

INITIAL DECISION NO. 72

ADMINISTRATIVE PROCEEDING
FILE NO. 3-8675

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of)

THOMAS P. GILMARTIN, JR.)

) INITIAL DECISION
) AUGUST 29, 1995
)

APPEARANCES: Nancy J. Guarino and Daniel R. Gregus for the Division of
Enforcement, Securities and Exchange Commission

Thomas J. Gilmartin, Jr., pro se

BEFORE: Burton S. Kolko, Administrative Law Judge

INTRODUCTION

On April 19, 1995, the Commission entered an Order Instituting Public Administrative Proceedings pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 ("Order Instituting") against Thomas P. Gilmartin, Jr. ("Gilmartin") and Respondent Terence W. Zawacki ("Zawacki"). 1/ On July 17, 1995, an evidentiary hearing was held to determine whether the allegations made by the Division of Enforcement ("Division") were true and, if so, what remedial action against Gilmartin, if any, is appropriate in the public interest. The Respondent failed to file his Brief and Proposed Findings of Fact and Conclusions of Law which were due August 24, 1995.

The following facts have been established by a preponderance of the evidence: 2/

FINDINGS OF FACT

From at least 1979 to at least June 1990, Gilmartin was a registered representative associated with various broker-dealers registered with the Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"). From November 1989 to at least June 1990, Gilmartin both acted as an unregistered investment adviser and was associated with an unregistered investment adviser. **Exh. 15.** Gilmartin was the Chairman of the Board of First Ohio Securities Company ("FOSC"), a broker-dealer registered with the Commission and, along with another, owned and controlled FOSC. **Exh. 1.** Gilmartin also formed the All American

1/ Respondent Zawacki submitted an offer of settlement which the Commission accepted on July 14, 1995. Pursuant to that settlement, Zawacki is barred from the securities industry.

2/ "Exh." refers to the Exhibits introduced by the Division during its case-in-chief.

Fund, Inc. ("All American Fund") and registered it with the Commission as an investment company on February 12, 1990. **Exh. 3.**

On August 31, 1994, in the case of US v. Thomas P. Gilmartin, Jr. (5:93CR204-001), filed in the U.S. District Court, Northern District of Ohio, Gilmartin was convicted of, among other things, eight counts of violating 18 U.S.C. § 1341 (mail fraud), five counts of violating 18 U.S.C. § 1343 (wire fraud), and 15 counts of violating 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5 (securities fraud). Gilmartin was then sentenced to 108 months of incarceration and ordered to pay restitution of almost \$4 million ("Criminal Conviction"). **Exhs. 15 and 2.**

On June 10, 1993, in the case of SEC v. Thomas P. Gilmartin, Jr. and Terence W. Zawacki (Civil Action No. 4:92CV2590), the United States District Court for the Northern District of Ohio, Eastern Division, entered an Order of Permanent Injunction By Default enjoining Gilmartin from future violations of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder and Sections 203(a), 204, 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act") and Rules 204-2 and 204-3 promulgated thereunder; and from aiding and abetting violations of Sections 15(c)(1), 15(c)(3) and 17(a)(1) of the Exchange Act and Rules 15c1-2, 15c3-1, 17a-3 and 17a-11(c) promulgated thereunder and Section 31(a) of the Investment Company Act of 1940 ("Investment Company Act") and Rule 31a-1 promulgated thereunder ("Permanent Injunction"). **Exhs. 15 and 4.**

The Criminal Conviction and the Permanent Injunction were based on conduct, from in or about February 1989 until in or about June 1990, wherein Gilmartin, through FOOSC, offered and sold to investors in Ohio and Wisconsin at least \$5.85 million in securities in the form of

stock issued by the All American Fund and investment contracts offered by the Pension and Public Funds Trust Account ("PPFTA"), Pooled Certificates of Deposit ("PCD") and Collateralized Certificates of Sheltered Income ("CCSI")(collectively referred to as the "Investment Programs"). Moreover, Gilmartin induced at least 132 investors to purchase shares in the All American Fund and invest in the investment contracts offered by the Investment Programs; however, neither the stock nor the investment contracts were registered with the Commission. **Exh. 3.**

Gilmartin made false representations to investors in the All American Fund and the Investment Programs including, among other things, that proceeds from the sale of All American Fund stock would be invested in equity and debt securities issued by start-up companies, that there was no risk in investing in the All American Fund, that investor funds in the PPFTA would be pooled and invested in government securities and bank issued certificates of deposit, that investor funds in PCD would be pooled and used to purchase high yield, low-risk certificates of deposit, and that investor funds in the CCSI would be pooled and lent to real estate developers. Gilmartin, however, failed to invest proceeds from the sale of All American Fund stock as he represented and failed to pool and invest proceeds from the sale of the securities issued by the Investment Programs. Instead, Gilmartin caused these funds to be deposited into bank accounts he controlled and from which he made capital infusions into FOOSC and paid personal living expenses and expenses incurred by FOOSC. **Exh. 3.**

Gilmartin controlled all investments in the All American Fund, rendered investment advice and received compensation for rendering such advice without registering with the Commission as an investment adviser and without maintaining the required books and records.

Gilmartin also failed to maintain the required investment company records for the All American Fund. **Exh. 3.**

Gilmartin was an organizer and leader of criminal activity which was extensive and involved five or more participants. From on or about July 1987 to on or about March 1989, Gilmartin, together with others, unlawfully and willfully, conspired to impair, obstruct and defeat the lawful functions of the Commission by creating false and fictitious documents in order to deceive the Commission and other regulators into believing that FOOSC had a sufficient amount of net capital in order to remain in business. For example, on or about February 24, 1989, Gilmartin filed and caused to be filed with the Commission, the National Association of Securities Dealers, Inc., and the State of Ohio Department of Commerce, Division of Securities audited financial statements and schedules for the calendar year ending December 31, 1988, and a FOCUS Report for calendar year 1988 which falsely stated that FOOSC had an asset valued at \$534,465. **Exh. 1.**

From on or about June 27, 1989 to on or about February 1989, Gilmartin, together with others, conspired to commit securities fraud, wire fraud and mail fraud by forging the names of FOOSC customers on Letters of Authorization to pledge securities in these customers' accounts to other accounts to be used as collateral for loans, caused the resulting fraudulent loan proceeds to be wire transferred to another account, and mailed altered account statements to these customers to conceal the fact that the securities in these accounts had been hypothecated in favor of other accounts. **Exh. 1.**

The public interest requires that Gilmartin be barred from being associated with any broker, dealer or investment adviser because he was convicted of multiple felony charges of

securities fraud, mail fraud, and wire fraud. In addition, Gilmartin was permanently enjoined from future violations or aiding and abetting violations of the registration and antifraud provisions of the Securities Act, the antifraud, net capital and books and records provisions of the Exchange Act, the registration, antifraud, and records and reporting provisions of the Advisers Act, and the accounts and records provisions of the Investment Company Act. Moreover, Gilmartin was directly and indirectly sanctioned by other regulatory agencies and was the subject of private litigation involving his conduct in connection with the purchase or sale of securities.

In particular, FOSC was the subject of two Orders of Suspension issued by the State of Ohio which suspended the issue or sale or any interests in CCSI and the PPFTA to Ohio residents. **Exhs. 5-6.** The State of Ohio also suspended the issue or sale or any interest in the All American Fund to Ohio residents. **Exh. 7.** Furthermore, FOSC's license as a securities dealer was revoked by the State of Ohio under the Ohio Securities Act. **Exh. 8.** The State of Michigan revoked FOSC's and Gilmartin's exemption from registration for selling exempt securities, revoked FOSC's broker-dealer registration, censured and ordered FOSC and Gilmartin to cease and desist from further violations of the Michigan Uniform Securities Act. **Exh. 9.**

In litigation by private parties, a temporary restraining order was entered against Gilmartin and FOSC by the International Brotherhood of Electrical Workers Local No. 540 based on allegations that Gilmartin and FOSC wrongfully converted to their own use \$2,984,951.21 intrusted to them for investment purposes. **Exhs. 13-14.**

Furthermore, on June 22, 1990, the Securities Investor Protection Corporation determined that FOSC was insolvent or was unable to meet its obligations as they matured, was not in compliance with applicable financial responsibility and books and records requirements of the Exchange Act and, as a result, obtained a protective order and the appointment of a receiver to liquidate FOSC's assets. **Exhs. 10-12.**

Given the fact that Gilmartin's conduct that formed the basis for the Criminal Conviction and Permanent Injunction was egregious, and that he has continued to argue that he did not sell unregistered securities and that he did not misappropriate investor fund, there can be no reasonable assurance that Gilmartin will not continue to engage in violations of the federal securities laws. **Exh. 15.**

CONCLUSIONS OF LAW

The United States Securities and Exchange Commission has jurisdiction over Gilmartin and the matters alleged in this proceeding;

From at least 1979 to at least June 1990, Gilmartin was a registered representative associated with various registered broker-dealers and, from November 1989 to at least June 1990, Gilmartin both acted as an unregistered investment adviser and was associated with an unregistered investment adviser;

Gilmartin's criminal conviction occurred within ten years of the commencement of these proceedings;

Gilmartin was convicted of felony charges for offenses enumerated in Section 15(b)(4)(B)(i), (iii) and (iv) of the Exchange Act; and


Gilmartin was permanently enjoined from engaging in certain conduct or practice in connection with the purchase or sale of any security.

ORDER

In view of the Findings and Conclusions, it is necessary and appropriate in the public interest to bar Gilmartin from association with any broker, dealer or investment adviser. SO ORDERED.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Rules of Practice.

Pursuant to Rule 17(f) of the Rules of Practice, this decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If the party timely files a petition for review, or the Commission takes action to review as a party, the initial decision shall not become final with respect to that party.



Burton S. Kolko
Administrative Law Judge

Washington, D.C.
August 29, 1995