INITIAL DECISION RELEASE NO. 345
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12832

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
JUSTIN F. FICKEN	:	February 20, 2008
	:	
	:	

APPEARANCES: Frank C. Huntington for the Division of Enforcement, Securities and Exchange Commission.

Gary G. Pelletier and Brad Bailey of Denner Pellegrino, LLP, for Respondent.

BEFORE: Robert G. Mahony, Administrative Law Judge.

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on September 26, 2007, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that on September 13, 2007, the federal district court for the District of Massachusetts entered a final judgment, permanently enjoining Justin F. Ficken (Ficken or Respondent) from violating Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) 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 Division of Enforcement (Division) seeks to bar Ficken from association with any broker or dealer or investment adviser.

The Division has provided evidence that Ficken was served with the OIP on November 5, 2007, and he filed an Answer on November 9, 2007. At a telephonic prehearing conference, I granted the Division's request for leave to file a motion for summary disposition (Prehearing Conference Transcript at 5; Order of Nov. 27, 2007; Order of Dec. 26, 2007). The Division filed its Motion for Summary Disposition, a supporting Memorandum of Law, and accompanying exhibits on December 10, 2007 (Motion). Ficken submitted his Opposition on January 15, 2008 (Opposition).

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 to promptly 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 Ficken's opposition raises such challenges, it provides no basis for denying the Division's motion for summary disposition.

FINDINGS OF FACT

Ficken, age thirty-two, is a resident of Hyde Park, Massachusetts. (Answer at 1-2). From October 1999 through September 2003, he was a broker in a Boston branch office of Prudential Securities, Inc. (PSI). (Id. at 1). He was registered as an investment adviser, and as a broker-dealer with the Commission. (Id. at 1-2).

On November 4, 2003, the Commission filed a civil action against Ficken and others in the U.S. District Court for the District of Massachusetts. (Decl. of Huntington at 1; SEC v. Druffner, et. al., No. 03-12154 (D. Mass. 2003). On July 14, 2004, the Commission amended the complaint. (Decl. of Huntington at 1). The amended complaint alleged that from January 2001 to Septemeber 2003, Ficken, along with his co-defendants, defrauded more than fifty mutual fund companies and the funds' shareholders by placing thousands of market timing trades. SEC v. Druffner, 517 F. Supp. 2d 502, 506 (D. Mass. 2007). It alleged that in furtherance of the market timing scheme, Ficken disguised his identity by establishing numerous broker identification numbers. Id. According to the amended complaint, Ficken also allegedly opened customer accounts under various names in order to disguise their market timing activity. Id. Ficken continues to deny the allegations in the amended civil complaint. (Answer at 2).

On August 14, 2007, the district court granted the Commission's motion for summary judgment against Ficken. SEC v. Druffner, 517 F. Supp. 2d 502. On September 13, 2007, the district court entered a final judgment against Ficken, permanently enjoining him from violating Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. (Answer at 2; Ex. C 1-3). The judgment also ordered Ficken to disgorge $589,854 of ill-gotten gains and prejudgment interest. (Id. at 3). Ficken has appealed the district court's final judgment to the First Circuit. (Answer at 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 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. Under Sections 203(e)(4) and 203(f) of the Advisers Act, the Commission may impose a remedial sanction on a person associated with an investment adviser, 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.

Ficken was associated with PSI, which was registered as a broker-dealer and as an investment adviser at the time of Ficken's underlying misconduct. The district court has entered a permanent injunction, pursuant to Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

The Public Interest

To determine whether sanctions under Section 15(b) of the Exchange Act and Section 203(f) of the Advisers 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). Remedial 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). Ficken has failed to present any "evidence to the contrary." Indeed, Ficken's only argument is that his conduct is less egregious than that of his cohorts.

The district court found that Ficken engaged in a market timing scheme from January 2001 until September 2003. According to the court's findings, Ficken registered multiple fictitious mutual fund trading accounts under his broker identification number, facilitating thousands of market timing trades. Ficken's actions occurred over a two and half year period. Thus, I find that Ficken's actions were egregious and recurrent.

The district court found Ficken acted with a high degree of scienter. The court pointed to multiple emails from Ficken to his market timing clients advising them on ways to avoid detection by the mutual fund companies. Additionally, the court pointed to several "kick-out" letters and emails sent by the mutual fund companies to Ficken and/or PSI, requesting Ficken stop his market timing activities. Thus, I find that Ficken acted with a high degree of scienter.

Ficken has not admitted the wrongful nature of his conduct, nor has he made any assurances against future violations. As noted, his argument against remedial sanctions is that a permanent bar would punish him more harshly than his cohorts. However, continued employment in the securities industry will present Ficken additional opportunities to violate securities laws.

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

ORDER

Based on the Findings and Conclusions set forth above:

It Is ORDERED that the Division of Enforcement's Motion for Summary Disposition is granted;

It Is FURTHER ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Justin F. Ficken is barred from association with any broker or dealer; and

It Is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Justin F. Ficken is barred from association with any investment adviser.

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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Robert G. Mahony
Administrative Law Judge