

INITIAL DECISION RELEASE NO. 278
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11605

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

DERRICK N. MCKINNEY
and RICK R. MALIZIA

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:
: INITIAL DECISION
: March 22, 2005
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APPEARANCES: John E. Birkenheier and Tracy W. Lo for the Division of Enforcement, Securities and Exchange Commission.

Derrick N. McKinney, pro se.

Rick R. Malizia, pro se.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) instituted this proceeding on August 25, 2004, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act).

The Order Instituting Proceedings (OIP) alleges that Derrick N. McKinney (McKinney) and Rick R. Malizia (Malizia) have been permanently enjoined from violating the antifraud and other provisions of the federal securities laws. The Commission issued the OIP 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 McKinney and Malizia from association with any broker or dealer.

Procedural History of the Case

McKinney and Malizia filed timely Answers to the OIP. The Division then notified both Respondents of the size and location of its investigative files, and informed them when those files would be available for inspection and copying. At the first telephonic prehearing conference with the parties, I discussed the public interest test and afforded McKinney and Malizia an opportunity to complete their inspection and copying (Prehearing Conference of Sept. 22, 2004, at 7-10, 12-15, 17, 23-25; Order of Sept. 22, 2004). At the second telephonic prehearing conference, I granted the Division leave to file a motion for summary disposition (Prehearing Conference of Oct. 18, 2004, at 12; Order of Oct. 18, 2004).

The Division filed its motion for summary disposition on November 18, 2004. Malizia served the Division with a timely opposition, but he did not sign his pleading or file it with the Office of the Secretary. The Division replied to Malizia's opposition on January 10, 2005.

McKinney failed to oppose the Division's motion for summary disposition by the December 23, 2004, due date, and I defaulted him on January 6, 2005. McKinney subsequently moved to vacate the default order. Although McKinney's explanation was dubious, I gave him the benefit of the doubt and granted that relief over the Division's opposition (Order of February 2, 2005). I held a third telephonic prehearing conference to determine if McKinney intended to file additional pleadings in opposition to the Division's motion for summary disposition (Prehearing Conference of February 11, 2005). I granted McKinney leave to submit such supplemental opposition papers, but he has elected not to file such pleadings. Accordingly, the Division's motion for summary disposition is now ready for decision.

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., 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 a prior injunctive action are immune from attack in a follow-on administrative proceeding, such as this one. Ted Harold Westerfield, 54 S.E.C. 25, 32 n.22 (1999) (collecting cases).

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 those exhibits and on Respondents' Answers, the Division has established, and McKinney and Malizia have not contested, the following material facts.

McKinney, age forty-one, is a resident of Lewis Center, Ohio. He was employed as a registered representative at Merrill Lynch from November 1991 through August 1992. McKinney worked as a registered representative for Hamilton Investments and Linsco Private Ledger from February 1994 through December 1997, and as a registered representative for Mutual Services Corporation, a Florida-based broker and dealer, from January 1998 through December 1999. During the relevant times, McKinney held Series 7 and 63 licenses (McKinney Answer).

Malizia, age forty-two, resided at the relevant times in Willoughby, Ohio, Chicago, Illinois, and Boynton Beach, Florida. He is now a resident of Weston, Florida. Malizia was employed as a registered representative at Merrill Lynch from October 1987 to May 1995. From 1995 to 1998, Malizia served as the branch manager of a Dean Witter Reynolds, Inc. (Dean Witter), office near Cleveland, Ohio. From 1998 to 1999, he was associate regional sales manager for Dean Witter's Chicago office. From October 2000 through February 2002, Malizia was employed by the brokerage firm of Legg Mason Wood Walker, Inc., in a supervisory position and was responsible for several offices in southeast Florida. During the relevant times, Malizia held Series 7, 8, 31, 63, and 65 licenses (Malizia Answer; Declaration of John E. Birkenheier, Exhibit F) (Birkenheier Decl., Ex. ___).

On April 2, 2001, the Commission filed a complaint in the U.S. District Court for the Southern District of Ohio, captioned SEC v. Thorn, Case No. 2:01-cv-290. On September 11, 2002, the Commission filed a second amended complaint, adding McKinney and Malizia, along with companies they controlled, as defendants to the lawsuit (McKinney and Malizia Answers; Birkenheier Decl., Ex. B).

The Commission's second amended complaint alleged that, from February 1998 through April 2001, the defendants, including McKinney and Malizia, raised approximately \$75 million through the offer and sale of investments in a series of purported European bank trading programs. The amended complaint also alleged that the programs offered and sold by McKinney and Malizia exhibited many of the characteristics of the fraudulent prime bank schemes that the Commission, the Federal Reserve Board, and other regulators have warned do not exist. In selling the relevant investments, the defendants, including McKinney and Malizia, told investors

that the programs involved the trading of bank instruments issued by foreign banks; they promised investors returns ranging as high as 200 percent per month; they assured investors that the investments were risk free; and they warned investors that participation in the trading programs required total secrecy and confidentiality. According to the second amended complaint, the defendants, including McKinney and Malizia, dissipated much of the investors' funds to pay personal and business expenses, to pay purported returns to earlier investors, and to pay undisclosed salaries and fees for themselves. The second amended complaint charged that McKinney and Malizia acted as securities brokers without being registered with the Commission, as required by Section 15(a)(1) of the Exchange Act. The second amended complaint also alleged that McKinney and Malizia thereby violated Section 17(a) of the Securities Act of 1933 (Securities Act), Sections 10(b), 15(a), and 15(c)(1) of the Exchange Act, and Exchange Act Rules 10b-5 and 15c1-2.

On July 31, 2003, the Commission moved for summary judgment (Birkenheier Decl., Ex. C, Docket Entry # 491). In support of its summary judgment motion, the Commission submitted excerpts from testimony and deposition transcripts of defendants and witnesses, summaries of bank records prepared by a Commission accountant, and declarations from investors. McKinney and Malizia both filed briefs in opposition, as did several other defendants and relief defendants.

On October 14, 2003, the court issued an opinion and order granting the Commission's motion for summary judgment (Birkenheier Decl., Ex. A). On November 5, 2003, the court permanently enjoined McKinney and Malizia from future violations of Section 17(a) of the Securities Act, Sections 10(b), 15(a), and 15(c)(1) of the Exchange Act, and Exchange Act Rules 10b-5 and 15c1-2 (Birkenheier Decl., Exs. D-E). The court further ordered McKinney to disgorge \$54,200, plus \$16,499 of prejudgment interest, and held him jointly and severally liable for \$1,434,757 of disgorgement and \$294,632 of prejudgment interest previously imposed against his company, International Trading Partners, Ltd. (ITP). The court ordered Malizia to pay disgorgement and interest in amounts to be determined after the court-appointed receiver files his final report. The court also ordered McKinney and Malizia to pay civil penalties in amounts to be determined later.

McKinney and Malizia have appealed the court's October 14, 2003, opinion and its November 5, 2003, order to the U.S. Court of Appeals for the Sixth Circuit (No. 03-4582). As of today, the appeals remain pending.

DISCUSSION AND CONCLUSIONS

Section 15(b) of the Exchange Act empowers the Commission to order a wide range of administrative sanctions against those associated with, or seeking to become associated with, brokers or dealers if the Commission determines that the person has been enjoined from violating the Securities Act, the Exchange Act, and/or Exchange Act Rules. In particular, Section 15(b)(6) of the Exchange Act authorizes the Commission to censure, place limitations on the activities or functions of any person, suspend for a period not exceeding twelve months, or bar such a person from being associated with a broker or dealer, if the Commission finds, on the record after notice and opportunity for hearing, that any such remedy is in 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).

The court found in the underlying injunctive action that both McKinney's and Malizia's conduct was egregious, that both of them misrepresented and omitted to disclose material facts, and that both of them diverted investor money to their own benefit (Birkenheier Decl., Ex. A at 24-26, 28-31). The court also found that McKinney's misconduct took place from February 1999 through April 2001 and that Malizia's misconduct occurred from September 1999 through March 2001 (Birkenheier Decl., Ex. A at 8-9). Finally, the court determined that McKinney and Malizia had each acted with scienter and that neither McKinney nor Malizia had recognized the wrongful nature of his conduct (Birkenheier Decl., Ex. A at 24-26, 31).

In opposition to the Division's motion for summary disposition, Malizia denies that his violations were egregious, asserts that his misconduct was isolated, and denies that he acted with scienter. However, Malizia is collaterally estopped from challenging the district court's contrary findings.

Malizia also emphasizes that he has no prior disciplinary record, and suggests that some sanction less severe than a bar would be appropriate. However, the Commission has held 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. See Marshall E. Melton, 80 SEC Docket 2812, 2825-26 (July 25, 2003). No mitigating evidence has been offered here.

Malizia attaches to his opposition three letters attesting to his good character. However, the letters are not sworn, and are not even signed. Malizia is relatively young, has a long history in the securities industry, and still attempts to minimize the seriousness of his misconduct. He does not rule out a return to the securities industry in the future (Prehearing Conference of Sept. 22, 2004, at 24). The Commission should control the timing of any such return.

McKinney attached to his motion to vacate the default order an untimely opposition to the Division's motion for summary disposition. McKinney's opposition contains unsubstantiated denials and factual assertions which, as a matter of law, are insufficient to defeat the Division's motion for summary disposition. The district court has already found that McKinney, individually and through his company, ITP, raised approximately \$5.6 million in funds from investors; that McKinney admitted that he paid purported profits to investors, knowing that the same were not profits; and that McKinney and ITP used at least \$1.4 million of investor funds for his own purposes. McKinney purports to make sincere assurances against future violations and claims that he recognizes the "inappropriate" nature of his conduct. In fact, McKinney

continues to deny wrongdoing. He insists there was no fraud because he had no intent to commit fraud and that investors were happy. McKinney fails to address the district court's findings that he diverted investor money to himself and his company and falsely told investors that their principal was at little or no risk. The district court found that McKinney had not recognized the wrongful nature of his conduct. McKinney's response in this proceeding reinforces that finding.

Finally, McKinney argues that there is no likelihood that he will engage in future violations because he has allowed his Series 7 license to lapse. However, McKinney is relatively young, has an extensive history of working in the securities industry, and does not rule out a return to the securities industry (McKinney Answer; Prehearing Conference of Sept. 22, 2004, at 4). The fact that McKinney is not currently employed in the securities industry is not controlling when, as here, he has a long career in the securities industry and, absent a bar, could try to reenter the industry at any time.

I conclude that bars are appropriate as to both McKinney and Malizia.

ORDER

IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted;
2. The telephonic status conference scheduled for March 30, 2005, is cancelled; and
3. Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Derrick N. McKinney and Rick R. Malizia are each barred from association 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. 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