INITIAL DECISION RELEASE NO. 1079
ADMINISTRATIVE PROCEEDING
File No. 3-17265

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

In the Matter of STEVEN R. MARKUSEN and JAY C. COPE	INITIAL DECISION OF DEFAULT November 9, 2016

APPEARANCES: Helen A. Contos and Anne C. McKinley for the Division of Enforcement, Securities and Exchange Commission

Daniel M. Scott, Kelley, Wolter & Scott, P.A. for Jay C. Cope

BEFORE: James E. Grimes, Administrative Law Judge

Summary

In this initial decision, I grant the Division of Enforcement's motion for sanctions. Respondents Steven R. Markusen and Jay C. Cope are barred from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Procedural Background

The Securities and Exchange Commission initiated this proceeding in May 2016, when it issued an order instituting proceedings (OIP) under Section 203(f) of the Investment Advisers Act of 1940. OIP at 1; *see* 15 U.S.C. § 80b-3(f). This proceeding follows the action the Commission filed in *SEC v. Markusen*, No. 14-cv-3395 (D. Minn.). The Division alleges the following in the OIP.

Markusen formed Archer Advisors LLC (Archer) in 2002 for the purpose of managing the Archer Equity Fund and the Archer Focus Fund.[1] OIP at 1. Markusen was Archer's sole owner and CEO. *Id.* He is not currently registered with the Commission. *Id.* at 2. Archer has never registered with the Commission. *Id.* at 1. Cope worked in various capacities at Archer from 2003 through 2013. *Id.* at 2. He is not currently registered with the Commission. *Id.*

[1] I refer to Archer Equity Fund and the Archer Focus Fund collectively as the Funds.

In November 2015, the United States District Court for the District of Minnesota entered a default judgment against Markusen and Archer based on an injunctive complaint filed by the Commission. OIP at 2. In April 2016, the district court granted the Commission's motion for summary judgment against Cope. *Id.* The district court then entered a final judgment and permanently enjoined Markusen from violating Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and Section 206(1) and (2) of the Advisers Act. *Id.* It also permanently enjoined Cope from violating Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, and aiding and abetting any violations of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Section 206(1) and (2) of the Advisers Act. *Id.* The court ordered Markusen to pay, jointly and severally with Archer, disgorgement of over $630,000, prejudgment interest, and a civil penalty of $100,000. *Id.* It ordered Cope to pay disgorgement of nearly $550,000, over $80,000 in prejudgment interest, and a civil penalty of $100,000. *Id.*

The OIP also contains various allegations regarding the facts found by the district court. OIP at 2-3.

Cope was served with the OIP on June 4, 2016, and Markusen was served on June 22, 2016. *Steven R. Markusen*, Admin. Proc. Rulings Release No. 3948, 2016 SEC LEXIS 2254, at *1 (ALJ June 27, 2016). I held a telephonic prehearing conference on June 27, 2016, and counsel for the Division and counsel for Cope appeared at the conference but Markusen did not. *Id.* Cope's counsel stated during the conference that Cope would not answer the OIP and would instead "let it go by default." Prehearing Transcript (Tr.) 4. Counsel explained that Cope had decided on this course of action after being informed by the United States Attorney's Office that he would be indicted. Tr. 4.

During the prehearing conference, I granted the Division leave to file a motion for summary disposition or sanctions. *Steven R. Markusen*, 2016 SEC LEXIS 2254, at *1. After Respondents failed to answer the OIP, I ordered them to show cause why this proceeding should not be determined against them based on the allegations in the OIP. *Steven R. Markusen*, Admin. Proc. Rulings Release No. 3984, 2016 SEC LEXIS 2450, at *1 (ALJ July 13, 2016).

The Division timely filed its motion in July 2016. Its motion is supported by numerous exhibits discussed more fully below.[2] Neither Respondent filed an opposition to the Division's motion or responded to the order to show cause.

Findings of Fact and Background About Soft Dollars

The findings and conclusions in this initial decision are based on the record and on facts officially noticed under Commission Rule of Practice 323, 17 C.F.R. § 201.323. Because

[2] Exhibits designated by number were introduced in the district court proceeding and retain the same numerical designations assigned to them in that proceeding; exhibits designated by letter were not introduced in the underlying proceeding. Decl. of Helen A. Contos at 1 n.1.

Respondents did not answer the OIP, they are in default.[3] *See* 17 C.F.R. §§ 201.155(a), .220(f). As a result, I have accepted as true the facts alleged in the OIP. *See* 17 C.F.R. § 201.155(a). In making the findings below, I have applied preponderance of the evidence as the standard of proof. *See Rita J. McConville*, Exchange Act Release No. 51950, 2005 WL 1560276, at *14 (June 30, 2005) ("[I]t is well settled that the applicable standard . . . is preponderance of the evidence."), *pet. denied*, 465 F.3d 780 (7th Cir. 2006).

Markusen formed Archer in 2002 for the purpose of managing the Archer Funds. OIP at 1. Archer has never registered with the Commission. *Id.* Markusen, who is not registered with the Commission, was Archer's sole owner and CEO. *Id.* at 1-2. Cope worked in various capacities at Archer from 2003 through 2013. *Id.* at 2. He is not currently registered with the Commission. *Id.*

Under their governing documents, the Funds were permitted to pay Archer in only two ways: a monthly management fee of 0.125% of each investor's capital account and a 20% performance fee. Ex. 30 at 8-9, 15-16; Ex. 48 at 19430-31, 19437, 19439.[4] Archer's employees and officers were not authorized to draw salary from the Funds. Ex. 30 at 9; Ex. 48 at 19431.

From 2008 to 2013, Markusen and Cope engaged in a scheme to defraud the Funds by misrepresenting that Cope was an independent research consultant. OIP at 2. This enabled Respondents to pay Cope with investor money. *Id.*

Respondents' scheme involved the Funds' soft-dollar accounts. Soft dollars refer to "arrangements under which products or services other than execution of securities transactions . . . are obtained by an adviser from or through a broker in exchange for the direction by the adviser of client brokerage transactions to the broker." Disclosure by Investment Advisers Regarding Soft Dollar Practices, Exchange Act Release No. 35375, 1995 WL 61161, at *2 (Feb. 14, 1995). Advisers may use soft dollars to pay for certain research and brokerage expenses. *See* 15 U.S.C. § 78bb(e); Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 54165, 71 Fed. Reg. 41978, at 41985 (July 24, 2006). Because of the conflict of interest that would otherwise arise and because soft dollars are client assets, advisers are not permitted—absent client consent—to draw from a soft dollar balance to benefit themselves. *See* 1995 WL 61161, at *2; Ex. 3 at 44-45. An adviser is required to "act in the best interest of its clients" and therefore must "obtain best execution of client transactions." 1995 WL 61161, at *2. An adviser may, however, choose a broker charging "a higher commission" if the "broker . . . provides research benefiting the adviser's accounts." *Id.*; *see* 15 U.S.C. § 78bb(e)(1) (the safe harbor provision).

---

[3] Respondents may move to set aside their defaults in this case. Rule 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.*

[4] Citations to exhibit page numbers that are Bates stamped are, excluding any leading zeros, to Bates numbers located in the bottom right corner of the documents.

An adviser may not rely on this "safe harbor" unless it "determine[s] in good faith that the commissions paid are reasonable in relation to the value of the brokerage and research services provided." 1995 WL 61161, at *2; *see* 15 U.S.C. § 78bb(e)(1).

In Archer's case, it could not draw on the Archer Funds' soft dollar accounts for its own benefit—the soft-dollars belonged to the Funds and their investors—but could authorize payments to third parties who provided "research related services." Ex. 3 at 43-45; Ex. 5 at 26; Ex. 12; *see* Ex. 48 at 19446.

In a 2003 Archer Equity Fund "confidential memorandum," Cope was identified as Archer's Chief Operating Officer. Ex. 7 at 86. A 2010 Archer Equity Fund presentation also identified Cope as Archer's COO, and further explained that he was "responsible for the management of [Archer Equity Fund's] operations, investor relations, and marketing." Ex. 6 at 2337. It also listed Cope as having an Archer e-mail address. *Id.* at 2339. Other documents listed Cope as an Archer employee and one of the "[k]ey members of" its "portfolio management team." Ex. 34 at 410, 417. Cope was thus an Archer officer or employee. As a result, he should not have received payments from the Funds' soft-dollar accounts, particularly in the absence of disclosure to clients.

From February 2008 through October 2013, Cope was paid by Archer and the Funds' broker based on monthly invoices he issued purportedly for research. Ex. F at 4-5, ex. 2;[5] Exs. 8, 9. From March 2008 through September 2011, Archer paid Cope nearly $100,000 for "research." Ex. F at 4, ex. 2. The Funds reimbursed Archer for these payments. *Id.* at 4. Markusen told the Funds' broker that Cope was not Archer's employee but rather was an independent contractor, Ex. 5 at 22-23, and in 2012, Cope warranted that payments made directly to him complied with the safe harbor in Exchange Act Section 28(e), Ex. 12. From May 2009 through November 2013, the broker directly paid Cope—with Markusen's authorization—almost $450,000 from the Funds' soft-dollar account. Ex. F at 4, ex. 2; Ex. 5 at 23; *see* Ex. 24. There is no evidence that Cope ever performed research services for Archer. Ex. A at 10. When deposed, Markusen and Cope both invoked their Fifth Amendment right to remain silent when they were asked whether Cope actually performed research for Archer. Ex. C at 29; Ex. 2 at 33. Cope, therefore, never performed any research for Archer. *See United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923) ("Silence is often evidence of the most persuasive character."); *United States v. Ianniello*, 824 F.2d 203, 208 (2d Cir. 1987) (explaining that drawing "a negative inference" in a civil case based on a witness's refusal to answer questions does not violate the Fifth Amendment). There is no evidence investors were ever told that Cope received payments from the Funds' soft-dollar account.

Prior to April 5, 2013, "Archer rarely, if ever, 'day-traded' securities on behalf of the Funds." Ex. F at 3. On that date, the Funds' broker informed Markusen by e-mail that the Funds' soft-dollar account was over $44,000 in arrears. Ex. 17. Markusen responded that "we will work on getting those paid back up." *Id.*

[5] Exhibit F has three attachments, titled "Exhibits 1-3." To avoid confusion with exhibits to the motion for summary disposition, I refer to the Exhibit F exhibits in lower case.

The "work" Respondents performed to deal with the arrearage was to engage in extensive day-trading in order to generate commissions, and thus soft-dollars. For the first three months of 2013, the Funds paid a total of just under $19,000 in commissions and did not participate in day-trading. Ex. F at 3. In April 2013 alone, after learning about the soft-dollar arrearage, Respondents conducted 110 day trades and generated almost $36,000 in commissions. *Id.* From April to October 2013, Respondents' trading in the Funds' accounts generated approximately $147,000 in commissions and their day-trading led to over $60,000 in losses. *Id.* at 3, ex. 1.

In August 2013, Markusen told Cope that Funds would close in October due to poor performance. Ex. 33. Respondents continued day-trading through the end of October, however, and were thus able to eliminate the soft-dollar arrearage. Ex. A at 14; Ex. F at 3, ex. 1.

In addition to the soft-dollar scheme, Respondents marked the close of the thinly traded stock of CyberOptics, Inc., in order to improve the Funds' performance, and thus increase Archer's fees. Marking the close involves "trading at or near the close of the market so as to influence the price of a security." *Donald L. Koch*, Advisers Act Release No. 3836, 2014 WL 1998524, at *9 (May 16, 2014), *pet. granted in part on other grounds*, 793 F.3d 147 (D.C. Cir. 2015). Archer, as manager of the Funds, would have had an incentive to do this in order to influence the Funds' net asset value and thus Archer's fees. *See* Ex. G at 9-10. For the Funds, net asset value was calculated based on the value of the stocks the Funds held as of the last trading day of a given month. Ex. G at 9-10; Ex. 54; *see* Ex. 20.

From 2010 through 2013, CyberOptics was the Archer Funds' largest equity investment. Ex. G at 3, 9. By the end of 2012, CyberOptics comprised 87% of the assets of Archer Equity Fund and 41% of the assets of Archer Focus Fund. *Id.* at 9. On twenty-eight of the month-end trading days during this period, Respondents placed a systematic series of buy orders designed to artificially drive up the price of CyberOptics and, consequently, the apparent value of the Funds. *Id.* at 10-24.

The Commission subsequently filed an injunctive complaint against Respondents based on the conduct described above. In November 2015, the United States District Court for the District of Minnesota entered a default judgment against Markusen and Archer. OIP at 2; Ex. B at Document 39. In April 2016, the district court granted the Commission's motion for summary judgment against Cope. OIP at 2; Ex. A. The district court then entered final judgment and permanently enjoined Markusen and Cope from violating Sections 17(a) of the Securities Act, Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Section 206(1) and (2) of the Advisers Act. OIP at 2; Ex. B at Document 59. The district court also enjoined Markusen from violating Section 206(1) and (2) of the Advisers Act and Cope from aiding and abetting any violation of Section 10(b) of the Exchange Act, Rule 10b-5, and Section 206(1) and (2) of the Advisers Act. Ex. B at Document 59. The court ordered Markusen to pay, jointly and severally with Archer, disgorgement of over $630,000, plus prejudgment interest, and a civil penalty of $100,000. OIP at 2; Ex. B at Document 59. It ordered Cope to pay disgorgement of nearly $550,000, over $80,000 in prejudgment interest, and a civil penalty of $100,000. OIP at 2; Ex. B at Document 59.

Conclusions of Law

Section 203(f) of the Advisers Act gives the Commission authority to impose a collateral bar[6] against a Respondent if, as is relevant here, (1) he was associated or seeking to become associated with an investment adviser at the time of his misconduct; (2) he was enjoined "from acting as investment adviser . . . or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security"; and (3) imposing a bar is in the public interest. 15 U.S.C. § 80b-3(e)(4), (f).

The first and second factors are met in this case because both Respondents were associated with Archer, an investment adviser, at the time of their misconduct.[7] OIP at 1-2. In connection with their conduct as officers of Archer, the district court enjoined both Respondents from violating, or aiding and abetting violations of, the antifraud provisions of the Securities Act, the Exchange Act, and the Advisers Act. *Id.* at 2. Respondents were thus enjoined from engaging in or continuing conduct in connection with activity associated with an investment adviser or with the purchase or sale of any security.

To determine whether imposition of a collateral bar would be in the public interest, I must consider the public interest factors described in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). *See Toby G. Scammell*, 2014 WL 5493265, at *5. The public interest factors include:

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

David R. Wulf, Exchange Act Release No. 77411, 2016 WL 1085661, at *4 (Mar. 21, 2016). The Commission also considers the deterrent effect of administrative sanctions.[8] *Id.* The public

---

6 A collateral bar is one that prevents an individual from participating in the securities industry in capacities beyond those in which the person was participating at the time of his or her misconduct. *See Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *1 & n.1 (Oct. 29, 2014).

7 An investment adviser is "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). Archer was an investment adviser because it was paid by the Funds to manage their investment portfolios. OIP at 1; Ex. 30 at 8-9, 15-16; Ex. 48 at 19430-31, 19437, 19439.

8 General deterrence is a relevant but not determinative consideration in assessing whether the public interest weighs in favor of imposing an industry bar. *See Peter Siris*, Advisers Act

interest inquiry is "flexible" and "no one factor is dispositive." *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *pet. denied*, 548 F.3d 129 (D.C. Cir. 2008).

Before imposing a bar, an administrative law judge must determine, based on the evidence presented, "whether such a remedy is necessary or appropriate to protect investors and markets." *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014) (quoting *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *9 (Dec. 13, 2012), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 WL 3030847 (May 27, 2016)), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016). I must therefore "'review'" a Respondent's case individually "to make findings regarding [his] fitness to participate in the industry in the barred capacities." *Id.* (quoting *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005)). A decision to impose a bar "should be grounded in specific 'findings regarding the protective interests to be served' by barring the respondent and the 'risk of future misconduct.'" *Id.* (quoting *McCarthy*, 406 F.3d at 189-90 and *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009)); *see also John W. Lawton*, 2012 WL 6208750, at *9 ("[T]he Commission must consider not only past misconduct, but the broader question of the future risk the respondent poses to investors.").

The Commission has explained that "because '[f]idelity to the public interest requires a severe sanction when a respondent's misconduct involves fraud,' in most fraud cases the *Steadman* factors, such as egregiousness, scienter, and opportunity for future misconduct, will weigh in favor of a bar." *Peter Siris*, 2013 WL 6528874, at *11 n.71 (alteration in original, internal citation omitted) (quoting *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *7 (Feb. 4, 2008), *pet. denied*, 561 F.3d 548 (6th Cir. 2009)). The Commission has "repeatedly held that 'antifraud injunctions merit the most stringent sanctions and that [the] foremost consideration must . . . be whether [the] sanction protects the trading public from further harm.'" *Mark Feathers*, Exchange Act Release No. 73634, 2014 WL 6449870, at *3 (Nov. 18, 2014) (second alteration in original) (quoting *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *5 (July 26, 2013)). These considerations are animated by the fact that "[t]he securities industry presents a great many opportunities for abuse and overreaching, and [therefore] depends very heavily on the integrity of its participants." *Bruce Paul*, Exchange Act Release No. 21789, 1985 WL 548579, at *2 (Feb. 26, 1985).

Here, it is easy to see that collateral bars are warranted for each Respondent and that issuing them will further the Commission's interest in protecting the investing public. By misappropriating money from the Funds' soft-dollar accounts, Respondents stole over $500,000 that belonged to the Funds. This misconduct is especially severe because of the fiduciary duty investments advisers owe to clients. Respondents compounded this misconduct by day-trading and marking the close. This series of acts manipulated the market and is thus "at the core of conduct that the securities laws were designed to prevent." *Donald L. Koch*, 2014 WL 1998524, at *9.

Release No. 3736, 2013 WL 6528874, at *11 n.72 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014); *see also PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007).

Respondents' conduct was egregious. Respondents knew that the soft dollars belonged to the Funds and thus to the Funds' investors. They knew that neither Archer nor people associated with it could receive those funds, particularly in the absence of any disclosure to clients. They thus devised a scheme—a continuing series of lies through misrepresentations and omissions—to steal the money to which they were not entitled. Respondents' willingness to steal from advisory client marks their misconduct as egregious. And, Respondents' day-trading to replenish the Funds' soft-dollar accounts caused additional losses to the Funds, further harming investors. The fact that they were then willing to manipulate the market, by marking the close, for their own benefit only lends additional support to this conclusion.

Respondents acted with scienter. This is evident from the fact that they lied when they claimed Cope performed research services. There is no evidence he ever performed any such services and there is plenty of evidence that he was Archer's COO. Respondents also did not inadvertently mark the close on twenty-eight separate month-end trading days. The evidence regarding the manner of their trading activity belies any claim that they acted with anything other than the specific intent to artificially inflate the Funds' performance.

Respondents' misconduct was recurrent. Cope submitted false invoices for research services every month for five years. And Respondents marked the close during twenty-eight different months.

Respondents have made no assurances against future violations. Aside from Cope's counsel's attendance during a prehearing conference, they have not participated in this proceeding. And Markusen did not to participate in the district court proceeding.

Respondents each have over twenty years' experience in the securities industry. OIP at 1-2. Respondents' occupations, if allowed to continue, would present opportunities for future violations. *See Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) ("[T]he existence of a violation raises an inference that it will be repeated."). In combination with the lack of evidence that they recognize the wrongfulness of their actions and the fact that their actions were not isolated, this factor weighs in favor of a collateral bar. *See Eric S. Butler*, Exchange Act Release No. 65204, 2011 WL 3792730, at *4 (Aug. 26, 2011) ("unwillingness to acknowledge the wrongfulness of the [misconduct] . . . raises serious concerns about the likelihood that [respondent] will engage in similar misconduct if presented with the opportunity").

Finally, imposing collateral bars will serve as a general and specific deterrent. It will deter Respondents and will further the Commission's interest in deterring others from engaging in similar misconduct.

Given the foregoing, I find that it is in the public interest to impose a full collateral bar against both Respondents.

Order

The Division of Enforcement's motion for sanctions is GRANTED.

Under Section 203(f) of the Investment Advisers Act of 1940, Steven R. Markusen is BARRED from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisoer, transfer agent, or nationally recognized statistical rating organization.

Under Section 203(f) of the Investment Advisers Act of 1940, Jay C. Cope is BARRED from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

This initial decision will become effective in accordance with and subject to the provisions of Rule 360. *See* 17 C.F.R. § 201.360. Under 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. *See* 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 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 occurs, the initial decision shall not become final as to that party.

____
James E. Grimes
Administrative Law Judge