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ADMINISTRATIVE PROCEEDING
FILE NO. 3-11692

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 7, 2004

In the Matter of	:	
	:	
RAYMOND JAMES FINANCIAL SERVICES, INC., J. STEPHEN PUTNAM, and DAVID LEE ULLOM	:	ORDER ON MOTIONS
	:	

The Securities and Exchange Commission ("Commission") instituted this proceeding on September 30, 2004, pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 203(f) of the Investment Advisers Act of 1940. The Order Instituting Proceedings ("OIP") directs that an Initial Decision be issued by August 1, 2005. See OIP at 17; 17 C.F.R. § 201.360. The Division of Enforcement ("Division") made its investigative file available to Respondents on October 6, 2004.

At a prehearing conference on November 12, 2004, I adopted the procedural schedule the parties proposed. The hearing will begin in Boston, Massachusetts, on January 31, 2005.

Respondent Raymond James Financial Services, Inc.

On November 15, 2004, Raymond James Financial Services, Inc. ("Raymond James"), a wholly owned subsidiary of Raymond James Financial, Inc., a Florida corporation headquartered in St. Petersburg, that is registered with the Commission as a broker-dealer and an investment adviser, filed:

1. an Answer and Affirmative Defenses;

2. a Motion (1) to Dismiss Disgorgement Claims, or (2) in the alternative, for a More Definite Statement as to Disgorgement Claims and (3) in Limine as to Evidence of Illegal Profits Other Than Those Properly Pled, ("Disgorgement Motion"); and

3. a Memorandum in Support of Disgorgement Motion ("Memorandum").

On November 22, 2004, the Division filed a Motion to Strike Raymond James's Answer. On November 30, 2004, Raymond James filed an Amended Answer and Affirmative Defenses ("Amended Answer") and a Memorandum in Opposition to the Division's Motion to Strike its Answer.[1] On December 1, 2004, as a result of the Amended Answer, the Division withdrew its Motion to Strike.

Answer and Affirmative Defenses

In its Amended Answer, Raymond James responds to each allegation in the OIP. (Amended Answer at 5-17.) Raymond James alleges that the purported fraud was an "isolated incident conducted by an unprincipled registered representative," Dennis Herula ("Herula"), "whose conduct was facilitated by the inaction of his branch manager," David Lee Ullom ("Ullom"), and that a cease-and-desist order and disgorgement are inappropriate and unnecessary remedies.[2] (Amended Answer at 4.) In addition, Raymond James makes several assertions and arguments such as: (1) Raymond James did not pursue, participate, or benefit from the fraud alleged in the OIP; and (2) the Division seeks to penalize Raymond James for failing to comply with a self-proclaimed "rule" for retention of electronic messages that was never properly adopted. (Amended Answer at 2-4.) The Amended Answer asserts the following twenty-five affirmative defenses. (Amended Answer at 17-21.)

1. "The Commission's purported application of Rule 17a-4 requirements to e-mail is improper and void."
2. Raymond James did not receive any illegal profits so disgorgement is not possible. Moreover, Raymond James is entitled to a jury trial for disgorgement claims above illegal profits.
3. There is no basis for imposition of a cease-and-desist order.
4. There is no basis for imposition of control person liability for Herula's activities.
5. Liability cannot be imposed on Raymond James for the alleged wrongdoing under any vicarious liability or agency theory.
6. Herula did not have actual or apparent authority to act on Raymond James's behalf, and investors did not believe that Raymond James was involved in their investments.

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[1] The Amended Answer consists of an answer and a ten-page addendum containing specific responses to the paragraphs in the OIP. The Amended Answer states, "Specifications for each of the numerical paragraphs as arranged in the [OIP] are included in Addendum A, attached hereto for the Commission's assistance." (Amended Answer at 6, 10-16.) The sentence contains a footnote, which states, "The Addendum attached hereto contains supplementary responses in the 'form' requested by the Commission, and is incorporated herein as part of [Raymond James's] First Amended Answer." (Amended Answer at 6 n.3.)

[2] Herula was a registered representative in Raymond James's Cranston, Rhode Island, branch office in 1999 until December 2000, when he was terminated. Ullom was the manager of the Cranston branch office.

7. Raymond James is not jointly or severally liable because it acted in good faith and did not induce the acts underlying the violation.
8. Control person liability does not apply to claims of disgorgement.
9. Raymond James maintained and enforced a reasonable and proper system of supervision.
10. Raymond James was not a culpable participant in the alleged fraud.
11. Raymond James satisfied NASD Rule 3010 in its supervision of Herula.
12. The allegations in the OIP are barred by the statute of limitations and/or laches.
13. Raymond James did not willfully violate Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, or Rule 10b-5, and it had no intent to deceive, manipulate, or defraud in connection with the purchase or sale of securities.
14. Under common law agency principles, Raymond James is not liable for the fraudulent conduct of its registered representatives.
15. Raymond James is not liable under an apparent agency theory because the transactions at issue were irregular on their face and investors had a duty to use reasonable diligence and prudence to ascertain that the registered representatives were acting within the scope of their powers.
16. Raymond James did not violate any purported e-mail retention policies.
17. Joint and several liability for disgorgement cannot be imposed on Raymond James because it did not act collectively, collaborate, or engage in a close relationship with those who violated the securities laws.
18. Joint and several liability for disgorgement is not appropriate because the alleged liability can be apportioned.
19. Raymond James has resolved claims with purported investors of Brite Business.
20. Raymond James did not act with the requisite scienter.
21. Raymond James did not employ a deceptive or manipulative device in connection with the purchase or sale of a security.
22. Third persons were the proximate cause of any violations of the securities statutes.
23. The Division cannot meet the standards for the relief it seeks.
24. Raymond James reserves the right to allege other affirmative defenses that it determines in discovery.
25. An administrative law judge does not have the appropriate Constitutional authority to decide this proceeding.

Disgorgement Motion and Memorandum

Raymond James moves to dismiss any claims of disgorgement. Raymond James argues that the prerequisite for disgorgement is missing, in that the OIP does not allege that Raymond James received any illicit profits or ill-gotten gains. Raymond James argues further that disgorgement beyond the wrongdoer's unjust enrichment would be an improper penalty. (Disgorgement Motion at 2, Memorandum at 6.) SEC v. First Jersey Sec., Inc., 101 F.3d

1450, 1476 (2d Cir. 1996); Haines v. St. Paul Fire & Marine Ins. Co., 428 F. Supp. 435, 441-42 (D. Md. 1977); SEC v. Phoenix Telecom, L.L.C., 231 F. Supp. 2d 1223, 1225 (N.D. Ga. 2001).

Raymond James contends that there are no allegations that Raymond James (1) except Herula and possibly Ullom, knew of the scheme while it was being carried out, (2) received any funds obtained illegally, or (3) engaged in any illegal conduct that resulted in receipt of illicit profits. (Memorandum at 7.)

In the alternative portion of the Disgorgement Motion, Raymond James claims that it is prejudiced in the preparation and presentation of its defense because the OIP does not specify the amount the Division seeks in disgorgement. (Id. at 9.) Raymond James further claims that there are no allegations that any transactions handled by Raymond James were, in and of themselves, illegal. It argues therefore that the funds received from those transactions are not ill-gotten gains or illicit profits subject to disgorgement. (Id. at 9-10)

On November 22, 2004, the Division filed its Opposition to Raymond James's Disgorgement Motion. ("Opposition to Disgorgement Motion"). On November 24, 2004, Raymond James filed a Reply Brief in Support of its Disgorgement Motion.

Respondent J. Stephen Putnam

In an Answer and a Motion for a More Definite Statement filed on November 15, 2004, J. Stephen Putnam ("Putnam") claimed that he cannot defend his interests because the OIP is vague in paragraphs 35, 36, 37, 47, 52, 53, 54, 57, 59, 61, 67. For example, Putnam wants the Division to specify what it considers to be red flags and exactly what correspondence allegedly came to his attention. Putnam also believes the Division should have to describe what it considers reasonable, since the OIP charges that certain actions and procedures were unreasonable. Finally, Putnam wants the Division to specify what he allegedly knew as opposed to what Respondent Ullom allegedly knew.

The Division filed an Opposition to Putnam's Motion for a More Definite Statement on November 22, 2004. Putnam filed a Response to the Division's Opposition on November 24, 2004.

RULINGS

Disgorgement Motion

Despite Raymond James's claims, the Division stated that it seeks disgorgement of $16.5 million at the prehearing conference on November 12, 2004, and in its Opposition to Disgorgement Motion. (Tr. 27.) The Division acknowledges that "It will be required at hearing, to present a reasonable approximation of Raymond James's ill-gotten proceeds." (Opposition to Disgorgement Motion at 3.) In its Opposition to Disgorgement Motion, the Division summarized its arguments as follows:

> Further, the OIP clearly alleges facts to support an order of disgorgement against Raymond James in the amount of $16.5 million. More specifically, the OIP alleges that Raymond James, acting through its agent [Herula], participated in a fraudulent scheme pursuant to which it received from defrauded investors $16.5 million in funds. These funds were then misappropriated or otherwise dissipated by Herula and others.

(Opposition to Disgorgement Motion at 1.)

I DENY Raymond James's Disgorgement Motion. The Commission issued the OIP pursuant to several sections of the securities statutes including Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act, which specifically allow the Commission to require disgorgement in a cease-and-desist proceeding. Raymond James's arguments that disgorgement is not allowed is based on its view of the facts. However, if the Division shows by a preponderance of the evidence that the facts alleged in the OIP are true, the Division will have made a prima facie showing that the Commission should order disgorgement. At this stage of the proceeding, I am not prepared to make a determination that disgorgement would be a necessary and appropriate sanction, but the Division's position that disgorgement is warranted would be an argument to be considered.

Raymond James's Affirmative Defenses

As a general matter, affirmative defenses should be disposed of as soon as possible so as to eliminate the necessity of irrelevant evidence. I DENY Raymond James's affirmative defenses because they are either premature or misdirected. Nearly all the defenses are arguments based on Raymond James's view of facts, which have yet to be established at a public hearing. Raymond James is free to raise any of these defenses when the record establishes a basis on which I can make a judgment. Affirmative defense number one is a challenge to the legality of Exchange Act Rule 17a-4. Assuming the Division presents evidence of violations of Rule 17a-4 at the hearing as part of its direct case, I will consider whatever evidence Raymond James offers to support its position as part of its rebuttal case. Affirmative defense number twenty-five, which challenges the authority of an Administrative Law Judge to decide the proceeding, should be addressed to the Commission since the OIP ordered that a public hearing be convened before an Administrative Law Judge. See 17 C.F.R. § 200.14 (citing the Administrative Procedure Act, 5 U.S.C. §§ 551-559).

Putnam's Motion for a More Definite Statement

For several reasons, I also DENY Putnam's Motion for a More Definite Statement. Putnam's claim that he cannot defend his interests without more information is unpersuasive. The Division made its investigative file available to Putnam almost two months ago pursuant to Rule 230 of the Commission's Rules of Practice. See 17 C.F.R. § 201.230. Under the procedural schedule, Putnam will know the names of the Division's witnesses and the identity of the Division's exhibits over a month before the hearing is scheduled to begin. In addition,

the case law does not require that the Division describe its evidence to a respondent before the hearing at the level of specificity Putnam requests. See Charles M. Weber, 35 S.E.C. 79 (1953); J. Logan & Co., 38 S.E.C. 827 (1959) M.J. Reiter Co., 39 S.E.C. 484 (1959). Finally, the OIP, which requires an answer, satisfies the standard set forth in Rule 200(b)(3) in that it sets "forth the factual and legal basis alleged therfor in such detail as will permit a specific response thereto." 17 C.F.R. § 201.200(b)(3).

Brenda P. Murray
Chief Administrative Law Judge