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

Administrative Proceedings Rulings
Release No. 6437 / February 1, 2019

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 the Division of Enforcement's Motion for Summary Disposition

The Securities and Exchange Commission instituted this proceeding to determine whether Respondent Peraza Capital and Investment, LLC, should be ordered to pay disgorgement or a civil monetary penalty and, if so, in what amounts. The Division of Enforcement moves for summary disposition, arguing that Peraza should be ordered to disgorge $1,180,487.98, plus prejudgment interest, and pay a civil monetary penalty of $75,000. Because the Division has not shown that "there is no genuine issue with regard to any material fact and that [it] is entitled to a ruling as a matter of law,"[1] its motion is DENIED.

Background

The 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] The only issue remaining to be decided is whether Peraza must pay disgorgement and a civil monetary penalty.

---

1 17 C.F.R. § 201.250(c).

2 OIP at 1.

Under the terms of Peraza's settlement with the Commission, it cannot argue "that it did not violate the federal securities laws described in the" OIP.[3] And the "findings made in [the OIP] shall be accepted as and deemed true."[4]

According to the OIP, this proceeding involves Angel Oak's "violations of the broker-dealer requirements of Section 15(a) of the [Securities] Exchange Act."[5] Specifically, Angel Oak operated as an unregistered broker-dealer after entering into an agreement with Peraza "so that" Angel Oak could "'conduct a securities business through' Peraza."[6] Under the agreement, Angel Oak was entitled to 85% of the commission revenue generated by its trading activity and Peraza received the remaining 15%.[7]

From March 2010 through October 2014, Angel Oak held itself out as a broker-dealer.[8] During that time, its employees, who were registered representatives of Peraza, entered over 900 trades, solicited customers, and marketed its securities business, "often us[ing] the 'Angel Oak' name."[9] Owners or employees of Angel Oak "who were not registered as broker-dealers or associated with a registered broker-dealer, were involved in the operations of [Angel Oak's] securities business."[10] And, despite not being registered as a broker-dealer, Angel Oak "received transaction-based compensation in connection with the purchase and sale of securities of approximately $3,054,288 in commissions through its arrangement with Peraza."[11] The OIP states that "[a]s a result of such conduct," *i.e.*, the conduct

---

3 *Id.* at 9.

4 *Id.*

5 *Id.* at 2.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

just described, "Angel Oak … engaged in broker-dealer activities without registering with the Commission, in violation of Section 15(a)."[12]

According to the established facts set forth in the OIP, Peraza's actions allowed Angel Oak to "to operate a brokerage business without registering as a broker-dealer."[13] Specifically, Peraza gave Angel Oak access to its trading platform and "facilitated Angel Oak['s] … operation of its securities business by registering certain employees as licensed representatives through Peraza."[14] Peraza "facilitated Angel Oak['s] trading activities, even though it knew Angel Oak … was not registered and knew or should have known that [Angel Oak's] owners, … who were not all registered as broker-dealers or associated with a registered broker-dealer, were exercising control over the operation of the firm's securities business."[15] Because of its agreement with Angel Oak, Peraza received commissions from Angel Oak's trading activity.[16] Peraza thus caused Angel Oak's violation of Section 15(a).[17]

Discussion

A motion for summary disposition 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."[18] In this case, I must accept the facts described in the OIP as established.[19] I must, however, view those facts in the light most favorable to Peraza.[20]

---

12 *Id.* at 3.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 17 C.F.R. § 201.250(c).

19 OIP at 9.

20 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).

1. Disgorgement

The Division argues that Peraza should pay more than $1.1 million in disgorgement. Peraza has three counterarguments. First, Peraza asserts that the Division's disgorgement figure is inconsistent with the OIP.[21] Peraza additionally argues that because Angel Oak's trades were entered by Peraza's registered representatives, they were legal, and commissions from those trades should not be considered ill-gotten gains.[22] Finally, Peraza argues that any disgorgement should be offset by some of its expenses.[23] As explained below, because there are discrepancies between the Division's disgorgement calculation and facts in the OIP, the Division is not entitled to summary disposition on the issue of disgorgement. I decline to rule on Peraza's arguments that disgorgement should be reduced by expenses and that the trades were legal. I will address those issues after the hearing.

Relying on the deposition testimony of Xiomara Perez, Peraza's Chief Financial Officer and Financial and Operations Principal, and a spreadsheet she created, the Division asserts that Peraza received $1,521,705.87 as a result of its arrangement with Angel Oak.[24] Of that amount, the Division calculates that Peraza received $1,180,487.98 "within the appropriate statute of limitations period."[25] The Division reduced the amount from the spreadsheet to account for the money that Peraza received before 2012.[26] Under the Supreme Court's decision in *Kokesh v. SEC*,[27] a five-year statute of limitations applies to disgorgement in SEC proceedings. Peraza and the Division entered into two tolling agreements under which the five-year window for disgorgement began on June 29, 2011.[28] But since the Division calculated Peraza's ill-gotten gains on a yearly basis based on Perez's

---

21 Opp'n at 3–4.

22 *Id.* at 4–5, 7–9.

23 *Id.* at 9–13.

24 Div. Mot. at 6–7; *See* Div. Ex. 2; Div. Ex. 3 at 1.

25 Div. Mot. at 7.

26 Decl. of John D. Worland in Support of Summary Disposition, at 2 (Nov. 16, 2018).

27 137 S. Ct. 1635 (2017).

28 Tolling Agreement (Nov. 28, 2016), attached to Div. Opp'n to Peraza's Mot. for Summary Disposition.

spreadsheet, it only seeks disgorgement for commissions received in 2012, 2013, and 2014.[29]

In its opposition, Peraza at first concedes that $1,521,705.87 "represents the revenues Peraza received from the trading conducted" by Angel Oak.[30] But it later disputes the Division's disgorgement figure, arguing the amount is inconsistent with the OIP. If, as the OIP states, Angel Oak received $3,054,288 in commissions and this amount equaled 85% of the total commissions generated, Peraza says the total generated must have been $3,593,280.[31] But 15% of $3,593,280 is not $1,521,705.87 or $1,180,487.98.[32] It is instead $538,992.[33]

Bearing in mind that I am required to accept the facts described in the OIP as established,[34] Peraza is correct that the Division has not met its burden to explain how the figures in Perez's spreadsheet are consistent with the OIP. The Division takes the initial disgorgement figure of $1,521,705.87 from Perez's spreadsheet.[35] The spreadsheet identifies gross commission revenue from Angel Oak's trades from 2010 through 2014 as $11,506,034.28.[36] It identifies the net commissions paid to the Atlanta branch—gross minus Peraza's 15% share, clearing fees, and other expenses—as $9,984,328.41.[37] And $1,521,705.87 is, according to Perez, Peraza's "gross share" of commissions.[38]

The OIP, however, states that Angel Oak's commissions totaled only $3,054,288.[39] It is not completely clear how to reconcile the spreadsheet's

---

29 Div. Ex. 3 at 1.

30 Opp'n at 2.

31 *Id.* at 3.

32 *Id.* at 4.

33 *Id.*

34 OIP at 9.

35 *See* Div. Ex. 3 at 1.

36 Div. Ex. 3 at 1; *see* Div. Ex. 2 at 45.

37 Div. Ex. 3 at 1; *see* Div. Ex. 2 at 46.

38 Div. Ex. 3 at 1; *see* Div. Ex. 2 at 46–47.

39 OIP at 2, 6.

$9,984,328.41 paid in commissions to the Atlanta branch with the OIP's lower figure of commissions paid to Angel Oak.

The Division does not directly address this confusion in its reply. When addressing a different aspect of Peraza's argument, it asserts that the $6.9 million discrepancy between Perez's $9.9 million calculation and the $3 million figure in the OIP results from the fact that "Angel Oak paid the clearing fees and all other marginal costs" as well as "the share of the commissions that went to [its] individual brokers."[40] But the Division does not explain the basis for this assertion or claim that these employee commission payments plus clearing fees and marginal costs add up to $6.9 million.[41]

There is another discrepancy between the spreadsheet and the OIP. The OIP states that Peraza "retained 15% of all commission revenue generated by" Angel Oak's trading activity except for commission revenue from approximately April 2011 to July 2012, when Peraza received 10%, and from approximately September to October 2011, when Peraza received 20%.[42] Although I have to accept these figures,[43] they are inconsistent with the spreadsheet, which puts Peraza's share at anywhere between 8% and 16% from 2010 through 2014.[44] The $1,521,705.87 figure from the spreadsheet, on which the Division bases its disgorgement request, is therefore dependent on figures that are at odds with the percentages in the OIP which, again, I must accept as true.

---

[40] Reply at 8.

[41] The OIP supports the Division's position to a degree; it states that after Peraza retained its 15% share, it paid the remainder to David Wells, who split it between the individual Angel Oak traders and Angel Oak itself. OIP at 6. The Division, however, has not established that the payments to individual traders account for the missing $6.9 million.

[42] OIP at 5 n.4. The OIP seemingly contradicts itself; the period of time in which Peraza received 20% (September – October 2011) is within the period it was receiving 10% (April 2011 – July 2012).

[43] *Id.* at 9.

[44] Div. Ex. 3 at 1 (subtracting line item "% paid to branch" from 100%).

Comparing the OIP and the Division's evidence raises questions of material fact. To the extent the Division seeks summary disposition on the question of disgorgement, the motion is denied.[45]

Peraza's second argument is that disgorgement is unwarranted because Angel Oak's securities transactions were legally conducted by Peraza's registered representatives in a Peraza branch office.[46] Peraza argues that although it "caused" Angel Oak's violations, those violations did not "cause" Peraza's legal trading revenues.[47]

But Peraza received commissions because it provided various services to Angel Oak which "facilitated" Angel Oak's "ability to operate as an unregistered broker-dealer."[48] According to the binding factual recitation in the OIP, Peraza caused Angel Oak's violation by doing two things: (1) registering some of Angel Oak's employees, and (2) allowing Angel Oak access to Peraza's trading platform.[49] All of the trades "were cleared through Peraza['s] … clearing firm," and Peraza deducted its 15% share of commissions for all of the trades before transmitting the balance to a registered representative of Peraza who then paid Angel Oak employees and Angel Oak.[50] In other words, all of the 900 trades described in the OIP occurred under the auspices of the arrangement between Angel Oak and Peraza; but for the arrangement, none of the trades would have occurred, and Peraza received commissions as a result of its arrangement with Angel Oak.[51] And this arrangement created a problem because when Peraza registered Angel Oak's employees and gave Angel Oak access to Peraza's trading platform, Peraza knew that Angel Oak was not registered and knew or should have known that some of Angel Oak's owners "were not … registered as broker-dealers or associated with a registered broker-dealer, [but] were exercising control over the operation of the firm's securities business."[52] The

---

45 *See* 17 C.F.R. § 201.250(c) (requiring a motion for summary disposition to show that there is no genuine issue with regard to any material fact).

46 Opp'n at 4–5, 7–9.

47 *Id.* at 8.

48 OIP at 6, 8.

49 *Id.* at 3.

50 *Id.* at 5–6.

51 *Id.*

fact that trades were processed in a legal manner does not eliminate Peraza's liability.

Peraza, however, still argues that "the findings in the OIP" do not "support[] a finding that Peraza entered or caused Angel Oak to enter any of the trades that are the basis for the disgorgement amount."[53] Although this argument appears to contradict the facts in the OIP, the parties will have the opportunity at the hearing to address whether this argument is consistent with the facts established by the OIP.

Further, because I am denying the Division's motion, there is no need in this order to determine whether Peraza should be able to offset disgorgement against its legitimate expenses.[54] The general rule, as the Division notes,[55] is that a respondent cannot offset disgorgement with expenses.[56] This rule flows from the idea that a respondent should not be able to offset expenses incurred for running an illicit business.[57] But suppose the respondent's business is otherwise legitimate and not an enterprise dedicated solely to defrauding others for the benefit of the enterprise's principals. In that case, offsetting

---

[52] *Id*. at 3.

[53] Opp'n at 8; *see id*. ("Simply stated, findings in the OIP that Peraza 'caused' Angel Oak's violation of Section 15(a) do not, without more, lead to the conclusion that Angel Oak, directly or indirectly, caused Peraza's trading revenues, which were indisputably generated by duly-registered representatives operating in a Peraza branch office that was registered with FINRA, to be illegal.").

[54] *See* Opp'n at 9–13.

[55] Div. Mot. at 8 (quoting *SEC v. Brown*, 658 F.3d 858, 861 (8th Cir. 2011)).

[56] *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1087 (D.N.J. 1996) ("[T]he overwhelming weight of authority holds that securities law violators may not offset their disgorgement liability with business expenses."), *aff'd*, 124 F.3d 449 (3d Cir. 1997).

[57] *See SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006) ("[I]t would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place."); *cf. SEC v. Liu*, No. 17-55849, 2018 WL 5308171, at *3 & n.4 (9th Cir. Oct. 25, 2018) (holding that the proper amount of disgorgement in a "long-standing scheme to defraud investors" is "the entire amount raised less the money paid back to the investors").

disgorgement against certain legitimate business expenses *might* be permitted.[58]

During the hearing and in post-hearing briefing, the parties should address whether disgorgement should be subject to offset when the funds potentially subject to disgorgement were not obtained through fraud but were obtained through an arrangement that violated Section 15(a).[59]

---

[58] *See JT Wallenbrock*, 440 F.3d at 1114–15; *see also Kokesh v. SEC*, 137 S. Ct. 1635, 1644–45 (2017) (suggesting the possibility that disgorgement amounts should be offset by "all marginal costs incurred in producing the revenues that are subject to disgorgement" (quoting, in parenthetical, Restatement (Third) of Restitution and Unjust Enrichment § 51, Cmt. h)). The Division argues that certain transaction costs were paid by Angel Oak, not Peraza, *see* Reply at 7–8, but I cannot conclude on summary disposition that Peraza incurred no marginal costs.

[59] Peraza relies on Perez's spreadsheet in claiming that its expenses were close to $800,000. Opp'n at 12–13. But as the Division notes, Perez explained that the figures to which Peraza referred were overhead expenses Perez allocated to Angel Oak. Reply at 6; Div. Ex. 2 at 48–53. On the other hand, the fact that Perez said that the expenses she allocated to Angel Oak were not "directly associated" with any particular trade, *i.e.*, they were not marginal expenses, does not mean Peraza did not incur expenses on a per transaction basis. In other words, Perez did not say that Peraza had no marginal expenses; she said that none of the expenses she allocated to Angel Oak were marginal expenses.

2. Civil monetary penalty

Because this is a cease-and-desist proceeding instituted under Exchange Act Section 21C, a civil monetary penalty may potentially be imposed.[60] The Exchange Act creates a three-tiered system for imposing civil penalties.[61] The Division seeks only a first-tier penalty of $75,000.[62] A first-tier penalty may be imposed simply based on the determination that a respondent caused a violation.[63]

The OIP establishes that a violation occurred. To determine whether to impose a civil monetary penalty, however, I will weigh the public interest factors listed in Section 21B(c).[64] Weighing the public interest factors is a fact-specific inquiry, and some issues are disputed. For example, Peraza raises legitimate questions about the egregiousness of its violations that will be better determined through testimony or documentary evidence than by briefing alone.[65] I cannot conclude based on the current record that the

---

60 15 U.S.C. § 78u-2(a)(2)(B).

61 15 U.S.C. § 78u-2(b).

62 Mot. at 11. The maximum first-tier penalty for an entity's violation from March 4, 2009, to March 5, 2013, is $75,000. 17 C.F.R. § 201.1001 tbl. I. The amount increased to $80,000 for violations from March 6, 2013, to November 2, 2015. *Id.*

63 15 U.S.C. § 78u-2(a)(2)(B).

64 *See* 15 U.S.C. § 78u-2(c). Although the Exchange Act contains the referenced list of public interest factors, *id.*, Section 21B(a) does not expressly require the Commission, in cease-and-desist proceedings instituted under Section 21C, to weigh the public interest before imposing monetary sanctions. *Compare* 15 U.S.C. § 78u-2(a)(1), *with* 15 U.S.C. § 78u-2(a)(2). Nonetheless, because the statutory factors found in subsection (c) provide an appropriate standard, and it would be incongruent if the Commission were to approve monetary sanctions in cease-and-desist proceedings without any analysis of the particular circumstances presented, I will rely on those factors in deciding whether a monetary penalty is appropriate. *See Laccetti v. SEC*, 885 F.3d 724, 725 (D.C. Cir. 2018) ("[T]he arbitrary and capricious standard requires that an agency's action be reasonable and reasonably explained."); *Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012) ("[T]he SEC must provide some meaningful explanation for imposing sanctions."); *see also* Reply at 9 (citing Section 21B(c) and discussing a public interest factor); Div. Mot. at 10 & n.3 (same).

65 *See* Opp'n at 13–14.

Division "is entitled to summary disposition as a matter of law," as to civil penalties, particularly when viewing the undisputed facts in the light most favorable to Peraza.[66]

James E. Grimes
Administrative Law Judge

[66] 17 C.F.R. § 201.250(c); *see Joseph John VanCook*, Exchange Act Release No. 61039A, 2009 WL 4026291, at *19 (Nov. 20, 2009) ("[T]he sanctions imposed in litigated cases … are the result of fact-specific considerations of various factors designed to best protect the public interest."), *petition denied*, 653 F.3d 130 (2d Cir. 2011); *Philip A. Lehman*, Exchange Act Release No. 54660, 2006 WL 3054584, at *9 (Oct. 27, 2006) (determining the "[a]ppropriate remedial action depends on the facts and circumstances of each particular case").