INITIAL DECISION RELEASE NO. 478
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14981

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

In the Matter of	:	INITIAL DECISION
	:	January 3, 2013
ROSS MANDELL	:	

APPEARANCES: Jack Kaufman and Shannon Keyes for the Division of Enforcement, Securities and Exchange Commission

Ross Mandell, pro se

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision grants the Motion for Summary Disposition filed by the Division of Enforcement (Division) and bars Ross Mandell (Mandell) from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (NRSRO).

PROCEDURAL HISTORY

On August 13, 2012, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP), pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that on July 26, 2011, Mandell was convicted of securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff; mail fraud in violation of 18 U.S.C. § 1341; wire fraud in violation of 18 U.S.C. § 1343; and conspiracy to commit offenses against the United States, namely securities fraud, mail fraud, and wire fraud, in violation of 18 U.S.C. § 371, before the United States District Court for the Southern District of New York (District Court), in United States v. Mandell, No. 09-cr-662 (Underlying Action). OIP, p. 2. The OIP further alleges that Mandell was sentenced to a prison term of 144 months, followed by three years of supervised release, and ordered to pay a $10,000 fine and a money judgment of $50,000,[1] with restitution to be determined. Id.

[1] This appears to be a typographical error in the OIP. A $50 million forfeiture penalty was imposed on Mandell, not $50,000. OIP, p. 2; Div. Ex. 4, p. 5; Div. Ex. 6, p. 2.

A prehearing conference was held on September 11, 2012, at which time the parties were granted leave to file motions for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice. Mandell filed his Answer to the OIP on September 18, 2012. The Division filed a Motion for Summary Disposition (Div. Motion) with eight exhibits (Div. Ex. 1 through Ex. 8) on October 16, 2012.[2] Mandell filed an Opposition to the Division's Motion on November 20, 2012, with ten exhibits (Resp. Ex. 1 through Ex. 10), which I construed as incorporating a motion for summary disposition. The Division filed a Reply on December 7, 2012, and Mandell filed a Reply on December 21, 2012. Accordingly, briefing is complete.

SUMMARY DISPOSITION STANDARD

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323 of the Commission's Rules of Practice. 17 C.F.R. § 201.250(a).

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 (collecting cases), petition for review denied, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare." See John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 55 S.E.C. 1023, 1028 n.12, petition for review denied, 66 F. App'x 687 (9th Cir. 2003).

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to Rule 323 of the Commission's Rules of Practice. See 17 C.F.R. § 201.323. The parties' motion papers and all documents and exhibits of record have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

[2] Div. Ex. 1 is the December 14, 2010, Superseding Indictment in the Underlying Action; Div. Ex. 2 is a Web CRD printout from the Financial Industry Regulatory Authority, Inc. (FINRA), of Mandell's employment history and securities exam information; Div. Ex. 3 is the July 26, 2011, Verdict Form in the Underlying Action; Div. Ex. 4 is the May 7, 2012, Judgment in the Underlying Action; Div. Ex. 5 is an excerpt of the sentencing transcripts dated May 3, 2012, in the Underlying Action; Div. Ex. 6 is the May 7, 2012, Order of Forfeiture in the Underlying Action; Div. Ex. 7 is the September 26, 2012, Order of Restitution in the Underlying Action; and Div. Ex. 8 is an excerpt of the transcript from the September 11, 2012, prehearing conference in this proceeding.

FINDINGS OF FACT

The fraudulent scheme began in 1998 with The Thornwater Company, L.P. (Thornwater), a licensed broker-dealer that raised money through private placements purportedly to bring companies public.[3] Dist. Ct. Order, p. 6; Div. Ex. 1, pp. 3-4, 9-10. Mandell was in charge of Thornwater and ran its operations, though another individual was nominally in charge of the company.[4] Dist. Ct. Order, p. 6; Div. Ex. 1, p. 4. The private placement memorandum (PPM) issued by the company to investors stated that the money raised through the placements would be used for legitimate business purposes. Dist. Ct. Order, p. 6. Instead, the money was used at Mandell's discretion for non-business purposes, including vacations, trips to London, and evenings at strip clubs and brothels; none of this was disclosed in the PPM. Dist. Ct. Order, pp. 6-7; Div. Ex. 1, p. 10. In addition to the information provided by the PPM, investors were told that the companies were going public, they would receive double their money, some future "liquidity" event would occur, and they would receive high returns on initial investments. Dist. Ct. Order, p. 6; Div. Ex. 1, p. 10. These statements were not opinions or optimistic predictions but were actually lies. Dist. Ct. Order, p. 6; Div. Ex. 1, p. 10. Thornwater ultimately only brought two companies public – Sky Capital Holdings Ltd. (Sky Capital) and Sky Capital Enterprises Inc. (Enterprises). Dist. Ct. Order, p. 6; Div. Ex. 1, pp. 1-3, 10.

In 2001, Mandell founded Sky Capital, a company which purportedly provided financial and investment advisory services to individuals and corporate clients domestically and in the United Kingdom.[5] Answer, p. 1; Dist. Ct. Order, p. 7; Div. Ex. 1, p. 1. Mandell was the chief executive officer of Sky Capital from January 2001 through March 2008. Answer, p. 1. During the transition from Thornwater to Sky Capital, Mandell continued to use Thornwater to raise money by way of a private placement in Dorchester Holdings Ltd. (Dorchester). Dist. Ct. Order, p. 7; Div. Ex. 1, pp. 9, 12. The inducement for the private placement – that every share in Dorchester could be converted on a one-to-one basis into Sky Capital stock and that Sky Capital stock would be offered at twice the price of Dorchester – was false. Dist. Ct. Order, p. 7; Div. Ex. 1, p. 12. In 2002, Sky Capital stock was listed on Alternative Investment Market (AIM) of the London Stock Exchange through an IPO. Dist. Ct. Order, p. 7; Div. Ex. 1, pp. 1, 11. In 2004, Enterprises, an affiliated company of Sky Capital and venture capital firm, was also listed on AIM. Dist. Ct. Order, p. 8; Div. Ex. 1, pp. 2-3, 13.

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[3] Official notice, pursuant to Rule 323 of the Commission's Rules of Practice, is taken of the District Court's November 2, 2011, Order (Dist. Ct. Order), which denied Mandell's motion for a judgment of acquittal or a new trial.

[4] According to FINRA's BrokerCheck website, of which Official Notice is taken pursuant to Rule 323 of the Commission's Rules of Practice, Mandell was a registered representative at Thornwater from April 1997 through February 2001.

[5] Mandell was a registered representative at Sky Capital LLC, a wholly-owned subsidiary of Sky Capital and registered broker-dealer, from at least May 2002 through March 2008. Answer, p. 1; Div. Ex. 1, p. 2.

Once Sky Capital and Enterprises were listed on AIM, Mandell and others were able to sell private placements at a discount to the stock listed on AIM,[6] which was artificially maintained at a higher level. Dist. Ct. Order, p. 8; Div. Ex. 1, p. 15. Maintaining the artificially high prices of the listed shares was a key component to the sale of private placement shares because there would be no reason to buy the private placement shares if they were not sold at a discount to the listed stocks. Dist. Ct. Order, pp. 8-9; Div. Ex. 1, pp. 15-18. Mandell knew this. Dist. Ct. Order, p. 9. To maintain the artificially high stock prices, Mandell and others used strategies such as facilitating the crossing of stock trades, promulgating a no net sales policy, refusing to execute a sell order, and parking the stock in other customers' accounts without authorization. Dist. Ct. Order, pp. 8-9; Div. Ex. 1, pp. 15-18. Mandell and others continued to emphasize that there would be a big "liquidity" event, and paid brokers special, undisclosed commissions, which were authorized by Mandell, to continue these practices. Dist. Ct. Order, pp. 8-9; Div. Ex. 1, pp. 15, 18-19.

The PPM received by investors did not disclose that there was no true discount for the private placements because the prices of Sky Capital and Enterprises' listed shares were artificially maintained. Dist. Ct. Order, p. 9. Nor did it disclose the brokers' misrepresentations regarding liquidity events or the illegal commissions they received. Id., pp. 9-10. With respect to GlobalSecure Holdings Ltd. (GlobalSecure), a privately owned company, brokers misrepresented when GlobalSecure would go public. Id., p. 10; Dist. Ct. Order, p. 4. They used its likely IPO as an inducement to buy private placements of Sky Capital and Enterprises' stock because these companies owned or had rights to acquire more GlobalSecure shares at below market prices. Dist. Ct. Order, p. 10; Div. Ex. 1, p. 14.

Mandell and the other perpetrators used wire and mail in interstate and foreign commerce to carry out this fraudulent scheme. Dist. Ct. Order, pp. 12-13; Div. Ex. 1, pp. 22-23. Over 250 investors lost at least $50 million as a result of the fraudulent conduct. Div. Ex. 5, p. 55.

After a five-week trial and two and one-half days of deliberation, on July 26, 2011, a jury found Mandell guilty of each of the four counts in the superseding indictment: securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff, 17 C.F.R. § 240.10b-5, 18 U.S.C. § 2; mail fraud in violation of 18 U.S.C. §§ 2, 1341; wire fraud in violation of 18 U.S.C. §§ 2, 1343; and conspiracy to commit offenses against the United States, namely securities fraud, mail fraud, and wire fraud in violation of 18 U.S.C. § 371. Dist. Ct. Order, p. 1; Div. Exs. 1, 3. The District Court entered judgment against Mandell on May 7, 2012, sentencing him to 144 months of imprisonment, followed by three years of supervised release, and ordering him to pay a special assessment of $400, a fine of $10,000, and $50 million in forfeiture. Div. Exs. 4, 6. On September 26, 2012, Mandell was held jointly and severally liable for $24,880,460 in restitution. Div. Ex. 7.

[6] Private placements of Sky Capital began in September 2003 and sales of private placement shares continued well beyond June 2004; Enterprises' private placement began in June 2005. Dist. Ct. Order, pp. 10-11.

CONCLUSIONS OF LAW

Section 15(b)(6) of the Exchange Act permits the Commission to sanction any person who, at the time of the misconduct, was associated with a broker or dealer, if the Commission finds that the sanction is in the public interest and the person has been convicted of any offense specified in Section 15(b)(4)(B) within ten years of the commencement of proceedings. 15 U.S.C. § 78o(b)(4)(B), (6)(A)(ii). Mandell was an associated person of a broker or dealer during the relevant time period, and has been convicted of felonies involving the purchase or sale of securities arising out of the conduct of the business of a broker or dealer, including violations of 18 U.S.C. §§ 1341 and 1343, all within the meaning of Section 15(b)(4)(B) of the Exchange Act. Accordingly, there is no genuine issue of material fact and this proceeding may be resolved without a hearing. See Kornman v. SEC, 592 F.3d 173 (D.C. Cir. 2010) (summary proceedings are appropriate in follow-on cases after a criminal conviction).

Mandell admits that he was convicted, sentenced, and fined; he argues, however, that his conviction will be reversed and the charges dropped following his appeal to the U.S. Court of Appeals for the Second Circuit (Second Circuit). Answer, pp. 1-2; Opposition, p. 3. Mandell argues that the Division's Motion should be denied based on the pendency of his appeal and the likelihood of its success. Opposition, pp. 3-4. He asserts that the Second Circuit's decision to grant him bail pending appeal overruled a contrary decision by the District Court, and, following that decision, the District Court adjourned the sentencing of his co-defendants until after the appeal is decided. Opposition, pp. 2-3. Mandell argues that by granting him bail, the Second Circuit has "implicitly found that a substantial question of law or fact exists that is likely to result in reversal or a new trial." Opposition, p. 3. Mandell has submitted an Amicus Brief filed by The Association of the Bar of the City of New York with the Second Circuit in support of his appeal. Opposition, p. 3; Resp. Ex. 10.

Even accepting all of Mandell's assertions as true, his arguments are unavailing. The statutory basis for this proceeding is satisfied in that Mandell was convicted of felonies involving the purchase or sale of securities arising out of the conduct of the business of a broker or dealer, among other things. See 15 U.S.C. § 78o(b)(4)(B), (6)(A)(ii). Mandell cannot challenge the validity of his conviction during this proceeding. See Joseph P. Galluzzi, Exchange Act Release No. 46405 (Aug. 23, 2002), 55 S.E.C. 1110, 1115-16 ("[A] party cannot challenge his injunction or criminal conviction in a subsequent administrative proceeding."); William F. Lincoln, Exchange Act Release No. 39629 (Feb. 12, 1998), 53 S.E.C. 452, 455-56.

Moreover, the Commission has repeatedly held that the pendency of an appeal is not grounds to dismiss or postpone judgment in a proceeding. Jose P. Zollino, Exchange Act Release No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2601 n.4 ("[T]he pendency of an appeal does not preclude us from acting to protect the public interest.") (quoting Galluzzi, 55 S.E.C. at 1116 n.21); Ira William Scott, Investment Advisers Act of 1940 (Advisers Act) Release No. 1752 (Sept. 15, 1998), 53 S.E.C. 862, 865 n.8 ("We need not await the outcome of any post-conviction proceeding in order to proceed."); Charles Phillip Elliott, Exchange Act Release No. 31202 (Sept. 17, 1992), 50 S.E.C. 1273, 1277 n.17, aff'd 36 F.3d 86 (11th Cir. 1994) ("Nothing in the statute's language prevents a bar to be entered if a criminal conviction is on appeal."). The remedy, if Mandell's appeal is ultimately successful and the statutory basis for the bar is no

longer present, is to petition the Commission for reconsideration of this action.[7] See Jon Edelman, Exchange Act Release No. 30096 (May 6, 1996), 52 S.E.C. 789, 790 ("If [Respondent] succeeds in having his conviction vacated, he can then apply to us for reconsideration of any sanctions imposed in the administrative proceeding."); Elliott, 50 S.E.C. at 1277 n.17; C.R. Richmond & Co., Exchange Act Release No. 12535 (June 10, 1976), 46 S.E.C. 412, 414 n.11. Accordingly, the Division's Motion for Summary Disposition is granted and a sanction will be imposed on Mandell if it is in the public interest.

SANCTION

The appropriate remedial sanction is guided by the well-established public interest factors listed in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); Vladimir Boris Bugarski, Exchange Act Release No. 66842 (Apr. 20, 2012), 103 SEC Docket 53374, 53378. They include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. Steadman, 603 F.2d at 1140. Deterrence should also be considered, and the sanction may not be punitive. Steven Altman, Exchange Act Release No. 63306 (Nov. 10, 2010), 99 SEC Docket 34405, 34435. The inquiry into the appropriate remedial sanction is flexible and no one factor is controlling. Chris G. Gunderson, Exchange Act Release No. 61234 (Dec. 23, 2009), 97 SEC Docket 24040, 24048; Conrad P. Seghers, Adviser's Act Release No. 2656 (Sep. 26, 2007), 91 SEC Docket 2293, 2298, aff'd, 548 F.3d 129 (D.C. Cir. 2008).

The egregiousness of Mandell's conduct weighs in favor of imposing a severe sanction. The Commission has repeatedly stated that "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions." Gunderson, 97 SEC Docket at 24049 (internal citation omitted); Marshall E. Melton, Advisers Act Release No. 48228 (July 25, 2003), 56 S.E.C. 695, 713. Over 250 investors lost at least $50 million as a result of the fraudulent conduct attributable to Mandell and the others involved in the scheme. Div. Ex. 5, p. 55. The egregiousness of Mandell's conduct is further demonstrated by the fact that he was sentenced to 144 months of imprisonment, followed by three years of supervised release, ordered to pay a $10,000 fine, $50 million in forfeiture, and held jointly and severally liable for over $24 million in restitution, and is currently released pending appeal on $5 million bail. Div. Exs. 4, 6, 7; Resp. Ex. 7.

Mandell acted with scienter and his conduct was recurrent, with the manipulative scheme beginning as early as 1998 and continuing through approximately 2006. Dist. Ct. Order, pp. 6, 10-11; Div. Ex. 5, p. 49. Mandell knew of the market manipulation in Sky Capital and

[7] Each count in Mandell's conviction – securities fraud, mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and conspiracy to commit securities fraud, mail fraud, and wire fraud – is an independent and alternative basis upon which the Commission can maintain this proceeding. See 15 U.S.C. § 78o(b)(4)(B)(i), (ii), (iv). Even if, for example, the Second Circuit Court of Appeals vacates Mandell's securities fraud conviction but upholds his convictions on the other three counts, this action may still be maintained.

Enterprises' shares and knew that the market was being manipulated to facilitate the ability to sell private placement stocks at an artificial discount to the listed shares. Dist. Ct. Order, p. 9.

Mandell has not offered assurances against future violations or recognized the wrongful nature of his conduct. Indeed, Mandell did not address any of the Steadman factors in his Opposition, despite my urging him to do so at the second prehearing conference held on October 11, 2012. Tr. 62-63, 81-82. While during his sentencing hearing Mandell apologized and said that he understood the seriousness of the crimes he had been convicted of, he also accused witnesses of lying and stated that he was fighting "lies, bad decisions, innuendo, [and] corruption." Div. Ex. 5, pp. 40, 45-46, 47.

The Division requests that Mandell be collaterally barred in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Motion, p. 1. Specifically, the Division requests that Mandell be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO. Id.

Dodd-Frank, enacted on July 21, 2010, added collateral bar sanctions to Section 15(b)(6) of the Exchange Act. The new sanctions authorize the Commission to simultaneously suspend or bar an individual who has engaged in certain unlawful conduct from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or NRSRO. Prior to Dodd-Frank, collateral sanctions were generally authorized only on a piecemeal basis, i.e., only when an individual sought association with the particular branch of the securities industry at issue. See generally Hector Gallardo, Exchange Act Release No. 65422 (Sep. 28, 2011) 102 SEC Docket 46308, 46312-15 (discussing Dodd-Frank's collateral bar provisions).

Mandell's conduct occurred prior to the enactment of Dodd-Frank, and Dodd-Frank does not explicitly state whether its collateral bar provision may be applied in cases where the conduct occurred prior to the statute's enactment. The Commission recently held, however, that Dodd-Frank's collateral bars "are prospective remedies whose purpose is to protect the investing public from future harm," and therefore applying the bars in a follow-on proceeding addressing pre-Dodd-Frank conduct is "not impermissibly retroactive." John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012). Accordingly, the Division's request for a collateral bar will be granted, and Mandell will be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO.

ORDER

It is ORDERED, pursuant to Rule 250 of the Commission's Rules of Practice, that the Division's Motion for Summary Disposition against Respondent Ross Mandell is GRANTED.

It is FURTHER ORDERED, pursuant to Section 15(b) of the Securities Exchange Act of 1934, that Ross Mandell is BARRED from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. See 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. See 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that 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 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 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.

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Cameron Elliot
Administrative Law Judge