

INITIAL DECISION RELEASE NO. 479
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14984

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

In the Matter of :
: INITIAL DECISION
OMAR ALI RIZVI :
: January 7, 2013
:

APPEARANCES: Timothy S. McCole for the Division of Enforcement, Securities and Exchange Commission

Omar Ali Rizvi, pro se

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Background

The Securities and Exchange Commission (Commission) issued an Order Instituting Proceedings (OIP) on August 15, 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 OIP alleges that on July 24, 2012, the United States District Court for the Central District of California (Court) permanently enjoined Omar Ali Rizvi (Rizvi) from violating Sections 5 and 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in SEC v. Rizvi, No. 8:10-cv-01632-JVS-FFM (Judgment). OIP at 2. The OIP alleges further that: (1) the Commission's complaint in Rizvi filed July 31, 2009, alleged that from January 23, 2003, through September 14, 2005, Rizvi offered and sold unregistered securities in an offering that raised more than \$1.8 million from investors throughout the United States and that he misrepresented material facts to investors in the offering; and (2) on March 6, 2012, the Court issued an Order on Motion for Summary Judgment (Summary Judgment) finding, among other things, that Rizvi violated the anti-fraud provisions of the federal securities laws by misrepresenting material facts in securities offerings during this time period. Id.

The hearing was scheduled to begin on September 18, 2012. On August 31, 2012, at the request of the Division of Enforcement (Division), I issued an order postponing the hearing and scheduled a telephonic prehearing conference on that date. On September 14, 2012, Rizvi filed a motion requesting an additional four weeks for his Answer, due within twenty days of service of the OIP, and an additional six weeks before the telephonic prehearing conference. I did not act on Rizvi's requests because they arrived too close to the scheduled prehearing conference.

Rizvi appeared pro se at the telephonic prehearing conference on September 18, 2012, and stipulated that he was served with the OIP on September 10, 2012. Rizvi asked for a hearing and the Division requested leave to file a motion for summary disposition. Tr. 4-5, 14. I agreed to wait until I reviewed Rizvi's Answer to determine whether there were any material facts in dispute that required a hearing. On October 1, 2012, Rizvi filed a First Amended Answer (Answer) with Exhibit A, the Form 1-E, Notification Under Regulation E, filed on August 11, 2004, by The Tiger Fund, Inc., and signed by Rizvi, Chief Executive Officer, and Exhibit B, Supporting Statement for the Paperwork Reduction Act Information Collection "Form N-6F."¹ In his Answer, Rizvi, among other things: (1) challenges the Commission's ability to take judicial notice of the Judgment in Rizvi; (2) denies some of the allegations in the OIP; (3) argues that the Judgment resulted from his former attorney's incompetence; and (4) argues that the OIP is barred by the five-year statute of limitations, by the doctrine of equitable estoppel, and by an incorrect interpretation of the Investment Company Act of 1940 (Investment Company Act). Answer at 4, 6-9.

The Commission's case law is such that an appeal of the underlying judgment is not grounds for staying an administrative proceeding. See James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2714 n.15, 2718, petition for review denied, 285 F. App'x 761 (D.C. Cir. 2008); Michael Batterman, Advisers Act Release No. 2334 (Dec. 3, 2004), 57 S.E.C. 1031, 1036-37 n.10, aff'd, No. 05-0404 (2d Cir. 2005); Joseph P. Galluzzi, Exchange Act Release No. 46405 (Aug. 23, 2002), 55 S.E.C. 1110, 1116 n.21; Charles Phillip Elliott, Exchange Act Release No. 31202 (Sept. 17, 1992), 50 S.E.C. 1273, 1276-77, aff'd, 36 F.3d 86 (11th Cir. 1994). Typically, if an appeal is successful, the Commission will entertain an application for reconsideration of its action. Elliott, 50 S.E.C. at 1277 n.17; Jimmy Dale Swink, Jr., 52 S.E.C. 379 (1995). Also, this administrative action is not barred by the statute of limitations as the basis of the OIP is the Judgment enjoining Rizvi, which was entered July 24, 2012. See Vladislav Steven Zubkis, Exchange Act Release No. 52876 (Dec. 2, 2005), 58 S.E.C. 1014, 1024 n.31, request for clarification denied, Exchange Act Release No. 53651 (Apr. 13, 2006), 87 SEC Docket 2584, citing William F. Lincoln, Exchange Act Release No. 39629 (Feb. 9, 1998), 53 S.E.C. 452, 457; Michael J. Markowski, Exchange Act Release No. 44086 (Mar. 20, 2001), 55 S.E.C. 21, 24, petition denied, No. 01-1181 (D.C. Cir. 2002). Rizvi offers no support for his charge that the OIP is barred by the doctrine of equitable estoppel, and as a general rule estoppel is unavailable against the government. Utah Power & Light Co. v. United States 243 U.S. 389, 409 (1917).

¹ At page 4 of his Answer, Rizvi seeks confidential treatment for about eight lines of text. No authority is cited. The request is denied because Rizvi has shown no harm from disclosure that outweigh benefits of disclosure. See 17 C.F.R. § 201.322(b). Rizvi's Answer is signed "Omar A. Rizvi, JD, LLM." Rizvi is no longer an attorney. Tr. 13.

By Order issued October 15, 2012, I found there were no material issues of fact that required an in-person hearing and granted the Division leave to file a motion for summary disposition. Tr. 14; 17 C.F.R. § 201.250(a).

On November 6, 2012, the Division filed its Motion for Summary Disposition (Motion), with an Appendix consisting of various documents filed in, or related to, Rizvi.² The Motion cites to portions of the Appendix that the Division contends establish that Rizvi was permanently enjoined from future violations of Sections 5 and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 as the result of misconduct that occurred while Rizvi was associated with an investment adviser and a broker from January 2003 through September 14, 2005. Motion at 3-9.

On November 26, 2012, Rizvi filed an Opposition to the Division's Motion (Opposition), with several exhibits.³ The Opposition argues that an order in this proceeding should be stayed pending review by the 9th Circuit Court of Appeals of Rizvi's appeal in Rizvi. The Opposition also argues that the Division should not be allowed to assert any "dismissed causes of actions [sic] (Section 15 violations and civil penalties)" in Rizvi, and that the Commission is bound by the District Court's finding that civil penalties were not warranted. Opposition at 3.

The Division did not file a Reply to the Opposition.

I accept into evidence all exhibits attached to the pleadings and I take official notice of all the documents shown in the Pacer History of Rizvi. 17 C.F.R. § 201.323.

Motion for Summary Disposition

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). There are no issues of material fact because the OIP is based on the Court's action in Rizvi, and the Motion establishes that Rizvi was permanently enjoined from further violations of Sections 5 and 17(a) of the Securities Act, and

² The Appendix includes the following: (1) Judgment; (2) Rizvi's Answer filed in this proceeding; (3) Declaration of Rizvi in Support of Defendants' Opposition to Plaintiff's Motion for Summary Judgment in Rizvi, filed February 6, 2012; (4) Civil Minutes in Rizvi dated March 6, 2012; and (5) several pages of transcript of what appears to be investigative testimony of Ryan D. Smith in Bellwether Venture Capital Fund, File No. FW-03135-A (Apr. 24, 2007). The Motion references the Appendix by page number, "App. at ___." I will follow that approach and use "Motion, App. at ___."

³ Exhibit A is Notice of Appeal filed September 24, 2012, in Rizvi; Exhibit B is Plaintiff's Notice and Motion for Order Dismissing Certain Claims Against Defendants Rizvi, Bellwether Venture Capital Fund I, Inc., and Strategy Partners, LLC and Imposing a Penalty Against Defendant Rizvi and Memorandum in Support in Rizvi (Aug. 29, 2012); Exhibit C is the Civil Minutes in Rizvi dated October 12, 2012.

Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5.⁴ Motion, App. at 1-4. Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act empower the Commission to act in certain circumstances where a person has been enjoined by a judgment issued by a court of competent jurisdiction or found to have violated the antifraud provisions of the securities statutes.

The Commission has repeatedly upheld use of summary disposition in cases 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), petition for review denied, 561 F.3d 548 (6th Cir. 2009). Rizvi acknowledges that the findings and conclusions made in the underlying action are immune from attack in a follow-on administrative proceeding. Opposition at 1. 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); Adoption of Amendments to the Rules of Practice and Related Provisions, Release No. 52846, 86 SEC Docket 1931, 2005 SEC LEXIS 3068, 2005 WL 3199273 at *3 (Apr. 21, 2005) (noting that motions for summary disposition are often made where a respondent has been criminally convicted or an injunction provides the basis for an administrative order against the respondent).

Accordingly, I GRANT the Division's Motion.

Findings of Fact

My findings are based on the entire record. Preponderance of the evidence has been applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-104 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

Rizvi is a 44-year-old California resident of who earned a J.D. from the University of San Francisco in 1992 and a Masters of Law in Securities and Financial Regulation from Georgetown University Law Center in 1993. Motion, App. at 22. Rizvi resigned from the State Bar of California in 2001 after his conviction of felonies involving domestic violence, assault, and false imprisonment. Id. at 22-23.

Rizvi formed Strategy Partners, LLC (Strategy Partners), a California limited liability corporation, as a business development and management consulting company, on June 4, 2002, and he has controlled it since its inception. Id. at 39. On November 1, 2002, Rizvi incorporated

⁴ The Court also ordered Rizvi jointly and severally liable with the other defendants for disgorgement of \$1,815,885, representing profits from conduct alleged in the complaint, together with prejudgment interest of \$786,571.06, for a total of \$2,602,456.06 payable to the Commission. Motion, App. at 5.

Bellwether Venture Capital Fund I, Inc. (Bellwether),⁵ in Maryland with its principal place of business in California. Id. at 23, 39. Rizvi served as Strategy Partners' managing director, and Strategy Partners became Bellwether's management advisor by contract on December 9, 2002. Id. at 39-40. As such, Strategy Partners managed Bellwether's day-to-day operations and administration, record keeping, and regulatory compliance functions, subject to board approval. Id. at 40. Bellwether employed two other investment advisers for periods of time, but Strategy Partners took over as investment adviser from March 5, 2003, until August 1, 2004, and after December 5, 2004, Rizvi and other Bellwether directors formed Bellwether Advisors, LLC, to serve as investment adviser. Id.

Rizvi had influence at Bellwether beyond that derived from his position at Strategy Partners. Id. On or before January 1, 2004, Rizvi became Bellwether's president and chief executive officer; Bellwether's subsequent president stated that Rizvi maintained high levels of control after leaving his officer positions; Rizvi was a member of Bellwether's board from at least August 10, to December 31, 2004; and prior to August 2004 continuing to at least mid-2005, Rizvi was the only signatory on Bellwether's bank accounts. Id. at 40-41.

Bellwether never filed a registration statement with the Commission covering any securities offerings, and it did not register as an investment company under Section 8 of the Investment Company Act. Id. at 41-42. However, from January 23, 2003, through August 30, 2004, Bellwether sold 125,250 shares of common stock for \$157,500 to seven investors. Id. at 41. And, from September 2, 2004, through September 14, 2005, Bellwether sold 473,019 shares for \$1,815,885 to 165 investors (Second Offering). Id. Bellwether received some investors' funds by checks sent through the mail. Id. Rizvi admits that between January 23, 2003, and September 14, 2005, Bellwether sold securities, which he claims were two exempt distributions, a claim the Court rejected as to the Second Offering. Answer at 2; Motion App at 48. The Court held that Strategy Partners and Rizvi as its managing partner sold, or offered to sell, Bellwether securities. Motion, App. at 46. However, "On the balance, the Court finds that genuine issues of material fact remain as to whether Strategy Partners or Rizvi are brokers." Id. at 54.

Rizvi drafted the "2002 Offering Circular" and the "2004 Offering Circular" to solicit investors in Bellwether, and he filed a Form 1-E, Notification Under Regulation E, a Form 1-E/A on behalf of Bellwether notifying the Commission of Bellwether's intent to offer securities to the public under Regulation E, and a second Form 1-E, on December 10, 2002, on January 27, 2003, and on August 11, 2004, respectively. Id. at 24, 27, 41-42. Information in the Offering Circulars was false and Rizvi made these false statements in connection with the purchase, offer to sell, or sale of securities. Id. at 49-51. Strategy Partners and Rizvi actively sought out finders to gather investors. Id. at 54. Bellwether ceased soliciting public investors in September 2005. Id. at 42.

The Court in Rizvi found as a matter of fact that:

⁵ Bellwether was formerly known as Rhino Micro Cap Fund, Inc., and subsequently Tigerfund, Inc. Id. at 23.

Rizvi assembled the team of four finders to contact potential investors via telephone to determine if they were interested in Bellwether's offering. Rizvi interviewed these individuals. Rizvi interviewed and hired three of these finders, including Mr. DeLaurie. These finders worked in the same space as Bellwether and Mr. Rizvi. These individuals performed tasks beyond soliciting investors for Strategy Partners or Bellwether. They were paid 10% of all investments brought in. If the finder or investor had questions about Bellwether's activities, Mr. Rizvi would normally answer those, including speaking to some investors directly. Mr. Rizvi knew these finders were unregistered at the time they were gathering investments in Bellwether. These finders sent several investors the 2004 Offering Circular. Several of the investors signed agreements acknowledging they read the Circular. Rizvi signed for receipt of funds from at least most investors.

Id. at 45. The Court's finding is supported by Ryan D. Smith's investigative testimony that Rizvi used Strategy Partners to work with finders who made cold calls to potential investors using a script promoting pre-IPO investment opportunities to raise money for Bellwether. Id. at 61, 65-68.

The Court found that the Commission was entitled to summary judgment as a matter of law on its claims that Rizvi violated Securities Act Sections 5(a), 5(c), 17(a)(1), 17(a)(2), and 17(a)(3) and Exchange Act Section 10(b), and Exchange Act Rule 10b-5. Id. at 37, 45.

Legal Conclusions

This proceeding was brought pursuant to Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b)(6), and Section 203(f) of the Advisers Act, 15 U.S.C. § 80b-3(f). The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. 111-203, H.R. 4173 (July 21, 2010) modified these section to empower the Commission, where it is in the public interest and a person has been enjoined by a court from engaging in or continuing conduct in connection with the purchase or sale of any security, to censure, place limitations on the activities or functions of, or suspend for a period not exceeding twelve months, or bar a person, who at the time of the misconduct was associated with a broker or dealer or investment adviser, from being associated 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. In the past, it was necessary to find that a person was associated with a specific type of investment entity to impose a bar, but that is no longer true. Now association with a broker, dealer, or investment adviser makes the entire range of collateral bars applicable where it is found to be in the public interest. See John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012) (“[W]e find that collateral bars imposed pursuant to Section 925 of Dodd-Frank are not impermissibly retroactive as applied in follow-on proceedings addressing pre-Dodd-Frank conduct because such bars are prospective remedies whose purpose is to protect the investing public from future harm.”).

The initial issue then is whether Rizvi, at the time of the misconduct, was associated with a broker, dealer, or investment adviser. A “broker” means any person engaged in the business of

effecting transactions in securities for the accounts of others. 15 U.S.C. § 78c(a)(4)(A). The term “dealer” means any person engaged in the business of buying and selling securities . . . for such person’s own account through a broker or otherwise. 15 U.S.C. § 78c(a)(5)(A). An “investment adviser” means any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. 15 U.S.C. § 80b-2(a)(11).

The preponderance of the evidence is that Rizvi, through his association with Strategy Partners and Bellwether, entities that he created, engaged in the business of recommending, advising, offering, selling, and effecting transactions in securities to investors and potential investors. Rizvi admits that Bellwether was an investment company, that he controlled Bellwether, that Bellwether sold securities, and that Strategy Partners acted as an investment adviser to Bellwether. Motion, App. at 12-13. A person need not be formally associated with a registered entity, but rather to be functioning as if he was so associated. See Zubkis, 58 S.E.C. at 1025 (acting as an unregistered broker is sufficient to come within the scope of Exchange Act Section 15(b)(6)); Feeley & Willcox Asset Mgmt. Corp., Securities Act Release No. 8249 (July 10, 2003), 56 S.E.C. 616, 618, 647 (barring a person associated with an unregistered investment adviser from association with an investment adviser), motion for reconsideration denied, Securities Act Release No. 8303 (Oct. 9, 2003), 56 S.E.C. 1264.

For all the reasons stated, I find that Rizvi comes within the scope of Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act for the imposition of a sanction if it is in the public interest.

Sanctions

The Division requests imposition of the full collateral bar allowed by Dodd-Frank. Motion at 10.

The Commission uses the following factors in determining the public interest: (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 Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff’d on other grounds, 450 U.S. 91 (1981). For the reasons stated below, I find that the Steadman factors weigh in favor of imposing a bar against Rizvi.⁶

⁶ The Court in Rizvi weighed the Steadman factors, except egregiousness, and concluded that a permanent injunction was not warranted, on the basis of the claims the Court granted judgment on. Id. at 57. The Court concluded that the scienter factor does not weigh in favor of imposing a permanent injunction against Rizvi. Id. at 56. This conclusion appears inconsistent with the Court’s finding that “the statements about Manuel and Levine in the 2004 Offering Circular were made with scienter and violated” the Securities Act and Exchange Act. Id. at 53.

Rizvi's actions were egregious and reoccurred in two unregistered securities offerings over a period of more than two years. Rizvi repeatedly misled potential investors by drafting offering circulars containing false information relating to Bellwether's status as a BDC and the composition of its management team. Rizvi supervised, actively sought out, and knowingly hired unregistered brokers to solicit potential investors in unregistered securities offerings. According to Rizvi, "Rizvi orchestrated the unregistered Bellwether offerings that raised \$1,973,385" from 172 investors selling unregistered securities. Id. at 41, 57. The Commission has noted that "the fact that a person has been enjoined from violating the antifraud provisions 'has especially serious implications for the public interest.'" Michael T. Studer, Exchange Act Release No. 50411 (Sept. 20, 2004), 57 S.E.C. 890, 898, aff'd, 148 F. App'x 58 (2d Cir. 2005), (quoting Marshall E. Melton, Advisers Act Release No. 2151 (July 25, 2003), 56 S.E.C. 695, 713). "[C]onduct that violates the antifraud provisions of the federal securities laws is . . . subject to the severest of sanctions under the securities laws." Jose P. Zollino, Exchange Act Release No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2608 (quoting Melton 56 S.E.C. at 713). The existence of such an injunction can indicate the appropriateness of a bar from participation in the securities industry. See Batterman, 57 S.E.C. at 1043; Melton, 56 S.E.C. at 709-10.

In March 2012, when ruling on the Commission's motion for summary judgment where it read the evidence in the light most favorable to Rizvi, the Court found that the record "establishes beyond any genuine issue of material fact that Rizvi acted either recklessly or negligently but not knowingly." Id. at 38, 55-56. The record is replete with false statements that appeared in materials that Rizvi authored and in the statements of the finders he hired and supervised in a boiler-room type operation. Id. at 41-55, 61-68. In assessing Rizvi's conduct and the reasonable likelihood of future violations I could find no consideration by the Court of the fact that Rizvi has extensive legal education and experience in the area of the regulation of securities. Id. at 55-57. I think this background information is significant because despite it, Rizvi does not acknowledge wrongdoing and offers the meekest of assurance of no further wrongdoing. In his Opposition, Rizvi states,

Insofar as the Administrative Law Judge finds that remedial sanctions are appropriate and does Order as such while the underlying matter is pending for appellate review, Respondent acknowledges and will comply with such and without admitting or denying his culpability for misconduct as being narrowly construed from the decision of the District Court upon which the Commission relies . . . he shall not violate such District Court Judgment or Order of the Commission at any time in the future.

Opposition at 2-3. Although Rizvi's statement offers some assurances against future violations, he continues to have unimpeded access to the securities industry. Rizvi's experience as an attorney, broker, and association with investment advisers, coupled with his continued access to the securities industry provide an increased likelihood of opportunities for future violations.

For all the reasons stated, I find the preponderance of the evidence is that Rizvi was associated with a broker and an investment adviser and that it is necessary and appropriate for the protection of investors to limit Rizvi's participation in the securities industry to the maximum extent possible.

Order

I ORDER, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, that Omar Ali Rizvi is barred from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization and from participating in an offering of 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. 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.

Brenda P. Murray
Chief Administrative Law Judge