ORIGINAL

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
FILE NO. 3-15317

In the Matter of FRANK BLUESTEIN Respondent.	DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

Respondent Frank Bluestein's brief does not identify any material dispute of fact that would preclude summary disposition of this matter. He does not – and cannot – dispute the fact that the District Court entered summary judgment against him, permanently enjoining him from violating the registration and antifraud provisions of federal securities law. Moreover, Bluestein does not dispute the facts underlying the Order Instituting Proceedings ("OIP") or the Division of Enforcement's (the "Division's") application of the *Steadman* factors as discussed in its brief.

Rather than point to a material factual dispute, Bluestein uses his response brief to re-litigate the underlying District Court action brought by the Division and revisit his decision to consent to a permanent injunction. He faults the District Court for entering summary judgment (including monetary relief) and claims that he was unaware that the Division intended to seek an industry bar in a follow-on administrative proceeding. Unfortunately for Bluestein, the time for such arguments has passed; Bluestein's regrets over how he handled the District Court litigation are not relevant to the relief sought here.

Yet, even if addressed on their merits, Bluestein's arguments are eviscerated by his sworn testimony to the District Court during settlement proceedings.

DISCUSSION

I. It is Undisputed That the District Court – for Multiple Reasons – Has Enjoined Bluestein From Further Violations of the Antifraud Provisions of Federal Securities Law.

Unlike a typical follow-on administrative proceeding, there actually are two independent bases for the District Court's injunction. First, as Bluestein admits in his brief – and as is clearly reflected in the October 24, 2012 transcript of proceedings – Bluestein consented under oath to entry of the injunction. (7/11/2013 Leiman Decl. Ex. B at 6:15-7:3; 7:22-8:8.) Second, for good measure, after Bluestein failed to execute the consent papers provided by the Division, the Court set a briefing schedule for the SEC's pending summary judgment motion and, ultimately, entered summary judgment against Bluestein. (7/11/2013 Leiman Decl. Exs. C & D.)

Bluestein laments that he did not participate in further proceedings in the District Court. (Resp. Br. at 4-5.) But that is precisely the point. Bluestein had counsel when he agreed, on the record, to entry of the permanent injunction. After Bluestein's counsel withdrew, the Court admonished him that if he did not retain new counsel:

> "you'll be representing yourself. That doesn't reduce or diminish in any way your obligations to this Court or your obligations to comply with orders of the Court or participate in further settlement discussions including providing the financial information."

(7/11/2013 Leiman Decl. Ex. B at 11:15 – 11:19.) Bluestein had the opportunity to respond to the Commission's Summary Judgment Motion; he neglected to do so. Bluestein

had 14 days to object to the Magistrate Judge's Report and Recommendation that the SEC's Motion for Summary Judgment be granted; he neglected to do so. Instead, he moved to Florida without providing the Court or the Division with his new contact information and he ignored the Court's admonition to continue participating in the proceedings. Bluestein should not be allowed to revisit his decision to abandon the District Court proceedings now that he is facing further consequences for his actions – especially when (1) he has not filed an answer to the OIP in this matter and (2) as shown below, he was fully aware of (and even agreed to) the relief sought in this proceeding.

II. Bluestein Was Informed About – and Even Agreed to – a Collateral Bar.

Unlike most cases of this sort, the Division not only obtained the underlying injunction, it obtained Bluestein's consent, under oath, to the industry bars that are sought in this matter. (*Id.* at 5:24 – 7:3.) Amazingly, Bluestein not only has retreated from his consent to that relief, he now argues that he "was never made aware of the risk or possible future existence of the 'Collateral Bar.'" (Resp. Br. at 5.) At the outset, Bluestein's argument fails to raise a material fact issue as to the existence of the underlying injunction.

Moreover, Bluestein's claim that he did not know that the Division would seek an industry bar in a follow-on administrative proceeding is demonstrably false. In fact, when Bluestein indicated that he was prepared to consent to an industry-wide bar, the Division, in an abundance of caution, provided Bluestein, his counsel,[1] and the Magistrate Judge with

[1] Although he now complains about his representation, Bluestein did not indicate at the hearing – or at any point during the underlying District Court litigation – that he had any questions about the proceedings, any problem with his representation by Mr. Foster, or any reservations about his agreement to the relief sought by the Division. To the contrary, at every turn, Bluestein indicated that he understood the nature of the relief sought in the

example collateral bar language and, for good measure, explained the relief in open court with Mr. Bluestein present:

> MR. LEIMAN: Thank you, Your Honor. The terms of the bifurcated settlement would be that today the defendant would agree to have entered a permanent injunction against the offenses therein enumerated in the commission's complaint, and also as part and parcel of that would agree that in a follow-on administrative proceeding, a series of industry bars would be entered against him along the lines of language that's been provided to the defendant.

(7/11/2013 Leiman Decl. Ex. B at at 4:4 – 4:11.) Then, both Bluestein's counsel (David Foster) and Bluestein himself (after he was placed under oath) told the District Court that they had had an opportunity to review the language of the collateral bar:

> THE COURT: Okay. And the specific language of the -- of the injunction of the bar, including the industry bar, was provided. Mr. Foster, do you and Mr. Bluestein, did you have the opportunity to review that?
>
> MR. FOSTER: Yes, Your Honor, and I also believe, although I prefer that Mr. Bluestein speak for himself ...
>
> THE COURT: Yeah, we're going to get to Mr. Bluestein ... -- well, as a matter of fact, I'll tell you what. Mr. Bluestein, I'm going to put you under oath and I'm going to have Mr. Foster ask you some questions about your understanding of the agreement and whether that agreement is acceptable to you, so if you would raise your right hand please, sir.
>
> FRANK BLUESTEIN was thereupon called as a witness herein, and after being first duly sworn to tell the truth and nothing but the truth, testified on his oath as follows:

District Court and in the anticipated follow-on administrative proceeding. (*E.g.*, 7/11/2013 Leiman Decl. Ex. B at 5:24 – 7:3; 7:22 – 8:2; 8:9 – 9:8; 10:25 – 11:2.)

...
MR. FOSTER: Mr. Bluestein, do you understand that you are consenting today to being permanently barred from the securities industry including all exchanges?
MR. BLUESTEIN: Yes.

MR. FOSTER: Were you given a document with the identical language that will be incorporated for your case and had an opportunity to read it?
MR. BLUESTEIN: Yes.

MR. FOSTER: I believe it was Judge Whalen's chambers I believe when all three of us met.
MR. BLUESTEIN: Yes.

MR. FOSTER: Do you recall that?
MR. BLUESTEIN: Yes.

MR. FOSTER: Do you have any questions about the document that was handed to you that you do not understand?
MR. BLUESTEIN: No.
...

(*Id.* at 5:1 – 6:14.) To avoid any doubt, the Court, once more, clarified for Mr. Bluestein that – after the District Court proceeding was complete – there would be an administrative proceeding in which his consent to the industry bar would be entered:

THE COURT: Okay. Back on the record. I think we've clarified that...There's this case and then the administrative case, and in terms of this case, you'll present the proposed injunctive order to Judge Cox, and in terms of the industry-wide injunction -- and that's -- you read, Mr. Bluestein, and Mr. Foster, you had the opportunity to read the language -- excuse me -- that will be presented to an administrative law judge.

(*Id.* at 10:12 – 10:23.) In sum, Bluestein (a) was told that the collateral bar would be sought, (b) stated under oath that he understood the nature of that relief and (c) even stated that he agreed to have the relief imposed. While Bluestein can retreat from his agreement to settle

this proceeding, he cannot escape the fact that when he agreed to the permanent injunction entered by the District Court, he was well-aware that this proceeding would follow.[2]

III. The District Court's Monetary Award Is Not Relevant to This Proceeding.

In his brief, Bluestein complains about the monetary relief ordered by the District Court at summary judgment. (*E.g.*, Resp. Br. at 4.) At the outset, that grievance is irrelevant to the question whether Bluestein has been enjoined from violating federal securities law. Moreover, to the extent that Bluestein is arguing that he had no opportunity to participate in summary judgment proceedings, that argument is manifestly false. The Court made clear to Bluestein that monetary issues were, as yet, unresolved, and that the parties had 60 days to reach settlement. The Court then told Bluestein:

> THE COURT: At the end of those 60 days, and I'll set a date certain, I will reconvene the parties, that will be you, Mr. Bluestein, the SEC's attorneys, we can do that by telephone, you'll advise me as to whether you've reached a settlement, whether you're close to a settlement such that it would be productive to come back to my court and try to hammer out on the details or whether you have not reached a settlement. If the latter is the case, then I will provide additional time, and I'll put this in my order, Mr. Bluestein, for you to respond to the pending summary judgment motion and I'll go forward with a report and a recommendation on that. Do you understand that, sir?
> MR. BLUESTEIN: Yes.

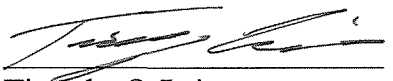
[2] Curiously, Bluestein argues that "the actual law underlying the Commission's proposed penalty" – presumably referring to the industry bar that is sought in this proceeding – "was not even in existence at the time of the injunction and thus could never have been contemplated by the parties." (Resp. Br. at 3.) That is simply not correct. The "collateral bar" remedy is provided for in Section 925 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") which was signed into law on July 21, 2010. The SEC staff provided Bluestein with sample collateral bar language – and Bluestein agreed to entry of a permanent injunction (and the bar) – on October 24, 2012, over two years after the Dodd-Frank Act became law.

(7/11/2013 Leiman Decl. Ex. B at 8:21 – 9:8 (emphasis added).) In short, Bluestein was given the chance to respond to the SEC's motion for summary judgment. His failure to do so does not preclude the relief sought in the Division's Motion for Summary Disposition.

CONCLUSION

There is no material factual dispute in this matter: Bluestein has been enjoined from violating the registration and antifraud provisions of federal securities law and the undisputed facts warrant the collateral bar sought by the Division. Bluestein's attempt to revisit his consent to the injunction and to attack the District Court's entry of summary judgment is nothing more than gamesmanship – offered without any legal or factual support. Bluestein's effort to distract from the operative facts of this case should be rejected.

Respectfully submitted,



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