INITIAL DECISION RELEASE NO. 1163
ADMINISTRATIVE PROCEEDING
FILE NO. 3-17676

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

In the Matter of	:	
	:	INITIAL DECISION AS TO
OTC GLOBAL PARTNERS, LLC and	:	RAIMUNDO DIAS[1]
RAIMUNDO DIAS	:	August 21, 2017

APPEARANCES: Russell Koonin for the Division of Enforcement, Securities and Exchange Commission

James D. Sallah and Aiman S. Farooq of Sallah Astarita & Cox, LLC, for Respondents OTC Global Partners, LLC, and Raimundo Dias

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision (ID) denies the request of the Division of Enforcement to add a penny stock bar to the sanctions previously imposed on Raimundo Dias for his violation of Sections 5(a) and 5(c) of the Securities Act of 1933 (Securities Act) through the sale of unregistered stock of a company.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on November 14, 2016, pursuant to Section 8A of the Securities Act and Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act).

The OIP incorporated a settlement, in which the Commission concluded that OTC Global Partners, LLC, and Raimundo Dias willfully violated the registration provisions of the Securities

[1] This proceeding has ended as to OTC Global Partners, LLC. *See OTC Glob. Partners, LLC*, Securities Act Release No. 10254, 2016 SEC LEXIS 4225 (Nov. 14, 2016).

Act, Sections 5(a) and 5(c); the Commission ordered them to cease and desist and to pay, jointly and severally, disgorgement of $39,241, prejudgment interest of $3,258.17, and a civil money penalty of $45,000. OIP at 2. The remaining question for determination is whether a penny stock bar should be imposed on Dias. In this further proceeding, the allegations of the OIP are deemed true, Dias is precluded from arguing that he did not violate Securities Act Sections 5(a) and 5(c), and the undersigned may determine the issues "on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence." OIP at 3. Familiarity with the findings of fact and conclusions of law in the OIP is assumed for the purpose of this ID.

As agreed on by the parties, the Division of Enforcement filed a motion for summary disposition; Dias, an opposition; and the Division, a reply. The findings and conclusions in this ID are based on the record, including those filings and the OIP. Additionally, official notice has been taken of the Commission's public official records contained in EDGAR, pursuant to 17 C.F.R. § 201.323. Preponderance of the evidence was applied as the standard of proof. *Steadman v. SEC*, 450 U.S. 91, 97-104 (1981). All arguments and proposed findings and conclusions that are inconsistent with this ID were considered and rejected.

B. Allegations and Arguments of the Parties

Respondents' violation of Securities Act Sections 5(a) and 5(c) arose from the following: in March 2013, a former affiliate of "Issuer A" assigned to Respondents convertible debt that they converted into free-trading shares that they sold into the market; no registration statement was filed as to the shares; and no exemption from registration applied. OIP at 2-3.

The Division requests that a penny stock bar be imposed, which Dias opposes. As mitigation, he argues that he conducted due diligence that led him to believe that the individual from whom he acquired his interest in Issuer A had not been an affiliate for at least one year previously. Further, Dias argues that his profits, which he has agreed to disgorge along with a civil penalty, were minimal; that he has no prior disciplinary record; and that the misconduct is unlikely to recur.

II. FINDINGS OF FACT

For purposes of this ID, the findings and facts set forth in the OIP are deemed true and incorporated herein: Dias is the sole manager of OTC, which provided investor relations services to small-cap publicly traded companies in the past. Dias participated in an offering of a penny stock. In March 2013, a former affiliate of Issuer A,[2] "Shareholder A,"[3] assigned a

[2] The OIP does not identify Issuer A. However, Respondent's filing identifies Issuer A as Embark Holdings, Inc., CIK No. 1005502, and successor companies (Embark). Opp., Exs. A, B. Embark filed a Form 15 Notice of Termination of Registration on March 20, 2013. Official notice.

[3] The OIP does not identify Shareholder A. However, Respondent's filing identifies Shareholder A as Larry Weinstein. Opp., Ex. A at OTC Global 000164. Embark's July 19, 2011, Form 8-K

portion of a convertible note to Respondents in exchange for $3,334; from March 2013 to March 2014, Respondents converted the note assignment into millions of free-trading Issuer A shares that they sold into the market for total proceeds of $39,241; no registration statement was filed as to any of the shares; and no exemption from registration applied to the transactions. Thus, Respondents willfully violated Sections 5(a) and 5(c) of the Securities Act.

Dias entered the securities industry in 1997 and has no previous disciplinary record. Opp. at 5. Prior to the purchase of debt from Shareholder A, Dias reviewed Issuer A's filings with the Commission; the filings stated that Shareholder A, who had been an officer of Issuer A, had resigned from the company in 2011. Opp. at 2. He studied opinion letters of Issuer A's counsel, Joseph L. Pittera,[4] dated December 9, 2013, February 18, 2014, and March 6, 2014, and directed to Issuer A's transfer agent, which opined that the shares at issue were freely tradable and that stock certificates could be issued without a restrictive legend. Opp. at 2, Ex. A. He obtained a letter dated March 8, 2013, from Issuer A's CEO, Michael Cummings, which stated that the original debt and related stock and conversion rights was greater than twelve months old and subject to assignment to Dias and OTC by a non-affiliate. Opp. at 2, Ex. B.

III. CONCLUSIONS OF LAW

As determined in the OIP, Dias willfully violated Securities Act Sections 5(a) and 5(c).

IV. SANCTIONS

The Division requests a permanent penny stock bar pursuant to Section 15(b)(6) of the Exchange Act, 15 U.S.C. § 78*o*(b)(6).[5] However, it acknowledges that a bar with a right to

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reported that on July 14, 2011, Weinstein resigned from his position as Executive Vice President and Michael Cummings was appointed to the position of CEO/President and Chairman/Secretary of the Board of Directors. Official notice, Form 8-K at 3. The March 8, 2013, issuer representation letter to OTC was signed by Cummings as CEO of Embark. Opp., Ex. B.

[4] Subsequently, on May 31, 2016, Pittera was adjudicated as having violated Securities Act Sections 5(a) and 5(c) through violative opinion letters; the court imposed a penny stock bar on him, enjoined him from violating those provisions, and ordered him to pay disgorgement of $5,000 plus prejudgment interest of $823.29 and a second-tier civil penalty of $50,000. *SEC v. OTC Capital Partners, LLC*, No. 16-cv-20270, ECF Nos. 1, 21, 27 (S.D. Fla.). Thereafter, Pittera was suspended from appearing or practicing before the Commission for four years, with a right to reapply after that time. *Joseph L. Pittera, Esq.*, Exchange Act Release No. 80063, 2017 SEC LEXIS 489 (Feb. 17, 2017). Conditions that he must satisfy in connection with a reapplication include paying the disgorgement and civil penalty and complying with the penny stock bar ordered in *SEC v. OTC Capital Partners*.

[5] A penny stock bar bars a person 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 Exchange Act.

reapply might be warranted in a case involving only violations of Securities Act Section 5, citing *Allen M. Perres*, Securities Act Release No. 10287, 2017 WL 280080 (Jan. 23, 2017). Dias argues that his due diligence, minimal profits, lack of scienter, clear disciplinary record, and agreement to pay disgorgement and a penalty show that a penny stock bar should not be imposed. He also argues that the Division has not shown that he is likely to reoffend.

A. Sanction Considerations

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

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)), *aff'd on other grounds*, 450 U.S. 91 (1981). 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). There is a dearth of precedent cases involving a respondent who violated only Securities Act Sections 5(a) and 5(c).

[6] The term "person participating in an offering of penny stock" includes any person acting as a promoter, finder, consultant, agent, or other person 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 307856, at *4 (Jan. 13, 2006). Exchange Act Rule 3a51-1 defines "penny stock." Dias does not dispute that the securities at issue were a penny stock.

A lack of a disciplinary record is not an impediment to imposing a bar for a respondent's first adjudicated violation. *See Mitchell M. Maynard*, Advisers Act Release No. 2875, 2009 SEC LEXIS 1621, at *42 & n.39 (May 15, 2009); *Robert Bruce Lohman*, Exchange Act Release No. 40892, 2003 SEC LEXIS 3171, at *16 (June 26, 2003); *Martin R. Kaiden*, Exchange Act Release No. 41629, 1999 SEC LEXIS 1396, at *30 (July 20, 1999).

B. Sanctions

Scienter is not an element of a violation of Securities Act Section 5. While the violation was willful,[7] the record does not show even a reckless degree of scienter.[8] Nor was Dias's conduct egregious. Rather, he conducted due diligence that convinced him that he was not acquiring his interest from an affiliate. The due diligence included review of: Issuer A's filings, which disclosed that Shareholder A resigned as an officer of Issuer A in 2011; opinion letters from Issuer A's counsel; and an issuer representation letter.[9] The conduct was recurrent, over a period of one year and involved multiple transactions. While harm to the marketplace is presumed,[10] it was not particularized in the record except as to the relatively limited proceeds, $39,241, received from selling the unregistered shares. Consistent with his settlement[11] and vigorous defense against imposition of a penny stock bar, Dias has not specifically recognized the wrongful nature of the conduct or made an assurance against future violations; nor does he deny the wrongful nature of the conduct or disavow future compliance. The Division's general

[7] Willfulness is shown where a person intends to commit an act that constitutes a violation; there is no requirement that the actor also be aware that he is violating any statutes or regulations. *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).

[8] The scienter requirement of violations that require scienter can be satisfied by recklessness. *See SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992); *David Disner*, Exchange Act Release No. 38234, 1997 SEC LEXIS 258, at *15 & n.20 (Feb. 4, 1997).

[9] Dias also relied on the fact that the transfer agent issued the shares to him without a restrictive legend. Such reliance is misplaced. *See Gilbert F. Tuffli, Jr.*, Exchange Act Release No. 12534, 1976 SEC LEXIS 1467, at *18 (June 10, 1976) ("Nor d[oes] the absence of a restrictive legend on the certificates warrant the conclusion that they must be freely tradable."); Sales of Unregistered Securities by Broker-Dealers, Securities Act Release No. 5168, 1971 SEC LEXIS 19, at *2 (July 7, 1971) (scoffing at reliance on "the fact that shares were put through transfer to be the definitive test of free transferability").

[10] *See Gordon Brent Pierce*, Exchange Act Release No. 71664, 2014 SEC LEXIS 4544, at *84 (selling unregistered stock harms investors and the marketplace "by depriving investors of the full disclosure that would have allowed them to make informed investment decisions"), *petition denied*, 786 F.3d 1027 (D.C. Cir. 2015).

[11] The settlement order incorporates his consent "without admitting or denying the findings herein, except as to the Commission's jurisdiction over [him] and the subject matter of these proceedings." *OTC Glob. Partners, LLC*, 2016 SEC LEXIS 4225, at *1.

argument that Dias may reoffend is outweighed by the particular facts of his violation and the deterrent effect of the sanctions already imposed on him. The nature of Dias's business is unclear from the record and thus, cannot weigh in favor of a penny stock bar.

In sum, the foregoing factors weigh against adding a penny stock bar to the sanctions – a cease-and-desist order, disgorgement, and civil money penalty – already imposed on Dias. Those sanctions are sufficient in the public interest and are an appropriate deterrent.

V. ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED that the request of the Division of Enforcement, that Raimundo Dias be barred from participating in an offering of penny stock, IS DENIED.

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