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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1437/May 15, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15141

In the Matter of		
	:	
MOHAMMED RIAD and	:	ORDER
KEVIN TIMOTHY SWANSON	:	

Under consideration is Respondents' Motion to Correct Manifest Errors of Fact (Motion to Correct), filed on May 2, 2014, pursuant to 17 C.F.R. § 201.111(h) (Rule 111(h)). The filing relates to the April 21, 2014, Initial Decision (ID) in this proceeding and is thus timely.[1] However, it does not identify a patent misstatement of fact in the ID. Thus, it must be denied.

BACKGROUND

The Securities and Exchange Commission's (Commission) December 19, 2012, Order Instituting Proceedings alleged that Respondents violated the federal securities laws while employed at an investment adviser that managed the portfolio of a closed-end investment company. The ID concluded that Respondents violated the antifraud provisions and ordered various sanctions. Mohammed Riad, Initial Decision Release No. 590, 2014 SEC LEXIS 1375 (A.L.J. Apr. 21, 2014) (Riad).

MOTION TO CORRECT

The Motion to Correct has been considered in light of the limited purpose of Rule 111(h) – to correct "a patent misstatement of fact." The Commission has stated, "[M]otions to correct manifest error are properly filed under this Rule only if they contest a patent misstatement of fact in the initial decision. Motions purporting to contest the substantive merits of the initial decision will be treated as a petition for review [by the Commission, pursuant to 17 C.F.R. § 201.410]." 70 Fed. Reg. 72566, 72567 (Dec. 5, 2005).

1. Respondents point to footnote 39 of the ID as containing a patent misstatement of fact, in that it states "Respondents do not claim that they were relying on the advice of counsel,"

[1] The Division of Enforcement timely filed an opposition to the Motion to Correct on May 9, 2014.

even though Respondents had presented evidence and argued that they had an understanding that in-house and outside counsel understood their strategy and never suggested that any disclosure issues existed.[2] The quoted sentence, however, is in the Conclusions of Law section of the ID, not the Findings of Fact. While Respondents may argue that it mischaracterizes their arguments or that a different conclusion should be drawn from the evidence, it is not a statement, or misstatement, of fact. The Motion to Correct does not dispute any specific finding of fact concerning what any counsel told anyone involved or concerning either Respondent's understanding of such discussions.

2. Respondents dispute the finding that Bruce Saxon's and Randall Barnes's "recollections were similar" to Ronald Toupin's understanding that short index puts and short variance swaps were occasional transactions, not a strategy, and thus Claymore Advisers, LLC, was not aware of the strategy. See Riad at 26, 2014 SEC LEXIS at *69. This is not a patent misstatement of fact; rather, Respondents are urging a different conclusion to be drawn from the evidence, which is properly made in a petition for review.

3. A third misstatement is said to be "three brokers and financial advisers whose clients invested in HCE testified" regarding their understanding of the fund. Respondents state that one of the three was a mutual fund research analyst at a financial firm who did not actually directly advise the firm's clients. See Riad at 10, 2014 SEC LEXIS at *25. Instead, the research analyst advised brokers who directly advised the firm's clients.[3] This summary statement cannot be characterized as a misstatement, much less a patent misstatement.

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[2] Riad at 32 n.39, 2014 SEC LEXIS at *87 n.39. Footnote 39 reads in its entirety:

> Respondents do not claim that they were relying on the advice of counsel. In considering whether to credit an advice of counsel claim, the Commission considers four elements: "that the person made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice" (footnote citing precedent omitted). Howard Brett Berger, Exchange Act Release No. 58950 (Nov. 14, 2008), 94 SEC Docket 11615, 11629-31, petition for review denied, 347 F. App'x 692 (2d Cir. 2009), cert. denied, 130 S. Ct. 2380 (2010). Counsel must also be independent. C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1436 (10th Cir. 1988); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 181-82 (2d Cir. 1976).

Respondents do not address whether the four elements of such a claim were present.

[3] This witness testified that his role was "[f]or the closed ends and ETFs, basically, answering broker questions, attending a lot of seminars." Tr. 1402. When brokers called him, he "would look over the universe of closed-end funds that were available at the time, review some of the ins and outs, get as much detail as possible from some publications, get them in the hands of the brokers and chat with them about what they might want to do." Tr. 1403.

4. Respondents dispute that the terms "uncovered" and "naked," as they refer to written puts, are not controverted, as is represented in the ID. See Riad at 3, 2014 SEC LEXIS at *5. Respondents cite to their post-hearing brief in which they argued that the index puts and variance swaps had been "covered" in accordance with applicable requirements under the Investment Company Act of 1940. Respondents' Post-Hearing Brief at 22. This position, first raised in post-hearing briefing, is inconsistent with the consensus at the hearing of the terms' usage, including by Riad and Swanson. See e.g., Tr. at 1936, 2261, 2283-84, 2399-2400. Accordingly, the definitions of these terms in the ID were not misstatements of fact.

In light of the above, the Motion to Correct must be denied.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge