INITIAL DECISION RELEASE NO. 352
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13017

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	INITIAL DECISION
CLARENCE FRIEND	:	July 14, 2008

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

Robert C. Rosen for Respondent Clarence Friend

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Clarence Friend (Friend) from association with any broker or dealer. He was previously enjoined from violating the antifraud and registration provisions of the securities laws, based on his wrongdoing in 2004 and 2005 in connection with the sale of stock in AirTrac, Inc. (AirTrac).

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) against Friend on April 21, 2008, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The undersigned granted the parties leave to file Motions for Summary Disposition at a May 27, 2008, prehearing conference, pursuant to 17 C.F.R. § 201.250(a), by June 23, 2008, with oppositions due on June 30, 2008. The Division of Enforcement (Division) timely filed its Motion for Summary Disposition, as well as an opposition to a legal argument, that the Commission lacked jurisdiction, made by Friend at the prehearing conference.[1] The administrative law judge is required by 17 C.F.R. § 201.250(b) to act "promptly" on a motion for summary disposition.

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[1] Friend did not file a Motion for Summary Disposition or an opposition to the Division's.

This Initial Decision is based on (1) the Division's June 23, 2008, Motion for Summary Disposition; (2) the Division's June 30, 2008, opposition; and (3) Friend's Answer, dated June 4, 2008. There is no genuine issue with regard to any fact that is material to this proceeding.[2] All material facts that concern the activities for which Friend was enjoined were decided against him in the civil case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that Friend was enjoined in April 2008 from violating the antifraud and registration provisions of the federal securities laws, in the civil action entitled SEC v. AirTrac, Inc., Civil Action No. SACV 06-582 JVS (RNBx) (C.D. Cal.) (SEC v. AirTrac), based on his wrongdoing while selling unregistered AirTrac stock. The Division urges that he be barred from association with any broker-dealer. Friend argues that, since he was never associated with a registered broker-dealer, jurisdiction is lacking and, in addition, denies the underlying facts and conclusions that were determined in SEC v. AirTrac.

C. Procedural Issues

1. Exhibits Admitted into Evidence

The following items, of which official notice is taken pursuant to 17 C.F.R. §§ 201.250(a), .323, in the Division's Motion for Summary Disposition at Exhibits 1-5, are admitted into evidence as Division Exhibits 1-5:

June 27, 2006, Complaint in SEC v. AirTrac, (Div. Ex. 1);

January 2, 2008, Minute Order and Findings of Fact and Conclusions of Law in SEC v. AirTrac (Div. Ex. 2);

February 1, 2008, Minute Order in SEC v. AirTrac (Div. Ex. 3);

March 6, 2008, Minute Order in SEC v. AirTrac (Div. Ex. 4); and

April 2, 2008, Second Revised Final Judgment in SEC v. AirTrac (Div. Ex. 5).

2. Collateral Estoppel

The Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent. See James E. Franklin, 91 SEC Docket 2708,

[2] In view of the disposition of the proceeding in this Initial Decision, the September 9, 2008, hearing date scheduled at the prehearing conference is moot.

2713 (Oct. 12, 2007); John Francis D'Acquisto, 53 S.E.C. 440, 444 (1998); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn.6-7 (1997). Nor does the pendency of an appeal preclude the Commission from action based on an injunction. See James E. Franklin, 91 SEC Docket at 2714 n.15.

II. FINDINGS OF FACT

Friend, of Fountain Valley, California, is the founder and controlling shareholder of AirTrac; he was, but is no longer, its CEO. Answer at 1. Friend was (and is) permanently enjoined from violating the registration and antifraud provisions of the federal securities laws – Sections 5 and 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as Section 15(a) of the Exchange Act by acting as an unregistered broker or dealer. SEC v. AirTrac (Apr. 2, 2008); Div. Exs. 2, 5. Additional sanctions included civil penalties of $130,000 each against Friend and AirTrac and disgorgement of $273,487.87 against Friend and $1,759,542.28 (less any amount Friend in fact disgorges) against AirTrac, plus prejudgment interest on the disgorgement amounts. SEC v. AirTrac (Apr. 2, 2008); Div. Exs. 2, 5. Official notice pursuant to 17 C.F.R. § 201.323 is taken of Friend's pending appeal of the judgment to the United States Court of Appeals for the Ninth Circuit, No. 08-55923.

The wrongdoing that underlies Friend's injunction is set forth in the court's January 2, 2008, Minute Order, Div. Ex. 2, and is as follows: AirTrac raised approximately $1.8 million from over 200 investors who purchased AirTrac securities between January 2004 and April 2005. Friend and other AirTrac employees, using scripts approved by Friend, repeatedly told investors, both in writing and on the telephone, that AirTrac would, in late 2004 or early 2005, engage in an initial public offering (IPO) and public trading on the NASDAQ. Friend even told one investor at the end of 2003 that he had already filed AirTrac's Form 10 with the Commission. However, AirTrac never filed a Form 10 or Form 10-SB[3] or applied for a listing on the NASDAQ. Further, AirTrac salespeople, using scripts approved by Friend, falsely told several investors that AirTrac was negotiating lucrative business contracts with well-known telecommunications companies, including SBC, Cingular, AT&T, and Alltel. AirTrac's private placement memorandum (PPM), distributed to investors who invested between January 2004 and April 2005, represented that their funds would be used for business activities; in fact, Friend used $273,487.87 of investor funds for personal expenses. In concluding that these misrepresentations were material and made with scienter, the court categorized the scheme as a well-thought-out and long-running attempt to accumulate millions of dollars in investor funds based on patently false information and found that Friend encouraged AirTrac employees to make these misrepresentations and also personally made them to potential investors. Finally, the court found, Friend, who was not registered with the Commission as a broker or dealer or associated person of a broker or dealer, acted as an unregistered broker in his activities selling AirTrac securities.

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[3] Form 10-SB may be filed in lieu of Form 10 by a company that is a "small business issuer" within the meaning of 17 C.F.R. § 228.10(a)(1). See generally 17 C.F.R. §§ 228.10-.702 (Regulation S-B) (setting forth disclosure requirements for small business issuers).

III. CONCLUSIONS OF LAW

Friend has been permanently enjoined "from engaging in or continuing any conduct or practice in connection . . . with the purchase or sale of any security" within the meaning of Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) of the Exchange Act. Further, his adjudicated misconduct included acting as an unregistered broker within the meaning of Section 15(a) of the Exchange Act.

Friend argues that this administrative proceeding is jurisdictionally flawed and should be dismissed because he has never been, or been an associated person of, a registered broker or dealer. Thus, he argues, he cannot be subject to a bar from association with a broker or dealer pursuant to Section 15(b) of the Exchange Act. Friend's jurisdictional argument fails. He cites no cases to support this argument, and the precedent is to the contrary. See Vladislav Steven Zubkis, 86 SEC Docket 2618 (Dec. 2, 2005), recon. denied, 87 SEC Docket 2584 (Apr. 13, 2006) (unregistered associated person of an unregistered broker-dealer barred from association with a broker or dealer).

IV. SANCTION

The Division requests a broker-dealer bar. As discussed below, Friend will be barred from association with a broker-dealer because of the seriousness of his violation, taking account of the facts and circumstances of his conduct.

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See Section 15(b)(6) of the Exchange Act. The Commission considers factors including:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. See Schield Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006).

In proceedings based on an injunction, the Commission examines the facts and circumstances underlying the injunction in determining the public interest. See Melton, 56 S.E.C. at 698. "An injunction, by its very nature, is predicated on conduct that . . . violate[s] laws, rules or regulations." Id. at 709. The Commission considers an antifraud injunction to be particularly serious. Id. at 710. The public interest requires a severe sanction when a

respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. See Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

B. Sanctions

Friend's conduct was egregious and recurrent. The District Court described it as a well-thought-out and long-running attempt to accumulate millions of dollars in investor funds based on patently false information. The court found that Friend displayed, at a minimum, a reckless degree of scienter in concluding that he violated the antifraud provisions of the Securities and Exchange Acts. Consistent with a vigorous defense of the charges against him, Friend has not given assurances against future violations or recognition of the wrongful nature of his conduct.

The record does not indicate Friend's occupation, except for his association with AirTrac, so it is not possible to determine the likelihood that his occupation will present opportunities for future violations. Friend's violations are recent, ending only in 2005. The degree of harm to investors in AirTrac is quantified in AirTrac's ill-gotten gains of $1,759,542.28 (which includes Friend's own ill-gotten gains of $273,487.87) that the court ordered disgorged. Further, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). Additionally, Friend's misappropriation of investor funds shows a lack of honesty and judgment and indicates that he is unsuited to function in the securities industry. A broker-dealer bar is also necessary for the purpose of deterrence. The record does not indicate a prior disciplinary record; however, a lack of a disciplinary record is not an impediment to imposing a bar for a respondent's first adjudicated fraud violation. See Robert Bruce Lohmann, 56 S.E.C. 573, 582 (2003); Martin R. Kaiden, 54 S.E.C. 194, 209 (1998).

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, CLARENCE FRIEND IS BARRED from associating with any broker or dealer.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial 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, 17 C.F.R. § 201.111. 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 the Commission determines on its own initiative to review the

Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge