

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
: INITIAL DECISION
CLARKE T. BLIZZARD : September 29, 2004

APPEARANCES: Linda B. Bridgman and Sandra J. Bailey for the
Division of Enforcement, Securities and Exchange Commission

John H. Cunha, Jr., of Cunha & Holcomb, P.C., for
Applicant Clarke T. Blizzard

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision denies Clarke T. Blizzard's (Blizzard) application for an award of fees and expenses pursuant to the Equal Access to Justice Act (EAJA). Blizzard, formerly associated with an investment adviser as a salesman, sought reimbursement for his defense of charges that he had aided and abetted the investment adviser's violation of the antifraud provisions of the federal securities laws. The Securities and Exchange Commission (Commission) concluded that the aiding and abetting charges were not established and dismissed the proceeding against him. This Initial Decision concludes, however, that the charges against Blizzard were "substantially justified" within the meaning of the EAJA and, accordingly, denies his application.

I. INTRODUCTION

A. Procedural Background

Blizzard filed an Application for an Award of Fees and Expenses (Appl.) pursuant to the EAJA, 5 U.S.C. § 504, and Sections 201.31–.59 of the Commission's Rules, 17 C.F.R. §§ 201.31–.59, on July 23, 2004. The Division of Enforcement (Division) timely filed an Answer on August 23, 2004, pursuant to 17 C.F.R. § 201.52. Blizzard did not file a Reply.¹

¹ An applicant may file a Reply within fifteen days of service of the Answer. 17 C.F.R. § 201.53.

Blizzard's EAJA application followed a final disposition that was favorable to him in a proceeding against him. Clarke T. Blizzard, Inv. Adv. Act Rel. No. 2253 (June 23, 2004) (Commission's Opinion). Blizzard's filing on July 23 was thirty days later and thus timely under the EAJA and the Commission's Rules. See 5 U.S.C. § 504(a)(2); 17 C.F.R. §§ 201.44(a), .160.

The Commission's Rules disfavor further proceedings, such as an evidentiary hearing, on matters at issue in an EAJA application, and emphasize a prompt decision by the administrative law judge. See 17 C.F.R. §§ 201.55, .56. The findings and conclusions in this Initial Decision are based on the record, which includes the record in the original proceeding and filings in the EAJA proceeding. Pursuant to 17 C.F.R. § 201.35(a), "[t]he burden of proof that an award should not be made to an eligible prevailing applicant is on [the Division]." All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

B. Allegations and Arguments of the Parties

Blizzard argues that he reasonably incurred fees and expenses, which were necessary to defend the proceeding against him, that total \$329,617.14, when attorney fees are reduced to \$75 per hour, the maximum allowable, as provided by 17 C.F.R. § 201.36(b).² He argues that the position of the Division in the proceeding against him was not "substantially justified" within the meaning of 5 U.S.C. § 504(a).

The Division argues that its position in the proceeding against Blizzard was substantially justified. Additionally, the Division argues that the fees and expenses claimed are excessive.

II. FINDINGS OF FACT

The Commission commenced a proceeding, seeking various sanctions under the securities laws, against Blizzard and others by an Order Instituting Proceedings (OIP) on September 9, 1999. The OIP charged that he willfully aided and abetted and caused violations by Shawmut Investment Advisers, Inc. (Shawmut), of the antifraud provisions of the Investment Advisers Act of 1940 (Advisers Act) – Sections 206(1) and 206(2). Shawmut allegedly violated those provisions because it failed to disclose to its clients that it used brokerage commissions generated from client transactions, or soft dollars, to compensate brokers for client referrals. The record of evidence was compiled in eleven days of hearings during October and November 2002 in Boston, Massachusetts, and Washington, D.C. The Commission's Opinion followed Blizzard's appeal of an initial decision that was unfavorable to him.³ Clarke T. Blizzard, 80 SEC

² Blizzard indicates that he will supplement his request with additional bills as soon as such bills are located. To date, he has not done so.

³ The initial decision concluded that Shawmut violated the antifraud provisions, that Blizzard willfully aided and abetted and caused the violations, and ordered various sanctions.

Docket 1672 (A.L.J. June 13, 2003) (ID). The Commission's Opinion concluded that the aiding and abetting charges were not established and dismissed the proceeding.

A. Background Facts

The following facts were found in the Commission's Opinion: Blizzard was associated with Shawmut and its successor, Fleet Investment Advisers, Inc. (Fleet), between 1993 and 1996 as Senior Vice President and Managing Director. His responsibilities were solely in the sales and marketing areas. Shawmut, a registered investment adviser, was required to file Form ADV with the Commission and to disclose to clients and prospective clients, in Part II of that form, the factors considered in selecting brokers for executing transactions in client portfolios. Shawmut's Part II stated that it selected brokers based on best execution and "the contribution made to its investment product by the research offered by brokers." It did not mention client referrals as a factor considered in selecting brokers. Blizzard was not involved in preparing or reviewing Shawmut's ADV or in otherwise monitoring compliance issues.

Shortly after joining Shawmut, Blizzard urged that trades be directed to brokers who had previously helped him obtain client referrals. This was a change from Shawmut's historical way of doing business and was a controversial issue at Shawmut, where some considered it unethical or even illegal. Blizzard was present at a meeting in mid-1994 when David Rajala (Rajala), Shawmut's Director of Research, raised the issue of the possible need for ADV disclosure of directing commissions to brokers based on referrals.⁴ Nonetheless, Shawmut commenced following Blizzard's recommendations without changing the disclosure in its Form ADV, rewarding several referral brokers with commission business for accounts Blizzard landed.

The Commission concluded that Shawmut violated Sections 206(1) and 206(2) of the Advisers Act. However, the Commission concluded that Blizzard did not aid and abet⁵ Shawmut's violations because the record did not establish that he substantially assisted in the conduct that constituted Shawmut's violations.⁶ The Commission found that Blizzard tried hard to ensure that referrals were a factor in choosing brokers, and that the referrals were a very significant factor in directing business to the referral brokers. Nonetheless, the Commission

⁴ Rajala testified that he stated at the meeting, "[We] had a problem with regulations, at least, because we weren't disclosing it in the ADV at the time [and] if we were directing commissions in exchange for new business referrals, that it is something we should disclose in the ADV." Oct. 22 Hearing Tr. 11.

⁵ Although the Commission's Opinion did not specifically address the question of whether Blizzard "caused" Shawmut's violations, it dismissed all charges against him. The undersigned assumes that the Commission concluded that Blizzard did not cause the violations.

⁶ "In addition to such a primary violation, aiding and abetting liability requires a showing of substantial assistance by the aider and abettor to the primary violation and general awareness, or reckless disregard, on the part of the aider and abettor of the wrongdoing and of his or her role in furthering it." Commission's Opinion at 9 n.10 (citing Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000)).

stressed, Blizzard was a salesman and not involved in preparing or reviewing Shawmut's ADV. Given Blizzard's openness in seeking to have trades sent to brokers who helped him with referrals, and the level of discussion at Shawmut regarding the practice, the Commission had no doubt that Blizzard adequately informed Shawmut senior management that commissions were going to brokers selected largely on the basis of client referrals. The Commission concluded that Blizzard's presence at the meeting when Rajala raised the issue of the possible need for ADV disclosure showed that Blizzard had reason to believe that the question of disclosure was being handled appropriately.

B. Fees and Expenses

Blizzard requests an award of fees and expenses in the amount of \$329,617.14. Appl. at Ex. A. This sum, however, includes fees and expenses incurred before the September 9, 1999, commencement of the adversary adjudication at issue – the Commission's administrative proceeding against Blizzard – and fees and expenses related to legal matters other than the Commission's administrative proceeding. Appl. at Ex. A. The Division requests that Blizzard be required to identify and segregate the fees and expenses incurred in connection with the Commission's proceeding against him. In view of the disposition of his application, this is unnecessary.

Blizzard's net worth was essentially zero at the time of the OIP. Appl. at Ex. B. He liquidated his retirement accounts to help pay his legal fees. App. at Ex. B.

III. CONCLUSIONS OF LAW

There is no dispute that Blizzard has met the following requirements of the EAJA: The proceeding against Blizzard was an "adversary adjudication" within the meaning of the EAJA. See 5 U.S.C. § 504(b)(1)(C).⁷ He was "prevailing" in that the adversary adjudication against him was dismissed. See 5 U.S.C. § 504(a)(1). Additionally, he is a "party" consistent with the requirements of 5 U.S.C. § 504(b)(1)(B) in that his net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated. However, as discussed below, the Division's position in the proceeding against Blizzard was "substantially justified" within the meaning of the EAJA.

⁷ Section 504(b)(1)(C) defines "adversary adjudication" as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license" The OIP cited Sections 203(f) and 203(k) of the Advisers Act as authority for the proceeding against Blizzard. Thus the proceeding was "on the record after notice and opportunity for hearing." Section 203(f) of the Advisers Act. Statutory requirements for adjudications under the Administrative Procedure Act are found at 5 U.S.C. §§ 554-59; 5 U.S.C. § 554(a) commences, "[t]his section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing"

“[T]he position of the agency was substantially justified” within the meaning of the EAJA if it was “reasonable in law and fact.” 17 C.F.R. § 201.35(a); Pierce v. Underwood, 487 U.S. 552, 565-66 (1988). An independent evaluation of the evidence in the adversary adjudication must be conducted through an EAJA perspective to determine whether or not the agency’s position was substantially justified. See Rita C. Villa, 71 SEC Docket 2438, 2443-44 (Mar. 8, 2000).

The position of the agency was articulated in the OIP and the Division’s conduct of the proceeding, including posthearing pleadings. The position of the Division was that Blizzard rendered substantial assistance to the conduct that constituted Shawmut’s violation and had knowledge that his role was part of an overall activity that was improper. While the Commission found that the record did not establish the position of the Division, the evidence is reasonably subject to a different interpretation that meets the lower threshold of substantial justification. That is, it would be reasonable in law and fact to conclude that Blizzard rendered substantial assistance and had knowledge, or reckless disregard, that his role was part of an overall activity that was improper.

As the Commission noted, Blizzard was at a meeting in mid-1994 when Rajala argued against allocating commission business to brokers who had referred clients and stated that the practice was not disclosed in Shawmut’s ADV and would violate the law unless disclosed. The Commission inferred from this that since Rajala had raised the issue, Blizzard had reason to believe that the question of disclosure was being handled appropriately. It is also reasonable to infer from this that Blizzard was put on notice that the practice was illegal because it was not disclosed in the ADV.

The ID addressed a series of meetings between Blizzard and new managers installed by Fleet in late 1995 and early 1996. ID, 80 SEC Docket at 1693-94.⁸ The ID found that Blizzard truthfully answered their questions about client accounts and brokerage allocation. It is possible, however, to find, based on the same evidence, that Blizzard falsely told them that he had letters from the clients directing that commissions generated by transactions for their accounts be directed to specified brokers and that he obtained a false invoice from one of the brokers. ID, 80 SEC Docket at 1693-94. This would indicate knowledge that his role was part of an overall activity that was improper, as well as substantial assistance in continuing the improper activity.⁹

Blizzard was an important person at Shawmut as indicated by his titles; a star salesman who was hired to increase Shawmut’s business, he brought in more new business than any other salesman at Shawmut. ID, 80 SEC Docket at 1678. While the Commission concluded that Blizzard did not render substantial assistance because he had no involvement in preparing or reviewing Shawmut’s ADV, it would also be reasonable to conclude from the record that he did render substantial assistance. Without Blizzard’s role in obtaining new accounts and in urging

⁸ Citations to the record are in the ID.

⁹ This was the view of the managers, Thomas O’Neill and Peter M. Vandervelde, who told him that they would no longer honor his requests for brokerage allocations, asked him to resign, and retained an outside law firm to investigate the matter. ID, 80 SEC Docket at 1680, 1694.

Shawmut to reward those who had helped him, Shawmut's violations would not have occurred. Blizzard attended management meetings at which commission allocations were discussed and decisions taken. ID, 80 SEC Docket at 1682. Blizzard continued to request brokerage allocations in connection with obtaining business after being notified in mid-1994 that Shawmut's ADV did not disclose the practice and that this was problematic. For example, he pressed for, and obtained, brokerage allocations in late 1994 and 1995 in connection with accounts of the pension plans of the Teachers Retirement System of Louisiana and of the International Brotherhood of Teamsters Local Union 710. ID, 80 SEC Docket at 1687-91.

Finally, there is precedent to hold an associated person of a registrant liable for aiding and abetting antifraud violations even where the person questioned, or even attempted unsuccessfully to stop, the violations. See Charles K. Seavey, 79 SEC Docket 3455 (Mar. 27, 2003), appeal pending, No. 03-71565 (9th Cir.);¹⁰ Sharon M. Graham, 53 S.E.C. at 1084-87, aff'd, 222 F.3d 994 (D.C. Cir. 2000);¹¹ cf. James J. Pasztor, 70 SEC Docket 2611, 2624 (Oct. 14, 1999).¹²

Accordingly, it is concluded that the position of the Division was reasonable in fact and law and thus was substantially justified within the meaning of the EAJA.

IV. RECORD CERTIFICATION

Pursuant to 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on February 27, 2003, and the items filed in this EAJA proceeding. Those items are (1) Clarke T. Blizzard's Application for an Award of Fees and Expenses, filed July 23, 2004; and (2) the Objection of the Division of

¹⁰ In Seavey, the Commission held an associated person of an investment adviser liable for aiding and abetting antifraud violations based on his participation in a letter to hedge fund investors that misrepresented the fund's assets by including assets that the fund purchased from sellers who fraudulently failed to deliver. The Commission recognized that the associated person diligently attempted to obtain delivery and urged, albeit unsuccessfully, the investment adviser to inform the investors and to initiate civil and criminal proceedings against the fraudulent sellers. The Commission took these factors into account in ordering sanctions, but emphasized that they did not excuse liability.

¹¹ In Graham, the Commission held a registered representative liable for aiding and abetting a customer's antifraud violations despite direction and reassurance from the broker-dealer's branch manager and owner that the trades were legal. The Commission emphasized the registered representative's responsibility to comply with the law. Accord, Adrian C. Havill, 53 S.E.C. 1060, 1068-70 (1998).

¹² In Pasztor, the Commission held that a branch manager failed reasonably to supervise a registered representative who aided and abetted a customer's antifraud violations. The branch manager tried to stop the violative trades, but was overruled by the broker-dealer's owner. In finding his efforts insufficient, the Commission emphasized the branch manager's responsibility despite his superior's role in the violations.

Enforcement to Respondent Clarke T. Blizzard's Application for Award of Fees and Expenses, filed August 23, 2004.

V. ORDER

IT IS ORDERED that Clarke T. Blizzard's Application for an Award of Fees and Expenses IS DENIED.

This order shall become effective in accordance with and subject to the provisions of Section 201.57 of the Commission's Rules of Practice, 17 C.F.R. § 201.57. Pursuant to that rule, a petition for review of this Initial Decision may be filed within twenty-one days after service of the decision. If neither party seeks review and the Commission does not take review on its own initiative, this Initial Decision shall become a final decision of the Commission on October 29, 2004.

Carol Fox Foelak
Administrative Law Judge