INITIAL DECISION RELEASE NO. 252
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11367

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
	:	June 3, 2004
EDWARD BECKER	:	
	:	
	:	

APPEARANCES: Kenneth A. Cureton and Michael K. Lowman for the Division of Enforcement, Securities and Exchange Commission.

Edward Becker, pro se.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) instituted this proceeding on December 29, 2003, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act).

The Order Instituting Proceedings (OIP) alleges that Respondent Edward Becker (Becker), formerly a registered representative of Investors Associates, Inc. (Investors Associates), a now-defunct broker and dealer, pled guilty to criminal charges of conspiracy to commit securities fraud, wire fraud, and mail fraud in violation of 18 U.S.C. § 371 and securities fraud in violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. The OIP also asserts that Becker made materially false statements to customers concerning the purchase and sale of the securities of Compare Generiks, Inc. (Compare Generiks), a penny stock.

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 Becker from association with any broker or dealer and from future participation in any offering of penny stocks.

Procedural History

On January 21, 2004, I received Becker's statement that he lacked sufficient information to admit or deny the allegations in the OIP. In view of Becker's pro se status, I treated this statement as his Answer to the OIP. See Rule 220(c) of the Commission's Rules of Practice. The Division notified Becker of the size and location of its investigative files and informed him when those files would be available for inspection and copying. See Rule 230(d)-(f) of the Commission's Rules of Practice.

Becker's incarceration complicated his ability to inspect and copy the Division's investigative file. Between mid-January and mid-March 2004, the Division delivered a great deal of its investigative material to Becker (Division's Reports Regarding Document Search and Production to Respondent, dated Feb. 27, 2004, and Mar. 17, 2004). Certainly, the Division provided Becker with more material than it could be required to produce under a strict reading of Rule 230 of the Commission's Rules of Practice. I appreciate the Division's flexibility and cooperation in this regard. Becker requested that the Division provide him with even more material—at the Division's expense. However, I ruled that the additional materials that Becker wanted were not relevant to the present dispute (Order of Mar. 4, 2004). See Rule 230(b)(1)(iv) of the Commission's Rules of Practice.

I also granted the Division leave to file a motion for summary disposition (Order of Mar. 4, 2004). The Division filed its motion for summary disposition, a memorandum of law, and a declaration with accompanying exhibits A through F on March 31, 2004 (Motion). At my direction, the Division supplemented its Motion by filing another memorandum of law, and a declaration with additional exhibits G through M on April 15, 2004. Becker submitted his opposition and accompanying exhibits 1 through 12 on May 17, 2004 (Opposition). The Division filed its reply and additional exhibits N and O on May 27, 2004 (Reply).

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., 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.

A criminal conviction cannot be collaterally attacked in a follow-on administrative proceeding, such as this one. William F. Lincoln, 53 S.E.C. 452, 455-56 & n.7 (1998) (collecting cases); see United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978). Nonetheless, the Commission has cautioned: "It is . . . possible that a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct, although we believe that those cases will be rare. We believe that, under such circumstances, an order granting summary disposition would not be appropriate." John S. Brownson, 77 SEC Docket 3636, 3640 n.12 (Jul. 3, 2002), pet. denied, No. 02-73194 (9th Cir. 2003).

FINDINGS OF FACT

The Division's Motion

Based on certain exhibits accompanying its Motion,[1] the Division has established, and Becker has not contested, the following material facts.

Investors Associates was registered with the Commission as a broker and dealer at the times relevant to this proceeding (Motion, Exhibit G ¶ 1) (hereafter, Motion, Ex. ___).[2] Among

[1] Exhibit A to the Division's Motion is Becker's most recent Form U-4 Application. I have previously determined that Exhibit A is authentic and admissible in its entirety (Order of May 12, 2004). This initial decision makes only limited use of the Division's Exhibit B, the original indictment returned by the grand jury. It does not rely on the Division's Exhibits E and F, which are unadjudicated customer complaints more than five years old (Order of May 12, 2004). Nor does it rely on the Division's Exhibits N and O, to which Becker has not had an opportunity to respond.

[2] Paragraph II.A of the OIP alleges that Investors Associates ceased operations, except for liquidating trades, on July 12, 1997, and the Commission cancelled its registration on September

its other businesses, Investors Associates underwrote initial public offerings (IPOs) and made markets in various securities (Motion, Ex. G ¶ 1).

Becker is thirty-six years old (Motion, Ex. A at SEC 319). He was a registered representative for several different brokerage firms from 1992 to 2001 (Motion, Ex. A at SEC 320). From May 1995 to September 1996, Becker was a registered representative in the Melville, Long Island, New York, office of Investors Associates (Motion, Ex. A at SEC 320; Ex. C at 21; Ex. G ¶ 4).

Compare Generiks is a Delaware corporation engaged in the distribution, marketing, and sale of dietary supplements and over-the-counter pharmaceuticals (Motion, Ex. G ¶ 26; Ex. I at 3). In March 1996, Investors Associates and another firm underwrote a $3,450,000 IPO of securities for Compare Generiks (Motion, Ex. G ¶¶ 26, 34-36; Ex. I at 40). Becker marketed Compare Generiks securities to customers throughout the United States during the March 6, 1996, IPO and, between March 7 and September 30, 1996, in the secondary market (Motion, Ex. G ¶¶ 4, 27, 36).

On February 26, 2001, a grand jury in the United States District Court for the Southern District of New York issued a five-count indictment against Becker and several other former registered representatives of Investors Associates (Motion, Ex. B). On February 13, 2002, the grand jury issued a five-count superseding indictment (Motion, Ex. G). Count One of the superseding indictment alleged that Becker and others participated in a conspiracy to commit securities fraud, mail fraud, and wire fraud in connection with the purchase and sale of the securities of three issuers between September 1995 and July 1997. The issuers in question were Compare Generiks, Perry's Majestic Beer, Inc., and Interiors, Inc. (Motion, Ex. G ¶ 26). Count Two of the superseding indictment alleged that Becker and others committed securities fraud in connection with the purchase and sale of Compare Generiks securities between March 1996 and July 1997 (Motion, Ex. G ¶ 70). Counts Three through Five alleged that Becker and others committed securities fraud in connection with the purchase and sale of the securities of three other issuers (Motion, Ex. G ¶¶ 71-76).

On May 1, 2002, Becker pled guilty to Counts One and Two of the superseding indictment (Motion, Ex. C). Becker then exercised his right of allocution, admitting under oath that he:

- Lied to his customers about his years of experience in the securities industry and the amount of money he made annually to create the false impression that he was a successful broker worthy of the customers' trust;

22, 1998. The Division's Motion fails to establish these allegations. Becker's evidence shows only that Investors Associates ceased business operations in mid-1997 (Opposition, Exhibit 4 ¶ 150) (hereafter, Opposition, Ex. ___).

- Lied to his customers about the size of his own personal investments in the securities markets and misled customers into believing that his stock recommendations were based upon privileged information;

- Lied to his customers that he and his co-conspirators were receiving thousands of unsolicited telephone calls from prospective investors all over the country who desperately were trying to invest in the securities he was selling;

- Lied to his customers that he had other customers who put hundreds of thousands of dollars into the same securities;

- Repeatedly made unsubstantiated predictions to customers that the securities he was recommending would generate a profit of 50% to 100% within a short time period, such as thirty days;

- Repeatedly deceived his customers by telling them that he would not receive compensation for the transactions he was recommending; and

- Participated in high-pressure sales tactics for the purpose of generating sales and commissions.

Becker also admitted that he knew his conduct was wrong when he engaged in it (Motion, Ex. C at 21-27).

On July 26, 2002, the district court entered judgment against Becker on Counts One and Two of the superseding indictment (Motion, Ex. C at 28; Ex. D). The court sentenced Becker to thirty-four months of incarceration, followed by three years of supervised release (Motion, Ex. C at 6-8; Ex. D). The court also held Becker jointly and severally liable for the payment of $182,006 in restitution to customers (Motion, Ex. D). In return for Becker's guilty plea, the prosecution dismissed the remaining counts against him (Motion, Ex. D).

The issue of whether Compare Generiks securities were "penny stock" did not arise during the criminal proceeding. The indictment, the superseding indictment, the guilty plea, the allocution, and the court's judgment never mentioned the words "penny stock" (Motion, Exs. B, C, D, G, and H). To the extent that OIP ¶ II.D suggests otherwise, it is in error.

Becker's Opposition

Becker argues that the Division is not entitled to summary disposition as a matter of law. He initially contends that the Division has failed to show that Compare Generiks securities met the Commission's definition of "penny stock" when Investors Associates offered and sold them to the public (Opposition at 1-7). Because Compare Generiks securities are the only securities identified as penny stock in the OIP, Becker claims that the Division has failed to demonstrate that a penny stock bar is appropriate.

Becker next argues that the Division has failed to prove that an associational bar is in the public interest. He does not dispute that he pled guilty to two felonies, but struggles to present evidence of both mitigating circumstances and rehabilitation.[3] In mitigation, Becker portrays himself as a low-level employee who played only a minor role in the fraudulent conspiracy at Investors Associates (Opposition at 9-13; Exs. 4-7). Becker also represents that he abused alcohol during the relevant time period. He asserts that alcohol abuse impaired his judgment and reduced his capacity to appreciate the offensive nature of his conduct (Opposition at 12-13; Ex. 4 ¶ 191; Ex. 8; Ex. 10 at 3).

Becker also offers evidence of his rehabilitation. He acknowledged responsibility for his offenses when he entered his guilty plea. In return, the district court granted him the appropriate offense-level reduction under the United States Sentencing Guidelines (Opposition at 16-18; Ex. 10 at 5; Ex. 11). Becker further states that he has not used alcohol since March 2001 (Opposition at 13). He has successfully completed a forty-hour alcohol and drug education class offered by the Federal Bureau of Prisons (Opposition, Ex. 9). While incarcerated, Becker has received training in commercial truck driving and he plans to obtain a commercial driver's license upon his release (Opposition at 20). In addition, Becker has recently been accepted for enrollment in a program of college-level correspondence courses (Opposition, Ex. 12).[4]

Becker was a day trader of a brokerage firm's proprietary funds for his last two months in the securities industry (Motion, Ex. A at SEC 319-20; Opposition at 19). In that position, Becker did not interact with public customers (Prehearing Conference of Feb. 9, 2004, at 26). If Becker returns to the securities industry in the future, he would likely do so as a day trader (Opposition at 20). He believes that a day-trading position would minimize any risk of repeating the misconduct that led to his criminal conviction.

DISCUSSION AND CONCLUSIONS

The Division Has Satisfied the Predicate for an Associational Bar

Section 15(b)(6)(A)(ii) of the Exchange Act empowers the Commission to impose a sanction against a person associated with a broker or dealer if such person has been convicted of

[3] The Division objects to Becker's factual representations, which appear in the text of his Opposition, and not in an affidavit or a declaration (Reply at 2-3 & nn.1-2). The Division also objects to several of Becker's exhibits as irrelevant, as lacking authentication, and as inadmissible hearsay. The Division's objections are noted, but I decline to strike the passages and the exhibits in question.

[4] Becker also maintains that he did not violate any securities laws between September 1996, when he resigned from Investors Associates, and March 2001, when he left the securities industry (Opposition at 18-19). The Division disputes that claim (Motion, Ex. A at SEC 322-23, 328-29) (Item 23I) (showing that Becker paid an arbitration claim in which a customer alleged sales practice violations dating from September 1998). Because these facts are disputed, I have not considered the issue for purposes of granting or denying summary disposition.

any offense specified in Section 15(b)(4)(B) of the Exchange Act within the past ten years. Specifically, the Commission may censure an associated person, place limitations on the activities or functions of that person, suspend that person for a period not exceeding twelve months, or bar that person from being associated with a broker or dealer if the Commission finds, on the record and after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest.

As here relevant, Section 15(b)(4)(B) of the Exchange Act applies to the conviction of a crime involving the purchase or sale of any security or arising out of the conduct of the business of a broker or dealer.

Becker was associated with Investors Associates, a registered broker and dealer, at the times relevant to his criminal conviction. His conviction involved the purchase and sale of securities and arose out of the conduct of Investors Associates's business as a brokerage firm. Accordingly, Becker is subject to a sanction under Section 15(b)(6)(A)(ii) of the Exchange Act because of his criminal conviction.

Penny Stock: The Division
Has the Burden of Proof

Paragraph II.B of the OIP alleges that Becker participated in public offerings of "penny stocks" while he worked for Investors Associates. Paragraph II.D of the OIP alleges that Compare Generiks "stock" was "penny stock." Becker's Answer generally denied all the allegations in the OIP. In addition, the underlying criminal proceeding never addressed the issue of "penny stock."

The Division initially contends that it need not prove that Compare Generiks securities were penny stock, but rather, that Becker must show that Compare Generiks securities were not penny stock (Response to the Court's April 8, 2004, Order at 3). In advocating this position, the Division has failed to consider that it bears the burden of proof as the proponent of an order imposing a penny stock bar. See 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). The Division's position is rejected.

The Division also asserts that Becker conceded that Compare Generiks securities were penny stock during a telephonic prehearing conference (Response to the Court's April 8, 2004, Order at 3). This claim is groundless. The Division offers no citation to the transcript. I find as a fact that Becker never made such a concession.

Finally, the Division maintains that the securities of the other issuers identified in the superseding indictment, in addition to Compare Generiks, were also penny stock and "could" support the imposition of a penny stock bar in this proceeding (Response to the Court's April 8, 2004, Order at 3). This argument is also rejected. The OIP identifies only the securities of Compare Generiks as penny stock. If the Division needed to prove its case for a penny stock bar by reference to the securities of other issuers, it could have drafted the OIP differently. At the very least, the Division could have moved to amend the OIP to identify these other alleged penny stock issuers. See Rule 200(d) of the Commission's Rules of Practice.

Penny Stock:
The Applicable Legal Criteria

In relevant part, Section 15(b)(6)(A)(ii) of the Exchange Act provides that the Commission may impose a penny stock sanction against a person if (1) the person was participating in a penny stock offering at the time of the alleged misconduct and has been convicted of an offense specified in Section 15(b)(4)(B) of the Exchange Act within ten years and (2) such a sanction is in the public interest. See Benjamin G. Sprecher, 52 S.E.C. 1296, 1297 n.2 (1997). As noted, Section 15(b)(4)(B) offenses include those involving the purchase or sale of securities or arising out of the conduct of the business of a broker or dealer.

Under Section 15(b)(6)(C) of the Exchange Act, the term "person participating in an offering of penny stock" includes any person acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of penny stock.

Section 3(a)(51)(A)(iv) of the Exchange Act defines "penny stock" as any equity security, other than a security that is excluded, on the basis of exceeding a minimum price, net tangible assets of the issuer, or other relevant criteria, from the definition of such term by Commission rule or regulation. The Commission's definitional rules for penny stock are promulgated in Exchange Act Rule 3a51-1.

At least two of the exclusions to the Commission's penny stock definition are relevant here.[5] First, equity securities that trade at or above $5.00 per share are excluded from the definition of penny stock by Exchange Act Rule 3a51-1(d). Second, equity securities that are

[5] Becker invokes a third exclusion, applicable to equity securities that are registered, or approved for registration upon notice of issuance, on a national securities exchange that makes transaction reports available (Opposition at 3-4). See Exchange Act Rule 3a51-1(e).

I do not believe that Compare Generiks ever traded on a national securities exchange. However, the United States Attorney apparently thought otherwise. Becker's argument finds support in the curious wording of the initial and superseding indictments, under which the prosecution assumed the burden of proving that Becker's misconduct involved the use of interstate commerce and the mails and the facilities of a national securities exchange (Motion, Ex. B ¶¶ 61, 70; Ex. G ¶¶ 63, 70). The Division is collaterally estopped from taking a position in this proceeding that contradicts the position taken by the United States Attorney in the underlying criminal proceeding (Motion at 9 n.3).

It is not necessary to address the "national securities exchange" issue here because Exchange Act Rule 3a51-1(e), like Rule 3a51-1(f), contains an exception to the exclusion which provides that securities that do not separately meet the requirements of Rule 3a51-1(d) are deemed penny stock for purposes of Section 15(b)(6) of the Exchange Act.

authorized, or approved for authorization upon notice of issuance, for quotation in the NASDAQ system are excluded from the definition of penny stock by Exchange Act Rule 3a51-1(f). If an equity security satisfies either of these requirements, then the brokerage firms that offer and sell it to the public need not comply with the Commission's penny stock disclosure rules. However, an equity security that satisfies the requirements of Rule 3a51-1(f), but does not also satisfy the requirements of Rule 3a51-1(d), is still deemed to be penny stock for purposes of Section 15(b)(6) of the Exchange Act.

The Underlying Criminal Proceeding Involved
Four Different Compare Generiks Securities

Four different Compare Generiks securities are potentially relevant to the present case: (1) the units offered during the IPO; (2) the units purchased or sold in the secondary market; (3) the separately trading common stock purchased or sold in the secondary market; and (4) the separately trading warrants purchased or sold in the secondary market.

The Compare Generiks IPO involved units consisting of two shares of common stock plus one Class A warrant (Motion, Ex. G ¶¶ 34, 36; Ex. I at 1). Upon completion of the IPO, both the Compare Generiks units and the components of the unit began trading separately in the secondary market (Motion, Ex. I at 4, 33). Three related but distinct securities traded on the NASDAQ SmallCap Market: Compare Generiks units (COGEU), Compare Generiks common stock (COGE), and Compare Generiks Class A warrants (COGEW).

The OIP is ambiguous about which of these four securities was a "penny stock." The Division contends that all the units and the common stock were penny stock, but it does not directly address the warrants. The Division believes that the units offered during the IPO present the clearest case (Response to the Court's Order of April 8, 2004, at 4-6; Reply at 10-11 & n.11). When a party seeks to use a prior criminal judgment as an estoppel, as the Division does here, the tribunal in the follow-on proceeding must examine the record of the criminal proceeding to determine specifically what issues were decided. See Emrich Motors Corp. v. Gen. Motors Corp., 340 U.S. 558, 569 (1951).

Compare Generiks Units Were
Not Penny Stock for Purposes of the
Penny Stock Disclosure Rules, But They
Were Penny Stock for Purposes of
Section 15(b)(6) of the Exchange Act

Because Compare Generiks units were authorized for quotation on the NASDAQ SmallCap Market upon completion of the offering, a brokerage firm offering the units to the public during the IPO was exempt from the Commission's penny stock disclosure rules. See Section 15(g)(2)-(5) of the Exchange Act and Exchange Act Rule 3a51-1(f). However, the units in the IPO were still penny stock for purposes of Section 15(b)(6) of the Exchange Act because they did not satisfy the requirements of Exchange Act Rule 3a51-1(d).

The Compare Generiks units in the IPO failed to meet the minimum price requirements of Exchange Act Rule 3a51-1(d) in two ways. First, the warrant component of the unit had an exercise price of only $4.00. It thus failed to satisfy Exchange Act Rule 3a51-1(d)(2), which requires an exercise price of $5.00 or more. Second, the common stock component of the unit had a maximum offering price of $4.50 per share (two shares were offered for $10.00, minus a markup of $1.00 per unit). It thus failed to satisfy Exchange Act Rule 3a51-1(d)(1), which requires a price per share of $5.00 or more without the markup. As a result, the Compare Generiks units offered during the IPO fell within the exception to the exclusion in Exchange Act Rule 3a51-1(f), and the units in the IPO are deemed to be penny stock for purposes of Section 15(b)(6) of the Exchange Act.

The Compare Generiks units offered or sold in the secondary market also failed to meet the minimum price requirements of Exchange Act Rule 3a51-1(d)(2), because a warrant with an exercise price of $4.00 remained as a component of the unit. As a result, these secondary market units also failed to satisfy the exception to Exchange Act Rule 3a51-1(f), and are deemed to be penny stock for purposes of Section 15(b)(6) of the Exchange Act.

I find that Compare Generiks units were "penny stock" for purposes of Section 15(b)(6) of the Exchange Act at all times between March 6, 1996, and September 30, 1996. This was a period when Becker was indisputably involved in the conspiracy to commit securities fraud, wire fraud, and mail fraud.[6] I further find that Becker was actively involved in the offer and sale of Compare Generiks units during the IPO (Motion, Ex. B ¶ 36, Ex. G ¶ 36). On that basis, I find that Becker was "participating in an offering of penny stock" during the IPO.

However, the Division has failed to present evidence that Becker was also "participating in an offering" of Compare Generiks units in the secondary market. The superseding indictment alleges only that, in the days after the IPO, Becker and his co-conspirators "sold many more Compare Generiks securities to retail customers in the secondary market at higher prices" (Motion, Ex. G ¶ 36). The Division is not entitled to an inference that the secondary market "securities" discussed in Ex. G ¶ 36 were units, as distinguished from common stock or warrants. Rather, at the summary disposition stage, all reasonable inferences must be drawn in Becker's favor. I note that none of the overt acts by any of the accused conspirators involved the purchase or sale of Compare Generiks units in the secondary market (Motion, Ex. G ¶¶ 68a-w).

Compare Generiks Common Stock
and Warrants in the Secondary Market

A security can move in and out of penny stock classification for any reason that, under the Commission's definition of a penny stock, changes it into a penny stock or moves it out from

[6] This is not to suggest that Becker withdrew from the conspiracy (which continued until July 1997) by resigning from Investors Associates in September 1996. See United States v. Berger, 224 F.3d 107, 118-19 (2d Cir. 2000) ("Our case law strongly suggests that resignation from a criminal enterprise, standing alone, does not constitute withdrawal as a matter of law; more is required. Specifically, the defendant must not take any subsequent acts to promote the conspiracy . . . and must not receive any additional benefits from the conspiracy . . . .").

the definition of a penny stock. Between March 7, 1996, and September 30, 1996, Compare Generiks common stock and warrants each drifted in and out of penny stock classification for purposes of Section 15(b)(6) of the Exchange Act.

As to the common stock, the superseding indictment lists several overt acts by Becker's co-conspirators. Each such overt act confirms transactions in COGE in the secondary market at prices well above $5.00 per share (Motion, Ex. G ¶¶ 68e, g, l, n, u, w). None of this evidence proves that the common stock was penny stock. On the other hand, the Division has provided a price chart demonstrating that COGE traded below $5.00 per share on two days between March 7, 1996, and September 30, 1996 (Motion, Ex. L). Nothing in the record quantifies the commissions, markups, or markdowns on these transactions in Compare Generiks common stock. I find as a fact that Compare Generiks common stock was penny stock on two of the relevant days: August 9, 1996, and September 4, 1996.

As to the warrants, the superseding indictment identifies Becker's overt act as causing a customer to purchase COGEW at a price of $6.00 per warrant (Motion, Ex. G ¶ 68c).[7] Several of Becker's co-conspirators were also charged with causing customers to purchase warrants at prices well above $5.00 per warrant (Motion, Ex. G ¶¶ 68a, b, d, f, i, k, m, o, t, v). None of this evidence proves that the warrants were penny stock. On the other hand, the Compare Generiks annual report demonstrates that the warrants closed at $4.00 on May 24, 1996 (Motion, Ex. J at 9). In addition, one of Becker's co-conspirators was charged with causing a customer to purchase warrants at $3.00 per warrant on July 25, 1996 (Motion, Ex. G ¶ 68j). Nothing in the record quantifies the commissions, markups, or markdowns on these transactions in Compare Generiks warrants. I find as a fact that Compare Generiks warrants were penny stock on two of the relevant days: May 24, 1996, and July 25, 1996.

The Division argues that, even if the price of Compare Generiks securities exceeded $5.00 per share on a consistent basis, the underlying conspiracy to defraud involved an upward price manipulation. The Division surmises that the "real, un-manipulated price would have been far below" the $5.00 per share ceiling in Exchange Act Rule 3a51-1(d) (Response to the Court's April 8, 2004, Order at 6).

There is no merit to the Division's claim that the "true" market price of Compare Generiks securities should be deemed to be something less than $5.00 per share. The Division presented no evidence to support its theory, and the case law is not supportive. See Robert G. Weeks, 76 SEC Docket 2609, 2663-64 & n.36 (Feb. 4, 2002) (Initial Decision), aff'd, 81 SEC Docket 1319, 1344 n.49 (Oct. 23, 2003); cf. Andrews v. Comm'r, 135 F.2d 314, 318 (2d Cir. 1943) ("[T]he 'fair market value' of securities often consists of what honest and willing dupes (or, to use Americanese, 'suckers') were actually paying for similar securities on a 'rigged' market."); W.T. Grant Co. v. Duggan, 94 F.2d 859, 861 (2d Cir. 1938) (rejecting a claim that

[7] Under Exchange Act Rule 3a51-1(d)(2), once the warrant has been severed from the unit, the exercise price of the warrant no longer matters for determining whether the warrant is penny stock. Rather, at that point, the test is whether the warrant, standing alone, meets the "price of a particular transaction" test in Exchange Act Rule 3a51-1(d)(1)(i).

exchange prices were greatly inflated during the boom market of 1929 in excess of their actual value and finding it immaterial that the market crashed shortly after a security was valued).

Becker's guilty plea to Count Two of the superseding indictment does not support the Division's claim that Becker was "participating in an offering" of Compare Generiks common stock or warrants when those two securities were penny stocks. Becker's guilty plea to Count One of the superseding indictment might do so because the conspiracy was ongoing. However, the Division has not developed this argument despite being given a second chance to do so. I consider the opportunity to do so as waived.

The Public Interest

To determine whether sanctions under Section 15(b)(6)(A) 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 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 (1980). Registration 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 same is true of penny stock bars. See Sprecher, 52 S.E.C. at 1301-02.

In determining the public interest, the Commission has traditionally considered the mitigating and aggravating circumstances presented by the record.[8] KPMG Peat Marwick LLP, 74 SEC Docket 384, 429 (Jan. 19, 2001), recon. denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002). It has also considered any evidence relating to a respondent's claim of rehabilitation. See Blinder, Robinson & Co., 48 S.E.C. 624, 632-35 (1986); cf. Brownson, 77 SEC Docket at 3640 (recognizing that evidence of rehabilitation or mitigating circumstances could counter evidence that a proposed bar is in the public interest).

Becker's misconduct was egregious. By committing securities fraud and conspiracy, Becker abused a position of trust as a registered representative (Opposition, Ex. 4 ¶ 168, Ex. 10 at 3). In addition, Becker's crimes had a substantial adverse impact on the investing public. The record in the criminal proceeding estimated that the gross dollar amount of the securities that Becker sold to the public was between $1.5 million and $2.5 million (Opposition, Ex. 4 ¶ 156, Ex. 10 at 2).

[8] Mitigation focuses on the facts and circumstances surrounding the underlying misconduct, and the evidence should show that the wrongdoing at issue arose from some type of exigent circumstances that are unlikely to be repeated in the future. Absent "extraordinary mitigating circumstances," a person who has been convicted of securities fraud "cannot be permitted to remain in the securities industry." Charles Trento, __ SEC Docket ___, ___ (Feb. 23, 2004), Securities Act Rel. No. 8391 at 7 (Feb. 23, 2004); Brownson, 77 SEC Docket at 3640.

In the criminal case, Becker stipulated that the charges to which he would plead guilty involved an offense level of nineteen and a sentencing range of thirty-three to forty-one months of incarceration (Opposition, Ex. 10). The parties to the criminal case also stipulated that neither a downward nor an upward departure from the sentencing guideline range was warranted (Opposition, Ex. 10). The district court then sentenced Becker to a term of thirty-four months of incarceration, followed by three years of supervised release (Motion, Ex. D).

Becker cannot now create a mitigating circumstance out of his purportedly limited role in the underlying conspiracy to defraud. The United States Sentencing Guidelines Manual § 3B1.2 provides that a defendant is entitled to a two-point reduction in his offense level if he is found to be "a minor participant in any criminal activity." If the defendant was a "minimal participant" in a conspiracy, as opposed to a "minor participant," his offense level decreases by four levels. Id. A defendant must be "substantially less culpable than the average participant" in order to warrant a reduction under § 3B1.2. See United States v. Boatner, 99 F.3d 831, 838 (7th Cir. 1996) (collecting cases).

In stipulating to an offense level of nineteen during the underlying criminal proceeding, Becker did not receive a downward adjustment for his role in the conspiracy (Opposition, Ex. 4 ¶¶ 162-75).[9] This was consistent with the approach the courts have followed in similar cases. See United States v. Hart, 273 F.3d 363, 378 (3d Cir. 2001) (rejecting the claim of a defendant in a securities fraud conspiracy that he was a "minor participant"); United States v. Jackson, 95 F.3d 500, 509-11 (7th Cir. 1996) (holding that a wire fraud defendant was not a "minor participant" in a telemarketing scheme); United States v. Duncan, 29 F.3d 448, 451 (8th Cir. 1994) (holding that a defendant's role in a mail and wire fraud scheme to defraud investors was more than minor). Becker was sentenced on the same day, and by the same judge, as several of his co-conspirators (Opposition, Ex. 4 ¶¶ 7-13, 15-18, 22).

Becker failed to obtain a downward adjustment as a "minimal participant" or a "minor participant" in the underlying criminal conspiracy. He also failed to obtain a stipulation that he withdrew from the conspiracy by resigning from Investors Associates (Motion, Ex. C at 13). See supra note 6. Under the circumstances, Becker has failed to show that his conviction involved violations that were less than egregious.

Becker's misconduct was recurrent, not isolated. It involved the securities of three issuers. Becker has admitted to participating in a pattern of fraudulent sales practices from September 1995 through September 1996 (Motion, Ex. G ¶ 62; Opposition, Ex. 4 ¶ 161). In entering his guilty plea, Becker acknowledged that he repeatedly deceived customers and repeatedly made unsubstantiated predictions (Motion, Ex. C at 22).

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[9] The record in this proceeding does not show whether Becker sought a downward adjustment as a minor participant, which the district court denied, or whether he waived the opportunity to seek such a downward adjustment. In either event, the result here must be the same. I note that Becker has recently filed a motion to reduce his sentence under 28 U.S.C. § 2255. Becker v. United States, 1:04-CV-03398-LAP, S.D.N.Y., filed May 4, 2004 (official notice).

Becker's criminal violations involved a high degree of scienter. Cf. United States v. Guadagna, 183 F.3d 122, 129 (2d Cir. 1999) (holding that the wire fraud statute requires a showing of intentional fraud); United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998) (same, as to securities fraud and mail fraud); United States v. Boyer, 694 F.2d 58, 59 (3d Cir. 1982) (holding that the scienter required for criminal conviction of mail fraud or securities fraud is no different than for civil liability) (collecting cases); United States v. Von Barta, 635 F.2d 999, 1005 n.14 (2d Cir. 1980) (holding that a mail fraud conviction requires proof of specific intent to defraud). There is no higher scienter requirement for a conspiracy offense than for the underlying offense. United States v. Feola, 420 U.S. 671, 686-93 (1975).

I accept as true Becker's representation that he was consuming alcohol frequently during the times relevant to his criminal conviction (Opposition, Ex. 4 ¶ 191). However, alcohol dependence or abuse is never a valid reason for a district court to impose a criminal sentence below the guideline range. See United States Sentencing Guidelines Manual § 5H1.4 (policy statement); United States v. Rybicki, 96 F.3d 754, 759 (4th Cir. 1996); United States v. Creed, 897 F.2d 963, 964-65 (8th Cir. 1990). In his allocution, Becker admitted that he knew his conduct was wrong when he engaged in it. He cannot argue in this proceeding that he was so intoxicated as to make it impossible for him to form the requisite mental state to commit the crimes to which he has already pled guilty. I am aware of no reason why the Commission should apply a more lenient policy toward a respondent's claim of alcohol dependence or abuse when it considers the degree of scienter in a follow-on administrative proceeding under Section 15(b)(6) of the Exchange Act.

Becker is entitled to credit for acknowledging the wrongfulness of his conduct when he entered his guilty plea. Although he has also offered verbal assurances against future violations, one must remember that Becker remains in confinement. He is not in a position to commit wrongful conduct. In addition, it is troubling that Becker now seeks to minimize his crimes by arguing that some of his co-conspirators were even more culpable. The fact that others at Investors Associates may have also acted illegally during the relevant period neither explains nor mitigates Becker's behavior. To the contrary, if a firm is unable or unwilling to enforce compliance with applicable law, there is a greater need for the Commission to impose significant sanctions to deter others from similar behavior and to protect the public interest. I do not believe that the fact that others at Investors Associates may have also committed crimes in any way lessens Becker's personal culpability.

Rehabilitation focuses on a respondent's changed direction in his activities since the time of the underlying misconduct. Becker is commended for his positive achievements after his indictment. He has acknowledged responsibility for the underlying crimes to the satisfaction of the United States Attorney (Opposition, Ex. 4 ¶¶ 161, 172; Ex. 10 at 3). In addition, he has successfully completed an alcohol and drug awareness class and has recently been accepted for enrollment in a program of college-level correspondence courses (Opposition, Exs. 9, 12). However, Becker will not be released from confinement until March 2005 (Answer). He then faces three years of supervised release (Motion, Ex. D). The Commission has consistently rejected claims of rehabilitation when the individuals advancing those claims remained on probation. See Frank Kufrovich, 76 SEC Docket 2709, 2718 (Feb. 13, 2002); Adrian Antoniu,

33 SEC Docket 1574, 1576 (Sept. 3, 1985), aff'd in relevant part, 877 F.2d 721, 725 (8th Cir. 1989).

Finally, there is a genuine opportunity for future violations. Becker was a securities industry professional for ten years (1992-2001). He left the field only after he was indicted and arrested. He hopes to resume day trading on behalf of others in the future. Given his relatively young age and his lack of experience in other fields, a return to the securities industry is quite possible. The Commission should control the timing.

The doctrine of collateral estoppel prevents Becker from arguing in this proceeding that his abuse of alcohol and his limited role in the fraudulent conspiracy should be considered as mitigating circumstances. Accordingly, this is not one of the rare cases, identified in Brownson, in which a defense of mitigating circumstances will prevent summary disposition. Although there is some evidence of rehabilitation, it is not sufficient to present a genuine issue for resolution at a hearing.

Considering the Steadman factors in their entirety, and giving due regard to Becker's evidence of mitigation and rehabilitation, I conclude that the public interest requires an associational bar and a penny stock bar.[10]

ORDER

IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted;
2. The telephonic status conference scheduled for June 8, 2004, is cancelled; and
3. Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Edward Becker is barred from association with any broker or dealer and also barred from participating in any offering of penny stock.

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

[10] Although Becker objects to a penny stock bar in his Opposition, he previously stated: "Actually, I don't care if I ever sell penny stock for the rest of my life" (Prehearing Conference of Feb. 9, 2004, at 26).

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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James T. Kelly
Administrative Law Judge