INITIAL DECISION RELEASE NO. 369
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13265

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

In the Matter of	:	
	:	
MICHAEL LAUER	:	INITIAL DECISION
	:	January 29, 2009
	:	

APPEARANCES: Christopher E. Martin for the Division of Enforcement, Securities and Exchange Commission.

Michael Lauer, pro se

BEFORE: Robert G. Mahony, Administrative Law Judge

BACKGROUND

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on September 30, 2008, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that, on September 23, 2008, the United States District Court for the Southern District of Florida (district court) entered an order and opinion on the Commission's motion for summary judgment, finding that Michael Lauer (Lauer) violated Sections 17(a)(1), (2), and (3) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder, both individually and as a control person pursuant to Section 20(a) of the Exchange Act, and Sections 206(1) and 206(2) of the Advisers Act. OIP at 2. Lauer filed an Answer on December 2, 2008.[1]

The OIP also alleges that Lauer has been permanently enjoined from violating Section 17(a)(1)-(3) of the Securities Act, Section 10(b) and Rule 10b-5 of the Exchange Act, and

[1] In an Order Following Prehearing Conference, dated November 3, 2008, I granted Lauer's request to extend the time to file an Answer until November 14, 2008. Lauer's Answer is postmarked November 12, 2008, but it did not arrive at the Office of Administrative Law Judges until December 1, 2008. The Division of Enforcement (Division) has made a motion for default against Lauer, which I deny.

Sections 206(1) and 206(2) of the Advisers Act. OIP at 2. The Division seeks to bar Lauer from association with any investment adviser. The Division's investigative file was made available to Lauer for inspection and copying by a Notice dated October 24, 2008.

At a prehearing conference on November 3, 2008, and in an Order issued that day, the Division was granted leave to file a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice. The Division filed its Motion for Default Against Michael Lauer or Alternatively its Motion for Summary Disposition Against Michael Lauer (Motion) with one exhibit on December 3, 2008.[2] Lauer submitted his opposition to the SEC's Motion (Opposition) on December 29, 2008. Lauer's Opposition includes a motion to stay this proceeding during the pendency of a criminal trial scheduled for April 2009. The Opposition also notes Lauer's intent to "appeal any judgment of disgorgement" by the district court. The Division filed its reply to Lauer's Opposition (Reply) on January 21, 2009.[3]

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 of the 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 summary disposition as a matter of law.

In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party. See Felix v. N.Y. City Transit Auth., 324 F.3d 102, 104 (2d. Cir. 2003); O'Shea v. Yellow Tech. Svcs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999); Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine

[2] The Division's Motion included Exhibit A, the district court's Order and Opinion on Motion for Summary Judgment entered September 24, 2008.

[3] The Division's Reply included Exhibit 1, titled Order Denying Defendant Michael Lauer's Motion for Continuance of Evidentiary Hearing.

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.

FINDINGS OF FACT

My findings and conclusions are based on the entire record, which consists of the OIP, all filed pleadings, including Lauer's Answer, motions and attached exhibits, opposing and reply briefs, orders, and the prehearing conference transcript. Exhibit A, attached to the Division's Motion, involves matters that may be officially noticed under Rule 323 of the Commission's Rules of Practice. Based on this exhibit, the Division has established the following undisputed material facts.[4]

Lauer was one of three founders, sole manager, and principal owner of Lancer Management Group, LLC (Lancer), and Lancer Management Group II, LLC (Lancer II), which were established in 1997. (Div. Ex. at 4.) Lauer controlled the operations and activities of Lancer and Lancer II (collectively, Lancer Management). (Div. Ex. at 4.) Lancer was the investment manager for Lancer Offshore, Inc. (Offshore), Omnifund, Ltd. (Omnifund), Viator Fund, Ltd. (Viator), and Orbiter Fund, Ltd. (Orbiter), hedge funds, and Lancer II was the general partner of Lancer Partners, LP (Partners) (collectively, Funds).[5] (Div. Ex. at 4.) Lauer directed the day-to-day operations of the Funds, communicated with investors, prepared and disseminated newsletters to investors, was the Funds' portfolio manager, and was a contact person for the Funds' auditors. (Div. Ex. at 5.)

The Funds pooled investments of qualified investors, and, from 1999 through 2002, the Funds raised more than $734 million. (Div. Ex. at 9.) Lauer was able to raise money by representing that the Funds were performing better than the major stock indexes during the bear market between 2000 and 2002. (Div. Ex. at 9.) Lancer Management managed the Funds for an advisory fee of one percent of net assets and an incentive fee of twenty percent of realized and unrealized gains for the year. (Div. Ex. at 9-10.) From 1999 through 2002, Lancer Management received more than $85 million in cash from the Funds, while Lauer himself received more than $53 million, primarily from Lancer Management. (Div. Ex. at 10.) Lauer failed to pay taxes to the IRS on more than $21 million he received during 2000 and lied about the existence of his offshore bank account into which he funneled millions. (Div. Ex. at 10-11.)

Lauer engaged in a fraudulent scheme whereby misrepresentations were made in sales documents. He created and provided false and fraudulent account statements to investors, and made material misrepresentations about certain of the Funds' holdings through newsletters to investors. He also falsely valued the Funds' investments, and engaged in manipulative trading of the Funds' individual investments in order to inflate the prices of certain thinly-traded stocks.

[4] I use the following citation format: Exhibit A to the Motion as "(Div. Ex. at __.)"; Lauer's Opposition as "(Opp. at__.)".

[5] Omnifund is the successor fund to the March 2002 merger of Orbiter and Viator. (Div. Ex. at 8.)

(Div. Ex. at 19-35.) For example, on December 31, 2002, Offshore reported that it owned investment securities worth more than $822 million; however, its broker, Bank of America Securities, had only $76 million worth of securities in its custody. (Div. Ex. at 21.) Lauer overstated Offshore's value by manipulating the shares of six of Offshore's investments and making up the market price of a seventh investment; however, these shares were worthless or worth pennies. (Div. Ex. at 41.) At the end of 2002, Lauer claimed that the Funds were worth more than a billion dollars; however, a receiver appointed in July 2003 recovered a portfolio worth less than $60 million. (Div. Ex. at 49.) Lauer's material misrepresentations and omissions included "(1) the Funds' portfolio valuation, concentration, and true contents; (2) Lauer's trading strategy; (3) the safety and liquidity of the investments; (4) Lauer's self-dealing; (5) the resignations of Citco and GGK[6]; and (6) the manipulation of assets in the Funds' portfolio." (Div. Ex. at 50.)

CONCLUSIONS OF LAW

This Proceeding was instituted pursuant to Section 203(f) of the Advisers Act. Under Section 203(f) of the Advisers Act, through incorporation of Section 203(e), the Commission is authorized to censure, place limitations on the functions or activities of, suspend for a period of up to a year, or bar from association, a person who willfully violates any provision of the Securities Act, Exchange Act or Advisers Act, and who at the time of the misconduct was associated with an investment adviser, if it is in the public interest to do so. The undisputed facts establish that a district court has found that Lauer violated provisions of the Securities Act, Exchange Act, and the Advisers Act. The district court also issued a permanent injunction prohibiting Lauer from continuing future violations of certain sections of the federal securities laws.

Lauer's Opposition to the Division's Motion notes that Lauer has appealed the district court's order and plans to appeal any judgment of disgorgement. (Opp. at 3.) Under Commission precedent, the pending appeal is not a valid reason for delaying the resolution of this matter. See Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002); Jon Edelman, 52 S.E.C. 789, 790 (1996). Further, the pending appeal does not impact the collateral effect of the district court's order. See Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1104 n 6 (D.C. Cir. 1988). If Lauer succeeds in having the underlying order and injunction vacated, he may ask the Commission to reconsider any sanctions imposed in this administrative proceeding. See Gary L. Jackson, 48 S.E.C. 435, 438 n.3 (1986); cf. Jimmy Dale Swink, Jr., 52 S.E.C. 379 (1995).

Lauer's Opposition includes a request to stay these proceedings so that he may focus on his criminal trial scheduled for April 2009. (Opp. at 5.) Lauer states that, if he invokes his Fifth Amendment privilege against self-incrimination, it "would almost certainly result in the court granting the [SEC's] motion for summary judgment." (Opp. at 6-7.) However, Lauer has answered the OIP and the Division has presented substantial undisputed evidence. Accordingly, this matter is being decided based upon the undisputed facts found by the district court and

[6] Citco Fund Services N.V. (Citco) performed administrative services for Offshore and Omnifund and resigned in 2002. (Div. Ex. at 17.) Goldstein Golub Kessler, LP's (GGK), was Partners' auditor. (Div. Ex. at 45.)

presented by the Division. While a court may stay civil proceedings in the interest of justice pending the outcome of criminal proceedings, the interests of justice do not require a stay in this case. See SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375-76 (D.C. Cir. 1980) (discussing factors, including a party's Fifth Amendment privilege against self-incrimination, that bear on a court's determination of whether to stay a civil proceeding pending the outcome of a criminal proceeding). The undisputed facts support the Division's Motion and no further proceedings are necessary.

Public Interest

The public interest considerations for a sanction pursuant to Section 203(f) of the Advisers Act are:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); see also Joseph J. Barbato, 53 S.E.C. 1259, 1282 n.31 (1999); Donald T. Sheldon, 51 S.E.C. 59, 86 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995). Deterrence is also a factor to be considered. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963.)

The facts described in the district court's order demonstrate conduct that is manipulative and deceptive and thus egregious. The facts detail numerous misrepresentations made to investors through offering and marketing materials, manipulative trading of investments in order to inflate the Funds' asset values, and fraudulent pricing of investments. Lauer repeatedly violated the federal securities laws over an extended period of time from 1999 through 2002. The district court's order notes that "[e]vidence of Lauer's scienter is plentiful." (Div. Ex. at 52.) Lauer has failed to give any assurance against future misconduct or reason to believe that he will not refrain from future violations of the securities laws. Lauer has not recognized the wrongful nature of his conduct. The Commission has stated that:

> In considering the factors, we recognize that conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanction under the securities laws.
>
> The fact that a person has been "permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction" from violating the antifraud provisions has especially serious implications for the public interest. Based on our experience enforcing the federal securities laws, we believe that ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to revoke the registration of, or suspend or bar from participation in the securities industry, or prohibit from participation in an offering of penny stock, a respondent who is enjoined from violating the antifraud provisions.

Marshall E. Melton, 56 S.E.C. 695, 713 (July 25, 2003) (quoting Section 203(e)(4) of the Advisers Act).

The evidence and the case law described above show that it is in the public interest to bar Lauer from association with any investment adviser.

ORDER

Based on the findings and conclusions stated:

I DENY Michael Lauer's request to stay this proceeding pending his criminal trial;

I GRANT the Division's Motion for Summary Disposition, because there are no issues of material fact and the Division is entitled to summary disposition as a matter of law; and

I ORDER, pursuant to Section 203(f) of the Investment Advisers Act of 1940, that Michael Lauer is barred from association with any investment adviser.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial 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, 17 C.F.R. § 201.111. 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 manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Robert G. Mahony
Administrative Law Judge