INITIAL DECISION RELEASE NO. 393
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13588

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
ANTHONY MARTIN	:	INITIAL DECISION
	:	January 26, 2010
	:	

APPEARANCES: Eric M. Schmidt and Sheldon Mui for the Division of Enforcement, Securities and Exchange Commission.

Anthony Martin, pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

INTRODUCTION

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on August 19, 2009, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that, on July 2, 2009, a jury in the United States District Court for the Southern District of New York (district court) found Anthony Martin (Respondent or Martin) guilty of securities fraud and conspiracy to commit securities fraud. The Commission instituted this proceeding to decide whether remedial action is appropriate in the public interest. The Division of Enforcement (Division) seeks to bar Respondent from association with any broker, dealer, or investment adviser.

Respondent filed an Answer to the OIP on September 14, 2009. At a telephonic prehearing conference, at which the Division and Respondent appeared, the Division represented that it had made the Commission's investigative files available to Respondent and that Respondent reviewed the files and identified documents to be copied, which the Division did and forwarded to him. (Prehearing Conf. Tr. at 4.) I then granted the Division's request for leave to file a motion for summary disposition. (Prehearing Conf. Tr. at 4-5; Order of Oct. 5, 2009.) The Division filed its Motion for Summary Disposition, its Memorandum of Law, a Declaration of Sheldon Mui, and accompanying exhibits on November 9, 2009 (Motion).[1] Respondent filed his

[1] I will cite to the Division's Motion as "(Div. Mot. at __.)."

Declaration in Opposition to the Motion on December 4, 2009 (Opposition), and the Division filed its Reply on December 11, 2009.[2]

The Standards for
Summary Disposition

Rule 250(a) of the Commission's Rules of Practice provides that, after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323 of the Commission's Rules of Practice.

Rule 250(b) of the Commission's Rules of Practice requires the hearing officer to promptly grant or deny the motion, or to defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law.

In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party. See Felix v. N.Y. City Transit Auth., 324 F.3d 102, 104 (2d Cir. 2003); O'Shea v. Yellow Tech. Svcs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999); Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon the mere allegations or denials of its pleadings. At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. See Anderson, 477 U.S. at 249.

FINDINGS OF FACT

Martin, 49, is a resident of Yardville, New Jersey. (Answer.) Between May 2005 and January 2006, he was a registered representative associated with Maxim Group LLC (Maxim), a broker-dealer registered with the Commission. (Id.) Maxim also operated as a registered investment adviser under the name Maxim Financial Advisors LLC. (Id.) Martin has been a broker for approximately seventeen years. (Resp. Opp. at 13.)

[2] I will cite to the Respondent's Opposition and the Division's Reply as "(Resp. Opp. at __.)" and "(Div. Reply at __.)," respectively.

On July 2, 2009, Martin was found guilty by a jury of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371, and securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. § 240.10b-5. (Answer.) On December 10, 2009, a final judgment was imposed on Martin[3] and he was sentenced to fifty-seven months in prison and two years supervised release.[4] United States v. Dennis Michael Nouri, Case No. 1:07-CR-1029-DC (S.D.N.Y. Dec. 17, 2009). Martin admits that he was convicted as described in the OIP and notes that he disputes it and intends to appeal. (Answer.) In his Answer, he "denies engaging in such conduct" as alleged in his indictment. However, in his Opposition he asserts no denial of the conduct underlying his criminal indictment and conviction, but maintains that his actions do not run afoul of the federal securities laws. (Resp. Opp. at 6-8.) He argues the facts do not support imposition of a remedial sanction in the instant proceeding. (Id. at 3-9.)

The indictment, which served as the basis for Martin's conviction, alleged that he received kickbacks from Smart Online, Inc. (Smart), in return for recommending the company's stock to his clients. (Div. Mot. Ex. A at 3-4.) Martin did not disclose this arrangement to his clients. (Resp. Opp. at 10.) Smart allegedly engaged in the kickback scheme to artificially inflate the price of its stock. (Div. Mot. Ex. A at 3-4.) William Blume (Blume) engaged Martin as part of a network of brokers to promote Smart stock, and served as Martin's contact with the company. (Resp. Opp. at 10.) The alleged purpose of Martin's recommendations, along with those of other brokers, was to create a false sense of market interest in Smart's stock. (Div. Mot. Ex. A at 7-8.)

Federal Bureau of Investigation Agent Michael Ryan (Ryan) testified in the criminal proceeding that Martin, at the time of his arrest, confessed that he purchased Smart stock for his clients in return for $2,000. (Div. Mot. Ex. D at 3-5.) Martin told Ryan that he never informed his clients about the payments he received from Smart, that he felt funny about it and, it was wrong. (Id. at 5.) Martin asserts that his actions were limited, and that he never intended to defraud anyone. (Resp. Opp. at 5.) He states that at the time Blume approached him, he was struggling financially, battling cancer, and suffering other health issues. (Id. at 11-12.) He researched the company, and thought it had merit. (Id. at 10, 12-13.) He began trading the stock two to three times per month in August 2005, and traded it until December 2005. (Id. at 13.) Blume testified that in December 2005, Martin asked him for a copy of Smart's shareholder list, so that Martin could attempt to sell more Smart shares to existing shareholders. (Div. Mot. Ex. C at 5.) According to Blume, he paid Martin on approximately six occasions, and Martin was responsible for the purchase of 44,000 shares of Smart stock. (Id. at 4.)

In addition, at Martin's trial, Richard Rafferty (Rafferty) testified that Martin was his broker and that Martin introduced Smart to him. (Div. Mot. Ex. B at 3-4.) Rafferty looked to Martin to provide him with investing advice, and purchased 4,100 shares of Smart stock, suffering a loss of $27,000. (Id. at 5-7.) Rafferty's losses occurred because he was a Smart shareholder at the time the Commission issued an order halting trading in Smart stock. (Resp. Opp. at 5.) Rafferty testified that he was unaware of Martin's arrangement with Smart, and that he would not have followed Martin's investment advice about purchasing Smart stock had he known about the arrangement. (Div. Mot. Ex. B at 7-8.)

[3] The district court deferred the determination of restitution to be paid by Martin for ninety days.
[4] I take official notice of the district court's judgment pursuant to 17 C.F.R. § 201.323.

CONCLUSIONS OF LAW

Under Sections 15(b)(4)(B) and 15(b)(6)(A)(ii) of the Exchange Act, the Commission may impose a remedial sanction on a person associated with a broker or dealer, consistent with the public interest, if the person has been convicted within ten years of the commencement of an administrative proceeding of any felony or misdemeanor involving the purchase or sale of any security, or of conspiracy to commit such an offense, while associated with a broker or dealer. Under Sections 203(e)(2) and 203(f) of the Advisers Act, the Commission may impose a remedial sanction on a person associated with an investment adviser, consistent with the public interest, if the person has been convicted within ten years of the commencement of an administrative proceeding of any felony or misdemeanor involving the purchase or sale of any security, or of conspiracy to commit such an offense.

Martin was associated with Maxim, which was registered as a broker-dealer and as an investment adviser at the time of Martin's underlying misconduct. The district court has entered a final judgment, pursuant to 18 U.S.C. § 371, 15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. § 240.10b-5, convicting Martin of offenses involving the purchase or sale of securities, and engaging in a conspiracy involving those offenses.

The Public Interest

To determine whether sanctions under Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act are in the public interest, the Commission considers six factors: (1) the egregiousness of the respondent's actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. No one factor is controlling. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Remedial sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

The Commission has held that "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest sanctions under the securities laws." Jose P. Zollino, 89 SEC Docket 2598, 2608 (Jan. 16, 2007). "[O]rdinarily, and in the absence of evidence to the contrary, it will be in the public interest to . . . bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions." Marshall E. Melton, 56 S.E.C. 695, 713 (2003). The Commission's presumption that an associational bar is appropriate for those who violate the antifraud provisions of the securities laws also holds true for those whose violations result in a criminal conviction. Martin's presentation of his "evidence to the contrary" fails to counter the Commission's presumption that violation of the antifraud provisions of the securities laws warrants sanction.

Martin was convicted of criminal violations of the federal securities laws for his participation in a pump-and-dump scheme. He makes a general denial of the facts underlying his indictment in his Answer, but makes no denial of the facts leading to his conviction in his Opposition. He claims that those facts do not rise to the level of criminal activity, but such a

determination is not in purview of this proceeding. He also argues that he should not be sanctioned.

Martin's actions occurred over a five month period, and included multiple recommendations of Smart's stock to multiple buyers. At least one client suffered a significant financial loss by following Martin's recommendation. Martin cannot excuse his actions by pointing to his illness, yet argue that he knew better at the time he engaged in the conduct. Neither does remorse felt at the time of his arrest mitigate his previous actions. Thus, I find that his actions were egregious and recurrent.

The facts demonstrate Martin acted with scienter. He told Ryan that he did not feel right about taking kickbacks from Smart for recommending its stock, but he accepted the payments anyway. Despite his troubled conscience, he also sought access to the company's shareholder list to increase his base of business in the stock. Additionally, he did not disclose his compensation arrangement with Smart to his clients. Martin seeks to mitigate his participation in the kickback scheme by asserting he thought Smart was a legitimate investment opportunity. However, his belief does not mitigate his violations of the federal securities laws. Thus, I find that Martin acted with scienter.

Martin, consistent with a vigorous defense of the charges against him, has not admitted the wrongful nature of his conduct, and maintains that he did not intend to defraud anyone. He has made assurances against future violations, and pointed to his long unblemished career as anticipatory proof of future good behavior. However, continued employment in the securities industry would present Martin with additional opportunity to violate the federal securities laws.

Viewing the Steadman factors in their entirety, I conclude that associational bars are necessary and appropriate in the public interest.

ORDER

Based on the Findings and Conclusions set forth above:

It Is ORDERED that the Division of Enforcement's Motion for Summary Disposition is GRANTED;

It Is FURTHER ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Anthony Martin is barred from association with any broker or dealer; and

It Is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Anthony Martin is barred from association with any investment adviser.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the 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 Practice. 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 to correct a manifest error of fact.

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 unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Robert G. Mahony
Administrative Law Judge