UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 61506 / February 4, 2010

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2984 / February 4, 2010

Admin. Proc. File No. 3-13280

In the Matter of DON WARNER REINHARD 174 Watercolor Way, Suite 232 Santa Rosa, Florida 32459	ORDER DENYING SUMMARY AFFIRMANCE AND REMANDING FOR ADDITIONAL PROCEEDINGS

I.

The Division of Enforcement has moved for summary affirmance of an administrative law judge's decision barring Don Warner Reinhard, an associated person with registered investment adviser Magnolia Capital Advisors, Inc. ("Magnolia") and with registered broker-dealer Paragon Financial Group, Inc. ("Paragon"), from associating with any broker or dealer or any investment adviser.[1] The law judge based her decision on the fact that Reinhard had been enjoined from violations of antifraud provisions of the securities laws, Section 17(a) of the Securities Act of 1933,[2] Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder,[3] Sections 206(1), 206(2), 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-4(a)(2) thereunder,[4] and Advisers Act Section 207;[5] and from aiding and abetting violations of books-and-records provisions of Advisers Act Section 204 and Advisers Act Rule

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[1] *Don Warner Reinhard*, Initial Decision Rel. No. 370 (Feb. 12, 2009), 95 SEC Docket 14,218.

[2] 15 U.S.C. § 77q(a).

[3] 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5.

[4] 15 U.S.C. §§ 80b-6(1), (2), and (4); 17 C.F.R. § 275.206(4)-4(a)(2).

[5] 15 U.S.C. § 80b-7.

204-2(a)(7).[6] On March 6, 2009, Reinhard filed a petition for review of the law judge's decision, and on March 24, 2009, the Division filed its motion for summary affirmance. For the reasons discussed below, we have determined to deny the Division's motion and remand these proceedings to the law judge.

II.

The circumstances under which the district court entered the injunction are relevant to our disposition of the Division's motion and we briefly describe them here.[7] The Division filed an injunctive complaint against Reinhard on December 13, 2007. The Division alleged that he had defrauded investment advisory clients in connection with the margin purchases of collateralized mortgage obligations ("CMOs"), causing substantial losses for those clients. Reinhard requested and received extensions of time within which to answer but, in fact, never answered the complaint. The Division moved to find Reinhard in default on June 9, 2008, and the clerk entered a default against Reinhard on June 12, 2008. After entry of the default, Reinhard interposed several procedural objections, which the district court deemed to be motions to set aside the default. The district court denied Reinhard's motions and, on July 13, 2008, entered a default judgment against him.[8] The district court entered a permanent injunction against Reinhard on October 3, 2008.[9] On December 8, 2008, the district court conducted a bench trial on the issues of disgorgement, prejudgment interest, and monetary penalties; as a result of that trial, the district court entered its Order for Entry of Judgment requiring Reinhard to pay $5,857,241.09 in disgorgement, $2,258,940.58 in prejudgment interest, and a $120,000 civil money penalty.[10] On October 28, 2009, the Eleventh Circuit affirmed the district court decision.[11]

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[6] 15 U.S.C. § 80b-4 and 17 C.F.R. § 275.204-2(a)(7).

[7] *SEC v. Reinhard*, No. 4:07-CV-529-RH/WCS (N.D. Fla.).

[8] *Reinhard*, No. 4:07-CV-529-RH/WCS (N.D. Fla. July 13, 2008).

[9] *Reinhard*, No. 4:07-CV-529-RH/WCS (N.D. Fla. Oct. 3, 2008).

[10] *Reinhard*, No. 4:07-CV-529-RH/WCS (N.D. Fla. Dec. 8, 2008). The district court stated that "[t]he government's proof at trial established that, from January 2002 through July 2003, from the transactions at issue, Mr. Reinhard received commissions of $5,857,241.09." The district court further stated that "[b]ased on the facts as admitted by the default and considering all of the circumstances, I conclude that a [$120,000] penalty is warranted." The district court did not further identify or discuss the circumstances affecting its sanctioning decision.

[11] *SEC v. Reinhard*, No. 09-10213, 2009 U.S. App. LEXIS 23744 (11th Cir. Oct. 28, 2009) (*per curiam*).

III.

On October 27, 2008, we issued an Order Instituting Proceedings ("OIP") alleging that Reinhard had been enjoined based on conduct between January 2002 and August 2003 while he was associated with a registered investment adviser and registered broker-dealer. Advisers Act Sections 203(e) and (f) and Exchange Act Sections 15(b)(4) and (6) allow for imposition of sanctions on a person associated with an investment adviser or broker or dealer, consistent with the public interest, if the person has been permanently enjoined from engaging in any conduct or practice in connection with the purchase or sale of securities.[12]

On December 1, 2008, Reinhard answered the OIP by challenging factual allegations in the injunctive complaint. Among other things, Reinhard asserted that the losses his clients suffered were not the result of his actions but of "illegal liquidation of their investment accounts by Bear Stearns as a result of numerous admitted errors during the period of July 2003."[13] Reinhard also asserted that all of the clients who suffered losses were sophisticated investors who were fully aware of, and accepted, the risks involved in their investments, that he and his wife participated in the same investments as the clients and lost "approximately $1 million," and that allegedly false quarterly statements provided by Magnolia to clients were the fault of "Bear Stearns as custodian of the CMOs" for Magnolia.

On December 18, 2008, the Division moved for summary disposition pursuant to Commission Rule of Practice 250(a).[14] In support, the Division attached three exhibits to its motion: the injunctive complaint, the order of injunction, and the Order to Enter Judgment. Reinhard's opposition to the Division's motion, which asserted that "there are numerous issues of material fact," did not include any exhibits. Reinhard's Answer to the OIP attached eight exhibits consisting primarily of offering documents in connection with the transactions at issue in the injunctive proceeding and correspondence between Reinhard and Commission staff. However, the initial decision admits only the Division's three exhibits and is based solely on those exhibits.

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[12] 15 U.S.C. §§ 80b-3(e) and (f); 15 U.S.C. §§ 78*o*(b)(4) and (6).

[13] Reinhard stated that Bear Stearns & Co., Inc. and Bear Stearns Securities Corp., Inc. (collectively "Bear Stearns") acted as Paragon's clearing agent with respect to the transactions at issue and the custodian of clients' accounts.

[14] 17 C.F.R. § 201.250(a). Rule of Practice 250(a) provides that a party to the administrative proceeding may move for summary disposition. Such motions may be granted "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law." 17 C.F.R. § 201.250(b). For purposes of determining if there is a "genuine issue with regard to any material fact," Rule 250(a) provides further that "the facts of the pleadings of the party against whom the motion is made shall be taken as true" subject to certain exceptions. 17 C.F.R. § 201.250(a).

The law judge did not address any of the factual issues raised by Reinhard in his answer to the OIP because, she held, "the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent."[15] The law judge determined that summary disposition was appropriate because

> [t]here is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Reinhard was enjoined were decided against him in the civil case on which this proceeding is based. Any other facts in his pleadings have been taken as true pursuant to 17 C.F.R. § 201.250(a).

The law judge determined that the statutory requirements for the imposition of sanctions were met. Based on the allegations of the injunctive complaint, the provisions of the injunction, her own characterization of Reinhard's conduct before the district court as "dilatory,"[16] and the district court's findings with respect to disgorgement, pre-judgment interest, and civil money penalties, the law judge concluded that Reinhard should be barred from associating with any broker, dealer, or investment adviser.

IV.

Rule of Practice 411(e)(2) provides that the Commission may summarily affirm an initial decision if the Commission determines that no issue raised in the proceeding warrants further consideration.[17] That rule provides further that the Commission may deny a motion for summary affirmance upon a reasonable showing that, among other reasons, the initial decision embodies "an exercise of discretion . . . that is important and that the Commission should review."[18] In support of its motion, the Division argues that summary affirmance is warranted because Reinhard "does not dispute, nor could he, the material facts relevant to this administrative proceeding," which are, according to the Division, that he defaulted in the Injunctive Proceeding; that the district court entered a permanent injunction against him; and that he was enjoined for conduct while he was associated with a broker-dealer and an investment adviser.

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[15] For support, the law judge cited three of our cases involving federal court injunctions entered against respondents following trials or summary judgment. *James E. Franklin*, Securities Exchange Act Rel. No. 56,649 (Oct. 12, 2007), 91 SEC Docket 2708 (injunction entered after jury trial); *John Francis D'Acquisto*, 53 S.E.C. 440 (1998) (injunction entered after summary judgment); *Demitrious Julius Shiva*, 52 S.E.C. 1247 (1997) (injunction entered after trial). None of the authorities cited involved injunctions entered by default.

[16] The district court's Order for Entry of Judgment does not include such a finding.

[17] 17 C.F.R. § 201.411(e)(2).

[18] *Id*.

We previously have noted that "[s]ummary affirmance is rare, given that generally we have an interest in articulating our views on important matters of public interest and the parties have a right to full consideration of those matters."[19] Summary affirmance is appropriate when it is clear that "submission of briefs by the parties will not benefit us in reaching a decision."[20] We do not believe that is the case here.

Nor do we believe that the law judge's earlier determination to grant the Division's motion for summary disposition was appropriate. In determining the need for assessment of sanctions in the public interest, we, like the law judge, are guided by the factors identified in *Steadman v. SEC*.[21] These factors include the egregiousness of Reinhard's actions, the isolated or recurrent nature of his conduct, the degree of his scienter, the sincerity of his assurances against future violations, his recognition of the wrongful nature of his conduct, and the likelihood that his occupation will present opportunities for future violations.[22] While the record appears to provide the statutory basis for the imposition of sanctions against Reinhard -- *i.e.*, he was enjoined while associated with an investment adviser and a broker-dealer -- we question whether the record is sufficient to address, in a meaningful manner, the public interest.

The disposition of this proceeding was based on three documents: the injunctive complaint, the injunctive order, and the Order to Enter Judgment. Such evidence can, under certain circumstances, provide an ample basis for the assessment of sanctions, as when the parties have litigated the allegations made in the injunctive complaint, or when the injunction has been entered by consent.[23] We have repeatedly held that a respondent in an administrative proceeding of this type, a so-called "follow-on" proceeding, may not challenge the findings made by the court in the underlying proceeding or, where he has consented to an injunction, the

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[19] *Richard E. Cannistraro*, 53 S.E.C. 388, 389 n.3 (1998); *see also Terry T. Steen*, 52 S.E.C. 1337, 1338 (1997) (denying summary affirmance and noting that such action is appropriate only where there are "compelling reasons").

[20] *Cannistraro*, 53 S.E.C. at 389 n.3.

[21] 603 F.2d 1126, 1140 (5th Cir. 1979).

[22] *Id*.

[23] *See, e.g.*, *Franklin*, 91 SEC Docket at 2708 (bar imposed based on injunction entered after jury trial); *Jeffery L. Gibson*, Exchange Act Rel. No. 57,266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 (bar imposed based on consent injunction), *petition dismissed*, No. 08-3377 (6th Cir. Mar. 11, 2009).

allegations made in that underlying proceeding, and we consider those findings or allegations in determining the appropriate sanction.[24]

Here, however, the injunction was entered by default, and the record before us indicates that the court made limited findings regarding the allegations made in the injunctive complaint.[25] Although the district court stated that, "[b]y his default, Mr. Reinhard in effect admitted the fraud alleged in the complaint," the Supreme Court has held that "[i]n the case of a judgment entered by . . . default, none of the issues is actually litigated. Therefore [issue preclusion, or collateral

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[24] *See, e.g.*, *Franklin*, 91 SEC Docket at 2708 ("It is well established that [respondents are] collaterally estopped from challenging in [follow-on] administrative proceeding the decisions of the district court in the injunctive proceeding."); *Marshall E. Melton*, 56 S.E.C. 695, 712 (2003) (stating that "[d]efendants in Commission injunctive actions must understand that, if the Commission institutes an administrative proceeding against them based on an injunction to which they consented after issuance of this opinion, they may not dispute the factual allegations of the injunctive complaint in the administrative proceeding"); *see also* 17 C.F.R. § 202.5 ("announc[ing Commission] policy not to permit a defendant . . . to consent to a judgment . . . or order that imposes a sanction while denying the allegations in the complaint . . . .").

[25] As discussed, after entry of the default judgment against Reinhard, the district court held a hearing with respect to the amount of disgorgement and penalties to be assessed. The Order to Enter Judgment which followed that hearing did not address issues of liability but merely made findings regarding the amount of commissions received by Reinhard as a result of the transactions at issue. There could be cases, however, in which a district court receives evidence and makes findings following entry of a default judgment with relevance to our sanctions analysis. In such a situation, summary disposition may be appropriate.

estoppel] does not apply with respect to any issue in a subsequent action."[26] Under these circumstances, we believe that our consideration of the public interest would be assisted by the introduction of additional evidence addressing the factors identified in *Steadman*.

Accordingly, it is ORDERED that the motion for summary affirmance by the Division of Enforcement be, and it hereby is, denied; and it is further

ORDERED that this proceeding be, and it hereby is, remanded for further proceedings consistent with this Order.

By the Commission.

Elizabeth M. Murphy
Secretary

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[26] *Arizona v. California*, 530 U.S. 392, 414 (2000) (quoting *Restatement (Second) of Judgments*, § 27 cmt. e, p. 257 (1982)); *but see Harold F. Harris*, Exchange Act Rel. No. 53,122A (Jan. 13, 2006), 87 SEC Docket 362, 369 (preclusive effect given to default injunction where district court's accompanying findings took account of "substantive defenses argued by Respondents" in late-filed answer); *Thomas J. Donovan*, Exchange Act Rel. No. 52,883 (Dec. 5, 2005) 86 SEC Docket 2652, 2653 (sanctions based on default injunction, but law judge conducted hearing accepting documents and testimony that related to the misconduct at issue and the public interest); *Lamb Bros., Inc.*, 46 S.E.C. 1053, 1058-59 (1977) (sanctions imposed based on default injunction but "allegations made in the injunctive suit [were] remade" in administrative proceeding and "an evidentiary record with respect to those matters was developed").