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

Administrative Proceedings Rulings
Release No. 6416 / December 19, 2018

Administrative Proceeding
File No. 3-17849

In the Matter of

Angel Oak Capital Partners, LLC,
Peraza Capital & Investment, LLC,
Sreeniwas Prabhu, and
David W. Wells

Order Denying Summary Disposition Motion of Peraza Capital & Investment, LLC

Respondent Peraza Capital & Investment, LLC, moves for summary disposition, arguing that any claims for civil monetary penalties or disgorgement are time-barred. Because Peraza's admitted misconduct "constituted 'a series of repeated violations of an identical nature,'"[1] some of which I must infer occurred within the limitations period, the Division of Enforcement's claims for monetary penalties or disgorgement based on conduct within that period are not time-barred. Peraza's motion is denied.

Background

In February 2017, the Securities and Exchange Commission instituted this proceeding against Peraza, Angel Oak Capital Partners, LLC, and two individuals associated with Angel Oak. The order instituting proceedings (OIP) was issued based on Respondents' offer of settlement.[2]

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1 *SEC v. Kokesh*, 884 F.3d 979, 985 (10th Cir. 2018) (quoting *Figueroa v. Dist. of Columbia Metro. Police Dep't*, 633 F.3d 1129, 1135 (D.C. Cir. 2011)).

2 OIP at 1.

The OIP explains that from March 2010 to October 2014, Angel Oak operated a securities business while acting as an unregistered broker-dealer.[3] Peraza, which has been registered with the Commission as a broker-dealer since 2002, facilitated Angel Oak's conduct.[4] As part of an agreement between Angel Oak and Peraza, Peraza permitted Angel Oak to access its trading platform and enter trades, thereby allowing Peraza to operate as a broker-dealer without registering with the Commission.[5] By the agreement's terms, Peraza kept 15% of all commission revenue generated by Angel Oak's trading activities and distributed the remaining 85% to Angel Oak.[6] During the time period in question, Angel Oak's employees entered more than 900 trades through Peraza and generated more than $3 million in commissions.[7] Based on these facts, the Commission determined that Angel Oak violated Section 15(a) of the Securities Exchange Act of 1934 and Peraza and the remaining Respondents caused that violation.[8]

The OIP recites that Peraza has agreed "to additional proceedings … to determine whether it" should be ordered to pay disgorgement, prejudgment interest, or civil monetary penalties, and if so, in what amounts.[9] Under the terms of Peraza's settlement with the Commission, it cannot challenge the factual findings in the OIP, and I must accept the findings as established.[10]

Discussion

Commission Rule of Practice 250(c) governs motions for summary disposition filed in 120-day proceedings.[11] A motion for summary disposition

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3 *Id.* at 2–3, 6.

4 *Id.* at 2–4, 8.

5 *Id.* at 2–3, 5–6.

6 *Id.* at 2, 5–6.

7 *Id.* at 2, 5–6.

8 *Id.* at 8.

9 *Id.* at 9.

10 *Id.*

11 *See* 17 C.F.R. § 201.250(c). This is a 120-day proceeding because the Commission ordered that the initial decision be issued with 120 days of the occurrence of one of the events listed in Rule 360(a)(2)(i). *See* OIP at 12; 17 C.F.R. § 201.360(a)(2)(i).

must demonstrate "that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law."[12] The facts on summary disposition must be viewed in the light most favorable to the nonmoving party.[13]

"[A]n action … for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim *first accrued*."[14] This statute of limitations applies to claims by the Division for disgorgement and civil monetary penalties.[15] It follows that because the Commission issued the OIP in this case on February 16, 2017, any claims for disgorgement or civil monetary penalties that first accrued before February 16, 2012, are time-barred unless there is a basis for tolling the limitations period.[16]

The OIP recites that Angel Oak's employees entered 900 trades between March 2010 and October 2014.[17] Because I must construe the facts in the Division's favor,[18] I infer for purposes of this order that at least some of these 900 trades occurred during the 32-month window from February 16, 2012, to October 2014.

Peraza nonetheless argues that under Section 2462, all claims against it for disgorgement and civil monetary penalties are untimely because they first

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12 17 C.F.R. § 201.250(c).

13 Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,224 n.112 (July 29, 2016); *see Jay T. Comeaux*, Securities Act Release No. 9633, 2014 WL 4160054, at *2 (Aug. 21, 2014).

14 28 U.S.C. § 2462 (emphasis added).

15 *See Kokesh v. SEC*, 137 S. Ct. 1635, 1640–41, 1644, 1645 (2017).

16 Peraza and the Division entered into an agreement tolling the statute of limitations from June 28, 2016, to February 28, 2017. Tolling Agreement (Nov. 28, 2016) (attached to the Division's Opp'n). "[F]or ease of analysis and calculation," the Division drops claims before January 1, 2012. Opp'n at 3. Nevertheless, because it makes no difference for purposes of this order, for the sake of convenience I will continue to refer to February 16, 2012, the date five years prior to the issuance of the OIP, as the beginning of the limitations period.

17 OIP at 5.

18 *Comeaux*, 2014 WL 4160054, at *2.

accrued more than five years before the Commission issued the OIP.[19] In support of this argument, it says the Commission has known about its arrangement with Angel Oak since 2010 or 2011.[20] In fact, in September 2011, the Commission sent a letter to Angel Oak Capital Advisors, LLC—an entity related to Respondent Angel Oak[21]—detailing the specifics of payments made between Angel Oak and Peraza under the arrangement described in the OIP.[22] On this basis, Peraza argues that the claims against it first accrued more than five years before the Commission instituted this proceeding and therefore, under the five-year statute of limitations, it cannot be ordered to pay any fine or disgorgement.[23]

Peraza also argues that the separate-accrual rule does not apply to securities actions.[24] And, Peraza asserts, the continuing-violation doctrine does not apply in this circumstance.[25]

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[19] Mot. at 3–6.

[20] Mot. at 2–3, 12.

[21] OIP at 3–4.

[22] *See* Ex. 2 at 2.

[23] Mot. at 6; *see* 28 U.S.C. § 2462.

[24] Mot. at 6–7. Under the separate-accrual rule, "when a defendant commits successive violations, the statute of limitations runs separately from each violation." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014).

[25] Mot. at 8–13. "The continuing-violations doctrine applies where 'no single incident in a continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm,' and so it is 'proper to regard the cumulative effect of the conduct as actionable.'" *Loumiet v. United States*, 828 F.3d 935, 948 (D.C. Cir. 2016) (quoting *Page v. United States*, 729 F.2d 818, 821–22 (D.C. Cir. 1984)). "Under the continuing violations doctrine, the statute of limitations is tolled for a claim that otherwise would be time-barred where the violation giving rise to the claim continues to occur within the limitations period." *Nat'l Parks & Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81 (1982)). The continuing violation doctrine, therefore, "would permit the [Commission] to consider untimely violative conduct so long as there was some timely violative conduct and the conduct as a whole can be considered as a single course of conduct." *Birkelbach v. SEC*, 751 F.3d 472, 479 n.7 (7th Cir. 2014).

I'm not convinced by Peraza's arguments. The application of Section 2462 depends on the nature of the misconduct.[26] Peraza caused Angel Oak's violations of Section 15(a), which prohibits unregistered broker-dealers from using "the mails or any means or instrumentality of interstate commerce to effect *any* transactions in, or to induce or attempt to induce the purchase or sale of, *any* security."[27] The use of the word *any* shows that Congress intended Section 15(a) to apply "expansive[ly]" to any one transaction or to whatever greater number of transactions that might be involved.[28] Any one of the transactions entered on or after February 16, 2012, could serve as a predicate for a Section 15(a) violation. Put another way, each transaction was potentially separately actionable and each one first accrued when it occurred, not when the first transaction was entered.[29] The statute of limitations, therefore, does not bar claims for disgorgement or civil monetary penalties related to transactions processed through Peraza's platform on or after February 16, 2012.

Perhaps one might argue that it was Angel Oak's *status* as an unregistered broker-dealer that constituted the violation and that because this status began in 2010, the statute of limitations must likewise run from 2010.[30] But the definitions of the terms *broker* and *dealer* are closely tied to the focus of Section 15(a)(1)—the act of transacting securities.[31] Absent that

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[26] *See generally Kokesh*, 884 F.3d at 982–85.

[27] 15 U.S.C. § 78*o*(a)(1) (emphasis added).

[28] *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)).

[29] *See Kokesh*, 884 F.3d at 984–85 (concluding that "Defendant's misappropriations of funds … are properly viewed as discrete violations" rather than continuing misconduct); *cf. Blanton v. OCC*, - - F.3d - -, 2018 WL 6423942, at *6 (D.C. Cir. Dec. 7, 2018) (even where an actionable claim "must be 'part of a pattern of misconduct' … a claim accrues each time a bank official recklessly engages in an unsafe or unsound banking practice as part of a pattern of misconduct").

[30] *See* 15 U.S.C. § 78*o*(a)(1) (prohibiting unregistered broker-dealers from using instrumentalities of interstate commerce to effect securities transactions).

[31] *See* 15 U.S.C. § 78c(a)(4), (5).

act, the bar in Section 15(a)(1) does not apply. The gravamen of the misconduct on which the limitations analysis must focus, therefore, is the transaction or transactions described in Section 15(a). Indeed, the OIP indicates that Angel Oak's transactions and Peraza's ongoing facilitation of these transactions are a primary basis for their liability.[32]

Peraza argues that the separate-accrual rule does not apply to Section 2462 because Congress used the word *first* in that section.[33] But the Tenth Circuit applied the separate-accrual rule in *Kokesh*, on remand from the Supreme Court, in a case involving a series of misappropriations of funds.[34] As the Tenth Circuit noted, crediting the sort of argument raised by Peraza would perversely "confer immunity for ongoing repeated misconduct."[35] Moreover, because each of the 900 transactions in this case is separately actionable, claims as to each transaction first accrued when each transaction was entered.[36] As in *Kokesh*, each transaction was part of "a series of repeated violations of an identical nature."[37]

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[32] *See* OIP at 2 (Angel Oak "held itself out as a broker-dealer" and "entered into more than 900 trades and regularly solicited customers"); *id.* at 8 (Peraza provided Angel Oak with access to its trading platform through which trades were submitted for execution and facilitated a payment arrangement in which Angel Oak received transaction-based compensation).

[33] Mot. at 7 (referring to the phrase *first accrued*).

[34] *See* 884 F.3d at 984–85.

[35] *See id.* at 985; *see also Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 127–28 (5th Cir. 1975) ("Employing the limitations statute additionally to immunize recent repetition or continuation of violations and damages occasioned thereby not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of private rights through private actions.").

[36] To the extent that Peraza alludes to an estoppel argument related to the fact that the Commission has allegedly been aware of Peraza's arrangement with Angel Oak since 2010 or 2011, *see* Mot. at 2–3, 7, 12, I reject its argument. First, Peraza has not developed the argument. Second, Peraza has not shown that estoppel can ever lie against the government. *See U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1323 (11th Cir. 2018). Finally, if estoppel can lie against the government, Peraza has not carried its burden to show "affirmative misconduct." *Id.*; *see Millard Refrigerated Servs., Inc. v. Sec'y of Labor*, 718 F.3d 892, 898 (D.C.

(continued…)

As noted, Peraza also argues that the continuing-violation doctrine does not apply. Because the Division has relinquished claims for disgorgement that accrued outside the limitations period in 2010 and 2011,[38] I need not consider whether the continuing-violation doctrine would allow consideration of transactions outside the limitations period.[39] Although Peraza cannot be ordered to disgorge commissions for transactions outside the limitations period or be subjected to monetary penalties based on them, this fact does Peraza little good for transactions within the limitations period. As the Tenth Circuit recognized in *Kokesh* on remand, the fact that "a person continue[s] to engage in misconduct over an extended period of time," does not mean "that the person ha[s] engaged in a singular continuing violation, as opposed to a series of separate violations, for limitations purposes."[40] Such is the case here.[41]

Cir. 2013) (holding that if "estoppel may run against the government … the bar for succeeding on such a claim is high").

[37] *Kokesh*, 884 F.3d at 985 (quoting *Figueroa*, 633 F.3d at 1135); *see also Birkelbach*, 751 F.3d at 479 (rejecting a claim that the appellant's failure to supervise under FINRA rules "was a single indivisible act which accrued on the day of the first failure to supervise" and held instead that it was "an ongoing series of violations" and was "divisible such that [the Commission] could consider the timely violative conduct, even if there was additional untimely violative conduct" outside of Section 2462's window).

[38] *See* Tolling Agreement; Opp'n at 3.

[39] *See Loumiet*, 828 F.3d at 948 (explaining the circumstances in which the continuing-violation doctrine applies).

[40] 884 F.3d at 983.

[41] Peraza's reliance on *Sierra Club v. Oklahoma Gas & Electric Co.*, 816 F.3d 666 (10th Cir. 2016), Mot. at 9–10, is misplaced because the conduct in that case—modifying or constructing a boiler without first obtaining a required permit—"constituted a continuing violation" while the modifying or constructing occurred, "rather than separately accruing violations." *Kokesh*, 884 F.3d at 981. As the court explained, the singular "act of constructing [without a permit]" was unlawful; the case did not involve "a disjointed series of discrete acts" but rather "an ongoing project." *Id.* at 982.

Peraza's motion is DENIED.

James E. Grimes
Administrative Law Judge