INITIAL DECISION RELEASE NO. 1381
ADMINISTRATIVE PROCEEDING
FILE NOS. 3-17874 and 3-17875

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

In the Matter of	:	INITIAL DECISION AS TO VICTOR ALFAYA
	:	MAKING FINDINGS AND
TALMAN HARRIS and	:	IMPOSING SANCTION BY DEFAULT
VICTOR ALFAYA	:	June 28, 2019

APPEARANCE: Dugan Bliss and John O. Enright for the Division of Enforcement, Securities and Exchange Commission

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Victor Alfaya from the securities industry. He was previously enjoined from violating the antifraud and registration provisions of the federal securities laws and convicted of conspiracy to commit securities fraud and wire fraud.

I. INTRODUCTION

The Securities and Exchange Commission instituted proceedings against Respondents Talman Harris and Victor Alfaya with Orders Instituting Proceedings, pursuant to Section 15(b) of the Securities Exchange Act of 1934 on March 10, 2017, and the two proceedings were consolidated on March 13, 2017. The proceeding is a follow-on proceeding based on *SEC v. Cope*, No. 1:14-cv-7575 (S.D.N.Y.), in which Respondents were enjoined from violating the antifraud provisions of the federal securities laws and on *United States v. Scholander*, No. 1:15-cr-335 (N.D. Ohio), in which Respondents were convicted of conspiracy to commit securities fraud and wire fraud and Harris was convicted of wire fraud. On October 30, 2017, an Initial Decision imposed associational bars on Respondents. *Talman Harris*, Initial Decision Release No. 1213, 2017 SEC LEXIS 3450 (A.L.J.).

On August 22, 2018, in light of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Commission ordered a new hearing in each pending proceeding, including this one, before an administrative law judge (ALJ) who had not previously participated in the proceeding, unless the parties expressly agreed to alternative procedures, including agreeing that the proceeding remain with the previous presiding ALJ. *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058, at *2-3 (August 22 Order). Accordingly, the proceeding was reassigned to the undersigned. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (C.A.L.J. Sept. 12, 2018).

As to each affected proceeding, including this one, in which the parties had not agreed to alternative procedures, the Commission ordered that the newly assigned presiding ALJ "issue an order directing the parties to submit proposals for the conduct of further proceedings." August 22 Order, 2018 SEC LEXIS 2058, at *4. The Commission specified, "if a party fails to submit a proposal, the ALJ may enter a default against that party." *Id.* Accordingly, after the reassignment of the proceeding, the parties were ordered to submit proposals for the conduct of further proceedings by December 14, 2018, and Alfaya was warned that an associational bar would be imposed, by default, if he failed to submit a proposal. *Talman Harris*, Admin. Proc. Rulings Release No. 6121, 2018 SEC LEXIS 2696 (A.L.J. Sept. 28, 2018). Alfaya did not file a proposal for the conduct of further proceedings or any other correspondence and was ordered to show cause, by April 19, 2019, why he should not be barred from the securities industry. *Talman Harris*, Admin. Proc. Rulings Release No. 6532, 2019 SEC LEXIS 696 (A.L.J. Apr. 1, 2019). (Order to Show Cause). To date, Alfaya has neither filed a proposal for the conduct of further proceedings or a response to the Order to Show Cause. Accordingly, in view of his failure to make required filings, Alfaya is in default, and the undersigned finds that the allegations in the OIP are true as to him. *See* August 22 Order, 2018 SEC LEXIS 2058, at *4; 17 C.F.R. § 201.155(a)(2).

II. PROCEDURAL ISSUE – OFFICIAL NOTICE

Official notice pursuant to 17 C.F.R. § 201.323 is taken of the Commission's public official records and of the docket reports and courts' orders in *SEC v. Cope* and *United States v. Scholander*, and from Financial Industry Regulatory Authority, Inc. (FINRA), records as well. *See Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *1 n.1 (Apr. 18, 2013), *pet. denied*, 575 F. App'x 1 (D.C. Cir. 2014).

III. FINDINGS OF FACT

Alfaya was convicted of conspiracy to commit securities fraud and wire fraud, in violation of 18 U.S.C. § 1349. Criminal Judgment, *United States v. Scholander* (Mar. 2, 2017), ECF No. 313. He was sentenced to twenty-one months of imprisonment, followed by five years of supervised release and ordered to pay, jointly and severally with other defendants, restitution of $3,629,516.19. He was enjoined, by default, against violations of the antifraud and registration provisions of the federal securities laws, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder and Section 17(a) of the Securities Act of 1933, and barred from participating in an offering of penny stock; he was also ordered to pay disgorgement of $136,540 plus prejudgment interest of $16,835 and a civil penalty of $500,000. Final Judgment as to Defendants Talman Harris and Victor Alfaya, *SEC v. Cope* (Feb. 7, 1017), ECF No. 294.

According to the Commission's official records and FINRA records, Alfaya has never been registered as, or associated with, a registered broker-dealer or other registrant.[1]

The facts underlying Alfaya's conviction are set forth in the transcript of his April 28, 2016, change of plea proceeding, *United States v. Scholander*, ECF No. 128, at 29-41. Alfaya worked at a boiler room called Small Cap Resource, where he would cold call and solicit investors and

[1] *See* BrokerCheck Report, *available at* http://brokercheck.finra.org (last visited June 26, 2019) (indicating that Alfaya is not in FINRA records).

recommend various stocks, the prices of which were manipulated by the conspirators in a "pump and dump" manner. Upon making a sale, Alfaya would receive a commission. This activity occurred from September 2006 to September 2014.

IV. CONCLUSIONS OF LAW

Alfaya has been permanently enjoined "from engaging in or continuing any conduct or practice in connection with . . . the purchase or sale of any security" within the meaning of Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) of the Exchange Act and has been convicted within ten years of the commencement of this proceeding of a felony that "involves the purchase or sale of any security" and that "arises out of the conduct of the business of a broker [or] dealer" within the meaning of Sections 15(b)(4)(B)(i), (ii) and 15(b)(6)(A)(ii) of the Exchange Act. Although he was not a registrant or associated with a registrant, the Commission has authority to bar persons from the securities industry based on their association with, or conduct as, unregistered brokers. *See Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *32 (July 26, 2013) ("It is well established that we are authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding."); *Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 SEC LEXIS 3125, at *9 & n.16 (Dec. 2, 2005) (unregistered associated person of an unregistered broker-dealer barred from association with a broker or dealer), *recons. denied*, Exchange Act Release No. 53651, 2006 SEC LEXIS 861 (Apr. 13, 2006). "Broker" is defined in Section 3(a)(4) of the Exchange Act as "any person engaged in the business of effecting transactions in securities for the account of others." "[T]ransaction-based compensation" is "one of the hallmarks of being a broker-dealer." *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011) (quoting *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, No. 8:04-cv-586, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006)). Alfaya acted as an unregistered broker in that he solicited transactions in securities and received commissions based on the funds he raised.

V. SANCTION

A collateral bar will be ordered.[2]

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. *See* 15 U.S.C. § 78*o*(b)(6). The Commission considers factors including:

> 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

[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which became effective on July 22, 2010, provided collateral bars in each of the several statutes regulating different aspects of the securities industry. At least some of the conduct that led to the cases against Alfaya occurred after July 22, 2010. *See Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017) (holding that a collateral bar cannot be imposed when the violative conduct on which a follow-on proceeding was based ended before the July 22, 2010, effective date of the Dodd-Frank Act).

> 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 *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 & n.46 (Jan. 31, 2006). The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. *See Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 n.26 (Apr. 20, 2012); *Richard C. Spangler, Inc.*, Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *34 (Feb. 12, 1976).

B. Sanction

As described in the Findings of Fact, Alfaya's conduct was egregious and recurrent, over a period of several years, and involved a high degree of scienter as indicated by the fact that his misconduct included wire fraud and conspiracy to commit securities fraud and wire fraud. His occupation, if he were allowed to continue it in the future, would present opportunities for future violations. Absent a bar, he could engage in fraud in the securities industry. The violations are relatively recent. Alfaya pleaded guilty to one count of conspiracy, but has not otherwise recognized the wrongful nature of his conduct or made assurances against future violations. The $3,629,516.19 that he and others were ordered to pay in restitution and the disgorgement of $136,540 that he was ordered to pay are measures of the direct harm to the marketplace. Further, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct 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). An injunction involving dishonesty requires a bar, and because of the Commission's obligation to maintain honest securities markets, an industry-wide bar is appropriate.

The Commission considers fraud to be especially serious and to subject a respondent to the severest of sanctions. *Marshall E. Melton*, 2003 SEC LEXIS 1767, at *29-30. Indeed, from 1995 to the present, there have been over fifty litigated follow-on proceedings based on antifraud injunctions or convictions in which the Commission issued opinions, and all of the respondents were barred[3] – at least fifty unqualified bars and three bars with the right to reapply after five years.[4]

[3] In the cases authorized before the effective date of the Dodd-Frank Act, which authorized collateral bars, the Commission imposed industry-specific bars, such as a bar from association with an investment adviser on a respondent who had been associated with an investment adviser at the time of his violation.

[4] Those three were *Richard J. Puccio*, Exchange Act Release No. 37849, 1996 SEC LEXIS 2987 (Oct. 22, 1996), *Martin B. Sloate*, Exchange Act Release No. 38373, 1997 SEC LEXIS 524 (Mar. 7, 1997), and *Robert Radano*, Advisers Act Release No. 2750, 2008 SEC LEXIS 1504 (June 30,

Further, in every such case that followed the statutory provision of collateral bars, the Commission imposed a collateral bar rather than an industry specific bar, reasoning that the antifraud provisions of the securities laws apply broadly to all securities-related professionals and violations demonstrate unfitness for future participation in the securities industry, even if the disqualifying conduct is not related to the professional capacity in which the respondent was acting when he or she engaged in the misconduct underlying the proceeding. *See John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855, at *42-43 (Dec. 13, 2012), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 SEC LEXIS 1926 (May 27, 2016).

VI. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934 VICTOR ALFAYA IS BARRED from associating with any 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.[5]

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.[6]

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

2008). The Commission's opinions do not make clear the factors that distinguished these cases from those in which unqualified bars were imposed, but there is little difference between a "bar" and a "bar with the right to reapply in five years."

[5] Thus, Alfaya will be barred from acting as 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 Exchange Act Section 15(b)(6)(A), (C).

[6] A respondent may also file a motion to set aside a default pursuant to 17 C.F.R. § 201.155(b). *See Alchemy Ventures, Inc.*, Exchange Act Release No. 70708, 2013 SEC LEXIS 3459, at *13 & n.28 (Oct. 17, 2013); *see also David Mura*, Exchange Act Release No. 72080, 2014 SEC LEXIS 1530 (May 2, 2014).