ADMINISTRATIVE PROCEEDING
FILE NO. 3-11972

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
October 26, 2005

In the Matter of	:	
	:	ORDER GRANTING PARTIAL
	:	SUMMARY DISPOSITION
PHILIP A. LEHMAN	:	
	:	
	:	

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on July 5, 2005. The hearing is scheduled to begin on October 31, 2005, in Dayton, Ohio.

By Order dated October 6, 2005, I granted the Division of Enforcement (Division) leave to file a motion for partial summary disposition.[1] See Rule 250(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.250(a). The October 6 Order further provided that Lehman could file an opposition to any such motion within the time permitted by the Rules of Practice. See Rule 154(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.154(b).

The Division filed its motion for partial summary disposition, a memorandum, and four declarations on October 13, 2005.[2] Lehman did not file an opposition to the Division's motion within the time allowed by the Commission's Rules of Practice. Nor did he move for an enlargement of time to file an opposition.[3]

[1] The Division made its investigative file available to Respondent Philip A. Lehman (Lehman) on August 4, 2005. Lehman filed his Answer to the OIP on August 9, 2005.

[2] The Division's motion to exceed the page limit applicable to motions for summary disposition is granted.

[3] Lehman did not argue that he lacked time to present, by affidavit prior to the hearing, facts essential to justify opposition to the Division's motion. See Rule 250(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.250(b).

The Division's motion and memorandum is supported by the report of Professor James E. Byrne (Byrne), a faculty member at George Mason University School of Law. I recognize Professor Byrne as an expert in the fields of commercial fraud, international commerce and finance, and international banking operations, and I accept his testimony that the investment programs at issue in this proceeding lacked a commercial basis, did not provide the extraordinary returns indicated, and were not viable as represented. The Division's motion and memorandum are also supported by the declarations of Stephen E. Cividino (Cividino) (an employee of Lehman's), Robert W. Gruen and Steven J. Welbourn (investors in Lehman's programs), and Jerrold H. Kohn (counsel for the Division). These declarations are, in turn, supported by several exhibits. I now grant the Division's motion for partial summary disposition.

Applicable Standards

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, 17 C.F.R. § 201.323.

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 a summary disposition as a matter of law.

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.

Matters Resolved by the Division's Motion for Partial Summary Disposition

I find that there are no genuine issues of material fact and that the following allegations in the OIP are true as to Lehman:

Background. Lehman is sixty-five years old and a resident of Englewood, Ohio. From 1984 until September 2000, Lehman was the sole shareholder and president of Tower Equities, Inc. (Tower Equities), a broker, dealer, and investment adviser registered with the Commission and located in Dayton. Lehman was also associated with Tower Equities from June 2001 until August 2002. Tower Equities is now known as Sicor Securities, Inc.

Prior Proceedings. On September 22, 1999, the Commission instituted administrative and cease-and-desist proceedings against Lehman and Tower Equities for raising $10.1 million from Tower Equities' investment advisory clients in connection with two fraudulent schemes. The Commission and Lehman eventually settled the matter.

The Commission ordered Lehman to cease and desist from future violations of Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), Exchange Act Rule 10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 (Advisers Act). The Commission also suspended Lehman for nine months from association with any broker, dealer, investment adviser, or investment company, and ordered him to pay a civil penalty of $10,000. Lehman consented to the Order without admitting or denying its findings. Philip A. Lehman, 73 SEC Docket 580 (Sept. 7, 2000).

As a result of the Commission's Order, the State of Ohio revoked Lehman's securities sales license and his investment adviser representative license, and the State of Arizona revoked Lehman's registration as a securities salesman. Philip Allen Lehman, 2002 WL 518622 (Ohio Dept. Comm.) (Jan. 17, 2002) (official notice); Philip A. Lehman, 2002 WL 417265 (Ariz. Corp. Comm.) (Feb. 22, 2002) (official notice). See Rule 323 of the Commission's Rules of Practice.

Relevant Entities. Ashar Endeavor I, LLC (Ashar), was an Ohio limited liability company organized in or about May 1999, with its principal place of business in Dayton. Ashar was dissolved in or about October 2002. Oberland Endeavor I, LLC (Oberland), is an Ohio limited liability company organized in or about July 2000 with its principal place of business in Dayton.

Sale of Ashar Units. Lehman operated and controlled Ashar. Beginning in 1999, Lehman sold, or directed others to sell, membership interests in Ashar. One of these individuals was Stephen E. Cividino (Cividino), who sold interests to at least four investors. At Lehman's direction, Cividino falsely told investors that Ashar would enter into a reserved funds transaction that could result in returns on their investments of 100% in a very short period with no risk to their principal. Lehman also directed Cividino to give the Ashar investors a copy of a document known as an Operating Agreement. The Operating Agreement represented that investors could receive a return up to 100% within sixty days. The oral and written representations to the investors in Ashar were false and misleading because the proposed reserved funds transaction or similar transaction, as described in the Operating Agreement, never existed and could not reasonably have existed. Lehman eventually raised a total of approximately $10 million on behalf of Ashar from twenty-six investors.

Periodic Status Reports. Beginning in August 1999, Cividino sent investors status reports on Ashar's efforts to invest the pool of funds. John L. Runft (Runft), an attorney who assisted Lehman in the preparation of the Ashar Operating Agreements, prepared these reports based on information he obtained from Lehman. Most of the reports claimed that Ashar was close to completing a transaction with investors' funds. However, subsequent reports always stated that the deal had fallen apart at the last minute. Ashar never entered into any "reserved funds transaction" or any other investment that produced the large returns as represented to investors.

Transfer to Oberland. In or about July 2000, Lehman created Oberland. At Lehman's direction, Cividino told at least one investor that it was necessary for him to transfer his investment from Ashar to Oberland because Ashar's confidentiality had been compromised. Lehman requested that all the investors in Ashar transfer their funds to Oberland. At Lehman's direction, Cividino falsely represented to investors that, as with Ashar, they could earn a large return on their investment in a very short time with no risk to their principal. At Lehman's direction, Cividino also gave investors a copy of Oberland's Operating Agreement. The Operating Agreement falsely stated that investors could receive a return of up to 200%, double the return represented for Ashar. All of the investors in Ashar transferred their funds to Oberland. Oberland never executed a "reserved funds transaction" or any other investment that produced the large returns as represented to investors.

On July 24, 2002, Lehman wired $1 million of investor funds from Oberland to a trust account controlled by Winston Crowder (Crowder), an attorney in Houston, Texas. Crowder had previously been found liable for breach of fiduciary duty in an unrelated, but similar, investment scheme, and ordered to pay damages of $180,500, plus pre- and post-judgment interest. Crowder v. Meyer, 1999 WL 82442 (Tx. Ct. App.) (Feb. 11, 1999) (official notice). While Crowder wired the money back to Oberland one week later, Crowder's history demonstrates the type of risk that Lehman took with Oberland investors' funds.

Seizure of Funds. In August 2002, the Federal Bureau of Investigation (FBI) seized the funds in Oberland's account at Key Bank in Dayton, pursuant to a seizure warrant issued by the United States District Court for the Southern District of Ohio. The seizure warrant was supported by the affidavit of an FBI Special Agent who had received information that Lehman was attempting to wire approximately $10 million from Oberland's account to an account in Switzerland.

On October 17, 2002, the United States Attorney for the Southern District of Ohio filed a complaint for civil forfeiture against the Oberland account at Key Bank, pursuant to 18 U.S.C. § 981. United States v. Contents of Key Bank, N.A., Account Number 353901001365, No. M-3-02-184 (S.D. Ohio) (official notice). The U.S. Attorney alleged in the complaint that the funds in the Key Bank account constituted proceeds traceable to violations of the federal mail fraud and wire fraud statutes. The case was dismissed after the U.S. Attorney, Oberland, and the Oberland investors, all of whom were claimants in the matter, agreed to a settlement in which all the funds in the account would be disbursed to the investors, resulting in full refund of their investments.

The Units Sold in the Offering Were Securities. Section 2(a)(1) of the Securities Act defines a security as, among other items, an investment contract. The United States Supreme Court has defined an investment contract as (1) an investment of money; (2) in a common enterprise; (3) with an expectation of profits to be derived solely from the efforts of others. SEC v. W. J. Howey Co., 328 U.S. 293, 301 (1946). The interests in Ashar and Oberland purchased by the investors are securities. The fact that the proposed "reserved funds transactions" did not exist does not alter the conclusion that the interests in Ashar and Oberland are securities. See SEC v. John D. Lauer, 52 F.3d 667, 670 (7th Cir. 1995).

Lehman Made Material Misstatements. Lehman made material misstatements to investors in the offer and sale, and in connection with the purchase and sale, of securities by representing orally and in writing that a "reserved fund transaction" was possible and that it could earn a return of as high as 100% in Ashar, and as high as 200% in Oberland, in a period of sixty days or less with no risk to principal. The lack of any opportunity to engage in reserved funds transactions was material to investors.

Lehman Acted with Scienter. Lehman acted with scienter because he knew or was reckless in not knowing that investment schemes that represent a return of 100% or more within sixty days without a risk to principal were not economically viable. While under investigation by the Division for similar spurious offerings, Lehman began raising money for Ashar. He then attempted to find a suitable "reserved funds transaction" for Ashar's investors while he was defending the administrative proceeding instituted by the Commission in September 1999.

Despite numerous unsuccessful attempts to find a suitable transaction, Lehman transferred investors' funds from Ashar to Oberland in July 2000. At that time, Lehman was in the process of settling the earlier administrative proceeding. Lehman also put investors' funds at risk when he caused Oberland to wire transfer $1 million to an attorney in Texas who had previously had a judgment entered against him in connection with a similar fraudulent scheme. Oberland investors ultimately suffered no loss of their principal investment only because the FBI intervened and seized the funds in Oberland's bank account. At a minimum, Lehman's conduct was extremely reckless and demonstrated disregard for the welfare of the investors to whom he sold or the risks to which he subjected their funds.

Antifraud Violations. As a result of the conduct described above, Lehman willfully violated Section 17(a) of the Securities Act in that he, by the use of the means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly, in the offer or sale of securities, employed devices, schemes or artifices to defraud; obtained money or property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers or prospective purchasers of such securities. As a part of this conduct, Lehman falsely represented to investors in Ashar and Oberland that, through fictitious transactions, they could earn high rates of return in a short period of time with no risk to principal.

As a result of the conduct described above, Lehman willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that he, in connection with the purchase or sale of securities, directly or indirectly, by the use of the means or instrumentalities of interstate commerce, or of the mails, employed devices, schemes or artifices to defraud; made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon investors in Ashar and Oberland. As a part of this conduct, Lehman falsely represented to investors in Ashar and Oberland that, through fictitious transactions, they could earn high rates of return in a short period of time with no risk to principal.

Sanctions. To protect the public interest, the Division seeks an order barring Lehman from association with any broker, dealer, or investment adviser. It also seeks an order imposing a second-tier civil penalty of $55,000. The Division does not request a cease-and-desist order or an order requiring disgorgement of ill-gotten gains.

Paragraphs II.C.6, II.D.34, and II.D.35 of the OIP allege that Lehman engaged in fraudulent conduct "from about April 1999 to at least August 2000." This language in the OIP arguably implicates 28 U.S.C. § 2462, because it involves a period more than five years before the Commission issued the OIP. Under 28 U.S.C. § 2462, as interpreted by Johnson v. SEC, 87 F.3d 484, 488-90 (D.C. Cir. 1996) and 3M Co. v. Browner, 17 F.3d 1453, 1456-61 & n.14 (D.C. Cir. 1994), evidence of misconduct occurring more than five years before the Commission issued an OIP may not be used to impose associational bars or a civil penalty. See Terry T. Steen, 53 S.E.C. 618, 623-25 (1998) (holding that the Commission will look only to wrongful conduct within the five-year period before the OIP to establish liability, but stating that it may consider a respondent's earlier conduct, when relevant, to establish the respondent's motive, intent, or knowledge); see also Edgar B. Alacan, 83 SEC Docket 842, 869-70 & nn.69-70 (July 6, 2004); Wheat, First Secs., Inc., 80 SEC Docket 3406, 3432 n.63 (Aug. 20, 2003); Terence Michael Coxon, 80 SEC Docket 3288, 3313 n.59 (Aug. 21, 2003), aff'd, 2005 U.S. App. LEXIS 13186 (9th Cir. June 29, 2005); Feeley & Willcox Asset Mgmt. Corp., 80 SEC Docket 2075, 2098-2100 (July 10, 2003). Lehman, who has been represented by counsel throughout this proceeding, did not raise the statute of limitations as an affirmative defense in his Answer to the OIP. He has thus waived the issue. See Rule 220(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.220(c). Notwithstanding Lehman's waiver, I have considered misconduct occurring only after July 5, 2000, in imposing associational bars and a civil penalty here.

I find that associational bars are warranted under Section 15(b)(6) of the Exchange Act, Section 203(f) of the Advisers Act, and the criteria set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). I also find that a civil penalty of $55,000 is warranted under the criteria of Sections 21B(b)-(c) of the Exchange Act and Sections 203(i)(1)-(3) of the Advisers Act.

Matters Still to be Determined at the Hearing

Lehman seeks to reduce or eliminate a civil monetary penalty on the grounds that he lacks the ability to pay. See Section 21B(d) of the Exchange Act; Section 203(i)(4) of the Advisers Act; Rule 630 of the Commission's Rules of Practice, 17 C.F.R. § 201.630. Lehman has provided the Division with a financial disclosure statement and other evidence in support of this defense. At the hearing, Lehman will have an opportunity to testify under oath about his financial circumstances, and the Division will have an opportunity to cross-examine him on that issue. This will be the only hearing issue. The Commission may then, in its discretion, consider the evidence concerning Lehman's ability to pay in determining whether a civil penalty is in the public interest.

The hearing will begin at 9:30 a.m. EST in Courtroom # 3 of the United States District Court for the Southern District of Ohio. The Courtroom is located on the Ninth Floor of the Federal Building, 200 West Second Street, Dayton, Ohio 45402.

This Order is interlocutory in character. Cf. Fed. R. Civ. Pro. 56(c). It is not an Initial Decision within the meaning of Rule 360(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.360(b). By analogy to Fed. R. Civ. Pro. 56(d), the Division and Lehman should view this Order as confirming that certain facts and certain sanctions have been deemed established for the case.

James T. Kelly
Administrative Law Judge