UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2901 / July 16, 2009

Admin. Proc. File No. 3-13008

In the Matter of

MITCHELL M. MAYNARD
and
DORICE A. MAYNARD
3099 West Chapman Ave., Apt. 426
Orange, California 92868

ORDER DENYING MOTION FOR RECONSIDERATION

I.

On May 15, 2009, we issued an opinion ("the May 15 Opinion") and order barring Mitchell M. Maynard and Dorice A. Maynard (collectively, the "Maynards"), formerly associated with Leveraged Index Management Company ("LIMCO"), a former registered investment adviser, from association with an investment adviser.[1] Our order barring the Maynards was based upon a final order issued by the Commissioner of the Vermont Department of Banking, Insurance, Securities, and Health Care Administration (the "Vermont BISHCA") that imposed a five-year bar from association with registered broker-dealers and investment advisers and other sanctions on the Maynards as a result of the Vermont Commissioner's finding that the Maynards had, among other things, (i) misappropriated investor funds, including by diverting large investments in LIMCO to themselves; (ii) made numerous misrepresentations or omissions about LIMCO's performance and financial condition, including giving investors projections of high returns that had no reasonable basis; and (iii) engaged in unethical or dishonest practices, including by failing to disclose a prior bankruptcy to investors ("Vermont Order"). The Maynards have now filed a motion for reconsideration. For the reasons discussed below, we have determined to deny the Maynards' motion.

[1] *Mitchell M. Maynard*, Investment Advisors Act Rel. No. 2875 (May 15, 2009), __ SEC Docket ____.

II.

We review the Maynards' motion to reconsider under Rule 470 of the Commission's Rules of Practice.[2] A motion for reconsideration is designed to correct manifest errors of law or fact or to permit the presentation of newly discovered evidence,[3] but may not be used to repeat arguments previously made.[4]

For the most part, the Maynards' motion reiterates arguments previously presented and facts previously considered. For example, the May 15 Opinion considered and rejected the Maynards' contentions that the "Division's choice of initiating a 'back door' follow-on administrative proceeding at this particular time instead of initiating a full hearing was [not] appropriate" and that a hearing is required to review the Pacific Regional Office's (the "PRO") September 2000 examination of LIMCO to determine whether the PRO was "deliberately misleading [the Maynards] as to their true intent, which was to postpone any action of its own, knowing it could more easily secure sanctions via the 'back door' of a follow-on proceeding." Similarly, the Maynards charge that we ignored "[m]itigative or exculpatory evidence" they had presented showing that "large sections of their current business activities are devoted to business ethics, ethical sales practices, and encouraging agents and advisors to make appropriate product recommendations to clients" and that they "have remained clear of any direct interactions with the general public - let alone investment advisory activity."[5] They also argue that it was "manifest error" to conclude that the Maynards' current business activities (which here they describe as providing "training services and software tools to advisors") provide opportunity for future violations of the Advisers Act "simply because of an inference drawn from the customer base or product niche of a company." However, these matters were addressed at length in the May 15 Opinion and provide no basis for reconsidering the conclusions reached there.

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[2] 17 C.F.R. § 201.470.

[3] *Leslie A. Arouh*, Securities Exchange Act. Rel. No. 51254 (Feb. 25, 2005), 84 SEC Docket 3652, 3653. *See also KPMG Peat Marwick LLP*, Order Denying Request for Reconsideration, 55 S.E.C. 1, 3 n.7 (2001) (specifying that efficiency and fairness concerns embodied in federal court practice of rejecting motions for reconsideration unless correction of manifest errors of law or fact or presentation of newly discovered evidence is sought "likewise inform our review of motions for reconsideration under Rule 470").

[4] *Arouh*, 84 SEC Docket at 3653 (holding that respondents cannot use motions for reconsideration "to reiterate arguments previously made or to cite authorities previously available").

[5] The Maynards fault the opinion for not taking into account the fact that the violations occurred nearly ten years ago. This proceeding is based on the 2007 Vermont Order, which the Maynards contested. *See Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000). We do not find that the age of the Maynards' underlying misconduct is a significant mitigating factor in light of all of the other circumstances discussed in the opinion and the entire record of the case.

The Maynards claim that the discussion in our opinion of the denial by the California Department of Corporations of their application to register as an investment adviser on behalf of Terra Vista Financial Planners ("Terra Vista") "implies a desire to seek adviser registration on the part of Respondents, which is not supported by the facts or records."[6] In our opinion, we noted the Maynards' assertion to us that they had abandoned their interest in the California registration several years before the California Corporations Commissioner issued his order and their contention that they had not withdrawn the application only because they desired to refute misconceptions that their application contained false statements. We note that the California Corporations Commissioner found that the Maynards declined to withdraw their application when requested in 2002. Thus, as we stated in our opinion, "Terra Vista's application remained pending until it was denied in 2007 and, during this period, the Maynards neither withdrew the application nor advised the agency of their purported intent to abandon it." In light of this, we see no reason to change our finding that "[t]heir actions undercut their assertions that they have no further interest in entering the securities industry."

The Maynards take issue with the statement in the May 15 Opinion that they "provided false answers in their filings with the California Department of Corporations that inquired as to whether Terra Vista was affiliated with any person that was subject to a regulatory proceeding." Although the original charging document issued by the California Department of Corporations made such a charge, the decision by the California Corporations Commissioner barring the Maynards from association with a broker, dealer, or adviser noted that, when the Terra Vista application was submitted in December 2001, the Maynards were being investigated by the Vermont BISHCA, but that no formal action had been filed against them. The California Corporations Commissioner found that an investigation is not a "proceeding," as that term is defined in the Form ADV on which the question had been asked and that therefore the question concerning proceedings had not been answered incorrectly. The May 15 Opinion overlooked this conclusion of the California Corporations Commissioner in making the statement quoted. The California Commissioner's conclusion, however, does not change our view that, "[g]iven the egregiousness of the Maynards' conduct in making numerous misrepresentations or omissions to the LIMCO investors over an extended period of time and continually misleading them as to the financial condition of the company," barring respondents is in the public interest. Our observation in the May 15 Opinion about the Terra Vista application was simply "noted" after the Maynards' misconduct as found by the Vermont Order had been detailed extensively. This oversight provides no basis for reconsideration of our finding that a bar is in the public interest.

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[6] The Maynards assert that the Division "stipulated" that they abandoned the Terra Vista application, citing the Division's motion for summary disposition. The Division's motion submits that it will not dispute Respondents' statement "that they 'believed they had abandoned'" the Terra Vista application because it was "blocked" by the Vermont proceeding. The Division also observes that the Maynards stated at the prehearing conference that in 2003 they asked California Department of Corporations to keep Terra Vista's application open.

Finally, the Maynards also seek to adduce new evidence which, they assert, has "been recently located in file storage and are being brought to the attention of the Commission, as being material to the issues raised in this matter." This new evidence consists of "a copy of a Memorandum received from Respondents' counsel in regards to his discussions with the PRO enforcement attorney . . . which adds credence to their claim that an implicit 'no-action' agreement was in place with the PRO," as well as "a copy of a 25-page set of documents exchanged between Vermont BISHCA and respondents' counsel, especially those signed by LIMCO investors."[7] On a motion for reconsideration, we accept, as do the federal courts, only that evidence the movant could not have known about or adduced before entry of the order subject to the motion for reconsideration. [8] The Maynards have not established that this evidence was either unknown to them or could not have been reasonably discovered and produced before the law judge. They admit to having received the Memorandum from their counsel. In any event, the May 15 Opinion expressly stated that "[w]hether the PRO agreed to close its file in 2001, or whether the PRO did, in fact, close its file is irrelevant. This proceeding is not based on the PRO's 2001 examination, but rather on the Vermont Order and the findings contained in that order." Moreover, the Maynards offer no reason why they could not have obtained the documents exchanged between the Vermont BISHCA and their own counsel at an earlier time. Accordingly, the documents "recently located" by the Maynards provide no basis for us to reconsider the May 15 Opinion.

Given the Maynards' egregious and recurrent actions in dealing with LIMCO's investors, their lack of appreciation for the responsibilities of an investment adviser and lack of remorse for the impact of their misconduct on their investors, the close nexus between the Maynards' current

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[7] Rule 452 of the Commission's Rules of Practice, 17 C.F.R. § 201.452, does not apply under these circumstances. See *Feeley & Willcox Asset Mgmt. Corp.*, Order Denying Motion for Reconsideration, 56 S.E.C. 1264, 1269 n.17 (finding that the time had passed for respondents to move for leave to adduce additional evidence under Rule 452 since that rule was only applicable "at any time prior to issuance of a decision by the Commission").

[8] *Feeley*, 56 S.E.C. at 1269-70 n.18. *See, e.g.*, *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996) (moving party must establish that evidence was not only newly discovered or unknown to it, but also that it could not have been reasonably discovered and produced during pendency of matter).

business and the investment advisory business, and the opportunities to rejoin the investment advisory business that may arise unless they are permanently barred, we see no basis for reconsidering our conclusion in the May 15 Opinion that barring the Maynards serves the public interest and is remedial.

Accordingly, IT IS ORDERED that the motion for reconsideration filed by Mitchell M. Maynard and Dorice A. Maynard, be, and it hereby is, DENIED.

By the Commission. (Chairman SCHAPIRO and Commissioners CASEY, WALTER, AGUILAR, and PAREDES).

Elizabeth M. Murphy
Secretary