Initial Decision Release No. 1372
Administrative Proceeding
File No. 3-18130

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

In the Matter of

Jeffrey Gainer

Initial Decision of Default
April 10, 2019

Appearances: Christopher H. White, Timothy Leiman, and Charles Kerstetter for the Division of Enforcement, Securities and Exchange Commission

Jeffrey Gainer, *pro se*

Before: James E. Grimes, Administrative Law Judge

Summary

I grant the Division of Enforcement's motion for default and sanctions. Respondent Jeffrey Gainer is barred from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization or from participating in an offering of penny stock.

Procedural Background

The Securities and Exchange Commission initiated this proceeding in August 2017, when it issued an order instituting proceedings (OIP) under Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940.[1] This proceeding is a follow-on proceeding

[1] OIP at 1; *see* 15 U.S.C. §§ 78*o*(b), 80b-3(f).

based on Gainer's conviction in the United States District Court for the Northern District of Ohio for selling unregistered securities.[2]

Gainer was served with the OIP in September 2017.[3] I held a telephonic prehearing conference in November 2018, attended by Gainer and counsel for the Division.[4] During the conference, I gave Gainer until November 26, 2018, to file an answer to the OIP.[5] I also established a motions schedule.[6] Gainer never filed an answer. The Division filed a dispositive motion in December 2018.

In February 2019, I ordered Gainer to show cause why this "proceeding should not be determined against him on default."[7] Gainer did not respond to the order to show cause.

Findings of Fact

The findings and conclusions in this initial decision are based on the record and on facts officially noticed under Commission Rule of Practice 323,

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[2] *See United States v. Abdallah*, No. 1:15-cr-231 (N.D. Ohio); OIP at 2. The OIP also refers to an injunctive action the Commission filed against Gainer but does not allege a resolution to that action. *See* OIP at 2; *SEC v. Abdallah*, No. 1:14-cv-01155 (N.D. Ohio).

[3] *See* Letter from Christopher H. White, Exs. 2–4 (Oct. 15, 2018). This administrative proceeding was previously assigned to another administrative law judge who issued an initial decision in 2017. *See Jeffrey Gainer*, Initial Decision Release No. 1221, 2017 WL 5067459 (ALJ Nov. 2, 2017). Following the decision in *SEC v. Lucia*, 138 S. Ct. 2044 (2018), the Commission remanded all pending cases and ordered that they be reassigned. *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 WL 4003609, at *1 (Aug. 22, 2018). This proceeding was reassigned to me in September 2018. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *2–3 (ALJ Sept. 12, 2018).

[4] *See Jeffrey Gainer*, Admin. Proc. Rulings Release No. 6335, 2018 SEC LEXIS 3243, at *1 (ALJ Nov. 16, 2018).

[5] *Id.*

[6] *Id.* at *1–2.

[7] *See Jeffrey Gainer*, Admin. Proc. Rulings Release No. 6464, 2019 SEC LEXIS 205 (ALJ Feb. 15, 2019).

17 C.F.R. § 201.323.[8] Because he failed to answer the OIP, Gainer is in default.[9] As a result of Gainer's default, I have accepted as true the factual allegations in the OIP.[10] In making the findings below, I have applied preponderance of the evidence as the standard of proof.[11]

Gainer was associated with PrimeSolutions Securities, Inc., from October 2010 through May 2014.[12] From 1999 until 2016, PrimeSolutions was registered with the Commission as a broker-dealer.[13] During that time, it was also registered as an investment adviser with a number of states.[14]

In May 2014, the Commission filed an injunctive complaint against Gainer and five other defendants.[15] The Commission alleged that Gainer violated registration and antifraud provisions of the Securities Act and the Exchange Act.[16] Gainer later executed a consent to judgment in which he agreed that he could not contest in a later administrative proceeding the factual allegations in the injunctive complaint.[17] I thus rely on the allegations in the complaint in making factual findings in this initial decision.

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[8] I take official notice of the docket in *SEC v. Abdallah* and the orders the district court has issued.

[9] *See* 17 C.F.R. §§ 201.155(a), .220(f).

[10] *See* 17 C.F.R. § 201.155(a).

[11] *See John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 WL 34300389, at *2 (Jan. 21, 1998).

[12] OIP at 1.

[13] *Id.*

[14] *Id.*

[15] Complaint, *SEC v. Abdallah*, 1:14-cv-01155-SO (N.D. Ohio May 29, 2014), ECF No. 1.

[16] *Id.* at 26–29. The complaint alleged that Gainer violated sections 5(a) and (c) and 17(a)(1), (2), and (3) of the Securities Act and 10(b), 15(a)(1), and Rule 10b-5 of the Exchange Act.

[17] Consent of Jeffrey Gainer at 4, *SEC v. Abdallah*, 1:14-cv-01155-SO (N.D. Ohio Sept. 21, 2017), ECF No. 318-3; *Siris v. SEC*, 773 F.3d 89, 96 (D.C. Cir. 2014) ("Whether or not issues established in the consent judgment were 'actually litigated' for purposes of [collateral] estoppel, the Commission's application of factual preclusion in the follow-on proceeding was appropriate

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Gainer was part of a Ponzi scheme run by Thomas Abdallah and Kenneth Grant. Abdallah and Grant induced investors to invest in KGTA Petroleum, Ltd., by guaranteeing high returns and promising investment funds would flow through an escrow account monitored by attorney Mark George.[18] Abdallah and Grant told investors KGTA bought crude oil and fuel at a discount for sale to corporate customers.[19] In 2012, Abdullah and Grant began offering investment in KGTA—promissory notes or investments referred to as "agreement[s]" or "joint venture[s]"—with a guaranteed monthly rate of return of between two and four percent.[20]

In reality, KGTA had no storage facilities and no way to transport oil or fuel.[21] Its alleged fuel sales were fake and it did not generate any revenue from the sale of oil or fuel.[22] Additionally, funds did not flow through an escrow account.[23] Instead, George paid funds directly to KGTA, which were used to pay fake returns.[24] Grant and Abdullah also used investor funds for their own benefit.[25]

Grant and Abdullah mostly offered investment in KGTA notes through Gainer and Jerry Cicolani, who were registered representatives with broker-dealer PrimeSolutions.[26] Gainer and Cicolani were instrumental in the investment process. They "found investors for KGTA, set up meetings with Grant and Abdallah, relayed information about KGTA to prospective investors, and obtained investor signatures on the agreements that

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because the judgment unambiguously barred Siris from making any future challenge to the allegations in the [civil] complaint."); *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003); 17 C.F.R. § 202.5(e).

[18] Complaint at 1–2.

[19] Complaint at 7–8.

[20] *Id.* at 8.

[21] *Id.*

[22] *Id.* at 9.

[23] *Id.* at 2, 11

[24] *Id.* at 2–3, 11–12.

[25] *Id.* at 12, 14.

[26] *Id.* at 3; OIP at 1.

memorialized the investment."[27] Gainer brought in 16 investors who invested over $9.6 million.[28] Gainer led investors to believe that because KGTA pre-sold oil and fuel at the time of each purchase and transactions were conducted through an escrow, the risk of loss was minimal.[29]

There was no registration statement in effect, however, when Gainer offered and sold KGTA notes.[30] And Gainer did not sell KGTA notes through his broker-dealer; he instead acted as an unregistered broker-dealer, did not tell his broker-dealer that he was selling KGTA notes, and pocketed the proceeds.[31]

Gainer also acted recklessly when he offered and sold the notes while knowing of red flags that marked KGTA as a fraud.[32] In particular, any securities industry professional with Gainer's level of experience would have known that the returns he guaranteed to investors were "too good to be true" and indicative of fraud.[33] Gainer also failed to tell investors that he was paid fees out of funds that purportedly would otherwise have gone to investors as returns.[34] KGTA eventually raised over $20 million,[35] and Gainer reaped $3 million in fees from KGTA.[36] His investors lost over $7.2 million.[37]

Based on the foregoing, Gainer was indicted and charged with various offenses. In July 2016, he agreed to plead guilty to selling unregistered securities, in violation of Section 5 of the Securities Act.[38] The district court

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27 Complaint at 3; *see id.* at 10.

28 *Id.* at 10.

29 Div. Ex. 2 at 15.

30 Complaint at 3.

31 *Id.* at 4; Div. Ex. 2 at 16.

32 Complaint at 4, 20–21.

33 *Id.* at 21.

34 *Id.* at 4.

35 *Id.* at 2.

36 Div. Ex. 2 at 17.

37 *Id.*

38 *Id.* at 3; *see* 15 U.S.C. § 77e.

imposed judgment in October 2016, sentencing Gainer to 52 months' imprisonment and ordering him to pay, joint and several with his codefendants, $7 million in restitution.[39]

In October 2017, the United States District Court for the Northern District of Ohio permanently enjoined Gainer from violating Sections 5 and 17(a) of the Securities Act, Section 10(b) and 15(a)(1) of the Exchange Act, and Exchange Act Rule 10b-5.[40] The court also found him liable for over $1.6 million in disgorgement plus interest in excess of $250,000, but the court deemed this satisfied by the restitution ordered in the criminal case.[41]

Conclusions of Law

The Exchange Act gives the Commission authority to impose a collateral bar[42] against Gainer if, as is relevant here, (1) he was associated with a broker or dealer or investment adviser at the time of the misconduct at issue; (2) he was convicted within the ten years preceding the issuance of the OIP of a felony involving the purchase or sale of any security; and (3) imposing a bar is in the public interest.[43]

The first factor is met in this case. At all relevant times, Gainer was associated with a broker-dealer and with an investment adviser.[44]

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[39] Div. Ex. 1 at 2, 5.

[40] Judgment as to Defendant Jeffrey Gainer at 1–4, *SEC v. Abdallah*, No. 1:14-cv-01155 (N.D. Ohio Oct. 27, 2017), ECF No. 328.

[41] *Id.* at 5. The OIP alleges that the Commission filed a complaint against Gainer and describes the allegations in the complaint. OIP at 2. Although the OIP does not allege the fact of the injunction because the district court issued its order enjoining Gainer after the Commission issued the OIP, the Commission may consider matters not recited in an OIP when assessing the public interest. *See Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *4 & n.22 (Oct. 29, 2014).

[42] A collateral bar, also referred to as an industry bar, is a bar that prevents an individual from participating in the securities industry in capacities in addition to those in which the person was participating at the time of his or her misconduct. *See Scammell*, 2014 WL 5493265, at *1 & n.1.

[43] 15 U.S.C. §§ 78*o*(b)(4)(B)(i), (6)(A)(ii), 80b-3(e)(2)(A), (f).

[44] OIP at 1. The definition of the term investment adviser applies regardless of whether an adviser is registered with the Commission or a state

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Turning to the second factor, Gainer was convicted in 2016, within the ten years preceding the issuance of the OIP.[45] Because felonies are those offenses punishable by more than one year in prison,[46] and Gainer was sentenced to 52 months' imprisonment,[47] Gainer was convicted of a felony. And because he was convicted of selling unregistered securities, his offense "involve[ed] the purchase or sale of any security."[48] The second factor is thus met.

To determine whether imposing a collateral bar would be in the public interest, I must weigh the public-interest factors set forth in *Steadman v. SEC*.[49] These include:

> 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.[50]

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securities regulator. *See* 15 U.S.C. § 80b-2(a)(11); *cf. Robert Radano*, Advisers Act Release No. 2750, 2008 WL 2574440 (June 30, 2008) (imposing sanctions under Advisers Act Section 203 in the case of an adviser registered with the state of Connecticut).

45 Div. Ex. 1.

46 *See* 18 U.S.C. § 3559(a).

47 Div. Ex. 1 at 2; *see* 15 U.S.C. § 77x ("Any person who willfully violates any of the provisions of this subchapter … shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.").

48 15 U.S.C. §§ 78*o*(b)(4)(B)(i), 80b-3(e)(2)(A).

49 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Gary M. Kornman*, Securities Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

50 *David R. Wulf*, Exchange Act Release No. 77411, 2016 WL 1085661, at *4 (Mar. 21, 2016).

The Commission also considers the deterrent effect of administrative sanctions.[51] The public interest inquiry is "flexible" and "no one factor is dispositive."[52]

Before imposing a collateral bar, an administrative law judge must determine, based on the evidence presented, whether a bar "is necessary or appropriate to protect investors and markets."[53] I must therefore "'review [Gainer's] case on its own facts' to make findings regarding [his] fitness to participate in the industry in the barred capacities."[54] A decision to impose a collateral bar "should be grounded in specific 'findings regarding the protective interests to be served' by barring the respondent and the 'risk of future misconduct.'"[55]

It is apparent that the public interest weighs in favor of imposing a bar. The Commission has remarked that "[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[56] It has also explained that "because '[f]idelity to the public interest requires a severe sanction when a respondent's misconduct involves fraud,' in most fraud cases the *Steadman* factors, such as egregiousness, scienter, and opportunity for

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[51] *Id.* General deterrence is relevant but not determinative of whether the public interest weighs in favor of imposing a collateral bar. *See Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *11 n.72 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014).

[52] *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *pet. denied*, 548 F.3d 129 (D.C. Cir. 2008).

[53] *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014) (quoting *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *9 (Dec. 13, 2012)), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016).

[54] *Id.* (quoting *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005)).

[55] *Id.* (quoting *McCarthy*, 406 F.3d at 189–90); *see also Lawton*, 2012 WL 6208750, at *9 ("[T]he Commission must consider not only past misconduct, but the broader question of the future risk the respondent poses to investors."), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 WL 3030847 (May 27, 2016).

[56] *Seghers*, 2007 WL 2790633, at *7.

future misconduct, will weigh in favor of a bar."[57] It is therefore the case "that 'antifraud injunctions merit the most stringent sanctions and that [the] foremost consideration must … be whether [the] sanction protects the trading public from further harm.'"[58]

Bearing these observations in mind, and considering the *Steadman* public-interest factors, I find that Gainer's conduct was egregious. Gainer played an instrumental role in a Ponzi scheme that cost investors millions. Gainer personally misrepresented or omitted material facts while inducing investors to invest. Gainer's willing participation in a fraudulent scheme and willingness to pursue his own financial gain to the serious detriment of his investors shows that he should not be allowed to interact with investors and that excluding him from the securities industry would best serve the Commission's interest in protecting the investing public.

Additionally, the notes Gainer sold were unregistered. Worse, when he sold them, Gainer hid the sales from his broker-dealer. In doing so, Gainer acted as an unregistered broker and engaged in the prohibited practice of "selling away." And selling away is prohibited because it "deprives investors of a brokerage firm's oversight, due diligence, and supervision," which are "protections investors have a right to expect,"[59] and instead subjects investors to "the hazards of unmonitored sales, while" leaving the broker-dealer "expos[ed] to loss and litigation."[60]

Notably, the securities registration requirements in Securities Act Section 5 and the broker-dealer registration requirements in Exchange Act Section 15 are central to the Commission's investor-protection mission.[61] In

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[57] *Siris*, 2013 WL 6528874, at *11 n.71 (alteration in original) (internal citation omitted) (quoting *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *7 (Feb. 4, 2008)).

[58] *Mark Feathers*, Exchange Act Release No. 73634, 2014 WL 6449870, at *3 (Nov. 18, 2014) (alterations in original) (quoting *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *5 (July 26, 2013)).

[59] *Anthony H. Barkate*, Exchange Act Release No. 49542, 2004 WL 762434, at *5 (Apr. 8, 2004)

[60] *Keith L. Mohn*, Exchange Act Release No. 42144, 1999 WL 1036827, at *6 (Nov. 16, 1999)

[61] *See Allen M. Perres*, Securities Act Release No. 10287, 2017 WL 280080, at *3 (Jan. 23, 2017), *pet. denied*, 695 F. App'x 980 (7th Cir. 2017); *Joseph J.*

(continued…)

particular, by selling unregistered securities in violation of Section 5 of the Securities Act, Gainer deprived investors of information they needed to make informed investment decisions.[62] Given that KGTA was a sham that was operated as a Ponzi scheme, Gainer's unregistered sales were particularly harmful. Gainer's criminal sentence and the district court's restitution order serve to underscore the seriousness of Gainer's misconduct.

Gainer's conduct was not isolated. Gainer participated in the scheme from October 2012 through March 2014.[63] During that time, Gainer brought in 16 investors who invested over $9.6 million.[64]

Gainer also acted with scienter. In his plea agreement, he admitted knowing "that federal securities laws prohibited him from offering or selling any securities, except those sold through a broker-dealer."[65] Gainer also concealed his involvement with KGTA by directing that fees be paid to his wife and others on his behalf.[66]

Additionally, scienter includes extreme recklessness, which is "extreme departure from the standards of ordinary care ... which presents a danger of misleading buyers or sellers that is either known to the [respondent] or is so obvious that the actor must have been aware of it."[67] Here, "[a]ny financial industry professional" in Gainer's position "would have known that [the] exorbitant, guaranteed return[s]" Gainer promised were "too good to be true."[68] Additionally, Gainer "recklessly disregarded … 'red flags' that" should have alerted him that KGTA was a sham and "reckless[ly]

Fox, Securities Act Release No. 10328, 2017 WL 1103693, at *3 (Mar. 24, 2017).

62 *See Perres*, 2017 WL 280080, at *3.

63 Complaint at 10.

64 *Id.*

65 Ex. 2 at 17.

66 *Id.* at 16.

67 *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008) (emphasis omitted) (quoting *SEC v. Steadman*, 967 F.2d 638, 641 (D.C. Cir. 1992)).

68 Complaint at 21.

disregard[ed] … the truth of the statements [he] made to investors about KGTA's business."[69]

Gainer has not made assurances against future misconduct. Although he pleaded guilty, thereby showing an appreciation for the wrongfulness of his conduct, and participated in the prehearing conference in this proceeding, he did not answer the OIP, oppose the Division's dispositive motion, or respond to the order to show cause.

Additionally, allowing Gainer to remain in the securities industry would present him with future opportunities for further misconduct and would put the investing public at risk. This determination is supported by my finding that Gainer's conduct was egregious.[70]

Finally, imposing a collateral bar will serve the Commission's interest in deterring others from engaging in similar misconduct.

In light of the factors discussed above, I find that it is in the public interest to impose a collateral and penny-stock bar against Gainer.

Order

The Division of Enforcement's renewed motion for sanctions by default is GRANTED.

Under Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 Jeffrey Gainer is BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Under Section 15(b) of the Securities Exchange Act of 1934, Jeffrey Gainer, is BARRED from participating in an offering of penny stock, including acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the

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69 *Id.* at 21–22.

70 *See Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) (holding that a finding of egregiousness "justifies the inference" that misconduct will recur); *Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *11 (Jan. 16, 2008) ("The existence of a violation raises an inference that the violation will be repeated, and where the misconduct resulting in the violation is egregious, the inference is justified.").

issuance of trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

This initial decision will become effective in accordance with and subject to the provisions of Rule 360.[71] Under 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.[72] 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 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.

Gainer may move the Commission to set aside the default under Rule of Practice 155(b), which 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.[73] 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.[74] Such motion, if filed, should be directed to the Commission, as the hearing officer may only set aside a default "prior to the filing of the initial decision."[75]

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James E. Grimes
Administrative Law Judge

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71 *See* 17 C.F.R. § 201.360.

72 *See* 17 C.F.R. § 201.111.

73 17 C.F.R. § 201.155(b).

74 *Id.*

75 *Id.*