

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of : INITIAL DECISION
: January 18, 2013
ANDREW J. FRANZ :

APPEARANCES: Robin Andrews and Jonathan S. Polish for the Division of Enforcement,
Securities and Exchange Commission

Gregory P. Amend and Ari H. Jaffe of Kohrman Jackson & Krantz PLL
for Andrew J. Franz

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision bars Andrew J. Franz (Franz) from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock.

PROCEDURAL HISTORY

The Securities and Exchange Commission (Commission) instituted this proceeding on July 24, 2012, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The Order Instituting Proceedings (OIP) alleges that on March 16, 2012, the United States District Court for the Northern District of Ohio (Court) entered an order permanently enjoining Franz from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1) and 206(2) of the Advisers Act (Injunction Order) in SEC v. Franz, No. 5:12-cv-00642 (Civil Action). The OIP also alleges that on June 14, 2012, the Court entered Findings of Fact and Conclusions of Law (Findings and Conclusions) in support of its Injunction Order, based on evidence offered during a May 24, 2012, evidentiary hearing.

Franz was served with the OIP on July 30, 2012, and he filed his Answer on August 24, 2012. Counsel for the parties appeared at a prehearing conference on December 4, 2012, at which the Division of Enforcement (Division) requested that Franz be barred from the industry based on the Court's findings and injunction against him. Tr., pp. 4-5. Franz stipulates to this relief. Tr., pp. 5-6, 9. He also admits that he is bound by the Court's findings, and, in fact, Franz

cannot challenge the Court's findings or injunction in this proceeding. See Phillip J. Milligan, Exchange Act Release No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26796-97; Ted Harold Westerfield, Exchange Act Release No. 41126 (Mar. 1, 1999), 54 S.E.C. 25, 32 n.22 (collecting cases); Joseph P. Galluzzi, Exchange Act Release No. 46405 (Aug. 23, 2002), 55 S.E.C. 1110, 1115-16; Tr., pp. 5-6, 9. The parties agree that no further briefing is necessary, and Franz does not object to an Initial Decision making factual findings based on the Civil Action and granting the relief sought by the Division. Tr., pp. 5, 8-9.¹ I therefore did not require the Division to file a written motion for summary disposition, but did issue an order dated December 4, 2012, requiring the Division to furnish me with whatever evidence it would have relied on in such a written motion.

In response to my December 4, 2012, Order, the Division submitted the Court's Injunction Order and Findings and Conclusions, which Franz admits were entered in the Civil Action. Answer, p. 1. The findings and conclusions in this Initial Decision are based on the entire record, including these documents, of which official notice is taken. See 17 C.F.R. § 201.323. Preponderance of the evidence has been applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-04 (1981).

FINDINGS OF FACT

Franz is a 40-year-old resident of Aurora, Ohio. OIP, p. 2; Answer, p. 1. From approximately 2002 until 2007, he was a paid employee and associated person of Ruby Corporation (Ruby), a Commission-registered investment adviser located in Beachwood, Ohio. Findings and Conclusions, p. 2. Franz was also employed as a registered representative with various broker-dealers such as Fortune Financial Services and H. Beck, Inc., from at least 2007 until March 2011 when he was terminated from H. Beck, Inc. Id.; OIP, p. 1; Answer, p. 1. After 2007, Franz ceased being a paid employee of Ruby but continued as an associated person, assisting with the operations of the firm. Findings and Conclusions, p. 2.

During the period from 2007 to 2012, Franz misappropriated numerous client advisory fee checks directed to Ruby by intercepting the checks and depositing them into his own bank account. Id., p. 3. He also misappropriated client funds by sending unauthorized advisory fee requests to mutual funds and annuity companies, which liquidated securities in the client accounts and sent checks directly to Franz's home, at his direction, or to Ruby's offices, where Franz intercepted them and deposited them into a personal bank account. Id., pp. 3-4. Additionally, Franz misappropriated funds from his parents' client accounts at Ruby, over which Franz was the broker of record, by causing checks to be issued, obtaining possession of them, forging his father's signature, and depositing the funds into a personal bank account. Id., p. 3.

During the period from January 2009 to 2012, Franz misappropriated funds from a Ruby client trust, over which his father had been appointed trustee, by forging his father's signature,

¹ The posture of this proceeding is distinguishable from AMS Homecare, Inc., in which the Commission issued an Order Remanding Proceeding to Administrative Law Judge, because Franz consents to this procedure and there are no undeveloped issues. See Exchange Act Release No. 68506 (Dec. 20, 2012).

intercepting redemption checks, and depositing them into his personal account. Id., p. 4. Franz kept or spent \$37,239 of the \$93,730 that he redeemed in this manner. Id.

Franz did not disclose these misappropriations to Ruby or record them on the firm's books. Id. He spent a portion of the funds on himself and family members and returned some to Ruby. Id., pp. 3-5. Franz's net misappropriation from Ruby and its clients based on this conduct was at least \$75,000.² Id., p. 5.

Franz violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and aided and abetted violations of Sections 206(1) and 206(2) of the Advisers Act. Id., pp. 6-7. The Court enjoined him from violating these provisions. Injunction Order, pp. 2-3.

CONCLUSIONS OF LAW

Section 15(b)(6)(A) of the Exchange Act states that the Commission shall sanction any person who at the time of the misconduct was associated with a broker or dealer, if the sanction is in the public interest and the person is enjoined from any action, conduct, or practice specified in Section 15(b)(4)(C). Similarly, Section 203(f) of the Advisers Act states that the Commission shall sanction any person who at the time of the misconduct was associated with an investment adviser, if the sanction is in the public interest and the person is enjoined from any action, conduct, or practice specified in Section 203(e)(4).

Franz, who was associated with an investment adviser and various broker-dealers at the time of his misconduct, is enjoined from engaging in or continuing certain conduct or practices in connection with acting as an investment adviser, broker, or dealer, or in connection with the purchase or sale of securities, within the meaning of Section 15(b)(4)(C) of the Exchange Act and Section 203(e)(4) of the Advisers Act. See 15 U.S.C. §§ 78o(b)(4)(C), 80b-3(e)(4). Accordingly, a sanction will be imposed on Franz if it is in the public interest.

SANCTION

The appropriate remedial sanction is guided by the well-established public interest factors listed in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); Vladimir Boris Bugarski, Exchange Act Release No. 66842 (Apr. 20, 2012), 103 SEC Docket 53374, 53378. They include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. Steadman, 603 F.2d at 1140. The inquiry into the appropriate remedial sanction is flexible and no one factor is controlling. Chris G. Gunderson, Exchange Act Release No. 61234 (Dec. 23, 2009), 97 SEC

² Franz was arrested in February 2012 and charged in state court with aggravated theft, telecommunications fraud, and identity fraud. Findings and Conclusions, p. 6. Although the conduct alleged in the state case is similar to the conduct described above, and involved a Ruby client, the state case is still pending and I have not considered the conduct alleged in it in resolving this proceeding.

Docket 24040, 24048; Conrad P. Seghers, Adviser's Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2298, aff'd, 548 F.3d 129 (D.C. Cir. 2008).

Franz's conduct was egregious, recurrent, and involved scienter. Over the course of several years, he violated the antifraud provisions of the federal securities laws by misappropriating funds from clients of an investment adviser, in some cases by outright forgery. The Commission has repeatedly stated that "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions." Gunderson, 97 SEC Docket at 24049 (internal citation omitted); Marshall E. Melton, Advisers Act Release No. 48228 (July 25, 2003), 56 S.E.C. 695, 713. Counsel for Franz represented that Franz has "no intention of trying to work within the industry for the remainder of his life." Tr., p. 6. However, even assuming this, the totality of the egregiousness, recurrence, and scienter involved outweighs any mitigating factors, and it is in the public interest to bar him from the industry.

ORDER

It is ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Andrew J. Franz is BARRED from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Andrew J. Franz is BARRED from participating in an offering of penny stock, including acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. See 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 occurs, the Initial Decision shall not become final as to that party.

Cameron Elliot
Administrative Law Judge