INITIAL DECISION RELEASE NO. 557
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15510

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

In the Matter of	:	INITIAL DECISION
	:	January 30, 2014
JOHN MORAITIS	:	

APPEARANCES: Ferdose al-Taie and Melissa A. Robertson for the Division of Enforcement, Securities and Exchange Commission

John Moraitis, pro se

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision grants summary disposition in favor of the Division of Enforcement (Division) and permanently bars Respondent John Moraitis (Moraitis) from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in an offering of penny stock (collectively, permanent bars).

PROCEDURAL HISTORY

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP) on September 19, 2013, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that "[o]n September 11, 2011," Moraitis was convicted of one count of securities fraud, in violation of New York General Business Law Section 352-c(5); two counts of securities fraud, in violation of New York General Business Law Section 352-c(6); and two counts of third-degree criminal possession of stolen property, in violation of New York Penal Law Section 165.50, in People v. Joseph Stevens & Co., Case No. 02394-2009 (N.Y. Sup. Ct., N.Y. Cnty.).[1] OIP at 1-2. The OIP further alleges that Moraitis was sentenced on January 6, 2012, to four months of incarceration and five years of probation, and ordered to make restitution in the amount of $75,220. Id. at 2.

[1] As clarified by the parties' submissions, discussed infra in this Initial Decision's findings of fact, Moraitis pled guilty to these offenses on October 11, 2011.

On October 10, 2013, the Division and Moraitis filed a Joint Motion and Brief in Support of an Order Making Findings and Imposing Sanctions by Consent, and for Cancelation of Hearing and Prehearing Teleconference (Joint Motion). The Joint Motion contains a statement of undisputed facts, which are substantively identical to the facts alleged in the OIP. Id. at 1-2; Joint Motion at 2-3. The Joint Motion requests a decision making findings pursuant to the recited facts and imposition of permanent bars, pursuant to Exchange Act Section 15(b)(6). Joint Motion at 1, 3.

In an October 15, 2013, Order, I granted the Joint Motion and ordered the Division to file evidence sufficient to support an initial decision with the agreed-upon sanction. See John Moraitis, Admin. Proc. Rulings Release No. 957, 2013 SEC LEXIS 3214. The Division subsequently submitted the following documents related to the underlying criminal proceeding in Joseph Stevens: (1) a certified copy of the indictment filed on May 19, 2009, against Moraitis and others (Indictment); (2) a certified copy of Moraitis' Certificate of Disposition Indictment, signed by the state-court clerk on July 30, 2013 (Certificate of Disposition); and (3) a copy of Moraitis' factual allocution, dated October 11, 2011 (Factual Allocution).[2]

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 summary disposition as a matter of law. 17 C.F.R. § 201.250(b). No motion for summary disposition was filed in this case, but the Joint Motion requests the same relief that a motion for summary disposition would, and Moraitis made clear, by admitting to the underlying criminal violations and agreeing to a decision ordering permanent bars, that a hearing is unnecessary. Accordingly, I construe the Joint Motion as a motion for summary disposition for the purposes of deciding this case, and I make findings according to the standards set forth in Rule 250 of the Commission's Rules of Practice.[3]

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or criminally convicted and the sole determination concerns the appropriate sanction. See Gary M. Kornman, Exchange Act Release No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14250-53, 14262-65, pet. denied, 592 F.3d 173 (D.C. Cir. 2010); Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 nn.21-24 (collecting cases), pet. denied, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud are not appropriate "will be rare." John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002), pet. denied, 66 F. App'x 687 (9th Cir. 2003).

[2] In its October 16, 2013, cover letter, the Division represented that the Factual Allocution document is not a court-filed document in New York and therefore a certified copy cannot be obtained.

[3] The posture of this proceeding is distinguishable from AMS Homecare, Inc., in which the Commission issued an Order Remanding Proceeding to Administrative Law Judge, because Moraitis consents to this procedure and there are no undeveloped issues. See Exchange Act Release No. 68506 (Dec. 20, 2012), 105 SEC Docket 62179.

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). Moraitis, in the Joint Motion, his only filing, conceded to facts substantively identical to the ones alleged in the OIP, and thus those facts are taken as true. Joint Motion at 2-3. As indicated in the October 15, 2013, Order requesting further support, Rapoport v. SEC, 682 F.3d 98 (D.C. Cir. 2012), requires that there be sufficient evidence in the record to justify a sanction, and the Joint Motion does not contain sufficient facts to justify permanent bars. The documents provided by the Division in response to the Order include clear and sufficient evidence to justify the requested permanent bars, but they were not filed under an affidavit, and there are no specific stipulations of record to the facts, independent of the facts agreed to in the Joint Motion.

Rule 323 of the Commission's Rules of Practice allows for official notice of material facts "which might be judicially noticed by a district court of the United States." 17 C.F.R. § 201.323. Rule 201 of the Federal Rules of Evidence allows U.S. district courts to take judicial notice of adjudicative facts that are "not subject to reasonable dispute because" they are "generally known within the trial court's territorial jurisdiction; or . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

That many U.S. district courts exercise judicial notice over state-court documents provides some authority for the proposition that Rule 323 of the Commission's Rules of Practice allows me to take official notice of filings from state-court proceedings. See, e.g., Trujillo v. Diaz, No. 1:12-cv-02087, 2013 WL 4853225, at *3 n.6 (E.D. Cal. Sept. 10, 2013) ("[T]his court may take judicial notice of filings in another [state] case."); Meegan v. Brown, No. 11-cv-621S, 2012 WL 1883346, at *2 (W.D.N.Y. May 22, 2012) ("[T]his [c]ourt can take judicial notice of state-court judgments."); Fridman v. City of N.Y., 183 F. Supp. 2d 642, 655 n.6 (S.D.N.Y. 2002) ("A federal court must take judicial notice of adjudicative facts upon the request of a party if supplied with the information that the fact is not subject to reasonable dispute and is either generally known in the jurisdiction or capable of accurate and ready determination. Here, the text and existence of the State Opinions [are] not in dispute and are capable of ready and accurate determination." (internal citation omitted)), aff'd, 52 F. App'x 157 (2d Cir. 2002). Some district courts are, however, hesitant to extend judicial notice to facts from state-court proceedings outside of their jurisdiction that are not "sufficiently indisputable." See, e.g., In re Ford Motor Co. Bronco II Prod. Liab. Litig., 982 F. Supp. 388, 395 (E.D. La. 1997).

The records provided by the Division are not "generally known in [the Commission's] jurisdiction," and are not all from a source "whose accuracy cannot reasonably be questioned." Most notably, the Factual Allocution, which contains the richest description of facts in support of sanctions, was not a court-filed document and cannot be certified, according to a representation by the Division, and is thus not capable of accurate and ready determination. The Commission readily accepts many adjudicative records from federal courts, but there are few instances, if any, of official notice by the Commission or its administrative law judges of state-court records. Accordingly, I decline to take official notice of the documents provided by the Division.

Nevertheless, Moraitis admitted to pleading guilty to the underlying state-court criminal charges, as alleged in the OIP. Joint Motion at 3. The documents provided by the Division are

essentially a record of facts supporting Moraitis' guilty plea. The Factual Allocution was not part of the official New York State court record, but Moraitis signed it on October 11, 2011, and it was offered in response to my October 15, 2013, Order, requiring sufficient evidence to support the agreed-upon sanction. Moraitis admitted and memorialized his wrongdoing in the underlying criminal proceeding in the Factual Allocution. I find that the Factual Allocution is a record of Moraitis' admission and therefore the facts set forth in the Factual Allocution may be taken as true pursuant to Rule 250(a) of the Commission's Rules of Practice. See 17 C.F.R. § 201.250(a). Additionally, the Division provided copies of the documents filed in support of the agreed-upon sanction, including the Factual Allocution, to Moraitis, and he has not taken issue with them.

The findings and conclusions in this Initial Decision are based on the factual recitation of the Joint Motion and on conclusions drawn from the materials provided by the Division. The parties' filings 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.

FINDINGS OF FACT

A. Background

On May 20, 2009, Joseph Stevens & Company, Inc. (Joseph Stevens), and sixteen individuals, including Moraitis, were charged in a 94-count indictment alleging enterprise corruption, securities fraud, and larceny. Joint Motion at 2; Indictment.

On October 11, 2011, Moraitis pled guilty and was convicted of one count of securities fraud, in violation of New York General Business Law Section 352-c(5); two counts of securities fraud, in violation of New York General Business Law Section 352-c(6); and two counts of third-degree criminal possession of stolen property, in violation of New York Penal Law Section 165.50. Joint Motion at 3; Certificate of Disposition; Factual Allocution at 1. On January 6, 2012, Moraitis was sentenced to four months of incarceration and five years of probation, and ordered to make restitution in the amount of $75,220. Joint Motion at 3; Certificate of Disposition.

From 2002 until 2008, he was associated with and employed as a proprietary trader by Joseph Stevens, a broker-dealer registered with the Commission at the time. Joint Motion at 2; Factual Allocution at 2. During Moraitis' employment, Joseph Stevens' primary source of business was buying and selling over-the-counter stocks on behalf of retail customers. Factual Allocution at 2. Moraitis knew which stocks were bought and sold, and how much money Joseph Stevens generated on those sales. Id. He also knew that Joseph Stevens had a duty to its clients to disclose all material information prior to inducing a client to engage in a transaction. Id. Moraitis reported to Joseph Stevens' owners, Joseph Sorbara (Sorbara) and Steven Markowitz (Markowitz). Id. Moraitis routinely spoke to Joseph Stevens' Chief Financial Officer. Id.

B. Schemes to Generate Excessive and Undisclosed Commissions

From January 2003 through November 2005, while associated with Joseph Stevens, Moraitis participated in firm-wide schemes, individually and as part of an enterprise, to generate and charge customers excessive and undisclosed commissions in connection with the purchase and sale of securities. Factual Allocution at 2, 5; Joint Motion at 3. The schemes included the firm's principals, brokers, and traders, including Moraitis; and by these schemes, Joseph Stevens stole money from customers by false and fraudulent pretenses, representations, and promises. Factual Allocution at 2. Moraitis knew that (1) Joseph Stevens systematically concealed the extra commissions from its customers; (2) Markowitz and Sorbara were aware of and engaged in the fraudulent and manipulative practices; and (3) the Chief of Compliance at Joseph Stevens participated in the fraudulent practices. Id. at 5.

Moraitis, and other traders at Joseph Stevens, would accumulate blocks of stock in which Joseph Stevens made markets and marketed the shares in those blocks without disclosing to customers the relevant trading information and true price of the stock for the purpose of generating extra commissions. Id. at 2. Joseph Stevens, Moraitis, and other traders and brokers at Joseph Stevens would accumulate stock, sometimes over a period of days, and manipulate the price higher so that the customer paid more for the shares than they should have paid. Id. at 2-3. In other instances, Moraitis participated in schemes involving large blocks of stock in which he, and other traders, secured purchase commitments from brokers before they spoke to their customers, thereby removing all risk to Joseph Stevens. Id. In both scenarios, the brokers did not disclose to their customers the actual price of the shares and they refrained from entering the order promptly or entered it in a way to allow traders to manipulate the price of the shares higher before executing the customer order. Id. This allowed the firm to realize additional profits not disclosed to customers; brokers would encourage their customers to buy or sell these stocks because they knew in advance they would be earning extra, undisclosed compensation. Id. The brokers, traders, firm principals, and Moraitis all shared in profits generated by these schemes. Id.

As part of the scheme, Moraitis advised brokers that they could delay customer trades by marking customer orders as "Not Held." Id. This designation meant that a trade would not be held to the market price at the moment when the broker and the trader held the order in hand. Id. Marking the trades as "Not Held" provided Moraitis, and others, the opportunity to mishandle customer orders and delay their execution until an artificially inflated price was reached at the expense of customers and for personal benefit of Moraitis and others. Id. This trade manipulation resulted in Joseph Stevens customers paying more than they should have when buying stocks and receiving less than they should have when selling stocks while Moraitis, among others, received extra, illegal money. Id.

Moraitis' guilty plea to two counts of third-degree criminal possession of stolen property, in violation of New York Penal Law Section 165.50, was based on his knowing possession of stolen property, on February 25, 2005, and March 11, 2005, which was obtained by fraudulent means with the intent to benefit himself and others at Joseph Stevens. Id. at 3. In each instance, Moraitis received a percentage of trading profits, and thereby Moraitis, together with others, wrongfully obtained and possessed property of a value in excess of $3,000 (totaling over $6,000) by trading in certain securities. Id.

Moraitis' guilty plea to securities fraud, in violation of New York General Business Law Sections 352-c(5) and (6), was based on his participation in three specific schemes that occurred from about April 2, 2003, to about October 4, 2005; January 22, 2003, to about November 30, 2005; and January 16, 2003, to about March 29, 2005. Id. at 4-5. Moraitis wrongfully obtained property as a result of his participation, including receipt of property valued in excess of $500 from two clients. Id. Moraitis worked with others at Joseph Stevens, including Sorbara and Markowitz, to execute these schemes; the illegally inflated commissions were hidden from the customers and divided among the participants. Id.

CONCLUSIONS OF LAW

Section 15(b)(6) of the Exchange Act authorizes the Commission to impose permanent bars as a sanction against any person who, at the time of the misconduct, was associated with a broker or dealer, if the person has been convicted of any offense specified in Exchange Act Section 15(b)(4)(B) within ten years of the commencement of the administrative proceeding, and if the sanction is in the public interest. 15 U.S.C. § 78*o*(b)(4)(B), (b)(6)(A)(ii). In 2011, Moraitis pled guilty and was convicted of one count of securities fraud, in violation of New York General Business Law Section 352-c(5); two counts of securities fraud, in violation of New York General Business Law Section 352-c(6); and two counts of third-degree criminal possession of stolen property, in violation of New York Penal Law Section 165.50. Each conviction under the facts of this case was a felony or misdemeanor that "involves the purchase or sale of any security," and "arises out of the conduct of the business of a broker [or] dealer," within the meaning of Exchange Act Section 15(b)(4)(B). 15 U.S.C. § 78*o*(b)(4)(B)(i)-(ii). At the time of his misconduct, Moraitis was associated with Joseph Stevens, then a registered broker-dealer. Accordingly, there is no genuine issue of material fact and summary disposition is appropriate. 17 C.F.R. § 201.250(b). A sanction will be imposed on Moraitis if it is in the public interest.

The Division requests the imposition of the full range of permanent bars against Moraitis, and Moraitis joins the Division's request. Joint Motion at 1, 3. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), enacted on July 21, 2010, added collateral bar sanctions to Exchange Act Section 15(b) and Investment Advisers Act of 1940 (Advisers Act) Section 203(f). The Commission has held 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), 105 SEC Docket 61722, 61737. Accordingly, the imposition of permanent bars against Moraitis, despite the fact that the violative acts ended in 2005, is an appropriate sanction if it is in the public interest.

SANCTIONS

When considering whether a sanction serves the public interest, the Commission considers the factors identified in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981): the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the respondent's recognition of the wrongful nature of his or her conduct, the sincerity of the respondent's assurances against future violations, and the likelihood that the respondent's occupation will present opportunities for future

violations (Steadman factors). Gary M. Kornman, 95 SEC Docket at 14255. The Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. Id. The Commission also considers the extent to which the sanction will have a deterrent effect. See Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46.

The Steadman factors weigh in favor of imposing permanent bars. Moraitis' actions were egregious and recurrent. He admittedly participated in a firm-wide criminal scheme that spanned over two years. See generally Factual Allocution. During that period, Moraitis fraudulently obtained and knowingly possessed stolen property in excess of $6,000 and wrongfully obtained property in excess of $500 from at least two customers. Id. at 3-5. He repeatedly engaged in these firm-wide schemes to earn excessive commissions and trading prices, and to steal money from Joseph Stevens customers through false and fraudulent pretenses, representations, and promises while engaged in the distribution, purchase, and sale of various securities. Id. at 1.

Scienter is defined as a "mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); accord Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980). A plain reading of New York General Business Law Sections 352-c(5) and 352-c(6), and New York Penal Law Section 165.50, which Moraitis admitted to violating, indicate requisite mental states comparable to scienter. New York General Business Law Section 352-c(5) holds liable a violator "who intentionally engages in any scheme constituting a systematic ongoing course of conduct with intent to defraud"; and New York General Business Law Section 352-c(6) involves "intentionally engag[ing] in fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale, or . . . mak[ing] any material false representation or statement with intent to deceive or defraud." Similarly, New York Penal Law Section 165.50 defines the mental state required for third-degree criminal possession of stolen property as "knowingly possess[ing] stolen property, with intent to benefit himself."

Moraitis acted with scienter by committing these crimes. He admitted that he intentionally schemed with other brokers, traders, and firm principals at Joseph Stevens to purposely delay customer orders until an artificially inflated price could be reached to benefit himself and others. Factual Allocution at 2-5. Additionally, Moraitis was aware of Joseph Stevens' duty to its clients, knew that others at Joseph Stevens engaged in manipulative practices, and knew that Joseph Stevens systematically concealed the excessive commissions it generated from its customers. Id. at 2, 5.

There is no evidence in the record that Moraitis recognizes the wrongful nature of his conduct and he has provided no assurances against future violations. Also, the record leaves unclear where Moraitis is currently employed, if at all, and whether, absent permanent bars, he would continue working in the securities industry, thereby creating a risk of future violations. Despite the lack of clarity surrounding these factors, all of the other Steadman factors overwhelmingly weigh in favor of the strictest sanction, and Moraitis has made clear his willingness to accept permanent bars. Additionally, permanent bars will further the Commission's interests in deterrence, particularly general deterrence. See Steadman, 603 F.2d at 1140 ("[E]ven if further violations of the law are unlikely, the nature of the conduct mandates permanent debarment as a deterrent to others in the industry[.]"); Steven Altman, Esq., Exchange Act Release No. 63306

(Nov. 10, 2010), 99 SEC Docket 34405, 34438 ("Other attorneys, who might be encouraged by a more lenient sanction to act in a similar fashion, must also be deterred."), pet. denied, 666 F.3d 1322 (D.C. Cir. 2011). Finally, permanent bars are remedial rather than punitive in this case because they will protect the integrity of the regulatory process and will thereby protect the investing public from future harm.

ORDER

It is ORDERED that, pursuant to Rule 250 of the Commission's Rules of Practice, summary disposition is GRANTED in favor of the Division of Enforcement.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, John Moraitis is permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, John Moraitis is permanently BARRED from participating in an offering of penny stock, including acting as any promoter, finder, consultant, agent, or other person who engages 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.

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 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 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 occurs, the Initial Decision shall not become final as to that party.

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Cameron Elliot
Administrative Law Judge