INITIAL DECISION RELEASE NO. 815
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16143

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

In the Matter of		
	:	INITIAL DECISION
KELLY BLACK-WHITE	:	June 17, 2015

APPEARANCES: Martin F. Healey for the Division of Enforcement, Securities and Exchange Commission

Kelly Black-White, *pro se*

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision (ID) concludes that Respondent Kelly Black-White (Respondent) violated the antifraud provisions of the federal securities laws. The ID orders her to cease and desist from further violations and imposes penny stock and officer and director bars.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on September 22, 2014, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act).

Respondent admitted to liability as to the violations of Exchange Act Section 10(b) and Rule 10b-5 charged in the OIP. Oral argument, following briefing, as to the appropriate sanctions, if any, was held on March 12, 2015. The briefing consisted of: Respondent's February 26, 2015, Oral Argument Brief, attaching exhibits, (Resp. Br.); the Division of Enforcement's (Division) March 2, 2015, Motion for Sanctions, attaching exhibits; and the Division's March 9, 2015, Reply Brief. Additional exhibits were admitted during the oral argument.[1] Official notice pursuant to 17 C.F.R. § 201.323 is taken of the docket report, the court's orders, and other documents in *United States v. Black-White*, No. 11-cr-10416 (D. Mass.), which involved the same events at issue in the instant

[1] Citations to the transcript of the oral argument will be noted as "Tr. __." Citations to exhibits offered by the Division and by Respondent will be noted as "Div. Ex. __" and "Resp. Ex. __," respectively.

proceeding. The findings and conclusions in this ID are based on the foregoing. All arguments and proposed findings and conclusions that are inconsistent with this ID were considered and rejected.

B. Allegations and Arguments of the Parties

The events at issue arise from a fraudulent scheme in which insiders of publicly-traded penny stock companies paid secret kickbacks to a purported corrupt hedge fund manager, who was actually an undercover Federal Bureau of Investigation (FBI) agent, in exchange for the agent's purchase of restricted stock of penny stock companies on behalf of his purported (and nonexistent) hedge fund. The OIP alleges that Respondent was involved in this scheme and that she was convicted, on her plea of guilty, of one count of conspiracy to commit securities fraud and eleven counts of wire fraud in *United States v. Black-White*.

II. FINDINGS OF FACT

Respondent was convicted, on her plea of guilty, of one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. §§ 1328, 1349, and eleven counts of wire fraud, in violation of 18 U.S.C. § 1343, in *United States v. Black-White*. *United States v. Black-White*, ECF No. 183. She was sentenced to twelve months and one day of imprisonment, followed by two years' supervised release and ordered to pay a $7,500 fine and to forfeit $6,050. *United States v. Black-White*, ECF Nos. 183, 183-1. Additionally, with reference to the allegations in the instant proceeding, Respondent admitted, on the record, that she violated Exchange Act Section 10(b) and Rule 10b-5. Tr. 4-5. Concerning sanctions, she agreed to the imposition of a cease-and-desist order. Resp. Br. at 2; Tr. 14.

In *United States v. Black-White*, a change of plea hearing (Plea Hearing) was held on September 12, 2013, before U.S. District Judge Denise J. Casper. *United States v. Black-White*, ECF No. 82 at 1. At the Plea Hearing, Respondent was present with counsel and stated that she was satisfied with her counsel's advice and representation of her. *Id.* at 6. She pleaded guilty to one count of conspiracy to commit securities fraud and eleven counts of wire fraud, stating that she understood the charges against her, had fully discussed the charges with her counsel, and deliberately and willingly agreed to an agreement with the U.S. Attorney's Office. *Id.* at 5-8, 23-24. The charges to which Respondent pleaded guilty were connected to an FBI sting operation. *Id.* at 11, 19. During the Plea Hearing, Respondent acknowledged the veracity of the following factual summary provided by the prosecutor from the U.S. Attorney's Office:

> Kelly Black-White was in the business of assisting publicly traded companies and finding sources of funding, as well as promoting penny stocks. She also served on the board of directors of Symbollon Pharmaceuticals [(Symbollon)], a public company in the business of developing and marketing pharmaceuticals.
>
> The evidence would show that in or around March 2011, [Respondent] learned of a potential funding opportunity for public companies involving an individual who purported to be a representative of a major investment fund. Unbeknownst to [Respondent], the fund representative was, in fact, an undercover FBI agent,[2] and

[2] Hereinafter, the undersigned will refer to this person as the fictitious fund representative.

> the fund itself did not exist. [Respondent] subsequently learned that the fund representative was willing to invest fund money in companies in exchange for those companies each sending 50 percent of the money back to the fund representative, and learned that the fund was unaware of the money kicking back to the fund representative, including an executive with Symbollon, an executive with the company known as MicroHoldings [US, Inc. (Microholdings)],[3] Albert Reda,[4] an executive of a company known as 1st Global Financial, and executives of . . . ComCam [International, Inc. (ComCam)][5] so that each of them could enter the funding arrangement and the scheme as described.
>
> As a result of these meetings, these individuals agreed to participate on behalf of their companies in the scheme. These individuals received payments purportedly made from the fictitious fund and, as discussed, then made payments back to the sham consulting companies that the representative purportedly controlled. In each case, these kicked-back payments amounted to 50 percent of the money that the fund had paid to the companies. Specifically, . . . [Respondent] caused a series of wires constituting such payments to and from the companies. . . .
>
> . . . [A]s a result of her introduction of these executives, [Respondent] received a portion of the kickbacks that were given to the fund representative. These kickbacks were sent or the money from these kickbacks were sent to [Respondent] by interstate wire transfer from a bank account purportedly belonging to one of the fund representative's sham consulting companies. . . . [Respondent] caused wires constituting such payments to be sent to an account in the name of Premier Funding and Financial Consulting, which was an account that she controlled.
>
> If the government's case were to proceed to trial, the government's evidence would include, among other things, documentary evidence, including bank records evidencing the funding and kickbacks and the bogus documents created to conceal the transactions by the executives that [Respondent] referred; testimony of witnesses who dealt with [Respondent] with regard to this kickback arrangement and her referral of executives to the fund representative; recordings of telephone calls between [Respondent] and other witnesses who dealt with her with regard to the arrangement and her referral of executives to the fund representative; and finally, videotaped evidence of the meeting between [Respondent] and the fund representative.

Id. at 20-23 (formatting altered).

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[3] *See* Resp. Exs. 1, 2.

[4] In a separate Commission administrative proceeding, the undersigned entered a default judgment and sanctions against Albert Reda in connection with the same FBI sting operation. *Albert Reda*, Initial Decision Release No. 744, 2015 SEC LEXIS 571 (A.L.J. Feb. 18, 2015).

[5] *See* Resp. Ex. 3.

After the Plea Hearing, on February 5, 2014, a sentencing hearing was held before Judge Casper. *United States v. Black-White*, ECF No. 192 at 1. During it, Judge Casper noted that Respondent: had no prior criminal history; was accepting responsibility for her criminal actions[6]; engaged in the scheme, which was "a serious one," knowingly; benefited from the scheme by collecting finder's fees; and was less active and less culpable in the scheme than others also charged in connection with it. *Id.* at 6, 31-33. Judge Casper imposed a forfeiture judgment of $6,050, which the prosecution had represented to Judge Casper as reflecting the portion of kickbacks that came to Respondent. *Id.* at 8, 15. The undersigned finds that Respondent benefited from the kickback scheme in the amount of $6,050. *See also* Resp. Br. at 4 (acknowledging $4,500 wire transfer followed by $1,500 wire transfer). The judgment was entered against Respondent later in February 2014. *United States v. Black-White*, ECF Nos. 183, 183-1.

At the oral argument in the instant proceeding, Respondent provided context for her guilty plea and her acknowledgment at the Plea Hearing that she contributed to a kickback scheme relating to penny stocks. She stated that she was reluctant to accept a plea agreement but feared a lengthy prison sentence if she did not. Tr. 23-24. However, Respondent confirmed that she: was on Symbollon's Board of Directors at the time of the sting operation; introduced Albert Reda of 1st Global Financial to the fictitious fund representative; and introduced someone at ComCam to the fictitious fund representative. Resp. Br. at 1, 4, 6; Tr. 16, 19, 21-22. Concerning her acknowledgement that she contributed to a kickback scheme relating to penny stocks, she reported that neither the term "kickback" nor the term "scheme" was ever used in conversations with her in connection with the transactions underlying her guilty plea; she did not personally benefit from the transactions underlying her guilty plea; Symbollon's CEO introduced her to the fictitious fund representative and not vice versa; and she would not have participated in the transactions underlying her guilty plea if she had known they were illegal.[7] She also believed that the transactions underlying her guilty plea were disclosed in the penny stock companies' filings with the Commission or with state regulators.[8] Resp. Br. at 1-2, 4-5, 7; Tr. 15, 19-23. There were

[6] At oral argument in this proceeding, Respondent stated "I take responsibility, I do take responsibility"; "I did accept responsibility because I had to mitigate the circumstances"; "I've never done anything wrong in my life"; and "I truly do believe I didn't do anything wrong." Tr. 16, 18, 48. She added, "there's no chance that I would ever be before this court again." Tr. 43.

[7] Respondent maintains that she in fact consulted with securities lawyers regarding the legality of the transactions, and was told that they were legal. Resp. Br. at 1; Tr. 20-21. However, she did "realize[] something was wrong with [the] transaction even after being told it was legal by 5 different [securities lawyers]." Resp. Br. at 1.

[8] The filings did not explicitly disclose the kickback scheme as such. For example, Microholding's filings represent that "consulting" agreements were entered into with Watersedge Group, associated with the fictitious fund, Seafin Capital, staffed by the fictitious fund representative, John Kelly. Resp. Ex. 1, Attachments C-1, C-2, C-3 (Stock Purchase Agreements and "consulting services" agreements); Resp. Ex. 2 at 18; *see also* Resp. Ex. 4 (reflecting that FBI agent was using the name John Kelly). No genuine consulting relationship existed between Microholdings and Watersedge, of course. It is also notable that one of these Microholdings filings offered by Respondent corroborates a fact admitted by Respondent in *United States v. Black-White*: it says that Premier Media, controlled by Respondent, was compensated by Watersedge. Resp. Ex. 2 at 18; Resp. Ex. 5.

numerous phone conversations and meetings in which Respondent did *not* participate that were part of the scheme underlying her guilty plea. Resp. Br. at 1-2, 4-5; Tr. 17, 27, 35, 48. Respondent also believes that the FBI "did not understand the penny stock market" and that transactions with a net discount of fifty percent are typical in the industry. Resp. Br. at 1, 4; Tr. 16, 29-32.

Respondent's occupation involves providing investor marketing services to penny stock companies. In this proceeding, Respondent provided letters, originally directed to Judge Casper, penned by business colleagues vouching for her good character.[9] *See* Resp. Br., Letters by Rima, Cockburn. One of these letters describes Respondent as an investor-relations professional. Resp. Br., Letter by Cockburn. Also, Respondent offered into evidence a folder of marketing materials for her business. Resp. Ex. 5. That folder includes a flyer advertising that her business handles "investor relations," among other things, for "both public and private companies." *Id.* Finally, ComCam, to which Respondent referred the fictitious fund representative, is a penny stock company; and at oral argument, Respondent admitted that she works with penny stock companies. Resp. Ex. 3 at 24; Tr. 16. For these reasons, and also because of the facts underlying her guilty plea, the undersigned finds that Respondent's occupation relates to promoting and marketing penny stock companies.

III. CONCLUSIONS OF LAW

Respondent has admitted to liability for the legal violations alleged in the OIP: that she willfully violated Exchange Act Section 10(b) and Rule 10b-5, which prohibit fraudulent conduct in connection with the purchase or sale of securities. Further, the facts described above establish these violations (and will be considered with the evidence and arguments in this proceeding to determine the issue of sanctions[10]). Thus, it is concluded that Respondent willfully violated Exchange Act Section 10(b) and Rule 10b-5.

IV. SANCTIONS

The Division requests: a cease-and-desist order pursuant to Section 21C(a) of the Exchange Act, 15 U.S.C. § 78u-3(a); a penny stock bar pursuant to Section 15(b)(6) of the Exchange Act, 15 U.S.C. § 78*o*(b)(6); and a permanent officer and director bar pursuant to Section 21C(f) of the Exchange Act, 15 U.S.C. § 78u-3(f). Respondent has consented to a cease-and-desist order; accordingly, she will be ordered to cease and desist from violations of the antifraud provisions. Additionally, as discussed below, penny stock and officer and director bars will be imposed.

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[9] One letter also pertained to the negative effect any punishment on Respondent would have on her, her family, and others. *See* Resp. Br., Letter by Cockburn; *see also* Tr. 25-26.

[10] The undersigned does not understand Respondent to be backing away from her guilty plea and acknowledgement of facts in *United States v. Black-White*. In any event, it is well established that the Commission does not permit criminal convictions to be collaterally attacked in its administrative proceedings. *See Ira William Scott*, Advisers Act of 1940 Release No. 1752, 1998 SEC LEXIS 1957, at *8-9 (Sept. 15, 1998); *William F. Lincoln*, Exchange Act Release No. 39629, 1998 SEC LEXIS 193, at *7-8 (Feb. 12, 1998).

A. Sanction Considerations

In determining sanctions, the Commission considers such factors as:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *4-5 (July 25, 2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35-36 & n.46 (Jan. 31, 2006). As the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. *See Christopher A. Lowry*, Investment Company Act of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. *See Berko v. SEC*, 316 F.2d 137, 141 (2d Cir. 1963); *Leo Glassman*, Exchange Act Release No. 11929, 1975 SEC LEXIS 111, at *7 (Dec. 16, 1975).

B. Sanctions

1. Penny Stock Bar

Section 15(b)(6) of the Exchange Act authorizes the Commission to issue a penny stock bar against a person who was participating in an offering of penny stock[11] at the time of misconduct if a bar is in the public interest. The *Steadman* factors are used to assess the public interest. *Vladlen "Larry" Vindman*, Securities Act of 1933 Release No. 8679, 2006 WL 985308, at *11 (Apr. 14, 2006)

Respondent's conduct was egregious since it violated the antifraud provisions. The kickback scheme in which she participated was, as characterized by Judge Casper, "a serious one." The violations were relatively recent, in 2011. The conduct was recurrent as Respondent referred multiple penny stock companies to the fictitious fund representatives. The conduct involved at least a reckless degree of scienter, and there is a lack of reliable assurances against future violations and recognition of the wrongful nature of the conduct. While Respondent had qualms that

[11] The term "person participating in an offering of penny stock" includes any person acting as a promoter, finder, consultant, or agent, who engages in activities with an 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. *Harold F. Harris*, Exchange Act Release No. 53122-A, 2006 WL 89510, at *4 (Jan. 13, 2006).

conversations with attorneys did not dispel, this did not dissuade her from participating in the scheme.[12] Respondent's belief that sanitized disclosures (as payments for consulting rather than kickbacks) of the transactions immunized them from illegality shows that she does not fully recognize the wrongful nature of her conduct. Similarly, her reliance on not having heard the terms "kickback" or "scheme" suggests that she did not recognize the conduct as such and might be at risk for a repetition. However sincere, her assurance against future violations is undercut by her failure to recognize the illegality of the scheme in which she was entangled. Since the conduct occurred within an FBI sting operation, no actual harm to investors and the markets occurred, but such conduct in market transactions would harm the marketplace because of its dishonest nature.[13]

Respondent is in the business of promoting and marketing penny stock companies. Her occupation presents opportunities for future illegal conduct in the securities industry, and weighs in favor of a penny stock bar.

Combined with other sanctions ordered, a penny stock bar is in the public interest and an appropriate deterrent. The violations involved penny stocks,[14] with Respondent acting as a promoter or agent of penny stock issuers.

2. Officer and Director Bar

Exchange Act Section 21C(f) authorizes a bar against a respondent who has violated Exchange Act Section 10(b) from acting as an officer or director of any issuer with a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act "if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer." The so-called *Patel* factors will be considered

[12] Insofar as Respondent states that securities attorneys told her that the transactions underlying her criminal conviction were legal, that does not establish an advice of counsel defense. In considering whether to credit an advice of counsel defense, the Commission considers four elements: "that the person made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice." *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *38 (Nov. 14, 2008) (footnote citing precedent omitted), *pet. denied*, 347 F. App'x 692 (2d Cir. 2009), *cert denied*, 559 U.S. 1102 (2010). Respondent, however, has not presented evidence that a complete disclosure of the pertinent facts was made to legal counsel; nor has she established that she sought advice on the legality of either her referrals of micro-cap companies to the fund representative or her receipt of compensation for orchestrating the referrals.

[13] The foregoing evaluation of Respondent's conduct also supports the imposition of a cease-and-desist order, to which she has consented.

[14] Respondent's conviction for wire fraud is itself a basis for a penny stock bar. Respondent has been convicted "within 10 years of the commencement of [this proceeding]" of a felony that involves 18 U.S.C. § 1343 within the meaning of Sections 15(b)(4)(B)(iv) and 15(b)(6)(A)(ii) of the Exchange Act.

in addition to the *Steadman* factors in evaluating the appropriateness of this sanction.[15] *Compare SEC v. Alliance Transcription Servs., Inc.*, No. 08-cv-1464, 2010 WL 483792, at *2 (D. Ariz. Feb. 8, 2010); *SEC v. Abellan*, 674 F. Supp. 2d 1213, 1223 (W.D. Wash. 2009); *with SEC v. Bakosky*, 716 F.3d 45, 47-49 (2d Cir. 2013); *SEC v. Metcalf*, No. 11-cv-493, 2012 WL 5519358, at *4 (S.D.N.Y. Nov. 13, 2012); *SEC v. Levine*, 517 F. Supp. 2d 121, 144-45 (D.D.C. 2007), *aff'd*, 279 F. App'x 6 (D.C. Cir. 2008).

As discussed above, Respondent violated Exchange Act Section 10(b) while acting with scienter and awareness of the deceptive and manipulative nature of her conduct, and her occupation presents the potential for recurrence. At the time of the scheme, Respondent was serving as a director of Symbollon, one of companies to which she referred the fictitious fund representative, and played a significant role in the scheme. She also had an economic stake in the scheme as she or her company received portions totaling $6,500 of the kickbacks given to the fictitious fund representative. Without an officer and director bar, Respondent would be free to assume director or officer roles in the future. Thus, it is appropriate and in the public interest to impose a permanent officer and director bar against Respondent. She will be barred from acting as an officer or director of any issuer with a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

I. RECORD CERTIFICATION

Pursuant to 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the Record Index issued by the Secretary of the Commission on April 6, 2015.

II. ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED that, pursuant to Section 21C of the Securities Exchange Act of 1934, KELLY BLACK-WHITE CEASE AND DESIST from committing or causing any violations or future violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934.

IT IS FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, KELLY BLACK-WHITE is BARRED from participating in an offering of penny stock.[16]

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[15] The *Patel* factors, which overlap with the *Steadman* factors, are: (1) the egregiousness of the underlying securities law violation; (2) recidivism; (3) the defendant's role or position in the fraud; (4) degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood of recurrence. *SEC v. Bankosky*, 716 F.3d 45, 48 (2d Cir. 2013); *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995).

[16] Thus, she is barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging 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, pursuant to Section 15(b)(6)(A), (C) of the Securities Exchange Act of 1934.

IT IS FURTHER ORDERED that, pursuant to Section 21C(f) of the Exchange Act, KELLY BLACK-WHITE is BARRED from acting as an officer or director of any issuer that has a class of securities registered with the Commission pursuant to Section 12 of the Securities Exchange Act of 1934 or that is required to file reports pursuant to Section 15(d) of the Securities Exchange Act of 1934.

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 a motion to correct a manifest error of fact is filed by a party, then a 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 a 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.

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Carol Fox Foelak
Administrative Law Judge