ADMINISTRATIVE PROCEEDING
FILE NO. 3-9933

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 26, 2003

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE
MAR 26 2003
CTFD. NO. 1st Class

In the Matter of		
A.S. GOLDMEN & CO., INC., ANTHONY J. MARCHIANO, STUART E. WINKLER, JOHN T. DIASABEYAGUNAWARDENA, (a.k.a. John Abbey) JOHN P. DELCIOPPO, CHRISTOPHER M. DELCIOPPO, VINCENT J. LIA, DUANE P. TAYLOR, and CHARLES TRENTO	:	ORDER ON MOTIONS

Background

On July 7, 1999, the Securities and Exchange Commission ("Commission") initiated this administrative proceeding with an Order Instituting Proceedings ("OIP"). Action was stayed because of state criminal proceedings begun about the same time involving all but one of the Respondents. See New York v. A.S. Goldmen & Co., Inc., Indictment No. 4772/99 (N.Y. Sup. Ct., N.Y. County Crim., Term). The parallel criminal proceedings ended in 2000 and 2001, and in this proceeding the Commission has accepted settlements from all but Respondents Trento and Winkler, who are both incarcerated and who appear pro se in this proceeding.[1]

The OIP alleges that (1) Respondent Winkler willfully violated Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rules 10b-5 and 10b-6 thereunder, and willfully aided and abetted or caused A.S. Goldmen & Co., Inc.'s ("Goldmen"), violations of Section 5 of the Securities Act, Section 17(a) of the Exchange Act, and Rules 17a-3 and 17a-4 thereunder, and (2) Respondent Trento willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, and willfully aided and abetted or caused Goldmen's violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

[1] Respondents have both filed answers to the OIP.

The declared purpose of this proceeding is to determine whether Respondents committed the violations alleged in the OIP, and if so, what, if any, remedial action is necessary or appropriate in the public interest and whether Respondents should be ordered to cease and desist, disgorge funds, and pay civil monetary penalties.

On March 10, 2003, the Division filed a Motion and Memo of Law in Support of Rule 250 Summary Disposition Against Respondents Stuart E. Winkler and Charles Trento ("Motion"); Declaration of Joseph J. Cella In Support of the Motion; Declaration of Lesley B. Atkins In Support of the Motion; and two volumes of exhibits ("Exhibit __."). On March 18, 2003, the Division filed a Motion To Adjourn Hearing Pending Determination of Dispositive Motion. I received Respondent Winkler's handwritten reply to the Motion on March 25, 2003. Respondent Trento received the Motion on March 17, 2003, so his reply to the Motion was due by March 24, 2003. A hearing for Respondent Trento is scheduled for April 3, 2003, and a hearing for Respondent Winkler is scheduled for April 4, 2003.

Respondent Winkler

On January 4, 2001, Respondent Winkler was criminally convicted of conspiracy in the second degree to murder the trial judge. He was sentenced to eight and one-third years to twenty-five years in prison. Respondent Winkler is incarcerated at the Clinton Correctional Facility in Dannemora, New York. (Motion at 6.)

On June 1, 2001, the Supreme Court of the State of New York, upon the entry of his guilty plea, convicted Respondent Winkler of the crime of enterprise corruption.[2] Respondent Winkler, a licensed securities principal and registered representative, had been the chief financial officer and chief compliance officer of Goldmen, a defunct broker-dealer, where he managed the New Jersey office and supervised all Goldmen operations. (Motion, Exhibit B at 3.) In his plea agreement dated June 1, 2001, Respondent Winkler stipulated to a lifetime bar to employment in the securities industry and agreed to execute a stipulation to forfeit money and property. (Motion, Exhibit C.) On the same date, Respondent Winkler signed a Factual Allocution that described how he intentionally committed the crime of enterprise corruption through the underwriting and offering of securities to the public through Goldmen in criminal activities in the period August 1992 through October 1998.[3] (Motion, Exhibit D.) Respondent Winkler was a leader in the "Goldmen Criminal Enterprise" which employed the following techniques:

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[2] Respondent Winkler was indicted on one count of enterprise corruption, twenty-three counts of the state equivalent of federal securities fraud, six counts of criminal possession of stolen property, and seventeen counts of falsifying business records. (Motion at 5.)

[3] The maximum sentence for the crime of enterprise corruption is eight and one-third years to twenty-five years imprisonment and a fine not exceeding the higher of $5,000 or double the amount of the defendant's gain from the commission of the crime. Penal Law §§ 70.00, 80.00. (Motion, Exhibit C at 2.)

manipulation of securities prices, control of stock through nominee and other controlled accounts, unauthorized trading in customer accounts, falsification of records, requiring brokers to offset customer sell orders with fraudulently-induced purchase orders, charging undisclosed and excessive markups and commissions, sales of securities by unlicensed persons, violation of "blue sky" registration laws, high pressure sales tactics, and making misleading and false statements to investors.

(Motion, Exhibit D at 1.) Respondent Winkler admitted to engaging in fraudulent actions in at least six public offerings, falsifying and destroying documents, lying to regulators, and violating General Business Law § 352-C(5) in connection with securities of Millennium Sports Management, Inc., Imatec Ltd., and Innovative Tech Systems, Inc. (Motion, Exhibit D.) It appears the court followed the District Attorney's recommendation and ordered Respondent Winkler to serve a prison term of three to nine years and to forfeit $3.5 million, of which $3 million was restitution to victims. (Motion at 6, 28, Exhibit C at 2.).

In letters to the presiding administrative law judge on December 30, 2002, March 1, 2003, and an undated letter that I received on March 24, 2003, Respondent Winkler acknowledged accepting a bar from the securities industry. In the March 1, 2003, letter, Respondent Winkler states that the Division had made "more threats of monetary remedies and other civil penalties. Even though in previous correspondence the SEC stipulated that I am penniless and without legal representation."

Respondent Trento

Respondent Trento was a broker with Goldmen from at least 1994 to and including 1997. (Motion at 5, Exhibit B at 185.) On July 23, 2001, after a six-month jury trial, Respondent Trento was convicted by the Supreme Court of the State of New York of enterprise corruption, fifteen counts of securities fraud, and twenty counts of falsifying business records.[4] (Motion at 6, Exhibit E.)

On November 8, 2001, Respondent Trento was sentenced to serve a maximum prison sentence of four to twelve years and to pay restitution of approximately $1.3 million. (Motion at 6-7, Exhibit F at 61.) The judge agreed with the jury's conclusion that Respondent Trento committed criminal acts, but noted that Respondent Trento did not believe that he had done so. (Motion, Exhibit F at 44-45, 60-61.) The judge characterized Respondent Trento as a con man with lots of charm, and that the criminal enterprise "milked many people of their life savings" and involved lying to regulators. (Motion, Exhibit F at 60, 63.) Respondent Trento is incarcerated at the Mid-State Correctional Facility in Marcy, New York. (Motion at 7.)

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[4] Respondent Trento was indicted on one count of enterprise corruption, eighteen counts of the state equivalents of federal securities fraud, twenty counts of falsifying business records, and one count of grand larceny. (Motion at 5.)

Division's Argument In Support of the Motion

The Division maintains that criminal convictions for violating New York's Martin Act, Business Law § 352-C, which prohibits fraud in either the purchase or sale of securities, establish Respondents' willful violations of the antifraud provisions of the federal securities laws. Violations of the Martin Act (General Business Law §§ 352-C(5) and (6)) require that a person intentionally engage in a scheme with intent to defraud. (Motion at 25.) The Division contends that the other violations alleged in the OIP are proven by Respondent Winkler's criminal conviction following his guilty plea and his Factual Allocution, and Respondent Trento's conviction.[5] (Motion at 10-22.) Specifically, the Division believes that it has shown that: (1) Respondents willfully violated the antifraud provisions; (2) Respondent Winkler willfully violated Exchange Act Rule 10b-6, recodified as Rule 101 of Regulation M; (3) Respondent Winkler willfully aided and abetted or caused Goldmen's violations of Section 5 of the Securities Act, and Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder; and (4) that Respondent Trento aided and abetted or caused Goldmen's violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. (Motion at 2, 14-22.) The Division maintains that a showing that Respondents employed the instrumentalities of interstate commerce is satisfied because they were registered representatives at the time of the illegal conduct citing Section 15(b)(3) of the Exchange Act, Bloom, 47 SEC 929, 931 (Aug. 3, 1983), and Declaration of Joseph J. Cella.[6]

The Division notes the applicability of the doctrine of collateral estoppel and case law holding that a criminal conviction is conclusive in subsequent civil litigation between the same parties on the same issues.[7] See SEC v. Everest Mgt. Corp., 466 F. Supp. 167, 172 (S.D.N.Y. 1979); see also McNally v. Pulitzer Pub. Co., 532 F.2d 69, 76 (8th Cir. 1976); United States v. Fabric Garment Co., 366 F.2d 530, 534 (2d Cir. 1966).

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[5] The Verdict Sheet for Respondent Trento lists the charges on which he was convicted as: Enterprise Corruption, PL § 460.20(1)(a); Martin Act Scheme to Defraud (General Business Law § 352-C(5)); Falsifying Business Records in the First Degree, PL § 175.10; and Martin Act Taking (General Business Law § 352-C(6)). (Motion, Exhibit E.)

[6] The Declaration of Joseph J. Cella, Chief of the Division's Office of Market Compliance, is persuasive that Goldmen was a member firm of the National Association of Securities Dealers ("NASD") in 1994 to 1998, and that the NASD member firms utilized the Automated Confirmation Transaction Service for trade reporting, which involved the interstate transmission of data.

[7] The Division cites SEC v. Dimensional Entm't Corp., 493 F. Supp. 1270, 1277 (S.D.N.Y. 1980), for the proposition that a criminal conviction carries a collateral estoppel effect even though the OIP alleges violations of different statutes. The Division maintains that the doctrine of collateral estoppel applies even though Respondent Trento has appealed his conviction. See Southern Pac. Communications Co. v. Am Tel. & Tel. Co., 740 F.2d 1011, 1018 (D.C. Cir. 1984); see also Petrella v. Siegel, 843 F.2d 87, 90 (2d Cir. 1988).

The Division argues that it is in the public interest to impose remedial sanctions on Respondents pursuant to Sections 15(b)(6), 21B, and 21C of the Exchange Act, and Section 8A of the Securities Act. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). The Division notes that Section 15(b)(6) of the Exchange Act authorizes imposition of a bar where a registered representative has been convicted of a securities related criminal offense.

The Division would bar Respondent Winkler from association with a broker or dealer citing his admission of egregious and extensive criminal conduct in his Factual Allocution, the high level of scienter he had as one of the architects of Goldmen's fraud, and a letter dated December 30, 2002, in which he reaffirmed his agreement with the New York County District Attorney to a permanent lifetime bar from the securities industry. (Motion at 22-24, Exhibits D, H.) The Division alleges, however, that Respondent Winkler has refused to execute papers to effect the agreed-to bar. (Motion at 24.) The Division offers a letter from the Deputy Superintendent for Programs at the Clinton Correctional Facility stating that Respondent Winkler refused to accept mail from the Division. (Motion, Exhibit G.) The Division cites Respondent Winkler's regulatory history shown in the NASD's Central Registration Depository ("CRD"), and Respondent Winkler's admission that he schemed to avoid regulatory scrutiny of Goldmen. (Motion at 28.) The Division represents that the CRD shows twenty-seven customer complaints against Respondent Winkler, with two adverse decisions, and nine regulatory actions, and that one of these caused the Massachusetts Securities Division to withdraw Respondent Winkler's state registration. (Motion at 28, Exhibit I.)

The Division supports barring Respondent Trento from association with a broker or dealer citing his egregious and extensive criminal conduct over at least a three-year period, which caused the court to order restitution in the amount of approximately $1.3 million.[8] (Motion 25-28.) The Division notes that Respondent Trento's criminal convictions of the Martin Act were for intentional misconduct, the sentencing judge's conclusion that Respondent Trento failed to acknowledge that his conduct was criminal, and Respondent Trento's failure to represent that he would not commit future violations. (Motion at 25, Exhibit F at 60.) The Division alleges that the CRD shows a history of customer complaints and regulatory actions for Respondent Trento. (Motion at 28, Exhibit J.)

The Division cites KPMG Peat Marwick, LLP, 74 SEC Docket 384, 429 (Jan. 19, 2001), as support for the imposition of cease and desist orders. The Division argues that the Commission should impose maximum third-tier civil monetary penalties against Respondents. It argues that penalties at the third tier are appropriate because the criminal convictions were for

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[8] The Division represents that it does not seek a disgorgement order as to Respondent Winkler because he paid court-ordered restitution of $3.5 million. (Motion at 2 n.1.) Apparently, Mr. Trento has not paid restitution in the amount of $1.3 million that was ordered in the criminal proceeding.

conduct involving fraud, deceit, reckless disregard of a regulatory requirement, and which caused investors to lose substantial sums and substantial pecuniary gain to Respondents. (Motion at 26-28.) In support of its request, the Division cites Respondent Winkler's plea agreement to forfeit $3.5 million, with $3 million as restitution, and that Respondent Trento was ordered to pay over $1.3 million in restitution. (Motion at 28.)

Ruling

The Commission's Rules of Practice permit a motion for summary disposition where, as here, the Division, which has the burden of proof, has received permission to file the motion before it presented any evidence. See 17 C.F.R. § 201.250(a). A motion for summary disposition may be granted where there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. See 17 C.F.R. § 201.250(b).

The exhibits to the Motion are all matters of public record and I take official notice of them. See 17 C.F.R. § 201.323. These materials establish by a preponderance of the evidence that Respondents' criminal convictions involved the use of the instruments of interstate commerce and the violations of the federal securities laws alleged in the OIP.[9] Accordingly, I find that:

Respondent Winkler willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rules 10b-5 and 10b-6 thereunder, and willfully aided and abetted or caused Goldmen's violations of Section 5 of the Securities Act, Section 17(a) of the Exchange Act, and Rules 17a-3 and 17a-4 thereunder; and

Respondent Trento willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, and willfully aided and abetted or caused Goldmen's violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

The Commission case law is unclear on whether a motion for summary disposition can or should be granted to impose sanctions and civil penalties without giving a respondent at a minimum an opportunity to request some type of hearing. Each of the statutory provisions that authorize the sanctions that the Division requests specifies that the Commission will act after notice and opportunity for hearing. See Section 8A of the Securities Act, Sections 15(b)(6), 21B, and 21C of the Exchange Act. Section 21B of the Exchange Act refers to a public interest determination.

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[9] Motion, Exhibit B, the Grand Jury Indictment in New York v. A.S. Goldmen & Co., Inc., Indictment No. 4772/99 (N.Y. Sup. Ct., N.Y. County Crim., Term); Exhibits C and D, Respondent Winkler's Plea Agreement and Factual Allocution; Exhibit E, Respondent Trento's Verdict Sheet in Indictment 4772/99; and Exhibit F, portions of the transcript of the sentencing hearing for Respondent Trento before Judge Leslie Crocker Snyder on Nov. 8, 2001.

The cases cited by the Division as authority for granting the motion resulted in the imposition of a bar from association with a broker or dealer. In this proceeding, the Division seeks a much wider range of sanctions and penalties. The grant of summary disposition in Joseph P. Galluzzi, 75 SEC Docket 1729 (Aug. 7, 2001), aff'd, 78 SEC Docket 1125 (Aug. 23, 2002), barred Respondent Galluzzi from association with any broker or dealer after he had been apprised that Steadman set out the applicable public interest criteria and that he could request an in-person hearing. He did not make such a request. Respondent Galluzzi had been convicted of twenty-six felony counts of mail fraud, wire fraud, bribery, and using facilities in interstate commerce to commit bribery; and was permanently enjoined from violating Section 10(b) of the Exchange Act and Rule 10b-5. In a footnote, the Commission volunteered that under the circumstances, summary disposition would have been appropriate even if Respondent Galluzzi had not waived a hearing. See Galluzzi, 78 SEC Docket at 1128 n.15.

In Galluzzi, the Commission noted that in John S. Brownson, 74 SEC Docket 1787 (Mar. 23, 2001), aff'd, 77 SEC Docket 3636 (July 3, 2002), it had affirmed summary disposition barring a respondent from association with a broker-dealer based on a criminal conviction for conspiracy to commit securities fraud and declared that "absent extraordinary mitigating circumstances, such an individual cannot be permitted to remain in the securities industry." Galluzzi, 78 SEC Docket at 1128 n.15. The Commission held in Brownson that the pro se Respondent had failed to show "the nature of any such evidence or explain how it would establish circumstances, such as rehabilitation or mitigating factors, that would counter a determination that it is in the public interest to bar him."[10] Brownson, 77 SEC Docket at 3640. In Brownson, the Commission noted that the appropriate remedial action depends on the facts of each case, and that while it is rare, it is possible that a respondent may present mitigating evidence. See id. at 3640 n.12; see also Martin J. Cunnane, Jr., 53 S.E.C. 285, 288 (1997) (citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973)); Alan E. Rosenthal, 53 S.E.C. 767, 770-71 (1998).

In Brad Haddy, 72 SEC Docket 1211 (May 8, 2000), an administrative law judge granted a motion for summary disposition and barred a respondent from association with any broker or dealer, or member of a national securities exchange or registered securities association. It appears Respondent Haddy, who was pro se, was unaware that he could request a hearing and the judge expressed the view that one was not needed because the Commission invariably imposed a bar in a litigated administrative proceeding based on a criminal conviction. See id. at 1216. The Commission, however, disagreed with a similar view expressed in Brownson with the statement "the appropriate remedial action depends on the facts of each particular case and cannot be determined precisely by comparison with the action taken in other cases." Brownson, 77 SEC Docket at 3639, n.10. No appeal was taken in Haddy.

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[10] Litigants rarely understand that where there is an underlying conviction or injunction the issue to be decided in the administrative proceeding is whether the imposition of sanctions and penalties is in the public interest and that Steadman is the applicable standard.

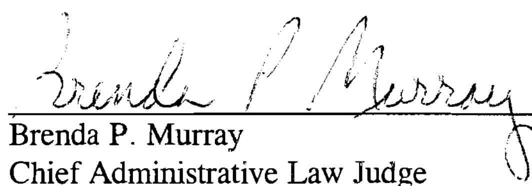
There is nothing in this record that indicates these Respondents, who appear pro se, are aware they can request a hearing to offer evidence on whether the Division's recommended sanctions are in the public interest.[11] Finally, it is difficult to understand how a respondent could show "extraordinary mitigating circumstances" if he is not allowed an opportunity through some type of hearing to introduce mitigating circumstances, if any exist, that could impact whether and to what extent sanctions or penalties are in the public interest. See Blinder Robinson & Co., Inc., 837 F.2d 1099, 1109 (D.C. Cir. 1988) ("Unless the SEC is to adopt a sanctioning regime whereby specific offenses call for certain specific sanctions, it seems inescapable that evidence relevant to a party's *degree* of culpability must be considered in deciding that issue.") (emphasis in original.)

For the reasons stated:

I GRANT the Division's Motion To Adjourn Hearing Pending Determination of Dispositive Motion and I postpone the hearing as to Respondent Winkler scheduled for April 4, 2003, and the hearing as to Respondent Trento scheduled for April 3, 2003.

I GRANT the Motion for Summary Disposition Against Respondents to the extent of the findings of violations set forth above and I defer a ruling on the other requested findings in the Motion.

Finally, I ORDER that by Friday, April 4, 2003, the Division will consult with my office to arrange a date and time for a telephonic prehearing conference with the Division and Respondents at which time we will determine whether in-person hearings are necessary.



Brenda P. Murray
Chief Administrative Law Judge

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[11] A telephonic prehearing conference was held on August 29, 2002. Neither Respondent was present in person or represented by counsel on the call. The correctional facility would not allow Respondent Winkler to be present, and it appears that the Division was unsuccessful in contacting an attorney who the Division thought represented Respondent Trento.