SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 61790 / March 26, 2010

Admin. Proc. File No. 3-13482

In the Matter of

PHILLIP J. MILLIGAN

322 East 79th Street, No. 3B
New York, New York 10075

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

Grounds for Remedial Action

Injunction

Former associated person of registered broker-dealer was permanently enjoined from violating antifraud provisions of the federal securities laws. *Held*, it is in the public interest to bar Respondent from association with any broker or dealer.

APPEARANCES:

Phillip J. Milligan, pro se.

Jack Kaufman and *Bohdan S. Ozaruk*, for the Division of Enforcement.

Appeal filed: September 16, 2009
Last brief received: January 19, 2010

I.

Phillip J. Milligan, the founder, sole owner, and president of J.P. Milligan & Co. (the "Firm"), a former registered broker-dealer, appeals from the decision of an administrative law judge barring him from association with any broker or dealer. The law judge based his decision on a 2009 order from the United States District Court for the Eastern District of New York enjoining Milligan from violations of the antifraud provisions of the securities laws and imposing

other sanctions as a result of his involvement in a fraudulent kickback scheme.[1] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

As the district court found, the Injunctive Action "is an offshoot of a criminal case that . . . resulted in several convictions, including that of the defendant Milligan."[2] A brief summary of the actions underlying the Criminal Proceeding follows.

During 1995 and 1996, Milligan was a registered principal and president of the Firm.[3] A stock promoter agreed to pay kickbacks to Milligan in exchange for Milligan causing stock in Pilot Transport, Inc. ("Pilot"), a publicly traded company, to be recommended to Firm customers for purchase. Between November 1995 and February 1996, Milligan caused shares of Pilot to be sold to Firm customers, without disclosure of the kickback arrangement.[4] Following the sales, Milligan received $93,600 as a result of his involvement in the scheme. Milligan received the $93,600 in a bank account under his control which carried the name of a third party with no apparent connection to Milligan or the Firm. Milligan was arrested and indicted in 1997 in connection with this activity. Milligan pled guilty in December 1998. He was sentenced to six months of incarceration, six months of community confinement, and three years of supervised release.

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[1] *SEC v. Milligan*, No. CV-99-7357 (NG) (VVP) (E.D.N.Y. Apr. 29, 2009) ("Injunctive Action"). Although the injunctive complaint was filed and injunctions were issued against several of the parties named in the complaint in late 1999, the proceedings continued against Milligan for roughly ten years, until an injunction was issued against him in April 2009.

[2] *United States v. Milligan*, No. 1:97-cr-0663-RJD (E.D.N.Y.) ("Criminal Proceeding"). On January 12, 2010, we issued an order to the parties soliciting their views on whether we should take official notice of the transcript of the allocution in the Criminal Proceeding. *See Phillip J. Milligan*, Admin. Proc. File No. 3-13482 (Jan. 12, 2010); Rule of Practice 323, 17 C.F.R. § 201.323. The Division had no objection to our use of the transcript, and Milligan did not file a written response. Accordingly, we have taken official notice of the transcript and refer to it herein.

[3] Milligan is approximately forty-five years old and has worked in the securities industry since at least 1993 when he founded J.P. Milligan.

[4] Although the complaint in the injunctive action specified that Milligan's misconduct occurred between 1995 and 1996, the magistrate judge in the Criminal Proceeding indicated that the fraudulent scheme occurred over a more extensive period, 1993 to 1996. The reason for this discrepancy is unclear from the record. We base our finding on the more narrow period specified in the injunctive complaint.

On April 29, 2009, in the Injunctive Action, the district court enjoined Milligan from violations of Section 10(b) of the Securities and Exchange Act of 1934,[5] Rule 10b-5 thereunder,[6] and Section 17(a) of the Securities Act of 1933[7] and ordered him to pay $93,600 in disgorgement, $144,430 in prejudgment interest, and $100,000 in a civil money penalty. In connection with the issuance of this injunction, the district court "adopt[ed] in their entirety" two reports prepared by a United States Magistrate Judge: the first recommended granting the Division's motion for summary judgment against Milligan, and the second addressed the appropriate amount of disgorgement. The magistrate judge found "that Milligan's guilty plea and the facts underlying Milligan's conviction on the wire fraud charge, as established by his plea allocution, coupled with other undisputed facts in the record, are sufficient to establish his liability for the securities fraud claims asserted here."[8]

In making these findings, the magistrate judge in the Injunctive Action focused on statements made by Milligan at his criminal allocution. The judge presiding over the allocution explained to Milligan the count to which he was to plead guilty:

> THE COURT: That count is commonly known as the wire fraud count, and you are alleged in that count to have engaged in a scheme to defraud. The object – the means by which that scheme was undertaken was through the transmission of wire communications through interstate commerce, through writings, signs, signals, pictures and sounds, and the object of the fraudulent scheme was to obtain money and property in connection with the sale of Pilot stock.
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> You are alleged to have, as part of this scheme and artifice to defraud, made false and fraudulent pretenses, representations and promises.

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[5] 15 U.S.C. § 78j(b).

[6] 17 C.F.R. § 240.10b-5.

[7] 15 U.S.C. § 77q(a).

[8] Although the district court in the Injunctive Action fully endorsed the magistrate judge's findings, it noted "one minor exception" to those findings, *i.e.*, that the magistrate judge had at one point in his report erroneously "described the count to which Milligan pled guilty as securities fraud" rather than wire fraud. As the quoted passage above indicates, the magistrate judge did properly describe Milligan's conviction at several other points in his reports, and the district court observed that "the broader and uncontroversial point being made by [the magistrate judge at the particular part of the report in question] was that Milligan had been convicted of fraud, and that bore on the question of his credibility." The district court in no way questioned the magistrate judge's finding, based on Milligan's conviction and other evidence in the record, that Milligan had engaged in fraud in connection with the sale of Pilot securities.

> Do you understand that count and have you discussed it with your attorney?
>
> THE DEFENDANT: Yes, Your Honor.

After entering his guilty plea to the wire-fraud count of the indictment, Milligan described, under oath, his conduct as follows:

> THE DEFENDANT: Your Honor, in the time period specified, I agreed with others to have my brokerage firm recommend the sale to the public of shares in a publicly traded company known as Pilot. I did this upon the understanding that I would be compensated by these persons for the recommendation and sale of this stock. This agreement was not disclosed to purchasers of Pilot . . . . I know that my conduct was unlawful.
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> * * *
>
> THE COURT: Did you receive money or property as a result of this conduct?
>
> THE DEFENDANT: Yes, Your Honor.

The district court in the Injunctive Action gave preclusive effect to these allocution statements. Thus, Milligan was not permitted to dispute them, and the district court awarded summary judgment in the Commission's favor.

The district court in the Injunctive Action characterized Milligan's actions furthering the "fraudulent kickback scheme" as "extensive – a total of thirteen [of Milligan's] customers purchased Pilot stock from Milligan's firm – and apparently highly profitable – there is evidence that Milligan netted a total of $93,600.00 in kickback payments." The district court also found that, by receiving payments through a third-party bank account, "Milligan undertook efforts to mask the illegitimate origin of the proceeds" and concluded that "[t]here is little question that Milligan exercised a high degree of 'scienter' in his unlawful actions, which were by no means isolated." The district court also determined that Milligan had not "taken responsibility for his transgressions," and that he was, "at the very least, capable of violating securities laws in the future."

The magistrate judge also held a hearing regarding the appropriate disgorgement amount. The Division proposed that Milligan disgorge $93,600, reflecting two payments Milligan received from a co-defendant in the criminal proceeding. Milligan challenged that amount, contending that he was never paid any of the alleged kickbacks. He claimed there (and continues to claim before us) that the payments at issue were, in one instance, repayment of principal and interest on a personal loan and, in the other, a return of funds tendered for Pilot stock that was never delivered. Based on the evidence adduced at the hearing, the magistrate judge found that the funds at issue were kickbacks. The magistrate judge found that Milligan's explanation that $60,000 was received as payment of principal and interest on a personal loan was "simply

incredible." The magistrate judge found further that Milligan's contention that the remaining $33,600 he received was "partial repayment of $75,000 that Milligan paid for stock he never received is similarly not credible." The magistrate judge concluded that "Milligan received at least $93,600 for his participation in the fraudulent scheme" and recommended disgorgement in that amount.

More generally, the district court made strongly negative credibility findings with respect to Milligan's overall testimony based on the magistrate judge's personal observation of Milligan throughout the Injunctive Action. In recommending the award of summary judgment to the Division, the magistrate judge found that "[a]ny assurances Milligan may offer that he will abide by securities laws in the future do not remotely satisfy the court's concerns to the contrary considering Milligan's demonstrated willingness to offer false and misleading testimony in proceedings before this court." The magistrate judge made similar findings in his report on the proper disgorgement amount stating that "[Milligan] testified that he lied under oath during his plea allocution, reinforcing the court's view that he does not take the oath, or the need to testify truthfully, with any seriousness." The magistrate judge also found that Milligan was a convicted felon and concluded that he was generally untruthful: "The court thus concludes that Milligan has no difficulty testifying in a manner consistent with his own self-interest, as he perceives it, regardless of what the truth might be, and that his testimony therefore cannot be believed absent substantial corroboration."

Following issuance of the injunction, and based on it, we instituted administrative proceedings against Milligan on May 22, 2009. Shortly after we issued the Order Instituting Proceedings ("OIP"), the Division moved for summary disposition pursuant to Commission Rule of Practice 250.[9] The law judge granted the Division's motion, finding that there was "no genuine issue" that Milligan, as alleged in the OIP, had been enjoined in connection with his participation in a fraudulent scheme to promote securities at the Firm, then a registered broker-dealer. The law judge then barred Milligan based on his findings that Milligan's actions were "egregious and recurrent," involved thirteen customers, generated thousands of dollars in undisclosed kickbacks, and demonstrated scienter.

III.

Exchange Act Sections 15(b)(6) and 15(b)(4)(C) authorize us to sanction any person associated with a broker or dealer who has been enjoined from "engaging in or continuing any

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[9] 17 C.F.R. § 201.250. Rule 250 provides that "[a]fter a respondent's answer has been filed . . . the respondent, or the interested division may make a motion for summary disposition of any or all allegations of the order instituting proceedings with respect to that respondent." 17 C.F.R. § 201.250(a). 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." 17 C.F.R. § 201.250(b).

conduct or practice in connection with the purchase or sale of any security."[10] The record establishes without dispute that Milligan has been enjoined from engaging in fraudulent conduct in connection with the purchase or sale of securities and that, at the time the enjoined conduct occurred, he was associated with a broker-dealer. We find, therefore, that the statutory requirements for the imposition of sanctions have been satisfied.

Milligan maintains that the injunction was wrongly imposed and administrative sanctions are unwarranted, notwithstanding his sworn allocution that he participated in the kickback scheme. While Millligan admits that he agreed with others to have the Firm recommend Pilot stock on the "understanding that [he] would be compensated by these persons for the recommendations and sale of the stock," he claims that he never admitted that he "actually went through with making the alleged recommendations" or received kickbacks. Milligan argues that the district court in the Injunctive Action erred in finding him liable for securities fraud based on his wire fraud conviction because he pled guilty only to wire fraud, not to securities fraud, which charges he asserts were dropped. He also maintains that the law judge erred in relying on the district court's findings in the Injunctive Action. According to Milligan, "the prior proceeding . . . did not litigate the securities fraud claims against him, thus the material facts in this proceeding remain in dispute," and summary disposition was wrongly awarded.

As we have summarized above, the district court made extensive and detailed findings of fact related to Milligan's conduct and credibility. The district court's findings are well supported by, among other things, Milligan's sworn allocution at his plea hearing.

Milligan is disputing before us the findings not only of the district court in the Injunctive Action but of the district court in the Criminal Proceeding.[11] Our precedent is clear that Milligan's collateral attack on the two district courts' findings is impermissible.[12] We have repeatedly held that a respondent in a follow-on proceeding may not challenge the findings made by the court in the underlying proceeding and we consider those findings in determining the

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[10] 15 U.S.C. §§ 78*o*(b)(6), 78*o*(b)(4)(C).

[11] As noted, in the Criminal Proceeding, Milligan expressly acknowledged that the count of the indictment to which he pled guilty involved fraudulent misconduct on his part involving the sale of securities.

[12] *John Francis D'Acquisto*, 53 S.E.C. 440, 444 (1998) (finding injunction entered after summary judgment precludes relitigation of issues in follow-on proceedings); *see also Gary M. Kornman*, Securities Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14257 (finding criminal conviction based on guilty plea has collateral estoppel effect precluding relitigation of issues in Commission proceedings); *James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2711 (granting preclusive effect to injunction entered after jury trial); and *Demitrious Julius Shiva*, 52 S.E.C. 1247, 1249 (1997) (granting preclusive effect to injunction entered after trial).

appropriate sanction.[13] The district court findings in the Injunctive Action can be challenged only through the appellate process, which Milligan has done.[14]

Milligan's current contentions contradict his sworn allocution at the plea hearing. Milligan, however, appears to have attempted to explain this contradiction when he told the magistrate judge in the Injunctive Action that he lied under oath in his allocution.[15] Even if we accepted Milligan's attempted recantation of his allocution, which we do not, we cannot allow a collateral attack on the finding of the district court that Milligan received the agreed-upon kickback.[16]

Milligan asserts that the law judge ignored evidence that Milligan had received the $93,600 for some reason other than a kickback. In fact, both of the alternative explanations – that they were repayments of a loan or a return of funds not expended to purchase Pilot stock – offered by Milligan to the magistrate judge in the Injunctive Action were rejected as "incredible," and the law judge properly adopted those findings.[17]

Milligan also objects to the institution of this proceeding fourteen years after his fraudulent conduct. Milligan's objection is based on a mistaken premise. The event upon which this proceeding is based is the April 2009 issuance of the injunction, not the underlying

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[13] *See, e.g., Franklin*, 91 SEC Docket at 2713 ("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").

[14] Milligan's appeal of the Injunctive Action is pending. *SEC v. Curtis*, No. 09-2782 (2d Cir. May 22, 2009) (filing notice of appeal). It is well established that a pending judicial appeal does not affect the injunction's status as a basis for an administrative proceeding. *Franklin*, 91 SEC Docket at 2714 n.15 (collecting cases). To the extent Milligan prevails in his appeal, he would be entitled to file a motion to vacate the opinion and order in this matter. *Id.* (citing *Jimmy Dale Swink*, 52 S.E.C. 379 (1995) (granting motion to vacate bar upon appellate reversal of criminal conviction that was basis for bar in administrative proceeding)).

[15] This assertion is further evidence of Milligan's unfitness to remain in the securities industry.

[16] *See D'Acquisto*, 53 S.E.C. at 446. We note that Milligan was represented by counsel at his allocution and that counsel advised Milligan with respect to his guilty plea and allocution. Furthermore, Milligan's counsel did not disavow any of the statements that Milligan now claims were untruthful at the time he made them under oath.

[17] Of course, as related above, the district court's determination that the funds at issue represented kickbacks is not subject to collateral attack in this proceeding. *Id.*

misconduct, as expressly authorized by the Exchange Act.[18] In that context, our institution of this proceeding in May 2009 is timely.

In assessing the need for sanctions in the public interest, we consider the following factors: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[19]

The district court's numerous detailed findings with respect to factors similar to the *Steadman* factors inform our consideration of the public interest. The district court found that the fraudulent kickback scheme earned Milligan $93,600 and defrauded thirteen of his customers over several months. Milligan objects to the law judge's use of the term "bogus shares" in his finding that Milligan's actions were egregious, contending that the finding is not supported by the evidence. While the record does not address whether, in fact, the shares at issue were "bogus," Milligan's objection does not affect the district court's finding that Milligan misled numerous customers into buying Pilot shares, earning close to $100,000 from the fraud. We find that conduct to be egregious.

Milligan argues that his conduct was not recurrent because he had a clean disciplinary record before he participated in the kickback scheme. Milligan's formerly clean record does not mitigate the reality that he defrauded numerous customers over an extended period. Milligan's repetition of the fraudulent actions amply supports our conclusion that his actions were recurrent. The district court found that Milligan's attempts to conceal his receipt of the kickback payments through use of the third-party bank account demonstrated that he acted with a "high degree of

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[18] 15 U.S.C. § 78*o*(b)(6)(A)(iii). *See Vyacheslav Steven Zubkis*, Exchange Act Rel. No. 52876 (Dec. 2, 2005), 86 SEC Docket 2618, 2626 (stating limitations period begins to run on date of injunction); *cf. William E. Lincoln*, 53 S.E.C. 452, 457 (1998) (noting that, because the Exchange Act "authorizes us to proceed . . . on the basis of [respondent's] conviction . . . it is the date of [the] conviction, not the conduct underlying the conviction, which is relevant"); *see also Michael J. Markowski*, 55 S.E.C. 21, 24 (2001) (stating that limitations period begins to run on the date of the injunction that provides the basis for the proceeding), *petition denied*, No. 01-1181 (D.C. Cir. 2002), (citing *Proffitt v. FDIC*, 200 F.3d 855, 862-65 (D.C. Cir. 2000)) (unpublished); *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) ("Under the statutory language, existence of the injunction provides a ground for the bar adequate in itself . . . .").

[19] *Scott B. Gann*, Exchange Act Rel. No. 59729 (Apr. 8, 2009), 95 SEC Docket 15818 (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979)), *aff'd*, No. 09-60435 (5th Cir. Jan. 13, 2010) (*per curiam*).

'scienter.'" That conclusion is consistent with our precedent, which holds that attempts to conceal misconduct indicate scienter.[20]

Milligan assures us that he will not violate the law again because he has no securities licenses at present and does not intend to procure any in the future. As noted previously, the magistrate judge found that Milligan's assurances "do not remotely satisfy the court's concerns to the contrary" because of Milligan's "demonstrated willingness to offer false and misleading testimony." This, and other negative credibility findings by the district court described above, persuade us to reject Milligan's minimal assurances of future compliance. Milligan's age and experience strongly suggest that, as the district court found, Milligan is, "at the very least, capable of violating securities laws in the future."

Milligan's injunction, based on allegations that he had defrauded thirteen investors of approximately $93,600 over an extended period in a manner designed to avoid detection, raises significant doubts about his integrity and his fitness to remain in the securities industry. Antifraud injunctions have especially serious implications for the public interest.[21] As we have held, "an antifraud injunction can . . . indicate the appropriateness in the public interest" of a bar from participation in the securities industry.[22] As we have also held, "[f]idelity to the public interest" requires a severe sanction when a respondent's misconduct involves fraud because the

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[20] *See Justin F. Ficken*, Exchange Act Rel. No. 58802 (Oct. 17, 2008), 94 SEC Docket 10887, 10892 (finding that concealment of improper trading demonstrated scienter).

[21] *See Michael T. Studer*, 57 S.E.C. 890, 898 (2004) (stating that "the fact that a person has been enjoined from violating antifraud provisions 'has especially serious implications for the public interest'"); *Marshall E. Melton*, 56 S.E.C. 695, 713 (2003) ("Based on our experience enforcing the federal securities laws, we believe that ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to . . . suspend or bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions.").

[22] *Michael Batterman*, 57 S.E.C. 1031, 1043 (2004) (quoting *Melton*, 56 S.E.C. at 709-10)), *aff'd*, No. 05-0404 (2d Cir. 2005) (unpublished).

"securities business is one in which opportunities for dishonesty recur constantly."[23] In our view, Milligan's continued presence in the securities industry represents a substantial threat to investors. Under the circumstances, therefore, we have determined that barring Milligan serves the public interest.[24]

An appropriate order will issue.[25]

By the Commission (Commissioners CASEY, WALTER, AGUILAR, and PAREDES). Chairman SCHAPIRO did not participate.

Elizabeth M. Murphy
Secretary

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[23] *Richard C. Spangler, Inc.*, 46 S.E.C. 238, 252 (1976).

[24] *See Jeffrey L. Gibson*, Exchange Act Rel. No. 57266 (Feb. 2, 2008), 92 SEC Docket 2104 (barring respondent in follow-on case based on antifraud injunction), *petition denied*, 561 F.3d 548 (6th Cir. 2009); *Batterman*, 57 S.E.C. at 1042 (same); *Studer*, 83 SEC Docket at 2853 (same); *Nolan Wayne Wade*, 56 S.E.C. 748 (2003) (same); *Christopher A. Lowry*, 55 S.E.C. 1133 (same).

[25] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 61790 / March 26, 2010

Admin. Proc. File No. 3-13482

In the Matter of

PHILLIP J. MILLIGAN

322 East 79th Street, No. 3B
New York, New York 10075

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's Opinion issued this day, it is

ORDERED that Phillip J. Milligan be, and he hereby is, barred from association with any broker or dealer.

By the Commission.

Elizabeth M. Murphy
Secretary