UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-14981

In the Matter of

Ross Mandell

Respondent.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY AFFIRMANCE OF THE JANUARY 3, 2013 INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 411(e) of the Securities and Exchange Commission's Rules of Practice ("Rules of Practice"), the Division of Enforcement ("Division") respectfully submits this memorandum of law in support of its motion for summary affirmance of the January 3, 2013 Initial Decision of the Administrative Law Judge. The Initial Decision bars respondent Ross Mandell from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO"), pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"). Ross Mandell, Initial Dec. Rel. No. 478, 2013 SEC LEXIS 15 (Jan. 3, 2013) (hereinafter "Initial Decision").

PRELIMINARY STATEMENT

The Initial Decision is based on Mandel's prior criminal conviction for securities fraud, wire fraud and mail fraud (and conspiracy to commit those crimes). United States v. Mandell, No. 09-662, 2012 U.S. Dist. LEXIS (S.D.N.Y. May 1, 2012), *appeal docketed*, No. 12-1967 (2^{nd} Cir. May 14, 2012). On January 25, 2013, Mandell filed a petition for review of the Initial Decision, pursuant to Rule 410(b) of the Rules of Practice. Mandell's petition focuses on a single, narrow, issue. He asserts that the Administrative Law Judge ("ALJ") erred in imposing the collateral bar remedy -- created by Section 925 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") -- because Mandell's underlying illegal conduct occurred prior to Dodd Frank's enactment and, thus, imposing the collateral bar on him in this case would constitute an impermissible retroactive application of Dodd-Frank. See Pub. L. No. 111-203, 124 Stat. 1376 (2010). Recent Commission precedent, however, resolves this issue as a matter of law. The Commission recently held that collateral bars authorized under § 925 of Dodd-Frank "are not impermissibly retroactive as applied to follow-on proceedings addressing pre-Dodd-Frank conduct because such bars are prospective remedies whose purpose is to protect the investing public from future harm." John W. Lawton, IA Act Rel. No. 3513 (Dec. 13, 2012). Thus, no genuine dispute exists as to whether the ALJ properly imposed a collateral bar against Mandel, and the Division respectfully requests that the Commission summarily affirm the Initial Decision.

STATEMENT OF UNDISPUTED FACTS

On December 14, 2010, the Office of United States Attorney for the Southern District of New York filed a superseding indictment against Mandell and five other defendants in *United States v. Mandell* . Div. Ex. 1.[1] Mandell was charged with, among other things, participating in a securities fraud scheme from in or about 1998 through in or about 2006. Div. Ex. 1; Initial Decision, at 4.

[1] The Division filed a Motion for Summary Disposition with eight exhibits (Div. Ex. 1 through Ex. 8), which are referenced in the Initial Decision and will be referred to *infra*.

On July 26, 2011, the jury in United States v. Mandell found Mandell guilty of securities fraud, wire fraud and mail fraud (and conspiracy to commit those violations).[2] Initial Decision at 4. On August 13, 2012, on the basis of Mandell's criminal conviction, the Commission instituted this proceeding against Mandell. On January 3, 2013, the ALJ granted the Division's Motion for Summary Disposition, barring Mandell from association with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or NRSRO, pursuant to Exchange Act Section 15(b). Initial Decision at 7.

On August 13, 2012, on the basis of Mandell's criminal conviction, the Commission issued an Order Instituting Proceedings ("OIP"), pursuant to § 15(b) of the Exchange Act. A prehearing conference was held on September 11, 2012, and on October 16, 2012, the Division filed a Motion for Summary Disposition, pursuant to Rule 250 of the Rules of Practice.

On January 3, 2013, the ALJ granted the Division's motion, imposing a collateral bar sanction against Mandell under § 15(b), which prohibits Mandell from association with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or NRSRO. Initial Decision at 6-7. In imposing the collateral bar, the ALJ found that Mandell's criminal activities were egregious, recurrent, involved a high degree of scienter, and that "Mandell has not offered assurances against future violations or recognized the wrongful nature of his conduct" (and that, to the contrary, speaking at his sentencing in his criminal case, Mandell continued to challenge the government's charges against him). Initial Decision at 7.

On January 25, 2013, Mandell filed a petition for review of the Initial Decision, pursuant to Rule 410(b) of the Rules of Practice. Mandell asserts that, because the conduct for which he

[2] On May 3, 2012, the Court sentenced Mandell to 144 months incarceration, three years of supervised release, and a $10,000 fine. In addition, the Court ordered Mandell to forfeit $50 million. Div. Ex. 5. Finally, on September 26, 2012, the Court ordered Mandell to pay $24,880,460 in restitution to his fraud victims (jointly and severally with his co-defendants). Div. Ex. 7.

was convicted "occurred between the years 1998 and 2006," and because Congress enacted the Dodd-Frank collateral bar remedy in 2010, the ALJ erred in applying the collateral bar to him in this case.[3]

ARGUMENT

For the following reasons, the ALJ did not err in issuing a collateral bar against Mandell on the basis of his conviction in *United States v. Mandell*, and the Division respectfully seeks summary affirmance of the Initial Decision.

I. Summary Affirmance Standard

Rule 411(e) of the Rules of Practice permits a party, within 21 days after the filing of a petition for review of an ALJ initial decision, to move that the Commission summarily affirm the decision. Respondent's petition for review was filed on January 25, 2013, and the Division's motion for summary affirmance falls within the authorized timeframe. Rule 411(e)(2) further provides that a motion for summary affirmance should be granted if "no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument." Rules of Practice, Rule 411(e)(2). Summary affirmance may be denied only upon a "reasonable showing that, among other reasons, the initial decision embodies an exercise of discretion that is important and that the Commission should review." Richard Kern and Charles Wilkins, Exch. Act Rel. No. 34-51115 (Feb. 1, 2005).

II. The Collateral Bar is a Prospective Remedy Applicable to Pre-Dodd-Frank Conduct

Section 925 of Dodd-Frank, enacted July 21, 2010, added collateral bar sanctions to § 15(b)(6) of the Exchange Act. John W. Lawton, IA Act Rel. No. 3513. The new sanctions authorize the Commission to bar an individual who has engaged in certain unlawful conduct

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[3] To the extent Mandell seeks review of any other aspect of the Initial Decision, the Division likewise seeks summary affirmance, for the reasons set forth in the Initial Decision.

from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO. Id. Prior to Dodd-Frank, collateral sanctions were generally authorized only on a particularized basis depending on specific associations that an individual had sought out. Id.

Mandell asserts that, because his criminal conduct occurred prior to 2010, imposition of Dodd-Frank's collateral bar against him would be an impermissible retroactive application. Directly contrary to Mandell's argument, the Commission's recent Lawton decision holds that collateral bars authorized under § 925 of Dodd-Frank "are not impermissibly retroactive as applied to follow-on proceedings addressing pre-Dodd-Frank conduct because such bars are prospective remedies whose purpose is to protect the investing public from future harm." Id. The ALJ correctly found that Mandell's criminal activities involved a high degree of scienter and were egregious and recurrent. Initial Decision at 6. Thus, as with the Respondent in Lawton, retroactive application of Dodd-Frank's collateral bar provisions to Mandell's conduct is appropriate because it serves to protect the public from future harm, rather than impose a punishment for past conduct. John W. Lawton, IA Act Rel. No. 3513; see Landgraf v. USI Film Products, 511 U.S. 244, 273-274 (1994) (applying a new statute to antecedent conduct is "unquestionably proper" when statute authorizes or affects the propriety of prospective relief"); see also Vartelas v. Holder, 132 S. Ct. 1479 (Mar. 28, 2012) (statutes authorizing prospective remedies may consider conduct pre-dating the statute without a genuinely retroactive effect).

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Commission grant the Division's motion for Summary Affirmance and affirm the Initial Decision of the Administrative Law Judge, pursuant to Rule 411(e) of the Securities and Exchange Commission's Rules of Practice.

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