

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11893

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 24, 2007

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE
JUL 24 2007
FIRST CLASS

In the Matter of :
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 :
 DAVID A. FINNERTY, DONALD R. FOLEY II, :
 SCOTT G. HUNT, THOMAS J. MURPHY, JR., :
 KEVIN M. FEE, FRANK A. DELANEY IV, :
 FREDDY DeBOER, TODD J. CHRISTIE, : ORDER DENYING
 JAMES V. PAROLISI, ROBERT W. LUCKOW, : RESPONDENTS'
 PATRICK E. MURPHY, ROBERT A. JOHNSON, JR., : MOTION FOR PARTIAL
 PATRICK J. McGAGH, JR., JOSEPH BONGIORNO, : SUMMARY DISPOSITION
 MICHAEL J. HAYWARD, RICHARD P. VOLPE, :
 MICHAEL F. STERN, WARREN E. TURK, :
 GERARD T. HAYES, and ROBERT A. SCAVONE, JR. :

The Securities and Exchange Commission (Commission) commenced this proceeding on April 12, 2005, with an Order Instituting Proceedings (OIP). The proceeding has been stayed pending the prosecution of parallel criminal proceedings against fifteen Respondents.¹ David A. Finnerty, Admin. Proc. No. 3-11893 (A.L.J. June 7, 2005) (unpublished). However, the stay was modified as to Respondents Foley, Hunt, T. Murphy, Fee, Delaney, Christie, Parolisi, Luckow, P. Murphy, Johnson, Volpe, Turk, Hayes, and Scavone with reference to their filing Answers and various motions, the Division's production of documents, pursuant to 17 C.F.R. § 201.230, and other discovery. David A. Finnerty, Admin. Proc. No. 3-11893 (A.L.J. May 3, 2007) (unpublished). Pursuant to leave granted at the May 2, 2007, status conference and 17 C.F.R. § 201.250, these fourteen Respondents filed a Motion for Summary Disposition on May 25, 2007. The Division of Enforcement (Division) filed an opposition on June 15, and the Respondents, a reply on June 22.

¹ The criminal proceedings have been resolved except for: Freddy DeBoer, reportedly a fugitive; Michael J. Hayward and Michael F. Stern, who appealed their convictions; and David A. Finnerty, in whose case the Presiding Judge set aside the jury's verdict of guilty, entered a judgment of acquittal, and conditionally granted his request for a new trial in the event the judgment of acquittal is later vacated or reversed. United States v. Finnerty, 05 Crim. 393 (S.D.N.Y. Feb. 21, 2007), appeal pending, No. 07-1104 (2d Cir.). The proceeding has ended as to Respondents McGagh and Bongiorno. David A. Finnerty, Securities Act Release Nos. 8805, 8806 (May 23, 2007).

The OIP alleges that each Respondent engaged in interpositioning and/or trading ahead while associated with one of five specialist firms at the New York Stock Exchange (NYSE). The alleged violative conduct continued from 1999 through June 30, 2003. Sanctions authorized by the OIP include barring Respondents from association with a broker-dealer, civil money penalties, disgorgement, and cease-and-desist orders.

The Respondents ask that summary disposition be granted dismissing the Division's claim for disgorgement and dismissing all sanctions based on conduct that occurred before April 12, 2000, five years before the institution of this proceeding. In addition to their legal arguments, the Respondents state that there are more than enough additional issues and evidence to fill many weeks of trial, and evidence concerning disgorgement and conduct that occurred before April 12, 2000, would further burden and extend the proceedings. Also, they suggest that trimming the scope of this case at the present time will facilitate settlements with certain Respondents. While the parties are free to consider streamlining the case as a practical matter, the Respondents' arguments for doing so as a matter of law are without a legal basis, and their motion must be denied, pursuant to 17 C.F.R. § 201.250(b).

Disgorgement

Concerning disgorgement, the Respondents argue that their former employers, the specialist firms, have already disgorged all of the profits resulting from the challenged trades such that disgorgement from the Respondents themselves would be a double recovery. The Respondents also argue various facts pertaining to individual Respondents. It goes without saying that an individual Respondent can only be required to disgorge ill-gotten gains that he received (and which he has not previously disgorged). The amount, if any, of ill-gotten gains of each Respondent is a question of fact to be determined at the hearing.

Statute of Limitations

The proceeding and the relief authorized in the OIP are affected, in part, by 28 U.S.C. § 2462, a statute of general applicability that provides a five-year statute of limitations for "an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." See Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996).² Some of the conduct alleged in the OIP occurred before April 12, 2000 – five years before the April 12, 2005, institution of this proceeding.³ The OIP authorizes "remedial action" that includes

² In Johnson, the court ruled that a Commission "proceeding resulting in a censure and a six-month disciplinary suspension of a securities industry supervisor was a proceeding 'for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise,' within the meaning of § 2462." 87 F.3d at 485.

³ The Division argues that the statute was tolled until 2003 when staff learned that the NYSE was investigating specialist interpositioning, citing a "discovery of violation" rule. However, this rule does not apply to 28 U.S.C. § 2462. 3M Co. v. Browner, 17 F.3d 1453, 1462 (D.C.

broker-dealer bars pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and civil penalties pursuant to Section 21B of the Exchange Act. OIP at 19. Such “remedial action” and civil penalties are subject to the five-year statute of limitations in 28 U.S.C. § 2462.⁴ However, acts outside the statute of limitations may be considered to establish a respondent’s motive, intent, or knowledge in committing violations that are within the statute of limitations. Sharon M. Graham, 53 S.E.C. 1072, 1089 n.47 (1998) (citing Fed. R. Evid. 404(b) and Local Lodge No. 1424 v. NLRB, 362 U.S. 411 (1960)), aff’d, 222 F.3d 994 (D.C. Cir. 2000); Terry T. Steen, 53 S.E.C. 618, 623-24 (1998) (citing H.P. Lambert Co. v. Sec’y of the Treasury, 354 F.2d 819, 822 (1st Cir. 1965)). Further, such acts may be considered in determining the appropriate sanction if violations are proven. Steen, 53 S.E.C. at 623-25.

The OIP also authorizes cease-and-desist orders pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Exchange Act. Cease-and-desist orders are not subject to the five-year statute of limitations in 28 U.S.C. § 2462. Herbert Moskowitz, 55 S.E.C. 658, 683-84 (2002). Likewise, as Respondents recognize, disgorgement, which restores the status quo ante, is not subject to 28 U.S.C. § 2462. Johnson, 87 F.3d at 491; Joseph J. Barbato, 53 S.E.C. 1259, 1279 & n.27 (1999).

IT IS SO ORDERED.



Carol Fox Foelak
Administrative Law Judge

Cir. 1994). Likewise, the doctrine of “fraudulent concealment” does not toll the statute of limitations here.

The fraudulent concealment doctrine “requires the plaintiffs show (1) that defendants engaged in a course of conduct designed to conceal evidence of their alleged wrongdoing and that (2) [the plaintiffs] were not on actual or constructive notice of that evidence, despite (3) their exercise of diligence.” Larson v. Northrop Corp., 21 F.3d 1164, 1172 (D.C. Cir. 1994) (quoting Foltz v. U.S. News and World Report, 663 F. Supp. 1494, 1537 (D.C. 1987), aff’d 865 F.2d 364 (D.C. Cir. 1989), cert. denied 490 U.S. 1108 (1989)). The Division did not articulate a claim of diligence. However, assuming arguendo that Respondents engaged in a course of conduct designed to conceal evidence of their alleged wrongdoing and that Division did not have notice of the evidence earlier than 2003, a claim that this was despite exercise of diligence would be difficult to maintain in light of the Commission’s regulatory responsibilities toward the NYSE.

⁴ The Commission described the censure and suspension in Johnson as “remedial action,” but the court ruled the sanction to be a penalty. Johnson, 87 F.3d at 486; Patricia A. Johnson, 52 S.E.C. 253, 260 (1995).