UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. ~~3-16153~~ 3-16143

In the Matter of

Kelly Black-White,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY BRIEF IN SUPPORT OF IMPOSITION OF SANCTIONS

The Oral Argument Brief ("Respondent's Brief") submitted by Respondent Kelly Black-White sets out purported facts and related argument which, she maintains, minimize her role in the scheme to defraud for which she is charged in the Order Instituting Proceedings ("OIP") in this matter, and for which she pleaded guilty in a related criminal case, *United States v. Kelly Black-White, et al.,* 11-CR-10416-DJC ("the criminal case"). While not specified in Respondent's Brief, Ms. Black-White presumably intends for the Court to consider her arguments in determining whether to impose the sanctions asked for by the Division in its Brief in Support of Imposition of Sanctions ("Division's Brief"). Neither the purported facts nor the arguments presented by Ms. Black-White are compelling. The sanctions requested in the Division's Brief should be imposed.

As to the arguments pressed by Ms. Black-White, they essentially fall into four general categories. First, Ms. Black-White contends that she did not know the transactions were illegal. Aside from the fact that this contention in directly undercut both by her guilty plea in

the criminal case and her stipulating to liability in this matter, whether or not she knew the transactions were illegal is irrelevant. As discussed in the Division's Brief, to demonstrate violations of the antifraud provisions of the federal securities laws, including Rule 10b-5(a) of the Exchange Act, the Commission must show that a party acted with scienter. *Aaron v. SEC*, 446 U.S. 680, 691 (1980). *See also SEC v. Hasho*, 784 F.Supp. 1059, 1106 (S.D.N.Y. 1992). Scienter is a mental state embracing intent to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 (1976). Circuit courts have concluded that scienter may also be established by a showing that a defendant acted with recklessness or sometimes "extreme recklessness," both of which are characterized by an "extreme departure from the standards of ordinary care." *See, e.g., SEC v. Infinity Group Company,* 212 F.3d 180, 192 (3d Cir. 2000) (requiring showing of conscious misbehavior or recklessness); *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2007) (showing of extreme recklessness can satisfy scienter requirement). Clearly, Ms. Black-White's conduct meets this standard, particularly given her admissions in her change of plea in the criminal case and her stipulation to liability in this matter.

Second, Ms. Black-White claims that she was told by any number of people, including Mr. Henderson, a cooperating witness/defendant in the FBI's undercover investigation, the FBI agent posing as a Fund Manager, other board members, and various attorneys, that what she was doing was legal. Aside from the fact that Ms. Black-White did not raise an advice of counsel defense in the criminal case, the facts presented by Ms. Black-White regarding advice that she received does not meet the standard for an advice of counsel defense. For a defendant or respondent to establish a defense that she relied on the advice of an attorney or other professional, the defendant or respondent must demonstrate that she (1) made a complete

disclosure to the attorney; (2) sought the advice as to the appropriateness of the challenged conduct; (3) received advice that the conduct was appropriate; and (4) relied on that advice in good faith. Even if these elements are established, they are not a complete defense, but only one factor to be considered. *See, e.g., Markowski v. SEC,* 34 F.3d 99, 104-05 (2d Cir. 1994). In addition, Ms. Black-White concedes in her brief that she "realized something was wrong with the transaction even after being told it was legal by 5 different SEC attorneys." *Respondent's Brief, p. 1, ¶ 5.*

Third, Ms. Black-White contends that the Court should consider how she was to benefit from the alleged scheme. As set out in the Division's Brief, each of the executives whom Ms. Black-White referred to the Fund Manager agreed to, and did, pay a kickback to the Fund Manager in exchange for the Fund Manager causing the Fund to invest in their respective companies' stock. In connection with the investments, each of the executives also caused stock certificates to be issued representing the purchase by the Fund of shares in their respective companies. The investments in the companies that Ms. Black-White referred to the Fund Manager were made by wire transfers from a bank account maintained in Massachusetts. The kickback payments from the various companies Ms. Black-White referred to the Fund Manager were made by wire transfers from the various companies to a Citizens Bank account held in the name of one of the Fund Manager's nominee companies in Massachusetts. *OIP ¶ C.1. (j) and (k).*

Based on her agreement with the Fund Manager, on various dates between June 22, 2011 and July 5, 2011, Ms. Black-White received a portion of the kickbacks paid by company executives she had referred to the Fund Manager. Her shares of the kickbacks, which totaled $6,050, were paid by wire transfer from a Citizens Bank account held by one of the Fund Manager's nominee companies in Massachusetts to JP Morgan Chase account number

**********6930, a bank account held by Premier Funding & Financial Marketing, LLC and controlled by Ms. Black-White. *OIP* ¶ *C.1.(l).* Ms. Black-White suggests in Respondent's Brief that an original $4500 payment made to her came "while she was out of town," and that she "should have returned the $4500.00 *in compensation* when it came into our account." (emphasis added) Obviously she did not return the $4500.00 "in compensation." Also, in order for the Fund Manager to make a wire transfer into Ms. Black-White's business account he would have had to know her account information. That information necessarily came from Ms. Black-White.

Finally, Ms. Black-White recounts myriad things she did not do as part of the scheme for which she pleaded guilty in the criminal case, and for which she has stipulated to liability here. She lists meetings she did not attend, telephone calls in which she was not a participant, negotiations she did not have, introductions she did not make, and more. What Ms. Black-White did not do is irrelevant, given that what she did do – as set out in the OIP and acknowledged by her as part of her guilty plea in the criminal case – establishes violations of the federal securities laws. The things Ms. Black-White did establish "scheme liability" under Section 10(b) of the Exchange Act and Rule 10b-5(a) thereunder, and it is for those violations that sanctions should be imposed in the form requested by the Division.

Conclusion

For the reasons discussed above and in the Division's Brief, the Division submits that, as stipulated, Ms. Black-White violated Section 10(b) of the Exchange Act and Rule 10b-5(a), thereunder. The Division further submits that based on the evidence and legal standards referenced in the Division's Brief and above, issuance by the Court of a cease-and-desist order, a

penny stock bar and an officer and director bar as to Ms. Black-White are well-founded and appropriate.

Dated: March 9, 2015

Respectfully submitted,

//s// Martin F. Healey

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