INITIAL DECISION RELEASE NO. 445
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14482

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
BENJAMIN W. YOUNG, JR.	:	December 16, 2011
	:	

APPEARANCES: Barbara T. Wells for the Division of Enforcement, Securities and Exchange Commission.

Benjamin W. Young, Jr., pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on July 21, 2011, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that on July 5, 2011, the United States District Court for the Southern District of Texas, Houston Division (District Court), entered a final judgment (Final Judgment) against Respondent Benjamin W. Young, Jr. (Young or Respondent) in SEC v. Navigators Int'l Mgmt. Co., Ltd., No. H-07-4518 (S.D. Tex.) (Civil Case). The Final Judgment permanently enjoined Young, by consent, from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 (Securities Act), and Sections 10(b) and 15(a)(1) of the Exchange Act and Exchange Act Rule 10b-5. Additionally, it ordered him to pay a civil penalty of $30,000, pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act.

The Commission instituted this proceeding to determine whether these allegations are true and, if so, to decide whether remedial action is appropriate in the public interest. The Division of Enforcement (Division) seeks to bar Young from association with any broker or dealer.

The Office of the Secretary and the Division have provided evidence that Respondent was served with the OIP on August 4, 2011, in accordance with Rule 141(a)(2)(i) of the Commission's Rules of Practice. Respondent filed his Answer on August 15, 2011. At the

August 25, 2011, prehearing conference,[1] the Division was granted leave to file a Motion for Summary Disposition (Motion). (Tr. 8.)

The Division filed its Motion on September 19, 2011, along with a brief in support and five exhibits. Exhibit 1 is the Civil Case Docket as of September 9, 2011. Exhibit 2 is the Complaint filed in the Civil Case (Complaint). Exhibit 3 is the Final Judgment. Exhibit 4 is an e-mail from Barbara T. Wells of the Division dated August 3, 2011, advising Young of his rights under Rule 230(a) of the Commission's Rules of Practice. Exhibit 5 is a Declaration of Barbara T. Wells In Support of the Division's Motion (Wells Declaration). Official notice is taken of Exhibit 1, Exhibit 2, and Exhibit 3, pursuant to Commission Rules of Practice Rule 323. All five exhibits are entered into evidence.

Young filed an Opposition to the Motion on October 14, 2011, and the Division filed its Reply, Second Declaration of Barbara T. Wells, and two additional exhibits (Exhibits 6 and 7), on October 24, 2011.[2] Exhibit 6 is Young's consent in the Civil Case (Consent) and Exhibit 7 is the May 6, 2011, hearing transcript. Official notice is taken of Exhibit 6 and Exhibit 7, pursuant to Commission Rules of Practice Rule 323. Both exhibits are entered into evidence. On November 2, 2011, Respondent filed a Second Brief in Opposition to Motion and Brief in Support of Respondent's Motion (Resp. Reply).

Standards for Summary Disposition

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 allegations of the OIP with respect to that respondent. See 17 C.F.R. § 201.250(a). A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. See 17 C.F.R. § 201.250(b). The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to Commission Rules of Practice Rule 323. 17 C.F.R. § 201.323.

The Division maintains that it is entitled to a grant of its Motion based upon the issuance of the Final Judgment in the Civil Case. (Motion at 6.) The Commission has repeatedly upheld use of the summary disposition procedure in cases such as this one where the respondent has been enjoined and the sole determination concerns the appropriate sanction. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 (collecting cases); Jeffrey L. Gibson v. SEC, 561 F.3d 548 (6th Cir. Mar. 11, 2009) (petition for review denied).

Respondent's Consent entered into in the Civil Case requires that he adhere to the Commission's policy "'not to permit a defendant or respondent to consent to a judgment or order

[1] References to the transcript of the August 25, 2011, telephonic prehearing conference will be cited as "(Tr. __.)".

[2] References to the Exhibits will be cited as "(Exhibit _ at _.)".

that imposes a sanction while denying the allegations in the complaint.' 17 C.F.R. § 202.5." (Exhibit 6 at 5.) Respondent asserts that the Complaint states allegations, not facts, that the Motion contains a "litany of incorrect statements made as factual," and that it "restates a series of unproven allegations." (Answer at 2.) However, there is no dispute that Respondent was enjoined from future violations of Sections 5 and 17(a) of the Securities Act, and Sections 10(b) and 15(a)(1) of the Exchange Act, and Exchange Act Rule 10b-5 in the Civil Case. Accordingly, I GRANT the Division's Motion. See Exhibits 3, 6; 17 C.F.R. § 201.250.

Civil Case Allegations

The Complaint in the Civil Case sets forth the following relevant allegations:

- Young is a U.S. citizen who resides in El Salvador.[3] Until the summer of 2006, Young was a vice president and a member of the board of directors of Navigators International Management Company, Ltd. (Navigators), a Bahamian corporation headquartered in Nassau, Bahamas, that administered a website and an internet store (Treasure Chest) where investors bought ZCASH. At the time the Complaint was filed, Young worked as a consultant for Navigators, retaining primary responsibility for preparing the content of its website. (Exhibit 2 at 3-4.)

- Beginning in or about 2005, until at least summer of 2007, Young, acting as an unregistered broker, participated in three unregistered offerings of securities: (1) a bond funding program, (2) the ZCASH scheme, and (3) the Power Avenue Offering. In at least two of the offerings, Young fraudulently disseminated materially false and misleading information to attract potential investors and facilitate offerings. No registration statements were filed with the Commission or were in effect with respect to any of these offerings of securities. (Exhibit 2 at 2, 4, 6, 7, 9-10.)

- At the time of each of these securities offerings, Young was not a registered broker or dealer, and was not associated with a registered broker-dealer. Young acted as a broker-dealer by negotiating the sale of these securities, by preparing and signing documents, and by communicating with investors about the bond offering. Additionally, Young solicited investors and negotiated the terms of investor transactions for the bond offering through internet posting in the Power Avenue Offering and ZCASH programs. (Exhibit 2 at 6, 9-10.)

- In the fall of 2005, Young, with the assistance of solicitors, raised approximately $1.1 million through the sale of investment contracts for the bond funding program.[4] Young

[3] The OIP states that Respondent is a resident of Allen, Texas.

[4] The bond funding program used investors' funds, pooled them together with the funds of others, to purchase a bank bond. The bank bond would be used to provide collateral for a commercial line of credit, the proceeds of which would be made available to Navigators. Navigators would use the proceeds of this credit line to repay investors' principal and provide them with returns of 67% or more. (Exhibit 2 at 4.)

signed documents, as a witness, containing the terms of the bond funding program transactions. Young personally misrepresented the bond funding program and advised solicitors what to tell investors regarding this offering. Specifically, Young stated that Navigators would have a line of credit within sixty days and that investors should expect repayment of their principal and profit thirty to sixty days thereafter. Young assured investors that their principal was safe and collateralized referring to the repayment of investor principal and profit as "automatic." In fact, investors' repayment was not "automatic," the bonds purchased were counterfeit, and no investor received a return of his principal or profits. (Exhibit 2 at 4-5.)

- Young continued making material misrepresentations after the bond funding program ended. In April 2006, Young sent an e-mail to the bond funding program investors misrepresenting that Navigators had found a way to honor its obligations and that it would make payments to investors as soon as possible. (Exhibit 2 at 5-6.)

- Young solicited investors to invest in the ZCASH program whereby investors purchased ZCASH, which are electronic tokens that can be used to purchase products and services or "scrolls"[5] listed on Treasure Chest. In excess of $4.0 million of ZCASH was sold as part of this program. Investors who purchased products and services, not scrolls, purportedly would receive two types of returns; first, they would receive $2 for each $1 of cash the investor paid out, in addition to the product purchased; and second, Young promised investors "rebates," which were available to investors who purchased products and services or scrolls. The investor could choose a rebate from a drop-down menu at the time of purchase, including rebates as high as $4.7 million on a $6,000 purchase. Investors were told that they "are not required to do anything other than wait" to receive their returns. In fact, Navigators only paid the "$2 for $1" return once and has never paid any rebates. Additionally, other than stating that Navigators uses the money "in business to obtain profits," it was not disclosed how it would generate the returns and rebates promised. (Exhibit 2 at 7-8.)

- In the summer of 2007, Navigators began offering stock in Power Avenue, a privately-held Delaware corporation, through Treasure Chest. Investors could purchase stock for $12 per share in blocks of various sizes. They were offered returns of $2 for every $1 spent buying Power Avenue stock. Navigator's announced the availability of Power Avenue stock in a bulletin dated June 27, 2007, which contained material misrepresentations. The bulletin claimed that Power Avenue received "over $100 Billion in Letters of Intent for hydrogen electrical power plants" and that Power Avenue had agreements "for the transferal of assets valued at over $5 billion to Power Avenue in exchange for its stock." The bulletin further stated that investors could leave their Power Avenue stock on "consignment" for resale and that Navigators would resell the stock for $120 per share, keep $20 per share of the resale price, and pay the remainder to the investor. In fact, the representations about Power Avenue stock were unfounded and

[5] Scrolls are designed to allow a purchaser to provide funds to a charitable foundation to distribute to persons the foundation selects.

untrue. Power Avenue did not have the contracts Navigator claimed it did. (Exhibit 2 at 9-10.)

- Young knew, or was extremely reckless in not knowing, that his misrepresentations relating to the rates and timings of returns in the bond funding program were unreasonable; that his statements about the security of investor funds were false or misleading; and that his representations regarding Power Avenue's business contracts were materially false. (Exhibit 2 at 6, 10.)

Findings of Fact

Young consented, without admitting or denying the allegations in the Complaint, and a Final Judgment was entered permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act, Sections 10(b) and 15(a)(1) of the Exchange Act, and Exchange Act Rule 10b-5. (Exhibits 2, 3.) Young has not recognized the wrongful nature of his conduct or given any meaningful assurances against future violations.

Discussion and Conclusions

The Division requests that Young be barred from association with a broker or dealer. (Motion at 14; Reply at 3.) In response, Young raises several issues in his defense. Specifically, Young asserts; (1) the proceeding is barred by res judicata, (2) the proceeding is barred by collateral estoppel, (3) the OIP violates the Consent, disregards the Final Judgment, and usurps the authority of the court in the Civil Case, and (4) the injunction in the Final Judgment is a recital of obligations of all United States citizens and does not inculpate him or require or justify any further action. (Answer at 1-5.) Each of Respondent's defenses were considered and rejected.

1. Res Judicata

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5 (1979). Res judicata precludes parties from relitigating issues that were or could have been raised in the prior action. San Remo Hotel, L.P. v. City and County of San Francisco, California, 545 U.S. 323, 336 n.16 (2005); Allen v. McCurry, 449 U.S. 90, 94 (1980). The party asserting res judicata has the burden of proving it. In re Brawders, 503 F.3d 856, 867 (9th Cir. 2007).

In order for res judicata to bar the Division from bringing this proceeding, each of the following four elements must be satisfied: (1) the parties in the two proceedings are identical or in privity; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior judgment was valid, final, and on the merits; and (4) the same claim or cause of action was brought, or could have been brought in the prior case. Id. at 401.

The first and second elements are satisfied. Respondent and the Division were both parties in the Civil Case and are both parties to this follow-on proceeding. (Exhibit 3.) Further,

the Final Judgment in the Civil Case was rendered by a court of competent jurisdiction, the District Court. (Id.)

The third element of the res judicata test requires there to be a final judgment on the merits. A final judgment generally resolves all claims at issue as to all parties. See American States Insurance Co. v. Dastar Corp., 318 F.3d 881, 889 (9th Cir. 2003). The Division contends that this element of res judicata is not satisfied and asserts that the Consent makes clear that the Final Judgment only resolved the Civil Case litigation. (Reply at 1-2.) Respondent stresses that the Consent and Final Judgment entered by the District Court in the Civil Case are the ruling in this proceeding. (Resp. Reply at 2.) Respondent states the "claim under Section 15(b) of the Exchange Act is barred by res judicata because the matter was judicially resolved by [the District Court] when it issued the Final Judgment incorporating the Consent." (Answer at 1.) This contention has no merit. The Final Judgment entered by the District Court in the Civil Case was not a final judgment on the merits with respect to this follow-on proceeding brought by the Division. This is evidenced by the language of the Consent that explicitly states, "entry of permanent injunction may have collateral consequences under federal and state law and the rule and regulations of other organizations." (Exhibit 6 at 5.)

This leaves the fourth element of the res judicata test: the same claim or cause of action was brought, or could have been brought, in the prior case. In the Civil Case, the Division established that Respondent violated Sections 5 and 17(a) of the Securities Act, Sections 10(b) and 15(a)(1) of the Exchange Act, and Exchange Act Rule 10b-5, resulting in an injunction from further violations of these securities laws and an order to pay $30,000, which are different sanctions than those sought in the present follow-on proceeding. In this follow-on proceeding, the Division seeks to impose an associational bar on Respondent preventing him from associating with a broker or dealer, which sanction requests was not and could not have been brought in the Civil Case. Because the Division could not bring this claim in the Civil Case the fourth element of res judicata is not satisfied.

Two of the four res judicata factors have not been satisfied; thus, in the absence of any additional considerations, res judicata does not bar the present proceeding.

2. Collateral Estoppel

Collateral estoppel is an affirmative defense "barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one."[6] It is well established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent. See James E. Franklin, 91 SEC Docket 2708, 2713 (Oct. 12, 2007); John Francis D'Acquisto, 53 S.E.C. 440, 444 (1998); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn.6-7 (1997).

Respondent contends that the Division is barred from bringing this follow-on proceeding by the Final Judgment and Consent entered in the Civil Case. (Answer at 1.) The Division does not specifically address Respondent's assertion. Nevertheless, Respondent consented to, without

[6] Black's Law Dictionary 256 (7th ed. 1999).

admitting or denying the allegations of the Complaint, the Final Judgment entered in the Civil Case enjoining him from future violations of securities laws. Respondent cannot now relitigate this issue. Accordingly, Respondent's affirmative defense of collateral estoppel is rejected.

3. Whether the OIP violates the Consent, disregards the Final Judgment, and usurps the authority of the court in the Civil Case

Respondent asserts that the OIP, as issued by the Commission, violates the Consent, disregards the Final Judgment, and usurps the authority of the District Court. (Answer at 2.) Respondent asserts:

- The OIP contains "incorrect statements made as factual" and restates "a series of unproven allegations." (Answer at 2.) Respondent represents that several allegations that were taken from the Complaint are included in the OIP as factual, including: (1) "After his resignation, Respondent continued to work for the company as a consultant and retained primary responsibility for the contents of its website; and (2) "Young was an officer of [Navigators] and a member of its board of directors from the company's inception until his resignation in the summer of 2006." (Answer at 3.) Respondent asserts that there are several unproven allegations recited in the OIP, including: (1) accusations that he engaged in three unregistered offering of securities, and (2) accusations that he, in two of the offerings, disseminated materially false and misleading information to attract investors. (Answer at 4.)

- The Consent states that it "is based on [Young's] understanding that the Commission will not take any action to make or permit to be made any public statement representing that [Young] has admitted any allegations in the complaint," that the District Court "shall retain jurisdiction [over] this matter for the purpose of enforcing the terms of the Final Judgment," and "all parties agree that they are not the prevailing party in this action since the parties have reached a good faith settlement." (Opposition at 2.) Respondent asserts that this proceeding and the OIP filed by the Commission violate these statements. (Id.)

- Taking further action "against" him violates the Consent decree in the Civil Case, which "effectively decrees no further action against [him] shall be taken." (Answer at 2, 4.) Additionally, he states that the Consent and Final Judgment do not require a follow-on administrative proceeding. (Answer at 4.)

- Respondent states that it has not been proven that he has "ever been involved in business related to or within the jurisdiction of the Commission" or that he has "applied for registration or association in any way related to the Commission." (Answer at 5-6; Opposition at 3.) Therefore, he is not subject to the jurisdiction of the Commission. (Answer at 5; Opposition at 3.)

These contentions however are without merit. The Consent, signed by Respondent, specifically states that the District Court's "entry of permanent injunction may have collateral consequences under federal or state law and the rule and regulations of other organizations." During the May 6, 2011, hearing, Respondent was made aware that follow-on administrative

proceedings would follow the injunction issued by the District Court, and that the Consent entered by him in the Civil Case "stands alone." (Exhibit 6 at 3-5.) Accordingly, the issuance of an OIP to institute administrative proceedings was proper. As such, Respondent's claims that the OIP violates the Consent, disregards the Final Judgment, and usurps the authority of the District Court are rejected.

4. Whether the injunction in the Final Judgment is a recital of obligations of all United States citizens and does not inculpate him or require or justify any further action

Respondent states that the injunction in the Final Judgment "does not . . . permit any further action against" him. (Answer at 4, 6.) Rather, Respondent asserts that the injunction is merely a "recital of obligations of all USA citizens and residents pertaining to governing law." (Id.) Further action is expressly permitted by the statute and reiterated in the Consent signed by Respondent and incorporated in the Final Judgment. (Exhibit 4 at 5; Exhibit 6 at 4-5.) Accordingly, Respondent's assertion is rejected.

Sanctions in the Public Interest

The Division seeks to bar Young from association with any broker or dealer. (Motion at 14; Reply at 8.) Section 15(b)(6) of the Exchange Act authorizes the Commission to impose remedial sanctions on a person associated with a broker or dealer at the time of the misconduct, consistent with the public interest, if the person is enjoined from violating the securities laws. 15 U.S.C. §§ 78o(b)(4)(C), (b)(6)(A)(iii). At the time of his underlying misconduct, Young was acting as an unregistered broker within the meaning of the Exchange Act, as he was "engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4). Young is permanently enjoined from violating the securities laws. Therefore, he is subject to Section 15(b)(6) of the Exchange Act, and may be barred from associating with a broker or dealer, if such sanctions are in the public interest.

To determine whether sanctions under Section 15(b) of the Exchange Act are in the public interest, the Commission considers six factors: (1) the egregiousness of the respondent's actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. See KPMG Peat Marwick LLP, Exchange Act Release No. 43862 (Jan. 19, 2001), 74 SEC Docket 384, 436, motion for reconsideration denied, Exchange Act Release No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, petition denied, 289 F.3d 109 (D.C. Cir. 2002); Conrad P. Seghers, Advisers Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2303-04 (quoting Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979)). No one factor is controlling. Conrad P. Seghers, Investment Advisers Act of 1940 (Advisers Act) Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2298. Remedial sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

The Commission has held that where there is a consent, it "will rely on the factual allegations of the injunctive complaint in determining the appropriate remedial action in the

public interest, taking into account what those allegations reflect about the seriousness of the underlying misconduct and the relative culpability of the respondent." Marshall E. Melton, 56 S.E.C. 695, 711 (2003). Further, in an earlier opinion, the Commission stated that the "allegations in an injunctive complaint in an action settled by consent are entitled, in a subsequent proceeding before [the Commission] to considerable weight for purposes of assessing the public interest." David M. Haber, 52 S.E.C. 201, 202 (1995) citing Charles Phillip Elliott, 50 S.E.C. 1273, 1277 (1992) aff'd 36 F.3d 86 (11th Cir. 1994).

Young's actions were egregious and recurrent. Young participated in the offer and sale of securities on three separate, consecutive occasions, resulting in significant losses to investors. The total amount of money lost by investors in these three offerings is not known; however, the bond funding program offering resulted in a total loss of $1.1 million. Young acted with scienter during at least two of the offerings. Young knowingly misled investors in the bond funding program to believe they would receive significant returns and that such returns were "automatic." Additionally, Young knowingly made material misrepresentations relating to the Power Avenue Offering, including publications on the internet, for which he was primarily responsible for preparing.

Young has not admitted the wrongful nature of his conduct. In fact, in his Answer, he denies the Division's allegations and asserts several defenses. Likewise, he has made no assurances against future violations. At the time the Complaint was filed, Young continued to act as a consultant for Navigators and was responsible for the content of Navigators' website, which presented opportunities for additional securities laws violations. In his Answer, Young states that this is not factual but rather an unproven allegation. (Answer at 3.) However, Young does not offer, in any of his filings, information pertaining to his current occupation. He merely represents that he has no intention of seeking a broker-dealer license. (Answer at 5.) However, without the imposition of a broker-dealer bar, Young's representation is unenforceable and the potential for future violations exists.

The Commission has often emphasized that the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, Advisers Act Release No. 2052 (Aug. 30, 2002), 55 S.E.C. 1133, 1145, aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., Exchange Act Release No. 11773 (Oct. 24, 1975), 46 S.E.C. 78, 100. In view of the Steadman factors in their entirety, an associational bar is necessary and appropriate in the public interest in this proceeding.

ORDER

IT IS ORDERED that, pursuant to Section 15(b)(6)(A) of the Securities Exchange Act of 1934, Benjamin W. Young, Jr., is barred from association with any broker or dealer.

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(h) of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). 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 a 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 a motion to correct a 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.

Robert G. Mahony
Administrative Law Judge