

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11179

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 12, 2003

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

SEP 16 2003

FIRST CLASS

In the Matter of :
:
IFG NETWORK SECURITIES, INC., :
WILLIAM KISSINGER, KISSINGER : ORDER ON MOTIONS FOR
ADVISORY, INC., BERT MILLER, : MORE DEFINITE STATEMENT
GLENN WILKINSON, and :
DAVID LEDBETTER :

The hearing in this matter is scheduled to commence on approximately October 20, 2003. Under consideration are (1) motions for more definite statement, filed August 8, 2003, by Glenn Wilkinson, and August 20 by William Kissinger and Kissinger Advisory, Inc. (Kissinger and KAI); (2) the response, filed August 19, by the Division of Enforcement (Division); and (3) a reply, filed September 3, by Wilkinson.

The Order Instituting Proceedings (OIP) alleges that Wilkinson, Kissinger, KAI, and Bert Miller recommended that customers invest \$250,000 or more in Class B shares of mutual funds without disclosing advantageous features of Class A shares related to sales charges, and without disclosing that they would receive higher commissions when customers invested in Class B shares. In addition to these alleged omissions, the OIP alleges a failure to disclose that Class A shares "would have produced materially higher returns than Class B shares," as a result of lower operating expenses, eligibility for breakpoints, and investment structuring options. The OIP charges Kissinger, KAI, Miller, and Wilkinson with violating the antifraud provisions of the securities laws and charges IFG Network Securities, Inc., and David Ledbetter with failing to supervise them with a view toward preventing their violations.¹

The movants note that the OIP failed to identify the customers, mutual funds, and dates of transactions. In response, the Division has identified twenty-nine customers and associated each with an individual Respondent. It has identified what it describes as substantially all the mutual funds and substantially all the dates of the transactions on which it intends to rely. The Division will, by October 1, identify, or confirm that it has identified, all the mutual funds and

¹ Specifically, the OIP charges violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940.

dates of transactions. Accordingly, the Division has, or will have, provided information that satisfies the gravamen of the motions for more definite statement.

Additionally, the movants state that the OIP fails to specify the dates and other specifics of the allegedly misleading omissions and fails to specify the amounts by which Class A shares would have outperformed Class B shares. The Division responds that the dates of the omissions occurred on or about the dates of the identified transactions. Further, as the Division states, the OIP alleges that Respondents omitted to explain breakpoints available for investments over \$250,000 in Class A shares and the effect of sales charges and expenses on performance. This information is sufficient to enable Respondents to defend against the charges of material omissions in connection with the transactions the Division identified.

Additionally, the movants refer to OIP ¶ III.E., which alleges that Kissinger, KAI, Wilkinson, and Miller made recommendations “without providing the customers with an adequate opportunity to study and understand the alternatives.” The movants urge that the Division be required to provide a more definite statement of the legal basis for the alleged requirement of an opportunity to study and understand. OIP ¶ III.E. is a factual allegation of the context of the alleged material omissions and does not state a legal requirement in itself.²

Additionally, the movants refer to OIP ¶ III.G., which states that Kissinger, as a person associated with an investment adviser, owed fiduciary obligations to his advisory clients and alleges that Wilkinson and Miller owed fiduciary obligations to customers who gave them discretion to choose which class of shares to purchase. It alleges that these three individuals breached fiduciary obligations by failing to disclose to customers that investments in Class B shares at or above \$250,000 would generate lower returns than investments in Class A shares. The movants state that the OIP failed to identify the customers that were the subject of the ¶ III.G. allegations, and Kissinger states that the OIP fails to state the legal basis for the alleged fiduciary obligations.

In response, the Division identifies specific customers who allegedly gave discretion to Miller and Kissinger to select the class of shares and states that Respondents exercised de facto discretion for the remaining customers in selecting Class B shares since the customers were unsophisticated, relied on Respondents’ judgment and almost always accepted Respondents’ recommendations. In reply, Wilkinson notes that the Division did not identify any customer who specifically gave him discretion and argues that the Division appears to be abandoning the ¶ III.G. allegations as to him.

² The Division has cited a 1969 settlement, Paine, Webber, Jackson & Curtis, 43 S.E.C. 1052, 1054 (1969), to support the existence of such a requirement. A settlement, however, is not precedent, as the Commission has stressed many times. See Richard J. Puccio, 52 S.E.C. 1041, 1045 & n.7 (1996) (citing David A. Gingras, 50 S.E.C. 1286, 1294 (1992), and cases cited therein); see also Kelley ex rel. Mich. Dep’t of Natural Res. v. FERC, 96 F.3d 1482, 1489-90 (D.C. Cir. 1996), and cases cited therein; Robert F. Lynch, 46 S.E.C. 5, 10 n.17 (1975) (citing Samuel H. Sloan, 45 S.E.C. 734, 739 n.24 (1975); Haight & Co. Inc., 44 S.E.C. 481, 512-13 (1971); Security Planners Assocs., Inc., 44 S.E.C. 738, 743-44 (1971)).

Concerning Kissinger, an investment adviser is a fiduciary. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-92, 194, 201 (1963). Concerning Wilkinson, ¶ III.G. contains factual allegations that his customers were unsophisticated, relied on his judgment, and almost always accepted his recommendations. The Division argues that such facts give rise to fiduciary obligations. No further definite statement is needed for Wilkinson to defend against these allegations.

Finally, Kissinger and KAI request a more definite statement as to the date of the prospectus governing each transaction at issue. The Division will identify each prospectus on its exhibit list, due October 1, by date.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Carol Fox Foelak". The signature is written in a cursive, flowing style with a horizontal line underneath the name.

Carol Fox Foelak
Administrative Law Judge