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Broker Says $17M Pump-And-Dump Claims Come Too Late

By **Jeannie O'Sullivan**

Law360, New York (August 4, 2017, 7:16 PM EDT) -- A broker-dealer accused in a $17.2 million pump-and-dump scheme told a federal judge Thursday that the U.S. Securities and Exchange Commission's switch from seeking monetary penalties to trying to bar him from the industry is an attempt to dodge case law rendering the claims time-barred.

In a response to the SEC's reply to his motion to toss the agency's injunctive relief bid, Guy Gentile doubled down on his argument that the five-year statute of limitations on civil penalties established by the U.S. Supreme Court's decision in Kokesh v. SEC had expired six months before the commission's March 2016 action commenced, thus barring it from seeking an injunction banning him from participating in the sale of penny stocks.

The SEC had previously dropped its attempt to obtain civil penalties and disgorgement from Gentile and now only seeks the injunctive relief. But such an action asks the court for an "extraordinary ruling" holding that, among other things, the SEC can bring an action "at any time into perpetuity," Gentile's brief said.

"By narrowing its requested relief to an injunction against violation of the securities laws and barring Gentile from an industry, the SEC hopes to avoid the impact of Kokesh by casting its claims as purely remedial. But the sanctions the SEC continues to seek are just as punitive as the pecuniary relief the SEC has abandoned. Merely labeling them as 'equitable' is insufficient to save the complaint, as the Supreme Court just instructed the SEC in Kokesh," the brief said.

The broker-dealer also clarified that he's not contesting the court's power to enjoin him from future violations, as the SEC implied, but rather the SEC's ability to seek this penalty after the time limit expired and without pleading facts showing entitlement to that relief. The alleged misconduct ended in 2008.

The SEC, after all, "did not believe" he needed to be enjoined for the past five years while he was cooperating with the investigation, the brief said.

Turning to the SEC's other arguments, Gentile blasted the notion that his dismissal bid was premature and that the court must evaluate the merits before considering whether the injunctions sought are are penal in nature. Such a course of action "would upend established civil procedure," he said.

Gentile likewise bristled at the SEC's assertion that his public criticism of it and other governmental agencies served as evidence of his "contempt" for authorities, thus justifying an injunction. Any statements by Gentile have "no bearing on whether he is likely to commit a securities violation," the brief said.

"The notion that an individual's public criticism of the government can be used to demonstrate a propensity to violate the law is deeply troubling," the brief said.

In **a response** last month to Gentile's motion to dismiss, the SEC said an injunction cannot be used to punish and it made no sense for Gentile to assert it was subject to a statute of limitations.

Prosecutors have said that after obtaining control over large blocks of the free-trading shares of the two companies, Gentile and his co-conspirators allegedly inflated the prices of those shares by engaging in manipulative trading and disseminating misleading promotional materials touting the stocks and encouraging others to purchase them.

Gentile and his co-conspirators ultimately sold large volumes of the stock to investors, netting about $17.2 million in gross trading proceeds, prosecutors said. Victims of the scheme suffered losses when the companies' stock prices dropped, prosecutors said.

In January, U.S. District Judge Jose L. Linares granted Gentile's motion to dismiss his March 2016 indictment on securities fraud charges.

The judge found that the alleged misconduct ended in June 2008 and that the case was covered by a five-year statute of limitations in effect at that time. If waivers executed by Gentile to toll the limitations period are considered valid, the indictment had to be filed by June 2015, the judge said.

Judge Linares rejected prosecutors' bid for a retroactive application of the six-year statute of limitations created by the 2010 Dodd-Frank Act.

Representatives for the parties didn’t immediately respond to request for comment on Friday.

The SEC is represented by in-house counsel Nancy A. Brown, Elizabeth A. Butler, Andrew M. Calamari, Simona K. Suh and Thomas P. Smith Jr.

Gentile is represented by Adam C. Ford and Adam Pollock of Ford O’Brien LLP.

The case is SEC v. Gentile, case number 2:16-cv-01619, in the U.S. District Court for the District of New Jersey.

--Additional reporting by William Gorta. Editing by Alanna Weissman.
