Initial Decision Release No. 1374
Administrative Proceeding
File No. 3-17907

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

In the Matter of

Anthony C. Zufelt

Initial Decision
April 22, 2019

Appearance: John J. Bowers and Christian D.H. Schultz
for the Division of Enforcement,
Securities and Exchange Commission

Anthony C. Zufelt, *pro se*

Before: Brenda P. Murray, Chief Administrative Law Judge

Procedural Background

On August 22, 2018, the Securities and Exchange Commission ordered that Anthony C. Zufelt should be given the opportunity for a new hearing before an administrative law judge who had not previously participated in the matter and that no weight or presumption should be given to any prior opinions, orders, or rulings.[1] *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058. The proceeding was assigned to me on September 12, 2018. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (ALJ).

On April 7, 2017, the Commission issued an order instituting proceedings (OIP), pursuant to Section 15(b) of the Securities Exchange Act

[1] The Commission issued a finality order on a prior initial decision on May 17, 2018. *Anthony C. Zufelt*, *notice of finality*, Securities Exchange Act of 1934 Release No. 83277, 2018 SEC LEXIS 1164.

of 1934. The OIP alleges that Zufelt's actions from June 2005 through December 2007, while he was acting as an unregistered broker-dealer, were the basis for a court to issue a final judgment enjoining Zufelt from future violations of Sections 10(b) and 15(a) of the Exchange Act, and Rule 10b-5; Sections 17(a), 5(a) and 5(c) of the Securities Act; and from participating in the issuance, offer, or sale of certain securities. OIP at 2; *SEC v. Zufelt*, No. 2:10-cv-00574 (D. Utah Oct. 7, 2016) (civil action).[2] I deemed what Zufelt submitted on May 22, 2017, to be an answer to the OIP. *Anthony C. Zufelt*, Admin. Proc. Ruling Release No. 6337, 2018 SEC LEXIS 3245, at *1 (ALJ Nov. 16, 2018).

Half an hour before the prehearing conference on November 15, 2018, Zufelt sent my office an email stating that he objected to this proceeding based on his interpretation of Supreme Court precedent and would not participate in the prehearing conference. I responded to his email, warning him that failure to participate in the prehearing conference could be grounds to find him in default. Zufelt did not participate. After the conference, I issued an order setting a procedural schedule under which either party could file a motion for summary disposition. *Zufelt*, Admin. Proc. Rulings Release No. 6337, 2018 SEC LEXIS 3245 (Nov. 16, 2018).

The Division filed a motion for summary disposition on February 7, 2019.[3] Attached to the motion are: the complaint in the civil action (Ex. A); the court's order granting partial summary judgment against Zufelt (Ex. B); the final judgment in the civil action (Ex. C); Zufelt's answer (Ex. D); and an email string (Ex. E). On March 13, 2019, the Division submitted additional evidence in support of its motion, which consisted of the Division's motions for summary judgment and final judgment in the district court and their

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[2] The judgment was based on an earlier grant of partial summary judgment as to violations of Sections 5(a) and 5(c) of the Securities Act and Section 15(a) of the Exchange Act, and a default judgment on the remaining charges. OIP at 2.

[3] The deadlines were extended due to the five-week furlough of Commission employees and subsequent stay of all administrative proceedings. *See Pending Admin. Proc.*, Securities Act Release No. 10602, 2019 SEC LEXIS 5 (Jan. 16, 2019); *Pending Admin. Proc.*, Securities Act Release No. 10603, 2019 SEC LEXIS 37 (Jan. 30, 2019).

related exhibits.[4] ECF Nos. 199, 227. As of the date of this initial decision, Zufelt has not filed an opposition.

Zufelt could be considered in default because he failed to participate in a prehearing conference and respond to a dispositive motion. 17 C.F.R. §§ 201.155(a), .221(f). Because Zufelt participated to some degree, I allowed a motion for summary disposition, which allowed him an opportunity to respond to the allegations.

Findings of Fact

These findings are based on the record and on facts officially noticed under Rule 323, 17 C.F.R. § 201.323. The record includes those allegations in the OIP deemed admitted because they were not denied in the answer. 17 C.F.R. § 201.220(c). 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), *pet. denied*, 465 F.3d 780 (7th Cir. 2006).

Between June 2005 and September 2007, Zufelt was the sole owner of Zufelt Business Services, Inc. (d/b/a Zufelt, Inc.), and Silver Leaf Investments, Inc. OIP at 1;[5] *see* Answer at 1; Ex. B at 2. Investments in Zufelt, Inc., were offered in the form of "purchase agreement[s]." *See, e.g.*, ECF No. 199-11. Investors were told that their money would be used to purchase a credit card processing portfolio. *See* Answer at 1; *see, e.g.*, ECF No. 199-17 at 7, 12. One investor's investment of $200,000 "represent[ed] a purchase of an income stream in the amount of $4,800.00 a month," which would be an annual return of 28.8%. *Id.* Investments in Silver Leaf were made in the form of promissory notes. *See, e.g.*, ECF No. 199-13. The investor's investment in Silver Leaf promised to pay "interest" at an annual rate of at least 28%. *Id.* The investor recalls Zufelt's associates assuring her that her money "was never going to be lost." ECF No. 199-17 at 31.

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[4] Citations to Exhibits A through C and the supplemental evidence refer to the ECF page number at the top right of each page. ECF refers to the electronic case filing system for most of the United States Federal Courts.

[5] The OIP calls the second company, Silver Leaf Investment, Inc., but the other evidence, including Zufelt's answer and transactional documents, state that the company is Silver Leaf Investments, Inc. *See, e.g.*, Answer at 1; ECF No. 199-13 at 1.

No registration statements were filed with the Commission with respect to either company's offerings or in Zufelt's name individually. ECF Nos. 199-2, 199-3, 199-5. Zufelt admitted that "the securities sold between 2005 and 2007 were not properly registered." Answer at 1. Zufelt and his two companies were not registered as broker-dealers. ECF Nos. 199-19–21. Zufelt, Inc., raised more than $2.8 million from 35 investors and Silver Leaf raised at least $720,000 from 11 investors. ECF No. 227-1 at 40 (conclusions of written report of forensic accountants retained by the Division); *id.* at 57 (table listing investor deposits and payments). Investors in those two entities received less than $1.2 million in return. *Id.* at 40. At his deposition in the civil case, Zufelt testified that some of the returns to investors were paid by funds from new investors:

> Q. So once you spend down whatever your working capital was, you were paying investors their monthly returns with investor funds that you're bringing in.
>
> A. Yes. That's a possibility, yes.
>
> Q. And that is, in fact, what happened, isn't it?
>
> A. Yeah. Yeah, that would have happened at some point. Yeah.

ECF No. 227-2 at 4.

The Commission filed a complaint against Zufelt, Zufelt, Inc., Silver Leaf, and other individuals and entities in the United States District Court in Utah on June 23, 2010. Ex. A. The complaint alleged that from 2005 to 2007 Zufelt violated, or aided and abetted violations of, the registration and antifraud provisions of the Securities Act and the Exchange Act. *See id.*

On January 4, 2016, the district court granted partial summary judgment and found that Zufelt violated Sections 5(a) and 5(c) of the Securities Act by selling unregistered securities, and violated Section 15(a)(1) of the Exchange Act by acting as an unregistered broker-dealer in connection with the offer and sale of securities. Ex. B at 2.

On February 22, 2016, "as a sanction for Zufelt's repeated refusal to meaningfully participate in litigation," the court entered a default on the Commission's remaining claims, including securities fraud and aiding and abetting claims based on his solicitation of investors in Zufelt, Inc., and Silver Leaf. *See* Ex. C at 2 (referring to ECF No. 222).

On October 6, 2016, the court entered a final judgment against Zufelt and enjoined him from violating Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5; Sections 5(a), 5(c) and 17(a) of the Securities Act; and from acting as an officer or director of an issuer and participating directly or indirectly in the issuance, offer, or sale of securities. In addition, the court ordered Zufelt to disgorge jointly and severally ill-gotten gains of more than $2.4 million, plus prejudgment interest, and ordered him to pay a penalty of $520,000. Ex. C at 3-7.

Motion for Summary Disposition

Rule of Practice 250(b) allows a motion for summary disposition in this type of proceeding where an answer has been filed, documents have been made available to the respondent, and there is no genuine issue with regard to any material fact. 17 C.F.R. § 201.250(b). Those requirements are met here. The Commission has approved the use of summary disposition in many follow-on proceedings such as this one. *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *10 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *5 & n.21 (Feb. 4, 2008) (collecting cases), *pet. denied*, 561 F.3d 548 (6th Cir. 2009).

Conclusions of Law

Exchange Act Section 15(b) authorizes the Commission to take certain actions, if it is in the public interest to do so, against a person who was associated with a broker or dealer where the person has been enjoined from actions in connection with the purchase or sale of any security. 15 U.S.C. § 78*o*(b)(4)(C), (6)(A)(iii).[6] Zufelt acted as an unregistered broker-dealer in connection with the offer and sale of securities during the period relevant to this proceeding." Ex. B at 2; OIP at 1. It makes no difference under Section 15(b) that Zufelt was not associated with a broker or dealer where, as here, he acted as one himself. *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119, at *1 n.2 (Apr. 23, 2015). Zufelt is subject to a Commission sanction because he has been enjoined from "participating

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[6] Exchange Act Section 15(b)(6) specifies censure, placing limitations on the activities or functions, suspending for no longer than twelve months or bar from association 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.

directly or indirectly in the issuance, offer, or sale of any securities." Ex. C at 5; *see* 15 U.S.C. § 78*o*(b)(4)(C).

Public Interest

In determining whether sanctions are in the public interest, the Commission considers the *Steadman* factors: 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. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see David R. Wulf*, Exchange Act Release No. 77411, 2016 WL 1085661, at *4 (Mar. 21, 2016). No single factor controls the outcome of the sanction determination, which is flexible. *Kornman*, 2009 WL 367635, at *6. In addition to the factors above, the Commission considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and deterrence. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 WL 231642, at *8 & n.46 (Jan. 31, 2006); *Marshall E. Melton*, Advisers Act of 1940 Release No. 2151, 2003 WL 21729839, at *2 (July 25, 2003).

Egregious and Recurrent Nature of Zufelt's Actions

Zufelt's conduct was egregious, that is, conspicuously bad, for the following reasons. Zufelt told investors they would receive monthly payments representing annual returns of greater than 20 percent. But the evidence shows that investors lost more than $2 million. Although Zufelt claims that he was running a legitimate business, Answer at 1, Zufelt's testimony and an analysis of bank records shows that Zufelt used new investor money to pay existing investors, ECF Nos. 227-2 at 4, 227-1 at 14, a classic description of a Ponzi scheme. *See Bernerd E. Young*, Securities Act Release No. 10060, 2016 WL 1168564, at *1 n.2 (Mar. 24, 2016) ("A Ponzi scheme, named for the perpetrator of such a scheme in the 1920s, is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors."), *pet. filed*, No. 16-1149 (D.C. Cir. May 24, 2016). His conduct was also recurrent, as it lasted more than two years and involved 46 investors. ECF No. 227-1 at 57.

In addition, the registration requirements of Securities Act Section 5 are "a keystone of the entire system of securities regulation." *Allen M. Perres*, Securities Act Release No. 10287, 2017 WL 280080, at *3 (Jan. 23, 2017) (quoting *Sirianni v. SEC*, 677 F.2d 1284, 1289 (9th Cir. 1982)), *pet. denied*, 695 F. App'x 980 (7th Cir. 2017). In *Perres*, the Commission said that the

registration requirement of Exchange Act Section 15(a) is also "of the utmost importance . . . because it enables the SEC to exercise discipline over those who may engage in the securities business and it establishes necessary standards with respect to training, experience, and records." *Id.* (quoting *SEC v. Benger*, 697 F. Supp. 2d 932, 944 (N.D. Ill. 2010)). Participating in the securities marketplace without complying with the registration requirements in the Securities Act and Exchange Act harms the marketplace. *See Gordon Brent Pierce*, Securities Act Release No. 9555, 2014 WL 896757, at *23 (Mar. 7, 2014) (sale of unregistered shares "caus[ed] harm to investors and the marketplace by depriving investors of the full disclosure that would have allowed them to make informed investment decisions"), *pet. denied*, 786 F.3d 1027 (D.C. Cir. 2015).

Zufelt's conduct was both egregious and recurrent.

Zufelt's Degree of Scienter

Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). The registration provisions from which he has been enjoined from violating do not have a scienter element. The antifraud statutes do require proof of scienter, but due to Zufelt's default, the district court made no findings in that regard. In his answer, he denies he had any intent to defraud or mislead investors. Answer at 1-2. But, as mentioned above, he admitted that new investor funds were used to pay returns to other investors. Further, an analysis of the bank records of Zufelt and his various businesses indicates that much of the money invested in Zufelt, Inc., and Silver Leaf was rerouted for Zufelt's personal use. ECF No. 227-1 at 21. Yet Zufelt told potential investors that their money would be used to invest in credit card processing. *See, e.g.*, ECF No. 199-7 at 12. Zufelt's use of investor funds for purposes other than those advertised to investors shows an intent to defraud investors. *Cf. SEC v. Scoville*, 913 F.3d 1204, 1224 (10th Cir. 2019) ("a Ponzi scheme . . . is inherently deceptive because it generates a false appearance of profitability by using money from new investors to generate returns for earlier investors" (internal quotation marks omitted)); *SEC v. Smart*, 678 F.3d 850, 857 (10th Cir. 2012) (finding intent to defraud where investor funds were used, contrary to the stated purposes, to make partial payments to other investors and to cover personal expenses).

Lack of Assurances Against Future Violations and Recognition of the Wrongful Nature of Conduct

Zufelt concedes in his answer that "mistakes were made," but he does not admit that he personally committed misconduct. Answer at 1. Rather he disclaims responsibility for running a Ponzi scheme and blames others for investor losses even though he directed investor money to himself and his personal businesses. *Id.* at 1-2; *see* ECF No. 227-1 at 21. Zufelt has not recognized that his conduct was wrong and, by choosing to not meaningfully participate in this proceeding, he has forfeited an opportunity to provide any assurances against future violations.

Opportunities for Future Violations

Given his apparent persuasive gifts with investors and his refusal to participate in civil and administrative proceedings where his conduct was at issue, there is a very high possibility Zufelt will violate the securities statutes and regulations in the future. *See Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *6 n.50 (July 26, 2013).

I take official notice, pursuant to 17 C.F.R. § 201.323, of *United States v. Zufelt*, No. 2:14-cr-00235 (D. Utah), in which Zufelt pled guilty on May 3, 2016, to a violation of 18 U.S.C. § 152(1), which makes it a crime in a bankruptcy proceeding to "knowingly and fraudulently conceal[] . . . any property belonging to the estate of a debtor." Zufelt was sentenced to twelve months and one day in prison, thirty-six months of supervised release, and ordered to make restitution of $80,755. ECF No. 125. This conviction further bolsters the need to bar Zufelt, as the Commission has stressed that "the importance of honesty for a securities professional is so paramount" that it has barred individuals for convictions "based on dishonest conduct unrelated to securities transactions or securities business." *Kornman*, 2009 WL 367635, at *7 & n.28.

The facts are persuasive that it is necessary and appropriate for the protection of investors to bar Zufelt from participating in the securities industry.

Order

I GRANT the Division of Enforcement's motion for summary disposition.

And, pursuant to Section 15(b) of the Securities Exchange Act of 1934, I ORDER Anthony C. Zufelt barred from association with a broker or dealer, and from participating in an offering of penny stock.[7]

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.

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Brenda P. Murray
Chief Administrative Law Judge

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[7] A respondent subject to a penny stock bar is 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 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).