

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

In the Matter of

CRAIG BERKMAN, d/b/a VENTURES TRUST LLC, :
JOHN B. KERN, FACE OFF ACQUISITIONS, LLC, : INITIAL DECISION
FACE OFF MANAGEMENT, LLC, a/k/a FACE : AS TO JOHN B. KERN¹
OFF ACQUISITIONS MANAGEMENT, LLC, : May 19, 2014
VENTURES TRUST II LLC, VENTURES TRUST III LLC, :
VENTURES TRUST IV LLC, VENTURES TRUST V LLC, :
VENTURES TRUST VI LLC, :
VENTURES TRUST ASSET FUND LLC, :
VENTURES TRUST MANAGEMENT LLC, :
VENTURES TRUST ASSET MANAGEMENT, LLC, a/k/a :
VENTURES TRUST II ASSET MANAGEMENT, LLC, :
ASSENSUS CAPITAL, LLC, and :
ASSENSUS CAPITAL MANAGEMENT, LLC :

SUMMARY

This Initial Decision (ID) denies Respondent John B. Kern's (Kern) motion, made pursuant to 17 C.F.R. § 201.630 (Rule 630), for relief from payment in full of disgorgement, prejudgment interest, and a civil penalty previously ordered in this proceeding.

I. BACKGROUND

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings on March 19, 2013, pursuant to Sections 8A of the Securities Act of 1933, 21C of the Securities Exchange Act of 1934 (Exchange Act), 203(f) and 203(k) of

¹ This proceeding has ended as to all Respondents except John B. Kern. See Craig Berkman, d/b/a Ventures Trust LLC, Securities Act of 1933 Release No. 9495, 2013 SEC LEXIS 3953 (Dec. 13, 2013); Initial Decision Release No. 541, 2013 SEC LEXIS 3970 (A.L.J. Dec. 17, 2013).

the Investment Advisers Act of 1940, and 9(b) of the Investment Company Act of 1940.² On March 7, 2014, the Commission issued an order, pursuant to Kern's offer of settlement, making various findings of facts and conclusions of law and imposing sanctions, including disgorgement of \$234,577 plus prejudgment interest of \$8,920 and a third-tier civil penalty of \$100,000. Craig Berkman, d/b/a Ventures Trust LLC, Exchange Act Release No. 71667, 2014 SEC LEXIS 866 (Mar. 7, 2014) (Settlement Order).

The Settlement Order ordered additional proceedings for the sole purpose of determining whether Kern should be ordered to pay the disgorgement, prejudgment interest, and civil penalty amounts in full based on such evidence as he might present pursuant to Rule 630 regarding his claimed inability to pay all such amounts in full. Id. As agreed upon by the parties, this determination is being made through briefing that includes Kern's Form D-A (17 C.F.R. § 209.1). Craig Berkman, d/b/a Ventures Trust LLC, Admin. Proc. Release No. 1326, 2014 SEC LEXIS 1022 (Mar. 21, 2014). Accordingly, this ID is based on: (1) Kern's Rule 630 Motion and Memorandum (including Form D-A and attachments), dated April 18, 2014 (Motion); (2) the Division of Enforcement's (Division) Opposition, dated May 1, 2014; and (3) Kern's Reply, dated May 9, 2014. The three filings were submitted under seal. Id. Familiarity with the findings of fact and conclusions of law in the Settlement Order is assumed for the purpose of this ID.

B. Allegations and Arguments of the Parties

Kern argues that he is unable to pay any of the disgorgement, prejudgment interest, and civil penalty that the Commission ordered. The Division argues that the evidence that Kern submitted shows that he has the financial ability to pay but has a history of choosing not to pay debts, such as taxes, instead directing his resources to consumer spending. The Division urges that Kern be ordered to pay the disgorgement, prejudgment interest, and civil penalty amounts in full.

C. Estoppel

The Settlement Order imposed disgorgement of \$234,577. Settlement Order at ¶¶ IV, V.D. Yet, in a section of his Motion titled "The Nature of the Fees and Out-of-Pocket Expenses Subject to 'Disgorgement,'" Kern states that the \$234,577 "was earned as ordinary practice income and used to provide the ordinary expenses of my practice and . . . to support my family." Motion at 5-6. In other words, he argues that the sum was not really ill-gotten gains, subject to disgorgement.

The Settlement Order imposed a \$100,000 third-tier penalty. Settlement Order at ¶¶ IV, V.D. Yet, in his Motion, Kern describes the third-tier penalty as "two second tier penalties of \$50,000 totaling \$100,000," and, in his Reply, describes the Division's reference to the penalty as a third-tier penalty as a "misrepresentation" and "twisting of the facts." Motion at 1; Reply at

² The proceeding was stayed between March 27 and July 19, 2013, during the pendency of a criminal investigation arising out of the same facts at issue. Craig Berkman, d/b/a Ventures Trust LLC, Admin. Proc. File No. 3-15249 (A.L.J. July 19, 2013) (unpublished).

2. He also enumerates the factors provided in Exchange Act Section 21B that the Commission may consider in determining whether imposition of a penalty is in the public interest and says, “there is no benefit as a deterrent in imposing further [sic] pecuniary costs.” Motion at 2, 9.

Thus, Kern appears to question the disgorgement and civil penalty ordered. However, he is estopped from challenging these sanctions by the terms of the Settlement Order. “Respondent agrees that he will be precluded from arguing that he did not engage in the conduct, and is not liable for the violations of the federal securities laws, described in this Order [and] that he may not challenge the validity of this Order or the disgorgement, prejudgment interest or civil monetary penalty amounts.” Settlement Order at ¶ IV.

II. FINDINGS OF FACT

Kern’s filings include Form D-A, with attached copies of account statements, tax returns and the like.³ These materials show substantial debts, including debts for unpaid taxes and student loans that arose ten or more years ago, and limited assets. Kern has a negative net worth. Kern is a lawyer and has been a sole practitioner for about twenty years. He is currently defending against a grievance filed with his state bar, but believes that his license to practice law is not in jeopardy. Kern’s tax returns show that he is receiving a full-time income, but his account statements essentially show that he is spending all or more of the income, including on discretionary expenditures.

III. CONCLUSIONS OF LAW

“It is well settled that an applicant bears the burden of demonstrating inability to pay.” Steven E. Muth, 58 S.E.C. 770, 814 (2005). Kern has demonstrated that he has a negative net worth, but a comfortable income. Kern was forty-nine at the time of the Settlement Order and can expect to continue his law practice for decades. Accordingly, he has not demonstrated an inability to pay in full the amounts of disgorgement, prejudgment interest, and civil penalty that the Commission ordered. To conclude otherwise would not be in the public interest as such a ruling would, essentially, enable a respondent who has incurred debts to escape the consequences of his subsequent wrongdoing.

IV. ORDER

IT IS ORDERED that the filings and attachments thereto submitted by John B. Kern and the Division of Enforcement, as listed infra, in paragraph I.A., shall be maintained under seal by the Commission’s Office of the Secretary.⁴

³ This form (Form D-A: Disclosure of assets and financial information) is filed pursuant to Rule 630(b) and is found at 17 C.F.R. § 209.1.

⁴ See Craig Berkman, d/b/a Ventures Trust LLC, Admin. Proc. Release No. 1326, 2014 SEC LEXIS 1022 (A.L.J. Mar. 21, 2014). As listed in paragraph I.A., the pleadings are: (1) Kern’s Rule 630 Motion and Memorandum, dated April 18, 2014; (2) the Division’s Opposition, dated May 1, 2014; and (3) Kern’s Reply, dated May 9, 2014.

IT IS FURTHER ORDERED that JOHN B. KERN'S Rule 630 Motion IS DENIED.

IT IS FURTHER ORDERED that JOHN B. KERN PAY DISGORGEMENT of \$234,577, plus PREJUDGMENT INTEREST of \$8,920, and a THIRD-TIER CIVIL PENALTY of \$100,000.

Payment of penalties and disgorgement plus prejudgment interest shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying the Respondent and Administrative Proceeding No. 3-15249, shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

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 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.

Carol Fox Foelak
Administrative Law Judge