

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
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: INITIAL DECISION
STEVEN SIRIANNI : November 19, 2008
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APPEARANCES: Nancy A. Brown and Sheldon Mui for the Division of Enforcement,
Securities and Exchange Commission.

Carl E. Person for Respondent Steven Sirianni.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on June 27, 2008, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that a federal district court has entered a final judgment, permanently enjoining Steven Sirianni (Sirianni or Respondent) from violating Section 17(a) of the Securities Act of 1933 (Securities Act), Sections 10(b) and 15(a)(1) of the Exchange Act, and Exchange Act Rule 10b-5. The Commission instituted this proceeding to determine whether these allegations are true and, if so, to decide whether remedial action is appropriate in the public interest. The Commission's Division of Enforcement (Division) seeks to bar Sirianni from association with any broker or dealer.

Sirianni filed an Answer to the OIP and the Division notified him of the opportunity to inspect and copy its investigative file. At a telephonic prehearing conference, I granted the Division's request for leave to file a motion for summary disposition (Prehearing Conference Transcript at pages 8, 11-14 (Tr. ____); Order of Aug. 14, 2008). The Division filed its motion for summary disposition, a supporting memorandum of law, the declaration of Sheldon Mui (Mui Decl.), and accompanying exhibits on September 22, 2008 (Motion). Sirianni submitted his

memorandum of law in opposition on October 20, 2008 (Opposition). The Division filed its reply on October 31, 2008 (Reply).

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 promptly to 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.

The Commission has repeatedly upheld use of the summary disposition procedure in cases such as this one where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. See Jeffrey L. Gibson, 92 SEC Docket 2104, 2111-12 (Feb. 4, 2008) (collecting cases), pet. for review pending, 6th Cir., No. 08-3377. Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare." See John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002), pet. denied, 66 Fed. Appx. 687 (9th Cir. 2003).

Findings of fact and conclusions of law made in an underlying injunctive action are immune from attack in a follow-on administrative proceeding. See Ted Harold Westerfield, 54 S.E.C. 25, 32

n.22 (1999) (collecting cases). To the extent that Sirianni's opposition raises such challenges, it provides no basis for denying the Division's motion for summary disposition.

FINDINGS OF FACT

The exhibits attached to the Division's motion for summary disposition involve matters that may be officially noticed under Rule 323 of the Commission's Rules of Practice. Based on these exhibits, as well as Sirianni's Answer to the OIP, the Division has established, and Sirianni has not contested, the following material facts.

Sirianni, age fifty-nine, is a resident of Wausau, Wisconsin (Answer). From March 2003 through October 2004, he was a registered representative with Berthel Fisher & Company Financial Services, Inc. (Berthel Fisher), a registered broker and dealer with an office in Wausau (Answer).

On November 14, 2006, the Commission filed a civil action in the United States District Court for the Southern District of New York against Sirianni and others. SEC v. World Information Tech., Inc., No. 06-CV-13181 (VM). The Commission's complaint alleged that Sirianni violated Section 17(a) of the Securities Act, Sections 10(b) and 15(a)(1) of the Exchange Act, and Exchange Act Rule 10b-5 (Motion, Mui Decl., Exhibit A). The complaint further alleged that Sirianni committed these violations while he worked for Berthel Fisher, by accepting undisclosed compensation to solicit customer purchases of World Information Technology, Inc. (World Information), stock (Motion, Mui Decl., Exhibit A). According to the complaint, Sirianni persuaded twelve customers to buy 106,900 shares of World Information stock for approximately \$440,000. In return for his sales efforts, and in addition to his regular commission-based compensation, Sirianni received \$75,800 from a co-defendant who acted as a promoter of World Information stock. The complaint alleged that Sirianni did not tell his customers that he had received any compensation as a result of their purchases, other than his ordinary commissions.

Following a trial in the injunctive action, a jury determined that Sirianni had accepted undisclosed kickbacks of \$75,800 for recommending World Information stock to customers, in violation of the antifraud and broker-dealer registration provisions of the federal securities laws (Motion, Mui Decl., Exhibit E). On June 10, 2008, the district court entered a final judgment against Sirianni. The court permanently enjoined Sirianni from future violations of Section 17(a) of the Securities Act, Sections 10(b) and 15(a)(1) of the Exchange Act, and Exchange Act Rule 10b-5 (Motion, Mui Decl., Exhibit F).

The final judgment also ordered Sirianni to disgorge \$75,800 in ill-gotten gains, plus \$23,020.37 in prejudgment interest, and to pay a civil penalty of \$110,000 (Motion, Mui Decl., Exhibit F). The district court required Sirianni to pay these financial sanctions within ten business days. Sirianni acknowledges that he has not done so, even in part (Tr. 5-6). Nor has Sirianni petitioned for a judicial stay of the order to pay (Tr. 5-6).

On July 10, 2008, Sirianni appealed the final judgment to the United States Court of Appeals for the Second Circuit (No. 08-3445-CV). As of today, his appeal remains pending.

CONCLUSIONS OF LAW

Under Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) 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 permanently or temporarily enjoined from engaging in any conduct or practice in connection with the purchase or sale of securities. The record establishes the statutory basis for imposing a remedial sanction here because Sirianni was associated with Berthel Fisher at the time of the underlying misconduct and because the district court issued a permanent injunction.

Sirianni's Answer urged me to stay this proceeding "pending the outcome of the appeal and any remand to the district court." We discussed the issue at the prehearing conference, and I denied his request (Tr. 4-7). Nonetheless, in opposing the Division's motion for summary disposition, Sirianni again asserts—without citation to any case law—that "it would behoove the parties to await the outcome of the appeal."

Under Commission precedent, the pending appeal is not a valid reason for delaying the resolution of this matter. See Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002); Jon Edelman, 52 S.E.C. 789, 790 (1996). If Sirianni succeeds in having the underlying injunction vacated, he may ask the Commission to reconsider any sanctions imposed in this administrative proceeding. See Gary L. Jackson, 48 S.E.C. 435, 438 n.3 (1986); cf. Jimmy Dale Swink, Jr., 52 S.E.C. 379 (1995).

The Public Interest

To determine whether sanctions under Section 15(b) of the Exchange 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). Such 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 of 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).

Sirianni's conduct was extremely serious and extended over the course of several months. The jury in the Commission's civil injunctive action determined that, from August 2003 to December 2003, Sirianni solicited customer purchases of World Information stock and accepted kickbacks to do so. The misconduct thus extended far beyond a single isolated violation. As a result of Sirianni's efforts, twelve customers purchased 106,900 shares of World Information stock,

amounting to approximately \$440,000. In all, there were twenty-seven separate transactions. From October 2003 to March 2004, Sirianni received \$75,800 in compensation for his role in the kickback scheme. Sirianni did not inform any customers that he was being paid such sums (in addition to his ordinary commissions) to recommend World Information stock to them, and deliberately concealed this information from them. His conscious concealment of the kickbacks reflects a high degree of scienter.

Sirianni has not accepted the wrongful nature of his conduct and has failed to give any assurance against future misconduct. He has not indicated any remorse for his actions. He has ignored the district court's order to pay financial sanctions within ten days after June 10, 2008. While Sirianni's attorney asserts that Sirianni is unable to pay, there is no evidence that Sirianni even attempted to persuade the district court or the court of appeals that these financial sanctions were unwarranted. There is a significant risk that, given the opportunity, Sirianni would commit further misconduct in the future.

I have considered Sirianni's argument that any sanction in this proceeding should be "tempered" because "there has been no research into [the] issue" of whether his 1,000 to 2,000 former customers want to continue to do business with him (Opposition at 3). Sirianni offers no record citation to support his attorney's claim that his former customers number in the thousands (Tr. 14; Opposition at 3). Sirianni has not presented evidence that any customers who purchased World Information stock testified on his behalf during the injunctive action. Nor have such customers executed sworn declarations on Sirianni's behalf in the present proceeding. In any event, in assessing the need for sanctions, the Commission looks beyond the interest of particular investors to the protection of the investing public generally. See Gibson, 92 SEC Docket at 2109-10; Christopher A. Lowry, 55 S.E.C. 1133, 1145 & n.26 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003).

Based on a consideration of the relevant factors, and all the circumstances in this case, I conclude that the public interest requires that Sirianni be barred.

ORDER

IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted;
2. The telephonic prehearing conference scheduled for November 24, 2008, is canceled;
3. Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Steven Sirianni is barred from association with any broker or dealer; and
4. Any reapplication for association by Sirianni will be subject to the laws and regulations governing the reentry process. The Commission may condition reentry on a number of factors, including, but not limited to, Sirianni's satisfaction of the disgorgement award and payment of the civil monetary penalty ordered against him in SEC v. World Information Tech., Inc.

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.

James T. Kelly
Administrative Law Judge