INITIAL DECISION RELEASE NO. 317
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12172

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

In the Matter of	:	
	:	
MICHAEL V. LIPKIN and	:	INITIAL DECISION
JOSHUA SHAINBERG	:	August 21, 2006
	:	

APPEARANCES: Bohdan Ozaruk and Jack Kaufman for the Division of Enforcement, Securities and Exchange Commission

Michael V. Lipkin, pro se

Joshua Shainberg, pro se

BEFORE: Lillian A. McEwen, Administrative Law Judge

SUMMARY

Respondents Michael V. Lipkin (Lipkin) and Joshua Shainberg (Shainberg) (collectively, Respondents) were permanently enjoined from future violations of Section 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) of the Exchange Act of 1934 (Exchange Act) and Rule 10b-5, thereunder. This Initial Decision bars Respondents from association with any broker or dealer.

PROCEDURAL HISTORY

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP), pursuant to Section 15(b) of the Securities Exchange Act of 1934, on February 3, 2006. I held a one-day public hearing on April 4, 2006, at the conclusion of which the record was closed. Three witnesses, including Lipkin, testified. Seven exhibits from the Division of Enforcement (Division) and nine exhibits from Respondents were admitted into evidence. The Division file its Post-Hearing Brief and Proposed Findings of Fact and

Conclusion of Law on May 23, 2006. Respondents' filed their Post-Hearing Brief on May 23, 2006.[1]

ISSUES PRESENTED

The OIP alleges that on January 13, 2006, the United States District Court for the Eastern District of New York entered a final judgment against Lipkin and Shainberg permanently enjoining them from committing future violations of and Section 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

The OIP alleges that the Commission's complaint in the underlying action charged that, from at least May 1995 through July 1995, Lipkin and Shainberg agreed with others to promote the stock of Alter Sales, Inc. (Alter Sales), to customers of Securities Planners, Inc. (Securities Planners), in exchange for kickbacks in the form of Alter Sales stock. That arrangement was undisclosed to Securities Planners' customers. According to the OIP, the complaint charged that Respondents violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in connection with their receipt of those undisclosed kickbacks. The OIP separately charged Lipkin with violating those antifraud provisions by agreeing to sell Alter Sales stock without disclosing to Securities Planners customers that the stock being sold was loaned to Securities Planners in order for the firm to meet its net capital requirement, and that Securities Planners' continued existence depended on that stock loan. Finally, the OIP alleges that the complaint also stated that Lipkin instructed his brokers to recommend Alter Sales stock to Securities Planners customers, even though Lipkin did not believe the stock was a sound investment, and despite the fact that neither Lipkin nor anyone else associated with Securities Planners possessed a reasonable basis for those recommendations.

If I conclude that the allegations in the OIP are true, I must then determine, pursuant to Section 15(b) of the Exchange Act, whether remedial sanctions against Lipkin and Shainberg are appropriate in the public interest.

FINDINGS OF FACT

The findings and conclusions herein are based on the entire record. I applied preponderance of the evidence as the standard of proof for the Division's case. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this Initial Decision. I find the following facts to be true.

Background

[1] Citations to the hearing transcript will be noted as "(Tr. __.)." Citations to the Division's and Respondents' exhibits will be noted as "(Div. Ex. __.)," and (Resp. Ex. __.)," respectively. Citations to the Division's and Respondents' Post-Hearing Briefs will be noted as "(Div. Post-Hearing Br. __.)," and "(Resp. Post-Hearing Br. __.)," respectively.

Lipkin, age fifty-eight, resides in Marlboro, New Jersey. Lipkin was a 50% owner of Hubert-Rosche, Ltd. (Hubert-Rosche), a branch office of the now defunct Securities Planners. (Answer at 2; Div. Ex. 2 at 4-5.) Shainberg, age forty-nine, resides in New York, New York. Shainberg was a 50% owner of Hubert-Rosche. (Answer at 2; Div. Ex. 2 at 4-5.) Securities Planners was a broker-dealer registered with the Commission during the time period in which Respondents engaged in the conduct underlying the injunctive proceeding. (Div. Exs. 2 at 5; 3 at 9.)

The Civil Action

On November 15, 2002, the Commission filed a civil complaint against Lipkin, Shainberg, and several others alleging that the defendants were part of a scheme to illegally retail stock at inflated prices. (Div. Ex. 3 at 2.) While employed at Securities Planners, Lipkin and Shainberg agreed to have Hubert-Rosche retail Alter Sales stock to Securities Planners' customers in return for a 50% undisclosed kickback. (Div. Ex. 3 at 24.) From at least May 1995 through June 1995, Respondents sold and/or directed the sale of Alter Sales stock to Securities Planners' customers pursuant to the kickback agreement. (Div. Ex. 3 at 27.) Lipkin and Shainberg did not disclose to their customers that they were to be paid a 50% kickback for selling Alter Sales stock. (Div. Ex. 3 at 27-29.) Lipkin instructed Hubert-Rosche brokers to recommend Alter Sales stock and to make only positive statements to customers regarding Alter Sales stock. He did so despite the fact that he did not believe Alter Sales stock was a sound investment and neither he nor anyone associated with Hubert-Rosche possessed a reasonable basis for such recommendations. (Div. Ex. 3 at 28.)

After a two week trial, the jury returned a unanimous verdict against Lipkin and Shainberg for securities fraud. (Div. Exs. 4 at 1-4; 5) The jury specifically found that:

> (1) Lipkin knowingly participated in a scheme to defraud investors, which involved the receipt of undisclosed payment in exchange for recommending Alter Sales stock to investors;
>
> (2) Shainberg knowingly participated in a scheme to defraud investors, which involved the receipt of undisclosed payment in exchange for recommending Alter Sales stock to investors;
>
> (3) Lipkin knowingly participated in a scheme to defraud investors in connection with Alter Sales stock, and he knew or recklessly disregarded that Alter Sales stock was not a sound investment;
>
> (4) Lipkin knew that brokers under his supervision were making false and misleading statements to customers to the effect that Alter Sales stock was a good or sound investment, and he participated in the brokers' false statements to their customers either by encouraging or instructing them to make such statements or in some other manner; and those false statements were material.

(Div. Ex. 1 at 1-2.) The United States District Court for the Eastern District of New York entered its final judgment as to Lipkin and Shainberg on January 13, 2006, permanently enjoining them from future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, ordering them to disgorge $277,382.45, plus prejudgment interest of $300,277.36, for which they were jointly and severally liable, and ordering each to pay a civil penalty of $200,000. (Div. Ex. 1.)

CONCLUSIONS OF LAW

Respondents' Arguments

As stated in their Post-Hearing Brief, Respondents are well aware that the doctrine of collateral estoppel prevents them from challenging the district court's rulings and findings and that the proper forum in which to do so is the United States Court of Appeals for the Second Circuit.[2] (Tr. 92-93; Reps. Post-Hear. Br. at 1-2, 4.) Respondents' defense in this proceeding, however, primarily consisted of attacking the findings and decision of the district court. (Tr. 92-111, 283-94; Resp. Post-Hear. Br. at 1, 4.) It is well established that the Commission does not permit a respondent to re-litigate issues decided in the underlying civil proceeding. Joseph P. Galluzi, 78 SEC Docket 1125, 1129 & n.20 (Aug. 23, 2002). Accordingly, to the extent that Respondents challenge the underlying injunctive proceeding, I find their arguments to be without merit.

The Permanent Injunction

The United States District Court for the Eastern District of New York entered its final judgment as to Lipkin and Shainberg on January 13, 2006, permanently barring them from future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. (Div. Ex. 1.) Based on the foregoing, I conclude that Respondents were enjoined by a court of competent jurisdiction in connection with the purchase and sale of a security.

Associated persons of a broker or dealer may be subject to sanctions under Section 15(b) of the Exchange Act if they have been "enjoined from any action, conduct, or practice," in a court of competent jurisdiction, "in connection with the purchase or sale of any security." Exchange Act § 15(b)(6)(A). Section 3(a)(4) of the Exchange Act defines the term "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." Section 3(a)(18) of the Exchange Act provides that the term "person associated with a broker or dealer" includes "any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer." Lipkin and Shainberg were associated with Securities Planners, when they sold and/or directed the sale of Alter Sales stock. Accordingly, I conclude that Lipkin and Shainberg were associated with a broker-dealer at the time of their misconduct.

[2] Respondents state that they have already appealed the district court's decision to the United States Court of Appeals for the Second Circuit. (Tr. 92-93; Resp. Post-Hear. Br. at 2.)

SANCTIONS

Section 15(b)(6)(A) of the Exchange Act authorizes the Commission to sanction any person who is, or at the time of the alleged misconduct was, associated with a broker or dealer if: (1) the person is enjoined from engaging in any conduct or practice in connection with the purchase or sale of a security; and (2) such a sanction is in the public interest. I have already concluded that Lipkin and Shainberg were enjoined in connection with the purchase and sale of a security. I have also concluded that at the time of their misconduct Lipkin and Shainberg were associated with a broker or dealer.

The remaining issue is what sanctions, if any, are appropriate in the public interest. The Division requests a permanent bar from associating with any broker or dealer. In determining whether a sanction is appropriate in the public interest, the following factors are examined:

> [T]he egregiousness of the [respondent's] actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the [respondent's] assurances against future violations, the [respondent's] recognition of the wrongful nature of his conduct, and the likelihood that the [respondent's] occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (citation omitted), aff'd on other grounds, 450 U.S. 91 (1981).

The Commission has noted that the fact that a person has been enjoined from violating the antifraud provisions has especially serious implications for the public interest. See Michael T. Studer, 83 SEC Docket 2853, 2861 (Sept. 20, 2004); Marshall E. Melton, 80 SEC Docket 2812, 2822-26 (July 25, 2003). The existence of such an injunction can, in the first instance, indicate the appropriateness in the public interest of a suspension or bar from participation in the securities industry. See Michael Batterman, 84 SEC Docket 1349, 1359 (Dec. 3, 2004); Melton, 80 SEC Docket at 2822-26.

In its decision and order the district court described Respondents' violations as "systematic" and "calculated," involving a "high degree of 'scienter' as proved by the substantial efforts the defendants took to hide the proceeds they received . . . through offshore bank accounts." (Div. Ex. 2 at 3.) Respondents' actions were not isolated as they took place over a two-month period. The conduct was egregious in that it caused forty-five investors to lose "virtually their entire investment," a total of $277,382.45. (Div. Ex. 2 at 4, 7.) Further, the district court stated that not only did Respondents fail to acknowledge their culpability, despite "overwhelming evidence" of their illegal conduct, but that Shainberg attempted to proffer false evidence in an attempt to deceive the district court. (Div. Ex. 2 at 3-4.)

At the hearing Respondent's did little more than introduce evidence and testimony attacking and challenging the district court's rulings on issues already decided in the underlying proceeding. (Tr. 92-111, 283-94.) Respondents took no responsibility for their conduct and exhibited no remorse for the damages caused by their actions and, instead, chose to blame the judicial system and the Commission, along with several others. (Tr. 284-96.) This makes the

likelihood of future violations high, when viewed in light of the high degree of scienter and egregiousness of their conduct. I, therefore, conclude that Respondents have not offered adequate assurances against future violations, nor have they recognized the wrongfulness of their conduct. In view of the foregoing, I conclude it is in the public interest to bar respondents from association with any broker or dealer. There are no mitigating factors.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I hereby certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on June 5, 2006.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Michael V. Lipkin is hereby BARRED from association with any broker or dealer; and

IT IS FURTHER ORDERED THAT, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Joshua Shainberg is hereby 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, 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 Practices, 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. 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.

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Lillian A. McEwen
Administrative Law Judge