

INITIAL DECISION RELEASE NO. 562  
ADMINISTRATIVE PROCEEDING  
FILE NO. 3-15581

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

In the Matter of  
  
TODD NEWMAN

INITIAL DECISION  
February 10, 2014

APPEARANCES:

Daniel R. Marcus, Matthew Watkins, and Valerie A. Szczepanik for the Division of Enforcement, Securities and Exchange Commission

John A. Nathanson, Shearman & Sterling LLP, for Todd Newman

BEFORE:

Brenda P. Murray, Chief Administrative Law Judge

The Securities and Exchange Commission (Commission) issued an Order Instituting Proceedings (OIP), pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act), on October 21, 2013, alleging that Todd Newman (Newman) was convicted on December 17, 2012, of four counts of securities fraud and one count of conspiracy to commit securities fraud, in violation of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rule 10b-5, in United States v. Newman, No. 1:12-cr-121 (RJS) (S.D.N.Y.) (Newman). Based on his criminal conviction, a federal district court on October 4, 2013, enjoined Newman from violations of Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, in SEC v. Adondakis, No. 2:12-cv-409 (HB) (S.D.N.Y.) (Adondakis). This proceeding is based on both the criminal conviction and the civil injunction. See Tr. 6.<sup>1</sup> Newman has appealed his criminal conviction to the U.S. Court of Appeals for the Second Circuit.<sup>2</sup> Docket in Newman, ECF No. 264; see Tr. 5.

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<sup>1</sup> Citations are to the transcript of the November 1, 2013, telephonic prehearing conference.

<sup>2</sup> I take official notice of the docket in Newman pursuant to Rule 323 of the Commission's Rules of Practice. See 17 C.F.R. § 201.323.

## **Issue**

Newman does not concede any of the factual allegations of the OIP, but has agreed with the Division of Enforcement (Division) not to oppose imposition of an industry bar, and the Division has agreed not to oppose Newman's seeking to lift an industry bar if Newman's appeal of his criminal conviction is successful. Tr. 6, 11. Newman acknowledges that the Commission has the right to seek a collateral bar based on the injunction and his criminal conviction, but is unwilling to enter a settlement because he stated that, under the Commission's settlement procedures, he would forfeit his ability to make public statements denying the factual allegations underlying the criminal proceeding, in which his appeal is pending. Tr. 5-8.

Although there is no dispute that Newman has been criminally convicted and civilly enjoined, as alleged in the OIP, and official notice permits reference to the relevant documents, I ordered a summary-disposition procedural schedule, which takes significant time and effort.<sup>3</sup> See AMS Homecare, Inc., Exchange Act Release No. 68506 (Dec. 20, 2012), 105 SEC Docket 62179, 62180-82 (holding, although respondent admitted the allegations, that there was "no justification for departing from" procedural rules that "contemplate the holding of a hearing prior to the issuance of an initial decision in the absence of a successful motion for summary disposition by one of the parties").

## **Background**

On November 25, 2013, the Division filed a Motion for Summary Disposition (Motion), a Memorandum of Points and Authorities in Support of the Motion (Memorandum), and the Declaration of Daniel R. Marcus (Marcus Declaration), attaching:

Exhibit 1, the Superseding Indictment in Newman, filed on August 28, 2012;

Exhibit 2, the Judgment as to Newman in Newman, entered May 9, 2013;

Exhibit 3, the Complaint in Adondakis;

Exhibit 4, the Final Judgment as to Newman in Adondakis, signed and filed on October 4, 2013;

Exhibit 5, Newman's Answer in Adondakis, filed March 26, 2012; and

Exhibit 6, Form ADV of Diamondback Capital Management, LLC (Diamondback), filed with the Commission on March 18, 2008.

On December 13, 2013, Newman filed a Memorandum of Points and Authorities in Response to the Division's Motion (Response). Accompanying the Response is the Declaration of John A. Nathanson (Nathanson Declaration), attaching:

Exhibit A, Brief of Newman, filed in his criminal appeal in Newman, No. 13-1837 (2d Cir.), on August 15, 2013;

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<sup>3</sup> I waived Newman's obligation to file an Answer. Tr. 14.

Exhibit B, a letter-brief, dated September 16, 2013, from the Division to U.S. District Court Judge Harold Baer, Jr., in Adondakis, regarding the Division's request for partial summary judgment in its favor and attaching unsigned judgments as to Newman and his co-defendant Anthony Chiasson; and

Exhibit C, the October 4, 2013, Judgment as to Newman in Adondakis.

On December 20, 2013, the Division filed a Reply Memorandum in Further Support of Its Motion (Reply) and the Second Declaration of Marcus, attaching:

Exhibit 1, the docket for the appeal of Newman, No. 13-1837 (2d Cir.), as of December 19, 2013;

Exhibit 2, the docket in United States v. Gupta, No. 12-4448 (2d Cir.), as of December 19, 2013;

Exhibit 3, the docket in United States v. Rajaratnam, No. 11-4416 (2d Cir.), as of December 19, 2013; and

Exhibit 4, the docket in United States v. Goffer, No. 11-3591 (2d Cir.), as of December 19, 2013.

### **Findings**

I admit into evidence the declarations and exhibits that are part of the filings made by the Division and Newman, and take official notice of documents in the public record. See 17 C.F.R. § 201.323. I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-04 (1981). The findings and conclusions herein are based on the entire record. I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this Initial Decision.

In Newman, Newman was convicted on December 17, 2012, after a four-week jury trial of four counts of securities fraud and one count of conspiracy to commit securities fraud. Marcus Declaration, Exhibit 2; Docket in Newman. The counts were described in the Superseding Indictment, which alleged that Newman, while acting as a portfolio manager at a hedge fund, participated in an insider-trading scheme from in or about 2008 through in or about 2009 where analysts provided him with material, nonpublic information, which he then used to execute trades in Dell, Inc. (Dell), and NVIDIA Corporation. Marcus Declaration, Exhibit 1. Newman admits that he was a portfolio manager at Diamondback in 2008 and that he effected trades in Dell.<sup>4</sup> Marcus Declaration, Exhibit 5 at 2. Newman was sentenced to fifty-four months in prison followed by one year of supervised release, and ordered to pay a \$1 million fine and \$737,724 in criminal forfeiture. Marcus Declaration, Exhibit 2. On May 10, 2013, Newman appealed his conviction. Docket in Newman, ECF No. 264; see Response at 1-2. In Adondakis on October 4, 2013, Newman was enjoined from violating Section 17(a) of the

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<sup>4</sup> At the time, Diamondback was registered with the Commission as an investment adviser. Marcus Declaration, Exhibit 6.

Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5 as alleged in the OIP. Marcus Declaration, Exhibit 4.

## **Positions of the Parties**

### **Division's Motion for Summary Disposition**

The Division argues that it is in the public interest to impose a collateral industry bar from association, as set forth in Section 203(f) of the Advisers Act, against Newman based on his criminal conviction in Newman and the civil injunction in Adondakis, because his conduct was egregious and intentional, and because Newman has never acknowledged his misconduct or indicated any willingness to refrain from future wrongdoing. Memorandum at 1, 4-8. The Division argues that consideration of the appropriate factors – the egregiousness of respondent's actions, the isolated or recurrent nature of the infractions, the degree of scienter involved, the sincerity of respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that respondent's occupation will present opportunities for future violations (Steadman factors)<sup>5</sup> – weigh in favor of a barring Newman from the securities industry. Id. at 5-8.

### **Newman's Response**

In his appeal to the Second Circuit, Newman argues “that the District Court erred by failing to instruct the jury that, to find Mr. Newman guilty, it had to find that he knew of a benefit received by the ultimate tipper,” among other assertions of error. Response at 2-3. He expects that his appeal may be decided in the first half of 2014, which could occur before an Initial Decision is due in this proceeding on May 22, 2014.<sup>6</sup> Id. at 3-4.

Newman does not agree with the Division's characterization of the facts in its Memorandum or that his actions were egregious, intentional, and repeated. Id. at 1-2, 5. He also takes issue with the Division's statement that he failed to accept the wrongful nature of his conduct, stating that he would not contest this statement if interpreted to mean only that Newman has exercised his right to appeal his criminal conviction and continues to deny the allegations against him. Id. at 5.

### **Division's Reply**

The Division sees no sound reason for delaying the Initial Decision, citing Charles Phillip Elliott, 50 S.E.C. 1273, 1276 n.15 (1992), where the respondent in a follow-on proceeding argued that the Commission should withhold judgment pending his appeal; however, the Commission found no need to delay the administrative proceeding until the outcome of the appeal. Reply at 1.

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<sup>5</sup> Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

<sup>6</sup> The U.S. Postal Service “green card” returned to the Secretary shows that the OIP, sent to Newman on October 21, 2013, care of his counsel, Nathanson, was delivered on October 24, 2013. 17 C.F.R. § 141(a)(2)(i). The due date for an Initial Decision is therefore May 22, 2014.

## Conclusions

Section 203(f) of the Advisers Act permits the Commission to impose sanctions against Newman because: 1) he has been both a) convicted of securities fraud and conspiracy to commit securities fraud, and b) enjoined from violating the securities statutes, within ten years of issuance of the OIP; 2) at the time of his misconduct, he was associated with an investment adviser; and 3) for the reasons discussed below, it is the public interest to do so. 15 U.S.C. § 80b-3(e), (f). Such sanctions include censure, limiting his activities in the securities industry, suspension for up to twelve months, and a bar from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. 15 U.S.C. § 80b-3(f).

For purposes of this proceeding, the facts and findings of the criminal and civil proceedings are taken to be true, despite the pending appeal. As in Elliott, the focus of this proceeding is Newman's conviction and injunction and their public-interest implications.<sup>7</sup> See Elliott, 50 S.E.C. at 1276. A criminal conviction of one count of conspiracy to commit securities fraud and four counts of securities fraud shows egregious, wrongful behavior. Newman's sentence of fifty-four months in prison, followed by one year of supervised release, and the imposition of a \$1 million fine and \$737,724 in criminal forfeiture buttress the egregiousness of his actions. According to the Superseding Indictment in Newman, Newman's illegal conduct occurred from in or about 2008 through in or about 2009. Marcus Declaration, Exhibit 1. Also, the criminal conduct for which Newman was convicted requires scienter. 15 U.S.C. §§ 78j(b), 78ff; 18 U.S.C. § 371; see United States v. Feola, 420 U.S. 671, 686 (1975) (holding that in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the government must prove at least the degree of criminal intent necessary for the substantive offense); United States v. Vilar, 729 F.3d 62, 88-89 (2d Cir. 2013) (scienter is an element of the government's criminal case for securities fraud under Section 10(b) of the Exchange Act). The application of the Steadman factors leaves no doubt that it is in the public interest to bar Newman from further participation in the securities industry. See Bruce Paul, 48 S.E.C. 126, 128 (1985).

## Order

I GRANT the Division's Motion and ORDER that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Todd Newman is barred from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. 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. 17 C.F.R. § 201.111. If

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<sup>7</sup> Newman's criminal appeal does not warrant delaying the issuance of an Initial Decision. See Response at 3-4. If the statutory basis for the collateral bars is no longer present, the remedy is to petition the Commission for reconsideration of this action. See Jon Edelman, 52 S.E.C. 789, 790 (1996).

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 occur, the Initial Decision shall not become final as to that party. 17 C.F.R. § 201.360(b)(1).

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Brenda P. Murray  
Chief Administrative Law Judge