

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 56344 / August 31, 2007

INVESTMENT COMPANY ACT OF 1940  
Rel. No. 27961 / August 31, 2007

Admin. Proc. File No. 3-9615

In the Matter of  
  
THE ROCKIES FUND, INC.

ORDER DENYING REQUEST FOR RECONSIDERATION

On October 2, 2003, we issued an opinion (the "Commission Opinion") finding, among other things, that The Rockies Fund, Inc. (the "Fund"), a closed-end investment company, and its directors Stephen Calandrella, Charles Powell, and Clifford Thygesen (collectively "Respondents") violated antifraud provisions of the Securities Exchange Act of 1934 by filing quarterly and annual reports containing material misrepresentations as to the classification, valuation, and ownership of certain shares of stock of Premier Concepts, Inc. ("Premier") between June 30, 1994 and December 31, 1995. 1/

We prohibited Calandrella, who was the president of the Fund as well as one of its directors, from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter. We prohibited Powell and Thygesen, independent directors of the Fund, from such service or action with a right to reapply after three years. We issued cease-and-desist orders as to all Respondents. Finally, we ordered Calandrella to pay a civil money penalty of \$500,000 and Powell and Thygesen each to pay a civil money penalty of \$160,000. 2/

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1/ The Rockies Fund, 56 S.E.C. 1198, reconsideration denied, Securities Exchange Act Rel. No. 49788 (June 1, 2004), 82 SEC Docket 3764, aff'd in part, vacated in part, and remanded, 428 F.3d 1088 (D.C. Cir. 2005), on remand, Exchange Act Rel. No. 54892 (Dec. 7, 2006), 89 SEC Docket 1517.

2/ This assessment was based on the findings of the law judge that a penalty should be imposed on Calandrella in an amount equal to \$50,000 for each misstated filing and  
(continued...)

On review, the U.S. Court of Appeals for the D.C. Circuit affirmed our findings of antifraud violations based on the filing of periodic reports containing material misrepresentations and related reporting violations, vacated our findings as to manipulation and the acceptance of improper compensation, and remanded this matter for reconsideration of the sanctions we had imposed. <sup>3/</sup> On December 7, 2006, on remand, we issued an opinion (the "Commission Remand Opinion") finding that it was in the public interest to impose cease-and-desist orders on all Respondents, to prohibit Calandrella, Powell, and Thygesen from associating with or acting as an affiliated person of an investment company, with a right to reapply (after five years in the case of Calandrella and after three years in the case of Powell and Thygesen), and to order Calandrella to pay a civil money penalty of \$50,000 and Powell and Thygesen to pay a civil money penalty of \$20,000 each.

On December 19, 2006, Respondents submitted a motion seeking reconsideration of the Commission Remand Opinion. Respondents base their motion on three grounds. First, Respondents argue that what they characterize as our "conclusion that there is 'no record evidence' showing reliance on counsel or auditors in the development of the valuations" ignores the record evidence cited by Respondents. <sup>4/</sup> Respondents contend that the evidence of reliance is sufficient to mitigate the sanctions imposed and that we should therefore reduce the sanctions imposed in the Commission Remand Opinion. Second, Respondents argue that we "did not address [their] contention that the valuation errors would have been avoided had the process deficiencies been noted" during a March 1994 examination by Commission staff. <sup>5/</sup> Respondents contend that the "course of dealing" between Respondents and Commission staff "illustrates one of the reasons why . . . [Respondents] did not believe at the time that their valuations were improper" and that "as a matter of fairness and equity, this course of dealing should mitigate the sanctions." Third, Respondents argue that their request for an explanation of the alleged inconsistency between the sanctions imposed here and those imposed in certain cited cases "does not 'attempt[] to downplay the seriousness' of the issues and should not impact the Commission's analysis of 'the likelihood of future violations.'" Respondents contend that one case in particular, Parnassus Investments, <sup>6/</sup> supports their request to alleviate the sanctions imposed.

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- <sup>2/</sup> (...continued)  
\$100,000 for the manipulation, and on Thygesen and Powell in the amount of \$20,000 each for each misstated filing.
- <sup>3/</sup> The Rockies Fund, Inc. v. SEC, 428 F.3d 1088 (D.C. Cir. 2005).
- <sup>4/</sup> Respondents' arguments pertain only to alleged reliance with respect to the valuation of Premier stock, not the classification or ownership thereof.
- <sup>5/</sup> Respondents make no such argument regarding "errors" as to classification or ownership.
- <sup>6/</sup> Initial Decision Rel. No. 131 (Sept. 3, 1998), 67 SEC Docket 2760.

In any event, Respondents assert, they "acknowledged the seriousness of the issues and, from the beginning, engaged in conduct that should have mitigated the sanctions."

We consider Respondents' motion under Rule of Practice 470. <sup>7/</sup> Reconsideration is an extraordinary remedy designed to correct manifest errors of law or fact or permit the introduction of newly discovered evidence. <sup>8/</sup> Motions for reconsideration are not to be used to reiterate arguments previously made or to cite authorities previously available. <sup>9/</sup> Respondents' motion does not meet the rigorous standard applied. Rather, it is based on a reworking of arguments and facts previously considered and rejected by the Commission and the Court of Appeals. As such, it is an inappropriate attempt to avoid the finality of the Commission's administrative process. The motion affords no basis for reconsideration of the Commission Remand Opinion.

A. Assertion of Reliance on Advice of Counsel and Auditor

The Commission Remand Opinion fully considered Respondents' contention that reliance on counsel and the Fund's auditors should mitigate sanctions and rejected it, stating that "Respondents point to no record evidence showing that they received contemporary advice from attorneys or auditors that the valuations of Premier contained in the periodic reports in question were reasonable." Nothing in Respondents' motion causes us to reconsider this conclusion, which is fatal to their reliance argument.

Respondents' present argument is based on their mischaracterization of the Commission Remand Opinion as concluding that there is "no record evidence" showing reliance on counsel or auditors in the development of the valuations," together with citation to evidence showing that counsel was consulted concerning the development of the valuation procedures adopted by the Fund. The Court of Appeals has already considered and rejected this argument, finding that "even if true, much of the testimony showed that the Fund used no set procedure – whether developed by counsel or not – for valuing its holdings, instead generally relying on Calandrella's recommendation to the board." <sup>10/</sup> The Court found that this "haphazard process for valuing the largest holding of the Fund" constituted recklessness, not a basis for mitigation of damages.

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<sup>7/</sup> 17 C.F.R. § 201.470.

<sup>8/</sup> See Philip A. Lehman, Exchange Act Rel. No. 54991 (Dec. 21, 2006), 89 SEC Docket 2006 (Order Denying Request for Reconsideration).

<sup>9/</sup> See Feeley & Willcox Asset Mgmt. Corp., Order Denying Motion for Reconsideration, 56 S.E.C. 1264, 1267 & n.8 (2003).

<sup>10/</sup> Rockies Fund, 428 F.3d at 1097; see also id. (finding that the Fund "rejected its publicly stated valuation procedures," noting without criticism Commission characterization of valuation method as "inconsistent and slipshod," and characterizing valuation process for Premier shares as "haphazard").

Respondents' further citation to evidence that the Fund's counsel attended certain unspecified meetings during which he "observed the valuation process" and discussed what the minutes of the meetings should reflect has been considered by the Commission and rejected because it does not show that counsel gave Respondents any advice at all about the reasonableness of the valuations. Respondents' reliance on Blinder, Robinson & Co. v. SEC <sup>11/</sup> is inapt. In Blinder, Robinson, the court held, among other things, that a district court decision holding that petitioners did not establish reliance on counsel as a defense to liability did not preclude petitioners' offering, in a subsequent administrative proceeding, evidence as to the circumstances surrounding the lawyer-client relationship insofar as relevant to a determination as to whether sanctions should be imposed in the public interest (and if so, what sanctions). <sup>12/</sup> Petitioners here introduced evidence as to their attorney-client relationship, which, as discussed above, we considered.

With respect to the asserted reliance on the Fund's auditor, Respondents cite testimony by the auditor purporting to show that he "discussed various factors . . . that formed the basis of the 1994 valuation of Premier with Calandrella 'at some length,' and was satisfied that the valuation was reasonable." We have already considered this testimony and concluded in the Commission Remand Opinion that "[s]ubsequent testimony that the valuations were, in the auditor's view, not unreasonable, cannot establish reliance." Respondents point to no evidence showing that the auditor's purported conclusion as to the reasonableness of the valuation was communicated to Calandrella (or any other Respondent) prior to the violative conduct, a critical requirement for reliance. <sup>13/</sup> Respondents also argue that in one instance, in 1995, the Fund lowered a valuation figure to one the outside auditor proposed after discussions with Calandrella. This evidence does not establish whether Calandrella disclosed all the facts relevant to the valuation of the Premier shares to the auditor so that the auditor could make an informed judgment as to valuation before proposing the use of the lower figure and thus does not adequately establish reliance. <sup>14/</sup>

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<sup>11/</sup> 837 F.2d 1099, 1109 (D.C. Cir. 1988).

<sup>12/</sup> Id. at 1109-11.

<sup>13/</sup> See The Rockies Fund, 56 S.E.C. at 1240 n.82 (setting forth elements required to establish reliance). Respondents similarly contend that their counsel testified that he thought Respondents acted reasonably – not that he told Respondents that the valuations were reasonable.

<sup>14/</sup> Respondents adduced no evidence showing full disclosure of relevant facts to the auditor and communication of the auditor's opinion to those asserting reliance on it. See, e.g., supra note 11.

B. Assertion that Commission Staff Had Uncommunicated Concerns about Valuation Process

Respondents argue that the Commission Remand Opinion failed to address their argument that, before any of the misconduct at issue here, "Commission staff apparently already had concluded that the Fund's processes were deficient but did not communicate that deficiency to the Fund as part of a March 1994 [examination]. After conversations with Calandrella in 1994, the staff allegedly developed concerns about the Fund's valuations procedures," but, Respondents contend, these alleged concerns were never communicated to Respondents.

Respondents made a similar assertion in the introduction to their brief before us on remand, followed by the observation that "the setting for the failings here should not be ignored." Their brief, however, did not return to this argument to explain in what way the "setting" they alleged should be considered. We originally considered and rejected Respondents' argument that any alleged failure of Commission staff to identify any problems with the Funds' valuations of Premier should act as an estoppel of our action against them. 15/

Respondents expand somewhat on this argument in the motion before us now. They claim that Commission staff "contribut[ed] to [Respondents'] belief that their valuation process had passed inspection by the Commission before a single faulty valuation was developed." This claim suffers from the same flaw as their argument concerning their purported reliance on counsel, *i.e.*, whatever Commission staff may have thought of the Fund's valuation procedures in March, 1994, the Court found that, commencing with the periodic reports in June, 1994, the Fund did not use the valuation procedures the Fund had previously established, but rather engaged in a "haphazard process" that rose to the level of recklessness.

Respondents also argue that, because of their contention that Commission staff failed to communicate its conclusions "that the Fund's processes were deficient," "as a matter of fairness and equity, this course of dealing should mitigate the sanctions." Respondents' allegation that "[Commission] staff allegedly developed concerns about the Fund's valuations procedures" is followed by a citation to two pages of the testimony of a Commission examiner involved in the 1994 examination of the firm. 16/ Nothing in this testimony suggests in any way that staff "developed concerns" about the valuation procedure. The examiner stated that Calandrella "basically indicated to [the examiner] that the board of directors – he presented them with the valuations, they signed off on them; that there was very little discussions [sic] or any questions

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15/ The Rockies Fund, 56 S.E.C. 1198 at 1239.

16/ In their brief before us on remand, Respondents also cite cryptically to the Court's opinion, 428 F. 3d at 1097, in support of the allegation that "staff had concluded as early as March 1994 that the Fund's valuation practices . . . were fundamentally flawed." There is nothing in the Court's opinion at this or any other page that discusses any Commission staff conclusions in March 1994.

asked." Neither this language, nor anything in the examiner's ten pages of testimony, explains what, if anything, the examiner knew or asked about the valuations to which he was referring, such as the method by which the valuations had been calculated, or the extent of any written explanation of the valuations that might have accompanied them. The testimony does not indicate any conclusions he may have drawn about the propriety of the valuation procedures or the valuations themselves. 17/

### C. Assertion Regarding Alleged Adjudicative Inconsistency

Respondents renew their argument that "adjudicative consistency" with the result in Parnassus Investments 18/ supports their request to alleviate the sanctions imposed. A comparison of the sanctions imposed here with those imposed in Parnassus does not implicate the issue of adjudicative consistency. 19/ As we said in the Commission Remand Opinion:

[I]n Parnassus the law judge found that the conduct in question "did not involve fraud, but rather violations of technical provisions of the securities laws." Parnassus Investments, 67 SEC Docket at 2789. In this case, in contrast, we found, as did the Court of Appeals, that respondents acted at least recklessly in violating antifraud provisions of the securities laws.

Respondents contend that our "attempt[s] to distinguish" Parnassus fail because the conduct in Parnassus, as in this proceeding, was found to be reckless. The Commission Remand Opinion did not distinguish Parnassus on the basis of Respondents' mental state, but on the basis of the nature of the violations found. As noted above, the Commission Remand Opinion contrasted the "violations of technical provisions" found by the law judge in Parnassus with Respondents' conduct here, which both we and the Court of Appeals found to be fraudulent. Considering the egregiousness of Respondents' misconduct as found by the Court of Appeals,

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17/ Respondents argue that the law judge "improperly barred" them from offering certain evidence apparently pertaining to this general issue. Respondents raised this argument in their original appeal to the Commission, and it was considered and rejected in the Commission Opinion. Respondents may not challenge this determination in a request to reconsider the Commission Remand Opinion.

18/ 67 SEC Docket 2760.

19/ Moreover, as we stated in the Commission Remand Opinion, "We have consistently held that the appropriate sanction depends on the facts and circumstances of each case and cannot be precisely determined by comparison with action taken in other proceedings. See, e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); see also, e.g., Anthony A. Adonnino, Exchange Act Rel. No. 48618 (Oct. 9, 2003), 81 SEC Docket 981, 999; Jonathan Feins, 54 S.E.C. 366, 380 (1999)."

together with other relevant factors discussed in the Commission Remand Opinion, 20/ we found the sanctions we imposed to be in the public interest. Nothing in Respondents' motion persuades us that we should revisit that determination. 21/

Respondents contend that, by refusing to find that the likelihood of future violations is low, the Commission Remand Opinion "elevate[d] one issue, [Respondents'] interpretation of the legal significance of prior precedent, over all of [Respondents'] positive responses to this matter." As positive responses, they assert that they "cooperated with the staff at every turn . . . , resolved all issues raised by the staff in March 1994 [during the examination] . . . , admitted their mistakes . . . , and exited the line of business in which the violations occurred." They further assert that they took these actions "notwithstanding the fact that the Fund's shareholders voiced their satisfaction with [the individual Respondents] in the face of the allegations of wrongdoing." They contend that "[i]t is unreasonable to discount all of [Respondents'] actions that reflect an understanding of the seriousness of the issues because of a request to be treated no worse than those whose conduct was worse."

The Commission Remand Opinion explicitly addressed many of the "positive responses to this matter" on which Respondents rely. It "[took] into consideration Respondents'

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20/ Our discussion of factors relevant to sanctions encompassed both the factors set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981), and a variety of other factors unique to this case.

21/ Although Respondents on remand identified Parnassus as "[t]he only case that [Respondents] have been able to identify as similar to the current context," they now argue that Robert F. Lynch, Administrative Proceeding File No. 3-3115 (S.E.C. June 29, 1973), 1973 SEC LEXIS 3480 (Initial Decision), aff'd, 46 S.E.C. 5 (1975), involves "similar or more egregious conduct but lighter sanctions" than we imposed on remand. Having failed to cite this authority at an earlier time, Respondents may not rely on it on now. See supra note 9.

We note, however, that although Respondents characterize the sanction imposed in Lynch as a "one-year bar and no fine," the sanction was in fact a permanent bar with the right to reapply after one year. Lynch, 46 S.E.C. at 11 & n.19. Moreover, the Commission noted in Lynch that because the propriety of the right to reapply had neither been appealed by the Division nor called for review by the Commission, the option of altering that aspect of the sanctions was not open to the Commission. Lynch, 46 S.E.C. at 11 n.19. We also note that when Lynch was decided, the Commission did not have the authority to impose civil money penalties in administrative proceedings except in insider trading cases. See generally Arthur W. Laby & W. Hardy Caldecott, Patterns of Enforcement Under the 1990 Remedies Act: Civil Money Penalties, 58 Albany L. Rev. 5, 5-13 (1994) (discussing history of availability of civil penalties).

cooperation with the Commission [examination]." 22/ It noted Respondents' assertion that they "voluntarily exited the line of business that involved the violations at issue here," but also noted that "there is nothing to preclude their entering the securities industry again at some point." 23/ The Commission Remand Opinion's conclusion that Respondents' "attempts to downplay the seriousness of actions found by the Court of Appeals to constitute fraud fall far short of a recognition that the conduct in question was wrongful" is a rejection of their assertion that they have admitted their mistakes. The sanctions we imposed in the Commission Remand Opinion were considerably lighter than those imposed in the Commission Opinion. As noted in the Commission Remand Opinion, they were lighter than those that could have been imposed for misconduct of the type engaged in by Respondents.

Respondents requested that we hear oral argument on their motion for reconsideration. Rule of Practice 451 provides that we will consider motions on the basis of the papers filed by the parties without oral argument unless we determine that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument. 24/ We believe that Respondents have presented their contentions in a manner that has permitted us to fully evaluate and determine the matters at issue and that oral argument would not significantly aid the decisional process.

Accordingly, IT IS ORDERED THAT Respondents' motion for reconsideration and motion for oral argument in this matter be, and they hereby are, denied. 25/

By the Commission.

Nancy M. Morris  
Secretary

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22/ We note that the examination occurred before the filings at issue were made, so cooperation during the examination is in any event of limited relevance.

23/ See Schild Mgmt. Co., Exchange Act Rel. No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862-67 (barring president of investment adviser where measures taken to limit president's future role at firm were "largely reversible, at [firm's] option" and where such measures would have no effect on president's assumption of similar role at another firm).

24/ 17 C.F.R. § 201.451.

25/ We have considered all of the contentions advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed in this opinion.