INITIAL DECISION RELEASE NO. 334
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12640

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
TERRENCE J. O'DONNELL	:	September 20, 2007
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	:	

APPEARANCES: Arthur S. Lowry and Matthew D. Strada for the Division of Enforcement, Securities and Exchange Commission.

Allan M. Lerner for Respondent Terrence J. O'Donnell.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on May 22, 2007, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that a federal district court has enjoined Terrence J. O'Donnell (Respondent or O'Donnell) for a period of five years from violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. 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 O'Donnell from association with any broker or dealer while the injunction remains in effect.

O'Donnell filed an Answer to the OIP and the Division notified him of the opportunity to inspect and copy its investigative file. At a telephonic prehearing conference, I granted the Division's request for leave to file a motion for summary disposition (Order of June 21, 2007). The Division filed its motion for summary disposition, a supporting memorandum of law, and accompanying exhibits on July 20, 2007 (Motion). O'Donnell submitted his opposition on August 1, 2007 (Opposition). The Division filed its reply on August 10, 2007 (Reply).

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 a 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 the underlying injunctive action are immune from attack in a follow-on administrative proceeding. Ted Harold Westerfield, 54 S.E.C. 25, 32 n.22 (1999) (collecting cases). To the extent that O'Donnell's opposition raises such challenges, it provides no basis for denying the Division's motion for summary disposition.

FINDINGS OF FACT

The exhibits attached to 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 these exhibits, as well as O'Donnell's Answer to the OIP, the Division has established, and O'Donnell has not contested, the following material facts.

O'Donnell, age forty-seven, resides in Loxahatchee, Florida. Between 1997 and 1999, O'Donnell was a bond trader associated with Suncoast Capital Group, Ltd. (Suncoast), a broker-dealer registered with the Commission and located in Ft. Lauderdale, Florida.

On April 21, 2003, the Commission brought a civil action against O'Donnell and others, alleging violations of the federal securities laws in connection with a scheme to defraud New York Life Insurance Company (New York Life), a customer of Suncoast. SEC v. Zwick, No. 03-CV-2742 (S.D.N.Y.) (Motion, Exhibit A).

According to the Commission's complaint, the scheme took two forms. First, officials at Suncoast bribed a trader from New York Life to obtain a flow of profitable securities trades from New York Life. Second, Suncoast failed to disclose to New York Life that it was charging excessive markups and markdowns on several of the trades it executed. The Commission charged that, from January 1998 through May 1999, Anthony Dong-Yin Shen (Shen), a bond trader at New York Life, defrauded his employer by directing bond trades to Suncoast, frequently at prices materially unfavorable to New York Life, in return for cash and other gifts. The complaint also alleged that Deborah Breckenridge (Breckenridge), a sales representative at Suncoast, provided items of value to Shen and received sales commissions from Suncoast's trades with New York Life in return. O'Donnell executed twenty of the twenty-seven Suncoast-New York Life transactions that involved excessive markups or markdowns. The trades in question started in 1997 and ended in 1999.

The Commission's complaint alleged three claims against O'Donnell: (1) direct violations of Section 17(a) of the Securities Act of 1933 (Securities Act); (2) direct violations of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5; and (3) aiding and abetting Breckenridge's and Shen's violations of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, pursuant to Section 20(e) of the Exchange Act.

After a three-week trial, the jury returned a special verdict in which it had been asked not only whether O'Donnell violated the specific provisions of the federal securities laws as charged in the complaint, but also, if it found a violation, to identify which of the two schemes constituted the violation. The jury found that O'Donnell did not directly violate Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, or Exchange Act Rule 10b-5. It further determined that O'Donnell aided and abetted Breckenridge's and Shen's violations of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 only with respect to the second alleged scheme, i.e., the excessive-markup scheme.

At the close of the trial, after the jury returned its verdict, O'Donnell moved for judgment as a matter of law and, in the alternative, for a new trial. At the same time, the Commission sought injunctive relief, disgorgement of ill-gotten gains, and a civil monetary penalty. On March 16, 2007, the district court issued an opinion and order in which it denied O'Donnell's motions for judgment and a new trial. SEC v. Zwick, 2007 U.S. Dist. LEXIS 19045 (S.D.N.Y. Mar. 16, 2007). The district court also granted some, but not all, of the equitable relief sought by the Commission (Motion, Exhibit B). As here relevant, the district court concluded:

- Substantial evidence supported the Commission's charge that there was a scheme to defraud New York Life by charging excessive markups;

- O'Donnell executed the great majority of the mortgage-backed securities trades with excessive markups;

- O'Donnell was aware that excessive markups were being charged to New York Life;

- O'Donnell's execution of the excessively marked up trades was undoubtedly a substantial causal factor in the perpetration of the excessive-markup scheme;

- There was evidence from which the jury could reasonably have inferred that O'Donnell took steps to disguise the excessive markups to New York Life;

- The jury's failure to find that O'Donnell committed fraud directly was not inconsistent with its determination that O'Donnell had the mental state to aid and abet Breckenridge's and Shen's fraud;

- The element of scienter favored the entry of an injunction against O'Donnell; and

- O'Donnell's pattern of aiding and abetting the excessive-markup scheme could not be considered an isolated occurrence.

On May 1, 2007, the district court entered its final judgment against O'Donnell. It enjoined him from future violations of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 for a period of five years (Motion, Exhibit C). In addition, the district court ordered O'Donnell to disgorge $49,760 in ill-gotten gains, plus prejudgment interest of $42,697, and to pay a civil penalty of $25,000 (Motion, Exhibit C).[1]

CONCLUSIONS OF LAW

O'Donnell represents that he has appealed the district court's decision to the U.S. Court of Appeals for the Second Circuit (Opposition at 2). The pending appeal is not a valid reason for delaying the resolution of this matter. See Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002); Jon Edelman, 52 S.E.C. 789, 790 (1996). If O'Donnell succeeds in having the underlying injunction vacated, he may ask the Commission to reconsider any sanctions 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).

Under Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) of the Exchange Act, the Commission may impose a remedial sanction on a person associated with a broker or dealer, consistent with the public interest, if the person has been permanently or temporarily enjoined from engaging in any conduct or practice in connection with the purchase or sale of securities. The record establishes the statutory basis for imposing a remedial sanction here because O'Donnell was associated with Suncoast at the time of the underlying misconduct and because the district court issued a final injunction of limited duration.[2]

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[1] The district court required O'Donnell to pay these financial sanctions within ten business days. O'Donnell acknowledges that he has not done so, even in part (Opposition at 5). Nor has O'Donnell petitioned for a judicial stay of the obligation to pay (official notice of court docket).

[2] On occasion, the federal district courts have denied the Commission's requests for permanent injunctions and, instead, issued final injunctions of limited duration. See, e.g., SEC v. Johnson, 2006 U.S. Dist. LEXIS 50307, at *20-21 (S.D.N.Y. July 21, 2006) (imposing a five-year injunction); SEC v. M & A West, Inc., 2005 U.S. Dist. LEXIS 30297, at *15-18 (N.D. Cal. Oct. 31, 2005) (same); SEC v. Clark, 1989 U.S. Dist. LEXIS 19135, at *10 (W.D. Wash. May 16, 1989) (same), aff'd on other grounds, 915 F.2d 439 (9th Cir. 1990). I conclude that persons subject to final injunctions of limited duration are "temporarily enjoined" within the meaning of Section 15(b)(4)(C) of the Exchange Act. Cf. Milton J. Shuck, 38 S.E.C. 69 (1957) (revoking

To determine whether sanctions under Section 15(b) of the Exchange Act are in the public interest, the Commission considers six factors: (1) the egregiousness of the respondent's actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. No one factor is controlling. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Registration sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

(1) The Commission has held that "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws." Jose P. Zollino, 89 SEC Docket 2598, 2608 (Jan. 16, 2007). "[O]rdinarily, and in the absence of evidence to the contrary, it will be in the public interest to . . . bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions." Marshall E. Melton, 56 S.E.C. 695, 713 (2003).

Here, the "evidence to the contrary" consists solely of the district court's observation that "the size of the markups that were at issue in this case fall at the extreme low end of the markups that have been held to be sufficient to state a claim for an excessive markup" (Motion, Exhibit B). However, the district court also noted that there is no bright-line floor beneath which any markup is deemed reasonable as a matter of law. See SEC v. Rauscher, Pierce, Refsnes, Inc., 17 F. Supp. 2d 985, 998 (D. Ariz. 1998); Press v. Chem. Inv. Servs. Corp., 988 F. Supp. 375, 385 (S.D.N.Y. 1997), aff'd, 166 F.3d 529, 536 (2d Cir. 1999).

There is no such thing as an antifraud violation which is trivial, inconsequential, or borderline. Consistent with Zollino and Melton, I consider the violations that O'Donnell aided and abetted to be quite serious.

(2) The district court explicitly rejected O'Donnell's claim that his misconduct was an isolated occurrence. O'Donnell aided and abetted the excessive-markup scheme, which lasted over eighteen months and involved twenty trades. There were three trades in late January and early February 1998 where the total markups exceeded $100,000 and two trades in January 1999 where the total markups exceeded $270,000. I consider the violations to be recurrent.

(3) O'Donnell contends that his state of mind compares favorably with the state of mind of a co-defendant, whom the district court found to have acted "with a high degree of scienter." Nonetheless, the district court plainly found that O'Donnell also acted with scienter. In addition, the district court pointed to evidence showing that O'Donnell repeatedly took steps to conceal

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the registration of a broker who was subject only to a preliminary injunction), aff'd, 264 F.2d 358 (D.C. Cir. 1958).

The parties have identified only one prior case in which the Commission brought a follow-on administrative proceeding against a person who was subject to a final injunction of limited duration. See Paul E. Johnson, 90 SEC Docket 877 (Mar. 22, 2007) (settlement).

the fraud. As illustrations, it noted that O'Donnell attempted to locate higher coupon bonds to conceal the high markups, altered a trade ticket to conceal a markup that had been questioned by New York Life as excessive, and executed the last trade with New York Life at no markup to make it appear that Suncoast had engaged in legitimate business with New York Life. These efforts to conceal the scheme persuade me that O'Donnell acted with a high level of scienter.

(4)-(5) The Division argues that O'Donnell fails to recognize the wrongful nature of his conduct or give any assurances against future misconduct. O'Donnell responds that he should not be penalized for exercising his right to defend himself, citing SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1229 (D.C. Cir. 1989) (holding that lack of remorse is relevant only where the defendant has previously violated court orders or otherwise indicated that they did not feel bound by the law). The district court gave little weight to these two Steadman factors. In this administrative proceeding, O'Donnell protests that "it would be helpful if the laws were spelled out clearly and the regulators got together and agreed on their meaning" (Opposition at 7). I consider this to be evidence that O'Donnell still seeks to minimize his misconduct. His "protest" suggests that the prospect of future violations cannot be ignored.

(6) O'Donnell argues that there is no likelihood of a future violation because he has lost his job in the securities industry and currently works as a mortgage broker. The district court found that there is a reasonable likelihood that O'Donnell could obtain a position in the securities industry, including, for example, with a hedge fund. Moreover, O'Donnell states that "[a]ll he knows is the bond business" (Opposition at 5).

Viewing the Steadman factors in their entirety, I conclude that an associational bar is necessary and appropriate to protect the public interest.

O'Donnell assumes that the underlying injunction will dissolve automatically on May 1, 2012—five years after the district court entered its final judgment. The Division does not challenge O'Donnell's assumption, and I find it to be reasonable.[3] Because the underlying injunction will cease to have effect after May 1, 2012, the associational bar imposed in this Initial Decision is entered without prejudice to the filing of a reapplication for association after May 1, 2012. The Division concurs with this approach (Motion at 10, 14 & n.49; Reply at 1).

ORDER

IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted;
2. The telephonic status conference scheduled for September 28, 2007, is cancelled;
3. Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Terrence J. O'Donnell is barred from association with any broker or dealer. O'Donnell shall

[3] The district court order underlying the present proceeding contrasts with the district court order in a prior case where additional proceedings were contemplated before a fixed-term final injunction could be dissolved. See SEC v. First Wisc. Mortgage Trust, 1974 U.S. Dist. LEXIS 6780, at *4-7 (D.D.C. Sept. 12, 1974) (denying the Commission's request for a permanent injunction, imposing an injunction for a fixed term of twenty-five years, but allowing the defendant to apply for relief from the injunction after a period of seven years).

have the right to reapply for association once the injunction entered on May 1, 2007, in SEC v. Zwick, No. 03-CV-2742 (S.D.N.Y.), is no longer in effect; and

4. Any reapplication for association by O'Donnell will be subject to the applicable laws and regulations governing the reentry process. The Commission may condition reentry on a number of factors, including, but not limited to, O'Donnell's satisfaction of the disgorgement award with prejudgment and postjudgment interest, and payment of the civil monetary penalty ordered against him in SEC v. Zwick.

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.

James T. Kelly
Administrative Law Judge