INITIAL DECISION RELEASE NO. 263
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11503

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
CURRENCY TRADING	:	
INTERNATIONAL, INC.,	:	INITIAL DECISION
CRAIG A. CUNNINGHAM,	:	October 12, 2004
JAMES R. KELSALL,	:	
and CHRISTIAN J. WEBER	:	
	:	

APPEARANCES: Gregory C. Glynn for the Division of Enforcement, Securities and Exchange Commission.

Sheldon M. Jaffe for Respondent Craig A. Cunningham.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on May 27, 2004, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that Respondents have been permanently enjoined from violating the antifraud provisions of the federal securities laws. 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 revoke the registration of Currency Trading International, Inc. (CTI), as a broker-dealer and to bar Craig A. Cunningham (Cunningham), James R. Kelsall (Kelsall), and Christian J. Weber (Weber) from association with any broker or dealer.

CTI and Weber failed to file Answers, and I issued a Default Order as to them on July 21, 2004. See Exchange Act Release No. 50050 (July 21, 2004). Cunningham has filed an Answer to the OIP. The Commission has not yet delivered the OIP to Kelsall. The Division has moved to resolve the proceeding against Cunningham by summary disposition.

Summary Disposition
As To Cunningham

The Division notified Cunningham of the size and location of its investigative files and informed him when those files would be available for inspection and copying. I then granted the Division leave to file a motion for summary disposition (Order of Aug. 10, 2004). The Division filed its motion for summary disposition, a memorandum of law, and a declaration with accompanying exhibits on August 17, 2004 (Motion). I now grant the Division leave to exceed the thirty-five page limit governing such motions. Cunningham submitted his opposition on August 25, 2004 (Opposition). The Division filed its reply on August 31, 2004 (Reply).

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.

Undisputed Facts

The OIP alleges, and Cunningham does not dispute, the following facts:

CTI is a Florida corporation owned by Brian R. Moore (now deceased) and Cunningham. Its principal office was in Newport Beach, California, and it had other offices in San Diego, California, Cleveland, Ohio, and Akron, Ohio. CTI became registered with the Commission as a broker-dealer in December 1993 and was a foreign currency options participant on the Philadelphia Stock Exchange from the fall of 1994 through the fall of 1998. During its years of operation, CTI employed approximately 350 people, the vast majority of whom were registered representatives. CTI ceased conducting a securities business on December 31, 1998, but it did not request to withdraw its broker-dealer registration with the Commission.

Cunningham, age forty-seven, resided in Irvine, California, at the times relevant to this proceeding. He now resides in Leawood, Kansas. Cunningham owned fifty percent of CTI and was CTI's vice president. From the summer of 1994 to October 1996, Cunningham directly solicited CTI clients, supervised registered representatives, and managed CTI's operations. At the relevant times, Cunningham held Series 3, 4, 7, 15, 24, and 63 licenses issued by the National Association of Securities Dealers.

On January 6, 2000, the Commission filed a complaint against Cunningham and others in the U.S. District Court for the Central District of California (Declaration of Gregory C. Glynn, Exhibit 1) (Glynn Decl., Ex. 1). The case was entitled SEC v. Currency Trading Int'l, Inc., Case No. CV 00-0012 AHS. The case was later reassigned to a different judge and became Case No. CV 02-5143 PA (CTx).

On February 2, 2004, the court issued its Findings of Fact and Conclusions of Law (Glynn Decl., Ex. 2). On May 3, 2004, the court entered a Revised Final Judgment of Permanent Injunction, Disgorgement, Prejudgment Interest, and Civil Penalties against Cunningham and others (Glynn Decl., Ex. 3). The Revised Final Judgment enjoins Cunningham from violating Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5. In the Revised Final Judgment, the court imposed a civil penalty of $110,000 against Cunningham. The court also ordered Cunningham to disgorge $4,361,993, plus prejudgment interest of $1,142,431.[1]

Cunningham's Opposition To the Division's Motion

The doctrine of collateral estoppel prevents Cunningham from relitigating in this proceeding the findings of fact and conclusions of law entered in the underlying injunctive action. Ted Harold Westerfield, 69 SEC Docket 722, 729 n.22 (Mar. 1, 1999) (collecting cases).

[1] Cunningham has appealed the judgment to the U.S. Court of Appeals for the Ninth Circuit (No. 04-56038). However, a pending appeal is not a valid reason for delaying the resolution of a follow-on administrative proceeding, such as this one (Order of July 6, 2004) (collecting cases).

Cunningham argues that the findings of fact in the district court's order of February 2, 2004, are not specific enough to justify the sanction sought here. For example, Cunningham points to Finding of Fact # 17 in the district court's order, which states that brokers made oral misrepresentations at Cunningham's direction (Opposition at 3). The Opposition observes that what Cunningham said or did is not specified in the district court's order. Cunningham argues that, even under the most generous interpretation of the doctrine of collateral estoppel, the broad conclusory language of the February 2 order is insufficient to support the bar the Division seeks in this proceeding (Opposition at 4).

The district court entered its injunction after a three-week trial, with testimony from thirty witnesses and the introduction of 450 exhibits. Under Federal Rule of Civil Procedure 65(d), every order granting an injunction "shall set forth the reasons for its issuance; shall be specific in terms; and shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." If Cunningham is claiming that the district court's February 2 order violates the requirement of specificity in Rule 65(d), his argument should be addressed to the Ninth Circuit. In any event, the presence of the antifraud injunction, as distinguished from the underlying findings and conclusions in the district court's order, is controlling here. See Marshall E. Melton, 80 SEC Docket 2812, 2825-26 (July 25, 2003) ("[W]e believe that ordinarily, 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 [of the federal securities laws].").

Discussion

I find no lack of specificity in the following aspects of the district court's order of February 2:[2]

Cunningham created and at all times controlled CTI and its brokers (Ex. 2, Find. # 14). He supervised brokers, monitored broker telephone solicitations, and directed brokers as to what they should tell customers (Ex. 2, Find. ## 14, 16, 30). CTI operated as an illegal boiler room, in that CTI and the individual Respondents, including Cunningham, sold speculative investments in foreign currency options through high-pressure sales tactics, soliciting new customers by telephone and deliberately creating a false expectation of gain without risk (Ex. 2, Find. ## 17, 27, 29). CTI brokers downplayed the risk disclosures contained in the written documents by telling their customers that the documents were a mere formality or were "unduly negative" (Ex. 2, Find. # 19). CTI brokers also told their customers falsely that they would "monitor the customer's account" and take action before the customer could lose money (Ex. 2, Find. # 19). Brokers repeatedly promised customers a false expectation of gain and then told customers to "trust us" (Ex. 2, Find. # 19). CTI brokers told customers that they would "double or triple" their money within a week or even days (Ex. 2, Find. ## 20, 21). Such statements were false (Ex. 2, Find. # 19).

[2] In the Discussion, the specific findings in Glynn Decl., Ex. 2 will be cited as "Ex. 2, Find. # ___."

CTI, with the knowledge of Cunningham, refused to disclose to CTI customers how CTI would manage their accounts (Ex. 2, Find. # 23). CTI, with the knowledge and direction of Cunningham, failed to disclose to its customers that the firm would refuse to return a customer's money unless the customer made a formal written demand and/or even threatened litigation (Ex. 2, Find. ## 14, 24).

The Public Interest

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 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).

Cunningham's conduct violated the antifraud provisions of the federal securities laws, and was egregious. His violations continued over several years, and cannot fairly be described as isolated. The violations involved a high degree of scienter. Cunningham never admitted the violations during the underlying district court action, or in this proceeding. He continues to deny wrongdoing. The nature of the violations, coupled with Cunningham's refusal to recognize the magnitude of his misconduct, supports an inference that such violations may be repeated. Although Cunningham is not currently involved in the securities industry, he is relatively young (age forty-seven) and has a long business life ahead of him. If Cunningham is to return to the securities industry, the Commission should control the timing. I am aware of no mitigating evidence and no rehabilitation evidence in this case. Considering the Steadman factors in their entirety, I conclude that the public interest requires the associational bar sought by the Division.

James R. Kelsall

It has now been more than four months since the Commission issued the OIP. Despite diligent efforts, the Office of the Secretary and the Division have been unable to effectuate service of the OIP upon Kelsall (Division's Status Report, dated July 2, 2004; Prehearing Conference of Aug. 10, 2004, at 5, 12; Reply at 6). There is no prospect of service in the foreseeable future.

The Office of the Secretary initially reported that it had received a Postal Service return receipt card (Green Card) demonstrating that Kelsall received the OIP on June 14, 2004. This turned out to be erroneous. The Green Card lacks a signature. It was returned to the Commission by the Postal Service and arrived in the SEC's Mail Room on June 14, 2004. The Green Card cannot be used as proof that Kelsall received the OIP.

The Division engaged a process server to effect personal service of the OIP upon Kelsall, but the process server was unable to locate Kelsall. The Division also advises that mail it has

sent to Kelsall and mail from the Clerk of the District Court in the underlying injunctive action has come back marked "undeliverable" for more than two years (Reply at 6). The Division acknowledges that the policy of the Commission is to dismiss without prejudice a respondent when service of the OIP cannot be accomplished within a reasonable amount of time. See Richard Cannistraro, 53 S.E.C. 388 (1998). That approach will be followed here.

ORDER

IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted as to Craig A. Cunningham;
2. The telephonic status conference scheduled for October 14, 2004, is cancelled;
3. Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Craig A. Cunningham is barred from association with any broker or dealer; and
4. The proceeding is dismissed without prejudice as to James R. Kelsall.

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.

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James T. Kelly
Administrative Law Judge