INITIAL DECISION RELEASE NO. 343
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12736

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
JONATHAN CARMAN	:	January 25, 2008
	:	
	:	

APPEARANCES: Karen L. Martinez and Thomas M. Melton for the Division of Enforcement, Securities and Exchange Commission.

Jonathan Carman, pro se.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on August 23, 2007, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that a federal district court has entered a final judgment, permanently enjoining Jonathan Carman (Carman or Respondent) from violating Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 (Securities Act), Sections 10(b) and 15(a) of the Exchange Act, and Exchange Act Rule 10b-5. 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 Carman from association with any broker or dealer.

Carman 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 unopposed request for leave to file a motion for summary disposition (Prehearing Conference Transcript at 17-19 (Tr. ___); Order of Sept. 24, 2007). The Division filed its motion for summary disposition, a supporting memorandum of law, and accompanying exhibits on October 26, 2007 (Motion). Carman submitted his opposition (including a memorandum of points and authorities, an affidavit, a statement of material facts, and evidentiary objections) on November 15, 2007 (Opposition). The Division filed its reply on November 28, 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. See Ted Harold Westerfield, 54 S.E.C. 25, 32 n.22 (1999) (collecting cases). To the extent that Carman's opposition raises such challenges, it provides no basis for denying the Division's motion for summary disposition.

FINDINGS OF FACT

Carman, age forty-three, is a resident of Aliso Viejo, California (Answer). From at least September 2004 through February 16, 2006, he was the vice president of The Carolina Development Company, Inc. (Carolina), a/k/a The Carolina Development Company at Pinehurst, Inc., a Nevada corporation headquartered in Irvine, California (Motion, Exhibit I at B.3, B.6).

On February 16, 2006, the Commission filed a civil injunctive action against Carman and others in the U.S. District Court for the Central District of California (Answer; Motion, Exhibit A). The complaint alleged that, from at least September 2004 until February 16, 2006, Carman sold Carolina stock through numerous private placement offerings, misappropriated investor funds, falsely stated to investors that their funds were invested, and otherwise engaged in a

variety of conduct that operated as a fraud and deceit on investors (Answer; Motion, Exhibit A).[1] The complaint also alleged that Carman participated in the unregistered sales of Carolina securities (Answer; Motion, Exhibit A). Finally, the complaint charged that Carman was not associated with a registered broker or dealer at the time of the fraudulent sales of Carolina stock (Answer; Motion, Exhibit A).

The complaint asserted that, through this conduct, Carman violated Sections 5(a), 5(c), and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act, and Exchange Act Rule 10b-5. As relief, the Commission sought a temporary restraining order, preliminary and permanent injunctions, an officer and director bar, a penny stock bar, disgorgement of ill-gotten gains plus prejudgment interest, and a civil monetary penalty against Carman.

On August 7, 2007, the district court granted the Commission's motion for summary judgment against Carman. It permanently enjoined Carman from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act, and Exchange Act Rule 10b-5 (Answer; Motion, Exhibit G). The district court also barred Carman from acting as an officer or director of a public company, and from participating in any offering of penny stock (Motion, Exhibit G). Finally, the district court directed Carman to disgorge $2,191,188.15, representing ill-gotten gains from the conduct alleged in the Commission's complaint, and to pay a third-tier civil penalty of $100,000 (Motion, Exhibit G).[2]

CONCLUSIONS OF LAW

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

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[1] The complaint alleged that the defendants obtained investments of at least $30 million through fraudulent offers, purchases, and sales of unregistered Carolina securities, pursuant to a private placement offering. It charged that the defendants made several material misrepresentations and omissions, including: (1) falsely representing that Carolina would soon be going public and that its stock would likely trade at a price many times the offering price, while, in reality, Carolina had taken no substantial steps to register its stock for an initial public offering; (2) failing to disclose that the same stock being offered through private placement memoranda, calls to prospective investors, on Carolina's website, and through other sales materials was available to purchase through the Pink Sheet quotation system at prices well below the offering price; (3) representing that shares purchased would be immediately available for trading as soon as Carolina went public, when, in reality, such shares were actually restricted and could not be sold for at least one year; (4) stating that Carolina owned or was developing a number of properties that it did not actually own; (5) claiming that the number of outstanding Carolina shares was substantially lower than the number actually outstanding; and (6) failing to disclose that defendant Lambert Vander Tuig (Vander Tuig) had been previously enjoined from antifraud and other violations of the federal securities laws in an action brought by the Commission and had been subsequently barred from association with any broker or dealer.

[2] Paragraph II.B.3 of the OIP alleges that the district court awarded prejudgment interest in the amount of $252,391.44. This is inaccurate. The district court's order plainly stated that prejudgment interest would be "calculated at the time of entry of final judgment" (Motion, Exhibit G).

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. Carman was associated with Carolina, an unregistered broker and dealer, at the time of the underlying misconduct. The district court has entered a permanent injunction.

Final Judgment

Paragraph II.B.2 of the OIP asserts that the district court entered a "final judgment" against Carman on August 7, 2007. Carman disputes this proposition.

Carman has appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit (No. 07-56391). He asserts that his pending appeal renders this administrative proceeding premature. By Order dated November 20, 2007, the Ninth Circuit ordered Carman to show cause why his appeal should not be dismissed for lack of jurisdiction. The issue has been briefed, and a ruling is pending.

In any event, even assuming that the Ninth Circuit were to exercise jurisdiction in No. 07-56391, the pending appeal would not be a valid reason for delaying the resolution of this administrative proceeding. See Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002); Jon Edelman, 52 S.E.C. 789, 790 (1996). If Carman succeeds in having the underlying injunction vacated by the Ninth Circuit, 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).

In making its August 7, 2007, ruling, the district court struck the words "final judgment" and "judgment" from the text of a draft provided by the Commission. It replaced them with the word "order" no less than twelve times (Motion, Exhibit G). A review of the district court docket sheet shows that litigation is ongoing in that forum, and that the Commission applied for the entry of final judgment on January 19, 2008.

However, these facts do not operate to deprive the August 7 permanent injunction of collateral estoppel effect in this administrative proceeding. See Restatement (Second) of Judgments § 13 (1982) ("The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."); In re Bridgestone/Firestone, Inc., Tires Prods. Liability Litig., 333 F.3d 763, 767 (7th Cir. 2003) ("Although claim preclusion (res judicata) depends on a final judgment, issue preclusion (collateral estoppel) does not."); Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979) (holding that a decision need not be "final" in the strict sense of 28 U.S.C. § 1291 in order to prevent the involved parties from relitigating contested issues); Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 955 (2d Cir. 1964) (holding that collateral estoppel does not require a judgment that ends the litigation; once liability has been established, the mere fact that damages have not yet been fixed does not deprive the liability determination of any preclusive effect it might otherwise have); Michael T. Studer, 83 SEC Docket 2853, 2857 (Sept. 20, 2004) (pending motion for a new trial does not render the doctrine of collateral estoppel inapplicable).

I conclude that the parties were fully heard in the district court action, that a reasoned order was issued, and that the permanent injunction order is entitled to collateral estoppel here.

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 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).

The Commission has held that "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest 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, there is no "evidence to the contrary." I consider Carman's violations to be quite serious.

The district court determined that Carman's misconduct occurred for at least eighteen months. It also found that Carman, along with Vander Tuig, continually revised and amended the information and documents given to investors during this period. On this basis, I conclude that Carman's violations were recurrent, not isolated.

In opposing the Division's motion for summary disposition, Carman contends that his misconduct was merely inadvertent and that he lacked the knowledge and sophistication to understand the federal securities laws. However, the district court concluded that, at the very least, Carman acted with reckless disregard for the truth, in authorizing the Carolina sales staff to make numerous misrepresentations to investors. I conclude that Carman's violations involved a high degree of scienter.

Carman has not made any assurances against future violations, other than stating that he does not want to continue in the securities industry (Tr. 11, 13, 16). Nor does he recognize his wrongdoing and accept responsibility for his reckless conduct. Instead, Carman seeks to blame others, including his attorney and his co-defendant, Vander Tuig, for his predicament. He does accept responsibility for the results of his "inadvertent" conduct. Before his affiliation with Carolina, Carman worked as a telemarketer. I conclude that, absent a bar, Carman's prior experience presents a genuine prospect of repeated violations.

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

ORDER

IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted;
2. The telephonic status conference scheduled for February 19, 2008, is canceled;
3. Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Jonathan Carman is barred from association with any broker or dealer; and
4. Any reapplication for association by Carman 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, Carman's satisfaction of the disgorgement award and payment of the civil monetary penalty ordered against him in SEC v. Carolina Development Company, Inc.

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