INITIAL DECISION RELEASE NO. 1118
ADMINISTRATIVE PROCEEDING
FILE NO. 3-17747

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

In the Matter of	:	INITIAL DECISION OF DEFAULT
	:	March 23, 2017
BRIAN C. ROSE	:	

APPEARANCES: Jason M. Casey and Polly Atkinson for the Division of Enforcement, Securities and Exchange Commission

BEFORE: Cameron Elliot, Administrative Law Judge

Summary

This initial decision grants the Division of Enforcement's Motion for Summary Disposition and bars Respondent Brian C. Rose 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, collateral bar).

Procedural Background

On December 27, 2016, the Securities and Exchange Commission issued an order instituting administrative proceedings (OIP) against Rose, pursuant to Section 15(b) of the Securities Exchange Act of 1934. The OIP alleges that in *United States v. Brian C. Rose*, No. 2:14-CR-76 (E.D. Tenn.) (*Rose*), he pleaded guilty to one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343, and 1349. OIP at 2; *see* DX 1.

Rose was served with the OIP on January 3, 2017, making January 26 the deadline for his answer. *Brian C. Rose*, Admin. Proc. Rulings Release No. 4559, 2017 SEC LEXIS 282 (ALJ Jan. 27, 2017). After he failed to file an answer by the deadline, I ordered him to show cause why the proceeding should not be determined on default. *Id.* I also set a briefing schedule for the Division to file a dispositive motion seeking a finding of default and requesting sanctions. *Id.* On March 9, 2017, I found Rose to be in default for failing to file an answer, respond to the order to show cause, or otherwise defend this proceeding. *Brian C. Rose*, Admin. Proc. Rulings Release No. 4666, 2017 SEC LEXIS 714.

The Division submitted its motion on February 24, 2017, including four exhibits: Rose's plea agreement (DX 1); the judgment against Rose (DX 2); Rose's testimony in a criminal case against one of Rose's associates (DX 3); and a private placement memorandum (PPM) for an investment opportunity offered by Rose's company (DX 4).

When I found Rose in default, I noted that I would construe the Division's motion as being a motion for sanctions. *Brian C. Rose*, 2017 SEC LEXIS 714 at *1, n.1. Because Rose is in default, I deem the OIP's allegations to be true and determine this proceeding upon consideration of the record. *See* 17 C.F.R. § 201.155(a). The findings and conclusions in this initial decision are based on the record and on facts officially noticed pursuant to Rule 323, including the proceedings, docket sheet, and record in *Rose*. *See* 17 C.F.R. § 201.323. All filings and all documents and exhibits of record have been fully reviewed and carefully considered. All arguments and proposed findings and conclusions that are inconsistent with this initial decision have been considered and rejected.

Findings of Fact

Rose and others created New Century Coal Inc. in 2011, buying an older Wyoming "shelf" corporation and domiciling it in Nevada, to make New Century Coal appear older than it actually was. DX 3 at 692; *see id.* at 669 (Rose describing the benefits of what he calls "shelf companies": "[S]omeone will pay for an aged company that's four or five years old to make it look like the business has been around . . . ."). From inception through June 17, 2014, Rose was a "co-developer, co-leader, and co-decision-maker" for the company. DX 1 at 2. Rose and his associates used New Century Coal as a vehicle to solicit investors for numerous limited liability partnerships in individual coal mines, for which New Century Coal would act as the mine operator. *Id.* Rose used United States mail and other interstate carriers to send documents, including private placement memoranda, investor suitability questionnaires, a mining development agreement and operating contract, and a subscription agreement, to potential investors. *Id.* at 2-3. Rose diverted investor funds to pay his personal expenses and staff, and to other uses not related to coal-mining operations. *Id.* at 3. For example, Rose admitted to spending the funds he raised "frivolously," including on a "trip to New Orleans to the casino and the [NCAA] final four [basketball tournament]." DX 3 at 675-76. Rose admitted to acting "with the intent to defraud investors and willfully participat[ing] in the conspiracy to commit mail fraud and wire fraud with knowledge of its fraudulent nature." DX 1 at 3.

In June 2014, Rose and eight others were indicted on charges of wire fraud, conspiracy to commit wire and mail fraud, and conspiracy to launder monetary instruments. Indictment at 1-22, 34-45, *Rose* (June 10, 2014), ECF No. 3. Rose pleaded guilty to count one of the indictment, conspiracy to commit wire and mail fraud. DX 1 at 1 (ECF No. 150). Among other facts, Rose stipulated to defrauding more than ten victims, at least one of whom was vulnerable under U.S.S.G. § 3A1.1(b)(1). *Id.* at 5; *see* U.S.S.G § 3A1.1, cmt. n.2 ("'vulnerable victim' means a person . . . who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct"). He later testified that he solicited investments from "probably 40" individuals in a single mining partnership. DX 3 at 622. The district court sentenced Rose to 108 months in prison followed by three years of supervised release and ordered him to pay restitution of $14,092,205.04, jointly and severally with his co-defendants. DX 2 at 1-9 (ECF Nos. 550, 605).

Conclusions of Law

Exchange Act Section 15(b)(6) authorizes the Commission to impose a collateral bar on Rose if: (1) at the time of the alleged misconduct, he was associated with a broker or dealer; (2) he has been convicted of an offense specified in Exchange Act Section 15(b)(4)(B) within ten years of the OIP; and (3) the sanction is in the public interest. 15 U.S.C. § 78*o*(b)(4)(B), (b)(6)(A)(ii). Rose pleaded guilty to conspiring to commit wire and mail fraud in violation of 18 U.S.C. §§ 1341, 1343, and 1349, which qualifies as an offense specified in Exchange Act Section 15(b)(4)(B)(iv). DX 1 at 1; *see Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *2 & n.3 (Mar. 7, 2014). Thus, if Rose was associated with a broker or dealer at the time of the misconduct, sanctions will be imposed if they are in the public interest.

The OIP alleges that Rose acted as an unregistered broker-dealer in connection with the offer and sale of securities related to New Century Coal. OIP at 1. Under the Exchange Act, a broker is one "engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). Two aspects of that definition—"transactions in securities" and "engaged in the business"—require further analysis.

"Transactions in Securities"

The OIP alleges that the limited liability partnerships Rose sold were securities, and I have deemed this to be true because Rose is in default. *See* OIP at 1. Additionally, the Division argues that the investments Rose marketed and sold were "securities," as that term is defined in the Exchange Act, because they were "investment contracts." 15 U.S.C. § 78c(a)(10); Mot. at 4-6.[1] The Supreme Court stated that the "test" for whether an arrangement is an investment contract as being "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946); *see also Anthony H. Barkate*, 57 S.E.C. 488, 495 n.13 (2004) (definition of investment contract requires "a contract or scheme for the 'placing of capital or laying out of money in a way intended to secure income or profit from its employment.'" (quoting *SEC v. Edwards*, 540 U.S. 389, 394 (2004))). Profits are generated solely by noninvestors when "the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973); *see United Hous. Found. v. Forman*, 421 U.S. 837, 852-53 (1975). Even where there is language in organizing documents suggesting that investors *could* play a role in determining their return by taking a direct hand in the enterprise, courts will "consider the reality of the transaction" to determine whether there actually is any "'reasonable expectation' of investor control." *United States v. Leonard*, 529 F.3d 83, 90 (2d Cir. 2008) (quoting *SEC v. Aqua-Sonic Prods. Corp.*, 687 F.2d 577, 585 (2d Cir. 1982)); *see SEC v. Shields*, 744 F.3d 633, 647 (10th Cir. 2014) (holding Commission plausibly alleged that investors in mining joint venture "lacked meaningful control over their interests").

[1] Although Rose testified about, and pleaded guilty to, selling two million dollars' worth of stock in New Century Coal, DX 1 at 3; DX 3 at 638-41, 661-62, that activity was not charged in the OIP.

Rose's New Century Coal operation satisfies this test. Rose testified that he "put an offering document together called a Private Placement Memorandum . . . and began to offer it, make it available to . . . potential investors over the telephone and solicit their investment." DX 3 at 607-08; *see* DX 4 (PPM for Thacklight Coal Mine LLP). The long term plan for New Century Coal was to "cash out" through an initial public offering, but in the short term, Rose testified that the strategy was to offer:

> investments in different partnerships on a mine by mine, property by property basis. And so we began doing an LLP for each mine and offering say 20 to 25 percent of the property incrementally in units. Each unit would own somewhere between one to two percent of the mine for fifty to one hundred thousand dollars. This was a way to bring capital to put the mines into production but also to cover everybody's living costs and to cover our own expenses in the interim . . . . So I and Mr. Sackett devised an offering document to solicit these people. Then we would all keep a commission. And I generally, a third goes to mine development costs, a third goes to overhead and operating costs, then I would keep a third personally.

Id. at 636-37. The Thacklight PPM informed potential investors that New Century Coal was offering forty "Units of participation in the Partnership" in the Thacklight mine, equivalent to a thirty percent mining interest, at eighty thousand dollars per unit. DX 4 at 6, 8. After the investors in the partnership were paid back, New Century Coal would take on a ten percent interest in the partnership. *Id.* The PPM also told investors that "the only source of income for the Partnership will be operating revenues from the sale of Coal." *Id.* at 9.

New Century Coal, as the "Mining Partnership Operator," had "the authority and responsibility for the management and control of all aspects of the Partnership's business and operations." *Id.* at 6, 34; *see id.*, Ex. C § 12.1; *id.*, Ex. E at 1 (turnkey mining development agreement and mine operating contract). Although the partnership agreement purported to give investors "a voice" and the ability to "take part in the day-to-day management of the business," *id.*, Ex. C § 12.1(a), the division of power between the managing partner (New Century Coal) and the investors shows this participation was illusory. New Century Coal was, among other things, empowered by the partnership agreement to buy and sell "any or all assets owned by the Partnership," to "manage the property," and to "employ persons at the expense of the Partnership." *Id.*, Ex. C § 12.1(b)(i), (iii), and (iv). By contrast, investors' enumerated powers bearing on the management of the partnership were limited to "elect[ing] a successor Manager"—but without the power to remove the manager—and "amend[ing] th[e] Agreement"—but "no amendment may be made in derogation or diminution of the rights, powers and privileges of the Manager unless the Manager consents thereto." *Id.*, Ex. C § 12.2(a)(i)-(ii). And even if New Century Coal were somehow replaced as managing partner, it would remain the mining operator under the turnkey agreement. *See id.*, Ex. E ¶¶ 7-9; *see also Shields*, 744 F.3d at 646-47 (investors' control of mining joint venture was limited despite "right to remove" managing partner, because "investors were locked into turnkey drilling and completion contracts with [the managing partner] as the contractor"). Rose's admission that the mining operations were a sham, DX 1 at 3; DX 3 at 664-65, only confirms that investors had no

realistic possibility of working to increase Thacklight's revenues—and, in turn, their profits. *See Shields*, 744 F.3d at 646 ("post-investment conduct" can "shed light" on parties' intent at time of investment). Thus, Rose and New Century Coal created a scheme whereby investors provided capital "to secure income or profit from its employment" "solely from the efforts of others."

"Engaged in the Business"

The Exchange Act definition of broker connotes "a certain regularity of participation in securities transactions at key points in the chain of distribution." *Mass. Fin. Servs., Inc. v. Sec. Inv'r Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd*, 545 F.2d 754 (1st Cir. 1976). According to the Commission, the following activities are indicative of being a broker: "holding oneself out as a broker-dealer, recruiting or soliciting potential investors, handling client funds and securities, negotiating with issuers, and receiving transaction-based compensation," with transaction-based compensation being a "hallmark" of being a broker. *James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 SEC LEXIS 481, at *14 (Feb. 15, 2017). "[R]ecruiting or soliciting potential investors" in more than "a few isolated transactions" is enough to qualify a person as a broker, even if the person in question is unregistered. *Anthony Fields, CPA*, Securities Act of 1933 Release No. 9727, 2015 SEC LEXIS 662, at *75 (Feb. 20, 2015) (quoting *Gordon Wesley Sodorff, Jr.*, Exchange Act Release No. 31134, 1992 SEC LEXIS 2190, at *15 (Sept. 2, 1992)); *see SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005) (being "regularly involved in communications with and recruitment of investors for the purchase of securities," is strongly indicative of acting as a broker).

Rose, through his recurrent solicitation of investors and receipt of commissions, was acting as an unregistered broker during the New Century Coal operation. He admitted in his plea agreement that he "solicited investors . . . based upon the promise of planned development of 'Blue Gem' coal." DX 1 at 2. He promoted New Century Coal "as an issuer/sponsor of partnerships with individual investors for the purpose of placing investors in limited liability partnerships in specific coal mine operations." *Id.* For the Thacklight mine, Rose and others "continued to solicit investments . . . for the next four, five, six months," after the initial sale in September 2011. DX 3 at 619. Rose estimated that he raised $1.8 million from forty investors for the Thacklight mine. *Id.* at 622. And that was just one of the mine properties. The record does not indicate how many investors were taken in by Rose, but the fourteen million dollars he was ordered to pay in restitution is nearly eight times what he raised for the Thacklight property. DX 2 at 9. In addition, Rose and his associates took commissions from their sales of interests in the mines. DX 3 at 637 ("So I and [an associate] devised an offering document to solicit these people. Then we would all keep a commission . . . . I would keep a third personally.").

Because Rose met the definition of a broker, he was also a person, "at the time of the alleged misconduct, who was associated . . . with a broker or dealer," for purposes of Exchange Act Section 15(b)(6)(A). 15 U.S.C. § 78*o*(b)(6)(A); *see Tagliaferri*, 2017 SEC LEXIS 481, at *17-18 ("[T]o hold that Tagliaferri was not associated with a broker simply because he declined to register would prevent the Commission from barring persons who themselves meet the definition of a broker but who are not otherwise associated with a registered brokerage—something that would be inconsistent with the Exchange Act's purpose of protecting investors.").

Sanctions

The Division seeks a collateral bar against Rose. Div. Mot. at 9-10. The appropriateness of any remedial sanction in this proceeding is guided by the public interest factors set forth in *Steadman v. SEC*, namely: the egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations. 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009). "[T]he Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive." *Kornman*, 2009 SEC LEXIS 367, at *22 (alteration in original). The Commission has also considered the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 58 S.E.C. 1197, 1217-18 & n.46 (2006); *Marshall E. Melton*, Exchange Act Release No. 48228, 56 S.E.C. 695, 698 (2003). Industry bars have long been considered effective deterrence. *See Guy P. Riordan*, Exchange Act Release No. 61153, 2009 SEC LEXIS 4166, at *81 & n.107 (Dec. 11, 2009) (collecting cases), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010).

In *Ross Mandell*, the Commission directed that before imposing an industry-wide bar, an administrative law judge must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities," and that the law judge's decision "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." 2014 SEC LEXIS 849, at *7-8 (internal quotation marks omitted). After engaging in such an analysis, I have determined that it is appropriate and in the public interest to collaterally bar Rose from participation in the securities industry to the fullest extent possible.

Here, the *Steadman* factors weigh in favor of imposing the full collateral bar.

Egregious and Recurrent. Rose's conduct was both egregious and recurrent. For three years, Rose was a "co-developer, co-leader, and co-decision-maker" for a scheme that raised more than fourteen million dollars from at least forty investors. DX 1 at 2, 5; DX 2 at 9; DX 3 at 622. Rose testified to numerous misrepresentations he made to investors:

> When marketed to the individual investors we misrepresented and it was fraudulent to state who the actual ownership and controllers were. Who the president was, it wasn't [Rose's associates], it was myself. The ownership of leases, Thacklight, we didn't own it. Meadow Creek, we oversold it. We sold more interest than the partnership owned. We misrepresented the annual rate of return based upon production numbers that were not feasible. We misrepresented and lied about the year in which New Century Coal was formed, stating that it was a 2006 company. In fact it was formed in 2011 and was a shell company that was purchased and

> formed in 2006. We lied about the use of proceeds and how the money would be spent. We misrepresented ourselves, who we were as individuals. We made representations about delays that were nothing more than us stalling, trying to buy time.

DX 3 at 663. Indeed, Rose formerly operated a NASCAR racing team, and because investors may have known Rose from his racing days, he went so far as to adopt an alias to perpetrate parts of the fraud. *Id.* at 607, 627, 641, 650, 709. Not only did he assume an alias, he later "had an attorney file a use of name" for that alias as "a way to legitimize and try to minimize the exposure to [him]self for committing the fraud." *Id.* at 685.

Scienter. Rose's degree of scienter was high. He admitted in his plea agreement that, "[a]t all relevant times, [he] acted with the intent to defraud investors and willfully participated in the conspiracy to commit mail fraud and wire fraud with knowledge of its fraudulent nature." DX 1 at 3. Rose's testimony about all of the misrepresentations it took to perpetuate the fraud, including his use of an alias, provides ample support for that admission. In fact, Rose testified that the fraudulent conspiracy was designed specifically "to skirt the edge of the securities laws in each state" and avoid the "notice" of "the SEC or any [state] attorney general." DX 3 at 670-71; *see Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 SEC LEXIS, at *33-34 (Sept. 20, 2012) (giving weight to efforts to conceal improper activities in scienter analysis).

Recognition of Wrongful Conduct and Assurances Against Future Violations. Rose's guilty plea provides some evidence that he recognizes the wrongful nature of his conduct. Moreover, during his testimony for the prosecution in a case against one of his associates, Rose expressed remorse for his actions, although much of that testimony was about the repercussions of Rose's actions on *his* life, not the harm he caused investors:

> The past 21 months has been the worst experience anyone could ever go through. I've lost everything in life. The one thing that you think you might be able to hold onto is some integrity or truthfulness to your life. In a lot of regards I've lost that. And this is about closure for me and moving forward with my life and being able to get back to being a father someday. It's about the victims, the investors, the victims now being able to have closure in their life and being able to move forward. This has been twenty something months and I have every motivation to myself to get it off my chest and be able to sleep at night and not have the nightmares and not have all the problems. I just want it over with. I want it over with for everyone who is involved. I've come to be as open and truthful as a person can be on any question about anything.

DX 3 at 672-73; *see also id.* at 725-26 ("I've read every victim statement that's been entered into this Court, every victim impact statement. I see how it's affected their life. I would rather not see my friends and people I value and know what grief and heart ache it's done to their family and the hurt. It has been the worst 21 months of my life.").

However, on cross-examination he conceded that he began to cooperate with the prosecution only after his attorney advised him that, with regard to sentencing, "the biggest break in everything that I could get was the three points from the acceptance of responsibility." *Id.* at 714. This admission undermines the sincerity of Rose's acceptance of responsibility.

Although "[c]ourts have held that the existence of a past violation, without more, is not a sufficient basis for imposing a bar[,] . . . 'the existence of a violation raises an inference that it will be repeated.'" *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *23 n.50 (July 26, 2013) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)) (alteration in internal quotation omitted). Further, he has not appeared in *this* proceeding to express remorse or offer an assurance against future misconduct.

Opportunities for Future Violations. Although Rose is incarcerated, upon release he may revert to similar misconduct. Indeed, the Commission does not view a "criminal sentence as mitigative of the appropriate sanction to be imposed in the public interest." *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *27 (Jan. 14, 2011). Further, even if a bar does not deter Rose, it is still in the public interest, as it may warn potential investors of the danger involved in giving their money to Rose.

Some of the other factors the Commission has considered in reviewing industry bars also favor imposing a bar on Rose. The violation is relatively recent, as Rose was defrauding investors up until his indictment in June 2014. Also, the degree of harm to investors—more than fourteen million dollars—was significant.

In conclusion, it is in the public interest to impose a permanent collateral bar against Rose.

Order

It is ORDERED that, pursuant to Rule 250(b) of the Securities and Exchange Commission's Rules of Practice, the Division of Enforcement's Motion for Summary Disposition against Respondent Brian C. Rose is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Brian C. Rose is 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, Brian C. Rose 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. *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. *See* 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed, then any 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. 17 C.F.R. § 201.360(d). 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.

Rose may move to set aside the default in this case. Rule 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.*

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Cameron Elliot
Administrative Law Judge