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ADMINISTRATIVE PROCEEDING
FILE NO. 3-12614

SECURITIES AND EXCHANGE COMMISSION
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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 19, 2007

In the Matter of	:	
	:	ORDER ON DIVISION'S
PARK FINANCIAL GROUP, INC.,	:	MOTION TO STRIKE
and GORDON C. CANTLEY	:	AFFIRMATIVE DEFENSES
	:	

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on April 11, 2007, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act). Respondents Park Financial Group, Inc. (Park), and Gordon C. Cantley (Cantley) each filed an Answer on May 30, 2007. In their Answers, each Respondent alleged sixteen affirmative defenses pursuant to Rule 220(c) of the Commission's Rules of Practice. The affirmative defenses for each respondent were substantially identical. An affirmative defense is a new matter which, assuming the complaint to be true, constitutes a defense to it. Thorn, Welch & Co., 57 SEC Docket 2421, 2422 (October 13, 1994) (citing Black's Law Dictionary, 5th ed. 1979); see also Rao v. Covansys Corp., 2007 WL 141892 (N.D. Ill. 2007) (stating "[m]otions to strike affirmative defenses are not favored and will not be granted unless it appears to a certainty that the plaintiffs would succeed despite any state of the facts which could be proved in support of the defense or are inferable from the pleadings").

The Division of Enforcement (Division) filed a Motion to Strike Affirmative Defenses (Motion) on June 13, 2007. The Division contends that the alleged affirmative defenses are legally insufficient or improper because they simply deny the allegations in the OIP. The Division further alleges that they state legal conclusions but no facts, and Respondents cannot prove them. Respondents filed their Responses to the Motion on June 26, 2007, and the Division filed a Reply on July 3, 2007.

The affirmative defenses alleged by Respondents are summarized below:¹

¹ Cantley has withdrawn the portion of his first affirmative defense that the OIP fails to allege any impact on the market or reliance by investors on any material misrepresentation or omission. He has also withdrawn a portion of his eleventh affirmative defense. (Cantley Response at 3 nn.1-2.) Cantley has also withdrawn his thirteenth and sixteenth affirmative defenses. (Cantley Response at 6 n.4; 8.) Park has withdrawn its eleventh and fifteenth affirmative defenses. (Park Response at 4.)

(1) The OIP fails to allege any misrepresentation or omission of material fact. It further fails to allege that Cantley and Park knew of any misrepresentation or omission of fact. Park further contends that the OIP fails to allege any impact on the market or reliance by any individual investor on any material misrepresentations or omissions.

(2-4) Cantley and Park did not knowingly substantially assist in the commission of alleged securities violations. They did not act recklessly and were not culpable participants in any alleged securities violations.

(5) Cantley and Park did not willfully aid or abet any securities violations by Dennis Crowley (Crowley), the alleged securities law primary violator.

(6-8) Cantley and Park did not violate, aid and abet or cause violations of Exchange Act Section 17(a) and Rule 17a-8 thereunder, and did not act with the requisite scienter.

(9) Park complied with the Suspicious Activity Report (SAR) filing requirements because it reasonably delegated responsibility for this function to other persons in the firm and it did not know and had no reason to know that the persons were not performing their functions. Cantley is not responsible for Park's compliance with the SAR filing requirements as the function was delegated to others.

(10) There is no basis for a cease-and-desist order against Cantley or Park as there is no risk of future violations.

(11) No disgorgement can be ordered because Cantley did not receive any illegal profits from the alleged "pump and dump" scheme conducted by Crowley.

(12) The OIP fails to state a claim upon which relief may be granted.

(13) The claims are barred by the statute of limitations or laches.

(14) Cantley and Park acted in good faith and did not directly or indirectly induce the acts constituting the alleged violations.

(15) The applicable standards for the relief sought cannot be met.

(16) Any other affirmative defenses that may be applicable.

I GRANT the Motion to Strike Affirmative Defense One (1) as to both Respondents. This affirmative defense alleges that the Commission has failed to (1) allege any impact on the market; and (2) plead any allegations that Mr. Cantley or Park knew of any material misrepresentation or omission of fact. As to the first allegation, in a proceeding brought by the Commission, the Division is not required to prove investor reliance in a fraud case or "impact on the market." SEC v. Berger, 322 F.3d 187, 193 (2d Cir. 2003). The second issue

attacks the sufficiency of the pleadings in the OIP. This issue has already been addressed in my Order Denying Motion for a More Definite Statement and Motion to Strike where I found that the OIP complied with Rule 200(b) in that it provided sufficient information for Cantley to prepare his defense. Further, Rule 200(b) does not require the Division to disclose its strategy or evidence. Order of June 29, 2007.

I GRANT the Motion to Strike Park's Affirmative Defense Seven (7) that denies it aided and abetted or caused violations of Exchange Act Section 17(a) and Rule 17a-8 thereunder. The OIP does not charge Park with aiding and abetting violations of Exchange Act Section 17(a) and Rule 17a-8 thereunder.

I GRANT the Motion to Strike Affirmative Defense Nine (9) as to Park. The defense, as it pertains to Park, says, in effect, that Park delegated compliance functions, including the filing of SAR reports, to "other persons in the firm" that is, to itself. This assertion cannot meet the test of new material that provides a defense for Park to the charges of aiding and abetting Crowley's alleged securities violations or that Park allegedly violated Exchange Act Section 17(a) and Rule 17a-8 thereunder.

I GRANT the Motion to Strike Affirmative Defense Ten (10) as to both Respondents and I GRANT the Motion to strike Affirmative Defenses Eleven (11) and Fifteen (15) as to Cantley. These defenses allege the Division cannot meet the applicable standards for the relief sought and it cannot prove entitlement to a cease-and-desist order or disgorgement. Challenging the Division's ability to prove entitlement to relief does not meet the definition of an affirmative defense as discussed in Thorne. A properly averred affirmative defense will assert a "new matter that eliminates or limits the [respondent's] ordinary liability, stemming from those allegations." Gwin v. Curry, 161 F.R.D. 70, 71 (N.D. Ill. 1995).

I GRANT, in part, the Motion to Strike Affirmative Defense Thirteen (13) as to Park. The defense of laches is generally not available against a government agency working in the public interest. Robert W. Armstrong, III, 85 SEC Docket 3011, 3036 n.74 (June 24, 2005); David Disner, 52 S.E.C. 1217, 1223 (1997). Park provides no factual allegations that suggest I should deviate from this norm. Therefore, I GRANT the Division's Motion to Strike as to the claim of laches, but DEFER ruling on the Division's Motion to Strike the defense of statute of limitations.

I GRANT the Division's Motion to strike Park's Affirmative Defense Sixteen (16). This is not an affirmative defense, it simply advises that Park may allege other affirmative defenses if determined to be applicable during discovery. The Respondents are free to seek leave to amend their Answers if such other affirmative defenses should arise. 17 C.F.R. §201.220(e).

I DENY the Motion to Strike Affirmative Defense Twelve (12) as to both Respondents; however, to the extent that this defense can be used to argue for dismissal of the OIP before the Division has an opportunity to present its case, the Commission has not delegated authority to dismiss an OIP on these grounds. See 17 C.F.R. § 200.30-10(8), 17 C.F.R. §201.250. Instead, I will treat this affirmative defense as a general denial that Respondents did not commit the

alleged violations. Nonetheless, the burden remains on the Division to prove the allegations of the OIP.

I DEFER ruling on the remaining alleged affirmative defenses. The Division's Motion and the Responses thereto will be further considered at the prehearing conference scheduled for October 15, 2007. Respondents will be afforded an opportunity to describe the evidence, if any, they will offer in support of the remaining alleged affirmative defenses.

SO ORDERED.



Robert G. Mahony
Administrative Law Judge