

INITIAL DECISION RELEASE NO. 1014
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16926

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

In the Matter of :
: INITIAL DECISION
ROBERT BURTON : May 27, 2016

APPEARANCES: Rebecca Israel for the Division of Enforcement,
Securities and Exchange Commission

Robert Burton, *pro se*

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Robert Burton from the securities industry. He was previously convicted of securities fraud and other crimes and enjoined against violations of Massachusetts state law related to investment related services.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission instituted this proceeding, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act), with an Order Instituting Proceedings (OIP) on October 27, 2015. The proceeding is a follow-on proceeding based on *United States v. Burton*, No. 13-cr-10292 (D. Mass.), *appeal dismissed*, No. 15-1578 (1st Cir. Sept. 14, 2015),¹ in which Respondent Robert Burton was convicted of securities fraud and other crimes, as well as on *Commonwealth v. Pinnacle Financial Consulting, LLC*, Civil Action No. 13-0812B (Sup. Ct. Mass.), in which he was enjoined against violations of state law related to investment related services. The Division of Enforcement filed a motion for summary disposition on February 5, 2016, pursuant to Commission Rule of Practice 250(a), 17 C.F.R. § 201.250(a) (Rule 250(a)), in accordance with leave granted. *Robert Burton*, Admin. Proc. Rulings Release No. 3500, 2016 SEC

¹ In dismissing Burton's appeal, the Court of Appeals stated, "Defendant is remitted to his remedies, if any, under 28 U.S.C. § 2255." Burton has a number of motions pending before the U.S. District Court, including one styled Motion to Vacate under 28 U.S.C. § 2255. See *United States v. Burton*, ECF Nos. 126, 130, 132, 137, 142, 143, 156-58, 162.

LEXIS 124 (A.L.J. Jan. 13, 2016). To date, Burton has not filed an opposition, which was due on March 4, 2016. *Id.*

This Initial Decision is based on the pleadings and Burton'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 Burton was convicted were decided against him in the criminal and civil cases on which this proceeding is based. Any other facts in his filing 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 Burton was convicted of securities fraud and other crimes in *United States v. Burton* and enjoined against violations of state law related to investment related services in *Commonwealth v. Pinnacle Financial Consulting, LLC*. The Division urges that he be barred from the securities industry. At the January 12, 2016, prehearing conference, Burton opposed this, disavowing his plea agreement in *United States v. Burton*. He also indicated concern that agreeing to a settlement of this proceeding might adversely impact his efforts to overturn his conviction.

C. Procedural Issues

1. Official Notice

Official notice pursuant to Rule 323, 17 C.F.R. § 201.323, is taken of the Commission's public official records and of the docket reports and the courts' orders in *United States v. Burton* and *Commonwealth v. Pinnacle Financial Consulting, LLC*. Selected materials from the dockets in those cases are attached to the Division's Motion for Summary Disposition as Declaration Exhibits A-F (Exs. A-F), and official notice pursuant to Rule 323 is taken of each of them.

2. Collateral Estoppel

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*, Securities Exchange Act Release No. 39629, 1998 SEC LEXIS 193, at *7-8 (Feb. 12, 1998). 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 LEXIS 236, at *10 (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*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *2-10, *22-30 (July 25, 2003).

Nor 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

*10 n.21 (Aug. 23, 2002); *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 SEC LEXIS 2334, at *11 (Sept. 17, 1992). If Burton 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

Burton was convicted in *United States v. Burton* on December 23, 2014, of five counts of securities fraud in violation of Section 10(b) of the Exchange Act and six counts of tax fraud in violation of 26 U.S.C. § 7206(1), (2); he was sentenced to 48 months of incarceration and a three-year term of post-release supervision and ordered to pay \$271,640 in restitution to the Internal Revenue Service, \$159,500 in restitution to victims, and a fine of \$7,500.³ Ex. C. The securities fraud conduct underlying *United States v. Burton* ended in June 2013. Ex. C at 1. At the time of the offenses, Burton was acting as an investment adviser. Ex. B at 3.⁴

On March 25, 2015, in *Commonwealth v. Pinnacle Financial Consulting, LLC*, the court (1) enjoined Burton and his company, Pinnacle, from advertising, marketing, soliciting fees in relation to, and/or providing, in Massachusetts: loan modification services; bankruptcy petition services; financial and investment advising services for compensation; and the unauthorized practice of law; (2) ordered Burton and Pinnacle to pay restitution of \$1,241,840.45, civil penalties of \$665,000, and the Commonwealth's attorney's fees of \$55,425; and (3) ordered that Burton and Pinnacle be jointly and severally liable for the money payments. Ex. E.

² See *Jilaine H. Bauer, Esq.*, Securities Act of 1933 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 Burton's pretrial release was revoked while he was awaiting sentencing because he repeatedly violated his conditions of release and lied to the Pretrial Services Officer. Ex. F.

⁴ In his Answer to the OIP, Burton denies acting as an investment adviser (while admitting that he owned and operated a business that provided investment advising services to clients). Answer at ¶ A.1. However, in the Plea Agreement that Burton signed on August 19, 2014, he acknowledges "at the time of the offenses, Defendant was acting as an investment adviser." Ex. B at 3. "Investment adviser" is defined in Advisers Act Section 202(11): "any person who, for compensation, engages in the business of advising others, . . . as to the advisability of investing in, purchasing, or selling securities."

Burton participated in *Commonwealth v. Pinnacle Financial Consulting, LLC*, to a limited extent, but the court entered a default against him. See Ex. D at ¶¶ 8, 15. Burton and Pinnacle were subject to a preliminary injunction issued on March 13, 2013, and, on November 15, 2013, were held in contempt for violating it on numerous occasions and assessed restitution of \$30,466.36, penalties of \$170,000, and attorney’s fees and costs of \$39,866. Ex. D at ¶¶ 3, 5. The court entered a default against Pinnacle with Burton’s agreement and, subsequently, on June 23, 2014, against Burton after he persistently failed to respond to discovery. Ex. D at ¶¶ 6, 7. On August 4, 2014, the court denied Burton’s motion to reconsider the default because of his repeated violations of the discovery rules and orders of the court. Ex. D at ¶ 8. Eventually, on January 9, 2015, after further defiance of the court’s orders, the court ordered the Commonwealth’s requests for admissions to be deemed admitted. Ex. D at ¶¶ 9-12.

III. CONCLUSIONS OF LAW

Burton has been convicted within ten years of the commencement of this proceeding of a felony that “arises out of the conduct of the business of a[n] . . . investment adviser” within the meaning of Sections 203(e)(2)(A) and 203(f) of the Advisers Act. Additionally, his injunction is within the meaning of Sections 203(e)(4) and 203(f) of the Advisers Act. Although unregistered, Burton was acting as an investment adviser. It cannot be questioned that the Commission has authority to bar persons from association with investment advisers, whether registered or unregistered, or otherwise sanction them under Section 203 of the Advisers Act. *Teicher v. SEC*, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999).

IV. SANCTION

As the Division requests, an industry bar will be ordered.

A. Sanction Considerations

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

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)), *aff’d on other grounds*, 450 U.S. 91 (1981). 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 *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, Burton's conduct was egregious and recurrent, and involved a high degree of scienter, as shown by his conviction for multiple counts of securities fraud as well as tax fraud. His 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 are recent, having ended in 2013. There is an absence of recognition by Burton of the wrongful nature of his conduct. His defiance of the court's orders in *Commonwealth v. Pinnacle Financial Consulting, LLC*, bodes ill for future compliance with legal requirements. There is a reasonable foreseeable risk that, if he were allowed to resume his former business activities, he would engage in similar criminal conduct. The degree of direct financial harm to investors is quantified in the \$159,500 in restitution he was ordered to pay in *United States v. Burton*, 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 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), ROBERT BURTON IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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 a 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