

INITIAL DECISION RELEASE NO. 743
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16104

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

In the Matter of :
: INITIAL DECISION
MICHAEL LEE MENDENHALL : February 18, 2015

APPEARANCES: Nancy K. Ferguson for the Division of Enforcement,
Securities and Exchange Commission

Respondent Michael Lee Mendenhall, *pro se*

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Michael Lee Mendenhall (Mendenhall) from the securities industry. Mendenhall was previously convicted of securities fraud and theft under Colorado state law.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on September 12, 2014, pursuant to Sections 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The proceeding is a follow-on proceeding based on *People v. Mendenhall*, No. 2011CR10094 (Colo. Dist. Ct. Apr. 20, 2012), *appeal pending*, No. 12CA1171 (Colo. App.) (*People v. Mendenhall*), in which Respondent Michael Lee Mendenhall was convicted of securities fraud and theft under Colorado state law. The Division of Enforcement (Division) filed a motion for summary disposition on December 12, 2014, pursuant to 17 C.F.R. § 201.250(a), in accordance with leave granted. *Michael Lee Mendenhall*, Admin. Proc. Rulings Release No. 1952, 2014 SEC LEXIS 4054 (A.L.J. Oct. 28, 2014). Mendenhall did not file an opposition.

This Initial Decision is based on the pleadings and Mendenhall's Answer to the OIP. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Mendenhall was convicted were decided against him in the criminal case on which this proceeding is based. Any other facts in his filings have been taken as true,

pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that Mendenhall was convicted of securities fraud and theft under Colorado state law in *People v. Mendenhall*. The Division urges that he be barred from the securities industry. Mendenhall argues that the proceeding should be dismissed as premature since his appeal in *People v. Mendenhall* is pending.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 is taken of the documents attached to the Division's Request for Official Notice in Support of Motion for Summary Disposition as Exhibits 1-6, which are materials from the courts' official records in *People v. Mendenhall*, and from Financial Industry Regulatory Authority, Inc. (FINRA), records as well. See *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *2 n.1 (Apr. 18, 2013), *pet. for review denied*, 575 F. App'x 1 (D.C. Cir. 2014):

Verdict and Sentencing Docket in *People v. Mendenhall* (Div. Ex. 1);

FINRA Investment Adviser Registration Depository Report concerning Mendenhall (Div. Ex. 2);

Indictment in *People v. Mendenhall* (Div. Ex. 3);

April 20, 2012, Transcript of Sentencing in *People v. Mendenhall* (Div. Ex. 4);

March 2, 2012, Transcript of Jury Verdict in *People v. Mendenhall* (Div. Ex. 5); and

Mendenhall's August 14, 2014, Opening Brief in his appeal of *People v. Mendenhall*, Case No. 12CA1171, Court of Appeals, State of Colorado (Div. Ex. 6). The Opening Brief is also included in Mendenhall's Answer as Exhibit A.

2. Collateral Estoppel

Mendenhall's Answer includes the opening brief in his appeal of *People v. Mendenhall*, which argues, *inter alia*, that the trial court made reversible errors in evidentiary rulings and jury instructions. However, it is well established that the Commission does not permit criminal convictions to be collaterally attacked in its administrative proceedings. See *Ira William Scott*, Advisers Act Release No. 1752, 1998 SEC LEXIS 1957, at *8-9 (Sept. 15, 1998); *William F. Lincoln*, Exchange Act Release No. 39629, 1998 SEC LEXIS 193, at *7-8 (Feb. 12, 1998).¹ Nor

¹ Nor does the Commission permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by consent, by summary judgment, or after a trial. See *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC

does the pendency of an appeal preclude the Commission from action based on a conviction. *See Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 SEC LEXIS 3423, at *11 n.21 (Aug. 23, 2002); *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 SEC LEXIS 2334, at *11 (Sept. 17, 1992). If Mendenhall is successful in overturning his conviction, he can request the Commission to vacate any sanctions ordered in this proceeding (or to dismiss the proceeding, if it is still pending).²

II. FINDINGS OF FACT

Mendenhall was convicted in *People v. Mendenhall* after a jury trial in 2012 of numerous counts of securities fraud, in violation of Colo. Rev. Stat. § 11-51-501, and theft, in violation of Colo. Rev. Stat. § 18-4-401. Div. Ex. 1 at 1; Div. Ex. 3. All counts are felonies. Div. Ex. 1 at 1; Div. Ex. 3; Div. Ex. 4 at 42-43. Mendenhall was sentenced to twenty-five or thirty years of imprisonment. *See* Div. Ex. 1 at 2 (sentencing docket showing thirty years); Div. Ex. 4 at 43-45 (court pronouncing sentence for each count on which Mendenhall was found guilty, totaling thirty years); Div. Ex. 4 at 45 (court summarizing sentence as twenty-five years). He was also ordered to pay restitution of \$1,408,667.77.³ Div. Ex. 1 at 3, Div. Ex. 4 at 46.

Mendenhall worked at Bankers Life and Casualty Company (Bankers Life) for almost twenty-eight years as an agent and a manager, starting in 1983. Answer at Ex. A, p. 2; Div. Ex. 2 at 4. He was terminated for cause on November 24, 2010. Answer at Ex. B. From 2005 to 2009,

LEXIS 236, at *9-11 (Feb. 4, 2008) (injunction entered by consent), *pet. denied*, 561 F.3d 548 (6th Cir. 2009); *John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 SEC LEXIS 91, at *1-2 & n.1, *7 (Jan. 21, 1998) (injunction entered by summary judgment); *James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at *11 & nn.13-14 (Oct. 12, 2007) (injunction entered after trial), *pet. denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Demitrios Julius Shiva*, Exchange Act Release No. 38389, 1997 SEC LEXIS 561, at *5-6 & nn.6-7 (Mar. 12, 1997). *See also Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *2-10, 22-30 (July 25, 2003).

² *See Jilaine H. Bauer, Esq.*, Securities Act of 1933 (Securities Act) Release No. 9464, 2013 SEC LEXIS 3132 (Oct. 8, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, reversed and remanded district court's judgment that was basis for OIP); *Richard L. Goble*, Exchange Act Release No. 68651, 2013 SEC LEXIS 129 (Jan. 14, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, vacated injunction that was basis for OIP); *Evelyn Litwok*, Advisers Act Release No. 3438, 2012 SEC LEXIS 2328 (July 25, 2012) (dismissing follow-on proceeding after court of appeals, while petition for review was pending before Commission, reversed certain convictions and vacated and remanded other convictions, all of which were basis for OIP); *Kenneth E. Mahaffy, Jr.*, Exchange Act Release No. 68462, 2012 SEC LEXIS 4020 (Dec. 18, 2012) (vacating bar issued in follow-on administrative proceeding where court of appeals, after Commission had issued bar order, vacated criminal conviction that was basis for proceeding).

³ The court expressed doubt as to whether Mendenhall would ever be able to repay this sum. Div. Ex. 4 at 42.

Mendenhall was associated with UVEST Financial Services Group, Inc. (UVEST), a registered broker-dealer and investment adviser. See Michael L. Mendenhall BrokerCheck Report at 4 available at <http://brokercheck.finra.org> (last visited Jan. 27, 2015).⁴ From January 2010 to October 2010, he was associated with Colorado Financial Service Corporation (CFSC), a registered broker-dealer and investment adviser.⁵ *Id.* Mendenhall was indicted on April 13, 2011. Div. Ex. 3 at 1.

Mendenhall was hard-working and honest for most of his working life but turned to criminal misconduct when financially pressed in the economic downturn that affected his real estate investments. Div. Ex. 4 at 37, 39-40. The conduct for which Mendenhall was convicted involved sixteen victims. Div. Ex. 5 at 7-14. He met the victims through Bankers Life. Div. Ex. 4 at 39. However, he considered them to be “life long friends/family not just policy holders.” Answer at 3. They trusted him. Div. Ex. 4 at 36, 38. They were elderly and far from wealthy, but he talked each one into loaning him, a large part or all of, his or her life savings and issued promissory notes. Div. Ex. 4 at 38-39, 41. The court instructed the jury that the term “security” includes a note. Answer at Ex. A, p. 4. By the time of his April 20, 2012, sentencing, Mendenhall had been in custody for 317 days. Div. Ex. 4 at 45-46. The court commented on Mendenhall’s demeanor as displayed at the trial and sentencing: sometimes contrite and sometimes arrogant. Div. Ex. 4 at 40. Mendenhall never meant to hurt the investors and apologized to them. Div. Ex. 4 at 33-36, 39-40. However, he has never recognized that he had done anything wrong. Div. Ex. 4 at 40.

III. CONCLUSIONS OF LAW

Mendenhall has been convicted within ten years of the commencement of this proceeding of a felony that “involves the purchase or sale of any security . . . ; arises out of the conduct of the business of a broker, dealer, . . . investment adviser, [or] insurance company . . . ; [or] involves the larceny, theft, . . . or misappropriation of funds, . . . or substantially equivalent activity” within the meaning of Sections 15(b)(4)(B)(i), (ii), (iii) and 15(b)(6)(A)(ii) of the Exchange Act and Sections 203(e)(2)(A), (B), (C) and 203(f) of the Advisers Act.

Mendenhall’s Opening Brief in his appeal of *People v. Mendenhall* (Exhibit A of his Answer) includes the argument that the loans or notes at issue were not “securities” within the meaning of applicable law. However, Mendenhall was convicted of theft as well as securities fraud, and the Commission has the authority to bar individuals based on convictions involving dishonesty that are not securities-related. See *Kornman v. SEC*, 592 F.3d 173, 180 (D.C. Cir. 2010) (citing with approval the Commission’s policy that “the importance of honesty for a securities professional is so paramount that [the Commission has] barred individuals even when [a respondent’s] conviction was based on dishonest conduct unrelated to securities transactions or securities

⁴ UVEST was registered from November 1, 1983, to July 16, 2012, and was a wholly-owned subsidiary of LPL Holdings, Inc. See UVEST BrokerCheck Report at 10, 16 available at <http://brokercheck.finra.org> (last visited Jan. 21, 2015).

⁵ CFSC has been registered with the Commission and the state of Colorado since December 2000. See CFSC BrokerCheck Report at 7-8 available at <http://brokercheck.finra.org> (last visited Jan. 21, 2015).

business”) (quoting *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *23 (Feb. 13, 2009)); *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *20-21 & n.27 (Jan. 14, 2011) (holding conviction for tax violation relevant to determine whether an individual is fit to work in an industry where honesty and rectitude concerning financial matters is critical); *Ahmed Mohamed Soliman*, Exchange Act Release No. 35609, 1995 SEC LEXIS 968, at *7-8 (Apr. 17, 1995) (revoking registration and imposing broker-dealer and investment adviser bars based on a misdemeanor conviction for submitting false documents to the Internal Revenue Service); *Bruce Paul*, Exchange Act Release No. 21789, 1985 SEC LEXIS 2094, at *4-5 (Feb. 26, 1985) (imposing broker-dealer bar with right to reapply for conviction of making false statements on income tax returns); *Benjamin Levy Sec., Inc.*, Exchange Act Release No. 14368, 1978 SEC LEXIS 2430, at *4-5 (Jan. 12, 1978) (imposing broker-dealer and investment adviser bars and other sanctions based on conviction for making false statements in a loan application). The securities business is “a field where opportunities for dishonesty recur constantly.” *Soliman*, 1995 SEC LEXIS 968, at *10.

Mendenhall suggests in his Answer that others, such as his former employers, do not have clean hands with regard to the events at issue in *People v. Mendenhall*. Assuming, *arguendo*, that others were aware of or contributed to Mendenhall’s conduct, that does not relieve him from responsibility. See *James J. Pasztor*, Exchange Act Release No. 42008, 1999 SEC LEXIS 2193, at *15-18, *25-29 (Oct. 14, 1999) (supervisor held liable for registered representative’s execution of violative directed trades; supervisor had tried to stop the trading but was overruled by broker-dealer’s owner who was friendly with the customer); *Charles K. Seavey*, Advisers Act Release No. 2119, 2003 SEC LEXIS 716, at *12-14, *19-20 (Mar. 27, 2003) (associated person found liable where investment adviser required him to sign materially misleading letter), *aff’d*, 111 F. App’x. 911 (9th Cir. 2004).

IV. SANCTION

As the Division requests, a collateral bar will be ordered.⁶

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See 15 U.S.C. §§ 78o(b)(6), 80b-3(f). The Commission considers factors including:

⁶ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which became effective on July 22, 2010, provided collateral bars in each of the several statutes regulating different aspects of the securities industry. Mendenhall’s conviction occurred after July 22, 2010. Additionally, even if some of his underlying wrongdoing occurred before that date, the Commission has determined that sanctioning a respondent with a collateral bar for pre-Dodd-Frank Act wrongdoing is not impermissibly retroactive, but rather provides prospective relief from harm to investors and the markets. *John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855 (Dec. 13, 2012); see also *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155 (July 26, 2013); *Johnny Clifton*, Securities Act Release No. 9417, 2013 SEC LEXIS 2022 (July 12, 2013); *Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 SEC LEXIS 2024 (July 11, 2013).

the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, 2003 SEC LEXIS 1767, at *4-5. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schild Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46 (Jan. 31, 2006). The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. See *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 n.26 (Apr. 20, 2012); *Richard C. Spangler, Inc.*, Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *34 (Feb. 12, 1976).

B. Sanction

As described in the Findings of Fact, Mendenhall's conduct was egregious and recurrent, involving at least sixteen elderly victims whom he met as policy holders of Bankers Life and who, he knew, placed their trust in him as a friend, and who could not afford the loss of their modest life savings. As such there was a high degree of scienter. Mendenhall's previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. Absent a bar, he could re-enter the securities industry. The violations, which grew out of financial pressure Mendenhall faced from the financial crisis, are thus relatively recent but could not, in any event, have continued after his 2011 incarceration. Mendenhall has not recognized the wrongful nature of his conduct. The degree of direct financial harm to investors is quantified in the \$1,408,667.77 in restitution he was ordered to pay, and, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct 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*, Investment Company Act of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975). A conviction involving dishonesty requires a bar, and because of the Commission's obligation to ensure honest securities markets, an industry-wide bar is appropriate.

V. 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, MICHAEL LEE MENDENHALL IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.⁷

⁷ Thus, Mendenhall will be barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging in activities with a broker, dealer, or issuer for purposes of the issuance or

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

trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, pursuant to Exchange Act Section 15(b)(6)(A), (C).