. Thereafter, the petitioners contested the citations before administrative law judges of the Occupational Safety and Health Review Commission. Id. at 446-448. The judges and the Occupational Safety and Health Review Commission affirmed the violations and abatement requirements and imposed a civil penalty. Id. at 448.

On appeal, the Supreme Court held that in cases in which “public rights” are being litigated, the Seventh Amendment does not prohibit Congress from assigning the fact finding function and initial adjudication to an administrative agency, in which a jury would be incompatible. Id. at 450. The Court stated that the government asserts “public rights” when the “[g]overnment sues in its sovereign capacity to enforce public rights created by statutes

within the power of Congress to enact.” Id. Although the Court did not define “public rights”, the Court cited Crowell v. Benson, 285 U.S. 22 (1932), in which the Court implied that “public rights” are those that “arise between the [g]overnment and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” Crowell, at 50.

The Court explained that the Seventh Amendment affords the right to a jury trial for suits that existed at common law, and the government’s claim under OSHA was a new “public right” created by Congress. Atlas, 430 U.S. at 455. When new “public rights” are litigated, the Court added, Congress may designate an agency to hear the claim, even if the Seventh Amendment would have required a jury trial if a court was designated to adjudicate the claim instead of an agency. Id.

In Granfinanciera v. Nordberg, 492 U.S. 33, 51 (1989), the Supreme Court explained the decision in Atlas, and stated that the power to “block application of the Seventh Amendment has limits. Congress may only deny trials by jury in actions at law, we said, in cases where ‘public rights’ are litigated.” Id.

In Tull v. United States, 481 U.S. 412 (1987), the Supreme Court held the petitioner had a right to a jury trial where the government filed the original claim in federal court and the bulk of the government’s claim was for a civil penalty. In Tull, the government filed a claim for injunction and civil penalties for a violation of the Clean Water Act (Act). Id. at 414-415. However, when the government filed the complaint, the petitioner had sold almost all of the involved property, except for a small portion of the land. Id. at 415. The district court denied the petitioner’s claim for a jury trial and granted the injunction and civil penalties for violations of the Act. Id. at 415-416. On appeal, the Supreme Court held the petitioner had the right to a jury trial because the penalty was similar to an action in debt and those cases were afforded a jury trial under the Seventh Amendment. Id. at 423.

Tull does not apply to the Division’s claim for civil monetary penalties because the claim in Tull was brought before a tribunal that offered a jury trial and the majority of the government’s claim consisted of the monetary penalty. Further, in Atlas Roofing Co., v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1976), the Court held that an administrative agency has the authority to adjudicate a monetary penalty when Congress creates a new “public right” and vests the initial fact finding authority in a government agency. This is true, even though the Seventh Amendment would require a jury trial if a court was designated to hear the claim instead of an administrative agency.²

² The parties cite several other authorities that are not applicable to the issue in this case. Vindman cites Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) (holding that Columbia Pictures had the right to a jury trial for a private suit against Feltner for copyright infringement) and Time Warner Cable v. Negovan, 2001 WL 1182843 E.D.N.Y. (July 30, 2001) (holding that Time Warner had the right to a jury trial for a private suit

CONCLUSION

According to the Order Instituting Proceedings (OIP), Vindman participated in a penny stock offering when he allegedly promoted the stock of Marx Toys & Entertainment Corporation (MRXT). The OIP alleges that he and others knew or recklessly disregarded the fact that kickbacks they paid to registered representatives to solicit sales of MRXT stock were not disclosed to investors.

Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934. As amended, Congress permitted the Commission to seek civil monetary penalties for violations of these statutes, when proceedings are brought pursuant to Section 15(b)(6). Section 15(b)(6) allows the Commission to bar a person from participating in any penny stock offering if that person willfully violates the Securities or Exchange Acts while participating in a penny stock offering, and such bar is in the public interest. In this case, Vindman is alleged to have violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. There is no requirement that Vindman be registered with the Commission. The respondent needs only to have participated in a penny stock offering at the time of the alleged misconduct to be subject to the statute. In this proceeding, the Division seeks to litigate “public rights” consistent with Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1976). Therefore, the imposition of civil monetary penalties will not violate the Seventh Amendment.

Accordingly, IT IS ORDERED that Vindman’s motion to dismiss is DENIED.



Carol Fox Foelak
Administrative Law Judge

against the defendant for pirating premium channels offered by Time Warner). These claims were brought by private parties, in federal court, and thus did not involve the litigation of “public rights” in an administrative forum. Vindman also cites Cutler’s testimony before Congress. Mr. Cutler’s testimony related to the Commission’s authority to impose monetary penalties in cease-and-desist proceedings against non-regulated persons, or persons not already regulated by the Commission. Section 21B(a) of the Exchange Act already provided for civil monetary penalties in proceedings instituted under Sections 15(b)(6), at the time of his testimony. The Division cites Robert G. Weeks, Exchange Act Release No. 48684 (October 23, 2003) (holding that the respondent was liable for civil monetary penalties pursuant to Section 21B of the Exchange Act for his misconduct during a penny stock offering). However, in that proceeding, the respondent did not argue that the Seventh Amendment precluded the Commission from imposing a civil monetary penalty. Thus, the respondent essentially consented to the Commission’s authority.