UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 23, 2014

Administrative Proceeding
File No. 3-15830

In the Matter of	
HERBERT STEVEN FOUKE,	
Respondent.	

DIVISION OF ENFORCEMENT'S AMENDED MOTION FOR SANCTIONS AGAINST RESPONDENT HERBERT STEVEN FOUKE

I. Introduction

Pursuant to Rules 155(a) and 220(f) of the Commission's Rules of Practice, and the Law Judge's Order Following Prehearing Conference, Finding Respondent In Default, And Directing A Motion For Sanctions ("Default Order") dated May 8, 2014, the Division of Enforcement moves for the sanctions of a penny stock bar and an industry bar from association against Respondent Herbert Steven Fouke pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"). We set forth the grounds for the sanction below.

II. History Of The Case

The Commission issued the OIP on April 8, 2014, pursuant to Exchange Act Section 15(b) and Advisers Act Section 203(f). In summary, the OIP alleges Fouke, while associated with a registered broker-dealer and investment adviser, assisted his friend and colleague, Richard

J. Buswell,[1] in making false statements to clients about Buswell's credentials and rates of return clients would receive, as well as omitting to explain the risky nature of several private placements into which Buswell was placing clients. These facts, described in more detail below, led to a guilty plea and conviction in a criminal case.

The Division served Fouke by certified mail on April 12, 2014 in accordance with Commission Rule of Practice 141(a)(2)(i). Default Order at 1. Fouke's Answer was due on May 5, 2014. *Id.* Fouke did not answer or otherwise appear in the case. *Id.* Accordingly, the Law Judge determined Fouke to be in default and directed the Division to file the instant motion. *Id.* at 1-2.

III. Memorandum Of Law

1. Allegations Of The OIP The Law Judge May Deem True

Pursuant to Rule 155(a), the Law Judge may deem the allegations of the OIP as true for purposes of determining sanctions against Fouke. *Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012); *In the Matter of Peak Wealth Opportunities, LLC and David W. Dube*, AP File No. 3-14979, 2013 WL 812635 at *1 (March 5, 2013). The OIP is attached as Exhibit 1 to this motion. The relevant allegations are:

- From approximately September 2008 until April 2009, Fouke was a registered representative at and associated with Brookstone Securities, Inc., (also doing business as Brookstone Investment Advisory Services) of Lakeland, Florida. OIP at ¶ II.A.1. Brookstone was formerly registered with the Commission as both a broker-dealer and investment adviser. *Id.*

- On September 6, 2013, Fouke pleaded guilty to one count of conspiracy in violation of 18 U.S.C. § 371, in the criminal case *United States v. Buswell, et al.,* Case No. 6:11-cr-00198, pending in the Western District of Louisiana. *Id.* at ¶ II.B.2. Fouke is currently awaiting sentencing. *Id.*

- The facts giving rise to the plea are that Fouke admitted he was present in meetings

[1] Buswell is the subject of a companion administrative proceeding, AP File No. 3-15829, which is currently stayed while the Commission considers Buswell's settlement offer.

when Buswell, his co-defendant in the criminal case, made false statements to clients regarding Buswell's credentials, the commissions Buswell would charge, and the rates of return Buswell was guaranteeing clients. *Id.* at ¶ II.B.3. Although he originally did not know these statements were false, Fouke later became aware they were not true. *Id.*

- Fouke also later learned Buswell did not explain to clients the risks of trading on margin and the riskiness of direct private placements Buswell was recommending. *Id.* He also became aware that information about clients' income and net worth had been falsified to make it appear they were accredited investors when they were not. *Id.*

2. Additional Evidence

In addition to the OIP allegations, the Division submits the following additional evidence showing we are entitled to the industry and penny stock bars we request:

- Fouke's Plea Agreement in the criminal case, attached as Exhibit 2.
- Buswell's Plea Agreement in the same criminal case, attached as Exhibit 3.
- FINRA Report on Brookstone Securities, Inc., attached as Exhibit 4.
- Registration/Reporting Status and Form ADV for Brookstone Investment Advisory Services, attached as Exhibit 5.[2]
- Minutes of Court dated Sept. 6, 2013 for the Western District of Louisiana in Fouke's criminal case, attached as Exhibit 6.

These exhibits contain the following pertinent facts:

- Brookstone Securities was incorporated in Florida in 2005. Exhibit 4 at 1. Brookstone and its predecessors were registered as a broker-dealer from April 8, 1983 until October 9, 2012. *Id.* at 10. FINRA expelled the firm from the securities industry in October 2012. *Id.* at 1.
- Brookstone Investment Advisory Services, listed at the same Lakeland, Florida address as Brookstone Securities, was a registered investment adviser with the Commission. Exhibit 5 at 1-2. Brookstone Investment Advisory Services was registered with the Commission from approximately 2005 until its registration was terminated on June 20, 2012. *Id.*
- Buswell became a licensed stockbroker in 2006. Exhibit 2 (D.E. 168-2 at 1). That same year, he formed Bowman Investment group. *Id.* Bowman, located in

[2] Undersigned counsel printed out Exhibits 4 and 5 using the Commission's website, www.sec.gov, and related links.

Lafayette, Louisiana, operated until 2009. *Id.* Bowman used Brookstone Securities as its broker-dealer to conduct stock transactions. *Id.*

- Fouke became a client of Buswell's in 2006, and eventually was named the president of Bowman in 2008. Exhibit 2 (D.E. 168-2 at 2). Fouke became a registered representative in September 2008. *Id.*

- Fouke recruited some of his friends and business associates to become clients of Buswell and Bowman. *Id.* He sat in meetings in which Buswell made false statements to these clients about his credentials, commissions he would charge, and the rates of return clients could expect. *Id.* Fouke later learned these statements were false. *Id.*

- Fouke also learned Buswell misrepresented or omitted to tell clients that private placement offerings he was recommending to them were risky. Exhibit 2 (DE 168-2 at 3). Fouke also learned clients' financial information was falsified on forms Bowman sent to Brookstone to make it appear the clients investing in the private placements were accredited, when, in fact, many were not. *Id.* at 3-4.

- Buswell and Fouke caused Bowman clients to lose at least $5 million. Exhibit 3 (DE 163-2 at 3). Buswell made $1.7 million in commissions in 2008 and 2009. *Id.*

- Those facts led Fouke to plead guilty to one count of conspiring to commit securities fraud, investment advisor fraud, wire fraud, and mail fraud. Exhibit 2 (D.E. 168-3 at 1).

- The criminal judge accepted Fouke's guilty plea and rendered judgment against him on Sept. 6, 2013. Exhibit 6.

3. An Industry Bar Is An Appropriate Sanction

Because the Law Judge has determined Fouke to be in default, the only question left is what sanctions are appropriate under Exchange Act Section 15(b) and Advisers Act Section 203(f).

Exchange Act Section 15(b)(6)(A) authorizes the Commission to, among other things, issue a penny stock bar and bar from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or nationally recognized statistical rating organization ("NRSRO") any person, who, at the time of the misconduct was associated with or seeking to become associated with a broker or dealer, if the person has been enjoined

from any action specified in Section 15(b)(4)(A)(D) or (E) of the Exchange Act, and if it is in the public interest. 15 U.S.C. §78(o)(b)(6)(A)(i); *In the Matter of Christopher A. Seeley*, AP File No. 3-15240, 2013 WL 5561106 at *13 (Oct. 9, 2013). Section 15(b)(4)(D) specifies that one of the actions giving rise to an industry bar is if the person has willfully violated any provision of the securities laws, including the Exchange Act. 15 U.S.C. §78(o)(b)(4)(D). Section 15(b)(6)(A) further allows the Commission to issue an industry bar from association against any person who has been convicted of a felony "involving the purchase or sale of a security" or arising "out of the conduct of the business of a broker, dealer . . . investment adviser . . . ." 15 U.S.C. §78(o)(b)(6)(A)(ii); 15 U.S.C. §78(o)(b)(4)(B)(i) and (ii).

Section 203(f) of the Advisers Act contains similar provisions permitting the Commission to issue an industry bar against anyone who has willfully violated a provision of the Exchange Act or been convicted of a felony involving the purchase or sale of a security or arising out of the business of a broker, dealer, or investment adviser, and who was associated with or seeking to become associated with an investment adviser. 15 U.S.C. §80(b)(3)(E) and (F).

There are three elements the Law Judge must determine to decide whether our proposed sanctions are proper: (A) whether Fouke was associated with a registered investment adviser and/or broker-dealer at the time of his misconduct; (B) whether Fouke willfully violated a provision of the securities laws or was convicted of an applicable felony; and (C) whether it is in the public interest to bar him.

A. Fouke Was Associated With A Registered Entity

The OIP, Fouke's plea agreement, and the Commission and FINRA statements about Brookstone (Exhibits 1, 2, 4, and 5) leave no doubt Fouke was associated with both a registered

broker-dealer and investment adviser at the time his misconduct occurred. Exhibits 4 and 5 establish that Brookstone Securities was a registered broker-dealer and Brookstone Investment Advisory Services was a registered investment adviser in 2008 and 2009. Fouke's plea agreement as well as the OIP state unequivocally that: (i) Fouke's misconduct occurred between September 2008 and April 2009; (ii) Fouke was a licensed stockbroker during that time; and (iii) Fouke was associated with Brookstone during the same time. Accordingly, the Division has met the first criteria for barring Fouke under Exchange Act Section 15(b)(6) and Advisers Act Section 203(f) because he was associated with the Brookstone entities.

B. Fouke Was Convicted Of A Felony

As noted above, both Exchange Act Section 15(b)(6) and Advisers Act Section 203(f) authorize the Law Judge to bar Fouke from the securities industry if he was convicted of a felony involving the purchase or sale of a security, or arising out of the business of a broker-dealer or investment adviser. Fouke's plea agreement and conviction establish both prerequisites. Fouke pleaded guilty to, and was convicted of, conspiracy to commit, among other crimes, securities fraud and investment advisor fraud. Exhibit 2 (DE 168-3 at 1); Exhibit 6. Among other things, the crime of conspiracy to commit securities fraud required that Fouke conspire to violate Exchange Act Section 10(b) and Rule 10b-5, which clearly involve the purchase or sale of a security. Exhibit 2 (DE 168-3 at 3). Similarly, the count to which Fouke pleaded guilty required him to conspire to deceive investment advisor clients in violation of the Advisers Act.

Furthermore, the factual basis for Fouke's plea agreement demonstrates his conviction (Exhibit 6 establishes the conviction) involved both the purchase or sale of a security and the business of a broker-dealer and investment adviser. As discussed in Section III.2 above, Fouke assisted Buswell in making a series of misrepresentations and omissions to clients of Bowman about securities the firm was recommending, including failing to adequately describe the risk of

margin trading and private placement investments, and misrepresenting rates of return and commissions. The misrepresentations and omissions caused clients to buy securities and lose at least $5 million. The misrepresentations and omissions led clients to invest with Bowman, and Bowman made investors' trades with Brookstone securities. Accordingly, the conviction concerned a felony involving the purchase or sale of a security and the business of a broker-dealer or investment adviser, and therefore Division has met the second prerequisite for an industry bar.

C. Industry And Penny Stock Bars Are In The Public Interest

In determining whether an administrative sanction is in the public interest, the Commission considers the factors outlined in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979): (1) the egregiousness of a respondent's actions; (2) the isolated or recurrent nature of the violations; (3) the degree of scienter involved; (4) the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood the respondent's occupation will present opportunities for future violations. *See also In the Matter of KPMG Peat Marwick, LLP,* AP File No. 3-9500, 2001 WL 47245 at *23-26 (Jan. 19, 2001), *aff'd sub nom KPMG v. SEC*, 289 F.3d 109 (D.C. Cir. 2002); *Peak Wealth Opportunities,* 2013 WL 812635 at *9-10; *Christopher Seeley*, 2013 WL 5561106 at *14. No one factor controls. *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996).

Here, at least five of the six factors weigh in favor of industry and penny stock bars. First, Fouke's actions were egregious. The OIP and the two plea agreements (Exhibits 1-3) set forth a scheme where Fouke recruited friends and associates to become clients of Buswell and Bowman, sat through presentations in which Buswell lied to them, and then did nothing about it when he found out Buswell was making false statements. Also, Fouke knew Bowman was

misrepresenting the net worth and financial status of clients to Brookstone to make it appear they were accredited investors and so could purchase the private placements and other securities the firm was recommending. The misconduct caused investors to lose at least $5 million.

Second, Fouke's actions were recurrent, continuing for several months and involving many clients. For the same reasons as discussed in the preceding paragraph, Fouke showed a high level of scienter, in particular for not notifying clients once he found out about the misrepresentations and omissions.

Fourth, Fouke has not appeared or defended in this case, and so has not given any assurances against future violations of the securities laws. The fifth factor – Fouke's recognition of his wrongful conduct – is the one factor that may not weigh in favor of a bar. Fouke pleaded guilty in the criminal case, which involved acknowledging his misconduct. Sixth, unless Fouke is barred from the securities industry he will have the chance to reoffend.

Finally, it is in the public interest to collaterally bar Fouke from all association with the securities industry. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, added collateral bars as sanctions under Exchange Act Section 15(b)(6) and Advisers Act Section 203(f). The Commission has held that Dodd-Frank's collateral bars "are prospective remedies whose purpose is to protect the investing public from future harm," and therefore applying the bars to address pre-Dodd-Frank conduct is "not impermissibly retroactive." *In the Matter of John W. Lawton*, AP File No. 3-14162, 2012 WL 6208750 at *10 (Dec. 13, 2012). Accordingly, the Law Judge should bar Fouke from the securities industry, even though his conduct occurred in 2008 and 2009, before the enactment of Dodd-Frank.

IV. Conclusion

For all the reasons discussed above, the Division asks the Law Judge to sanction Fouke

by issuing a penny stock bar and barring him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or NRSRO.

Respectfully submitted,

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