INITIAL DECISION RELEASE NO. 558
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15527

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

In the Matter of	:	INITIAL DECISION
	:	January 30, 2014
ALAN FERRARO	:	

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

Alan Ferraro, 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 Alan Ferraro (Ferraro) 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 26, 2013, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that on June 22, 2012, Ferraro pled guilty to one count of grand larceny in the third degree in violation of New York Penal Law Section 155.35, in People v. Joseph Stevens & Co., Case No. 02394-2009 (N.Y. Sup. Ct., NY County).[1] OIP at 1. The OIP further alleges that Ferraro was sentenced to seventy hours of community service and was ordered to make restitution in the amount of $201,572.[2] Id.

[1] As clarified by the parties' submissions, discussed infra Ferraro pled guilty on August 2, 2011, and he was sentenced on June 22, 2012.

[2] The OIP also alleges that Ferraro was sentenced to three years of probation. OIP at 1. In a Joint Motion and Brief in Support of an Order Making Findings and Imposing Sanctions by Consent, the Division notes that Ferraro informed it that this allegation is erroneous. Joint Motion at 2 n.1.

On October 15, 2013, the Division and Ferraro 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. 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 16, 2013, Order, I indicated that I would grant the parties' Joint Motion. Alan Ferraro, Admin. Proc. Rulings Release No. 962, 2013 SEC LEXIS 3230. The October 16, 2013, Order required the Division to file evidence sufficient to support an initial decision with the agreed-upon sanction. Id. 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 Ferraro and others; (2) a copy of Ferraro's factual allocution, dated August 2, 2011 (Factual Allocution)[3], which the Division represents was attached to Ferraro's plea agreement but has not separately furnished a copy of that agreement; (3) a certified copy of Ferraro's Certificate of Disposition Indictment, signed by the state-court clerk on July 30, 2013; and (4) a copy of the transcript from Ferraro's plea hearing.[4]

SUMMARY DISPOSITION STANDARD

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and a party 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 Ferraro made clear, by admitting to the underlying criminal violation 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.[5]

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.

[3] In its October 1, 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.

[4] Citations to the transcript of Ferraro's plea hearing in Joseph Stevens are referred to as "Plea Hr'g Tr. ___."

[5] 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 Ferraro consents to this procedure and there are no undeveloped issues. See Exchange Act Release No. 68506, (Dec. 20, 2012) 105 SEC Docket 62179.

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 is not appropriate "will be rare." See John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002), pet. denied, 66 F. App'x 687 (9th Cir. 2003).

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). Ferraro, in the Joint Motion, his only pleading, 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 16, 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).

The fact 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 New York, 183 F. Supp. 2d 642, 654 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 is 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 territorial 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. Similarly, the court clerk did not certify the plea-hearing transcript. Furthermore, 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, Ferraro admitted to pleading guilty to the underlying state-court criminal charges, as alleged in the OIP. Joint Motion at 3. The state-court documents provided by the Division are essentially a record of facts supporting Ferraro's guilty plea, and I consider the underlying facts encompassed in Ferraro's admission in the Joint Motion. Accordingly, I take them as true, pursuant to Rule 250(a) of the Commission's Rules of Practice. See 17 C.F.R. § 201.250(a). The Factual Allocution was not part of the official New York State court record, but Ferraro signed it, orally agreed to its basic facts during the plea hearing, and offered it to the judge during his plea hearing. Factual Allocution at 4; Plea Hr'g Tr. 3, 10-11, 17-25. There is sufficient evidence in the plea-hearing transcript to demonstrate that the Factual Allocution was part of the guilty plea he admits to offering in Joseph Stevens and the facts in the Factual Allocution were relied upon by the judge when deciding to accept Ferraro's plea agreement, so I take this as true as well. See Plea Hr'g Tr. 17-25. Furthermore, the documents provided by the Division were submitted in response to the October 16, 2013, Order, which required materials sufficient to support the agreed-upon sanction. The Division provided Ferraro with a copy of the documents, 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 August 2, 2011, Ferraro pled guilty to participating in a firm-wide scheme to generate and charge customers excessive and undisclosed commissions in connection with the purchase and sale of securities while he was associated with Joseph Stevens & Company, Inc. (Joseph Stevens), a broker-dealer registered with the Commission at the time. Joint Motion at 2-3; Factual Allocution at 1. Ferraro pled guilty to one count of attempted enterprise corruption, New York Penal Law Sections 110 (attempt)/460.20 (enterprise corruption), and one count of grand larceny in the third degree, New York Penal Law Section 155.35. Joint Motion at 3; Plea Hr'g Tr. 3, 13. According to the plea-hearing transcript, Ferraro's plea agreement required his cooperation with the prosecution going forward. Plea Hr'g Tr. 3-7. If he cooperated satisfactorily, the New York Attorney General could, in his discretion, request that the court allow Ferraro to withdraw his attempted enterprise corruption guilty plea and reduce the grand larceny in the third degree count to grand larceny in the fourth degree, New York Penal Law

Section 155.30. Plea Hr'g Tr. 6-7, 14-15. Neither the Division nor Ferraro has filed any materials in this proceeding showing that the New York Attorney General requested that the court allow Ferraro to withdraw his guilty plea or reduce the grand larceny charge.

On June 22, 2012, Ferraro was convicted by plea of one count of grand larceny in the third degree, New York Penal Law Section 155.35, and was sentenced to seventy hours of community service and was ordered to make restitution in the amount of $201,572. Certificate of Disposition Indictment. It appears from this that Ferraro was permitted to withdraw his guilty plea because there is no record of conviction for the attempted enterprise corruption charge. Id. There was, however, no reduction in degree to the Ferraro's grand larceny plea. Id. The Certificate of Disposition Indictment indicates that in addition to community service and restitution, Ferraro was sentenced to three years of conditional discharge, but not probation, as is indicated in the OIP, but corrected in the Joint Motion.[6] Id.; OIP at 1; Joint Motion at n.1; see also n.2, above.

Ferraro was a registered representative associated with Joseph Stevens between 1997 and 2006. Joint Motion at 2. Joseph Stevens' primary sources of business during Ferraro's employment were investing in and marketing over-the-counter stocks in which the firm acted as a market maker. Factual Allocution at 1. In his capacity as a registered representative of Joseph Stevens, Ferraro bought and sold numerous over-the-counter stocks for retail customers. Id. Ferraro was supervised by Joseph Stevens' management, which included the firm's owners Joseph Sorbara (Sorbara) and Steven Markowitz (Markowitz). Id.

B. Schemes to Generate Excessive and Undisclosed Commissions

While employed by Joseph Stevens, Ferraro was aware of and participated in firm-wide schemes to generate excessive and undisclosed commissions. Factual Allocution at 1; Plea Hr'g Tr. 17. The schemes included the firm's principals, traders, and brokers who stole money from customers through false pretenses, representations, and promises. Factual Allocution at 1; Plea Hr'g Tr. 17. Ferraro also knew that Joseph Stevens' Compliance Department systematically concealed the fraudulently obtained commissions from customers and regulators as part of the ongoing scheme. Factual Allocution at 4. Ferraro participated in these schemes by encouraging his customers to purchase shares of particular stocks on particular days so that he would receive extra, undisclosed commissions on the transactions. Id. at 2; Plea Hr'g Tr. 19. Ferraro also sold certain stocks to his customers based solely upon his expectation of receiving extra commissions, without regard for whether the stocks provided good investments for his clients. Factual Allocution at 2; Plea Hr'g Tr. 19.

As part of the scheme, Ferraro and the other traders at Joseph Stevens would incorrectly mark customers' trades as "not held" without the knowledge or consent of the customers involved. Factual Allocution at 2-3; Plea Hr'g Tr. 23. This designation meant that a trade would not be held to the market price at the moment when Ferraro and the trader held the order in hand. Factual Allocution at 2-3. Marking customers' orders as "not held" provided Ferraro and other

[6] Conditional discharge, according to New York Penal Law Section 65.05, is an imposition other than imprisonment or probation. N.Y. Penal Law § 65.05 (McKinney 2013).

traders the opportunity to delay the orders until an artificially inflated price was reached for personal benefit. Id. at 3. As a result of this trade manipulation, the customers paid more than they should have when buying stocks and received less than they should have when selling stocks. Id. at 3; Plea Hr'g Tr. 22. As part of the scheme, Ferraro worked with other brokers to delay trades, allowing Ferraro and others, including Sorbara and Markowitz, to steal the price difference, unbeknownst to their clients. Factual Allocution at 3.

Ferraro's guilty plea to grand larceny in the third degree in violation of New York Penal Law §155.35 was based upon specific thefts from his clients related to recommendations of various securities that occurred between on or around April 9, 2003, and on or around April 5, 2005. Id. at 3. These thefts included $45,950 from a single client. Id. at 3; Plea Hr'g Tr. 23. Using manipulative techniques, Ferraro stole a total of $447,079.70 from more than twenty of his customers during the period between January 2001 and December 2005. Factual Allocution at 4; Plea Hr'g Tr. 24.

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), (6)(A)(ii). Ferraro pled guilty to and was convicted by plea of grand larceny in the third degree in violation of New York Penal Law Section 155.35, a felony or misdemeanor under the facts of this case 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, Ferraro was a registered representative for 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 Ferraro if it is in the public interest.

The Division requests the imposition of the full range of permanent bars against Ferraro, and Ferraro joins the Division's request. Joint Motion at 1. 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 Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). 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 Ferraro, despite the fact that the violative acts ended by 2006, 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. Ferraro's actions were egregious and recurrent. He admitted to participating in a criminal firm-wide scheme that spanned several years. Factual Allocution at 2-4. During that period, Ferraro admitted he stole a total of $447,079.70 from more than twenty of his customers. Id. at 4. He repeatedly engaged in these schemes to earn excessive commissions and steal money through trades in multiple securities. Id. at 2.

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 Penal Law Section 155.35, which Ferraro admitted to committing, indicate requisite mental states comparable to scienter. Factual Allocution at 2-3; Plea Hr'g Tr. 19, 23. New York Penal Law Section 155.05 defines the mental state required for all grades of larceny, including Section 155.35, as "intent to deprive another of property." (McKinney 2013). By committing this crime, Ferraro acted with intent, the highest degree of scienter. Ferraro admitted to intentionally engaging in a scheme with other traders at Joseph Stevens to purposely delay customer orders until an artificially inflated price could be reached to benefit Ferraro and others at Joseph Stephens. Factual Allocution at 2-3.

There is no evidence in the record of Ferraro showing either any recognition of the wrongful nature of his conduct or giving any assurances against future violations. It is unclear from the record where Ferraro is currently employed, what the status of Joseph Stevens is, or whether, absent industry bars, Ferraro would continue working in the securities industry. Thus, whether his occupation would create a risk of future violations cannot be determined. Nevertheless, all of the other Steadman factors support a severe sanction, and Ferraro has made clear his willingness to accept such a severe sanction. Additionally, permanent bars will further the Commission's interests in deterrence, particularly general deterrence. See 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); 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."). 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, Alan Ferraro 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, Alan Ferraro 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