HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16326

In the Matter of

Khaled A. Eldaher,

Respondent.

POST-HEARING REPLY BRIEF OF THE DIVISION OF ENFORCEMENT

Table of Contents

TABLE OF AUTHORITIES

CASES

FEDERAL STATUATES

Securities Exchange Act of 1934

COMMISSION RULES OF PRACTICE

I. INTRODUCTION

The Division of Enforcement ("Division") submitted uncontroverted evidence at the hearing that Respondent Khaled Eldaher ("Eldaher") "sold away" from his employing broker-dealer. He accordingly was acting as an unregistered broker-dealer in violation of Section 15(a) of the Exchange Act. Eldaher now argues in his Post-Hearing Brief that, on the one-hand, he did not violate the law but that, on the other hand, he is "sincerely remorseful" and "now that he fully understands what 'selling away' is – he acknowledges the wrongful nature of his conduct." (Respondent's Brief at 15.)

Obviously, Eldaher cannot have it both ways – he cannot deny that he violated the law for purpose of defeating the Division's claims, and then assert that he acknowledges that he did, in fact, violate the law and therefore should not be sanctioned.

Eldaher's arguments that he is not liable and that he should not be barred are inconsistent with the evidence and are generally unsupported by citations to legal authority. Indeed, as set forth below, many of his legal arguments are simply erroneous when relevant case law is considered. Eldaher admitted he "sold away" and was terminated for it, the U5 confirms this fact, and his conduct additionally establishes that he was acting as a broker. The Division more than satisfied the preponderance of the evidence

standard of proof as to liability, and further amply established that the sanctions it seeks against Eldaher – including a permanent collateral bar – are in the public interest.

II. ARGUMENT

A. The Division Has Satisfied its Burden of Proof as to Liability

Eldaher claims that the Division has not met its burden of proof, which he acknowledges is the lowest, "preponderance of the evidence" burden. (Respondent's Brief at 8.) He supports his argument by objecting to consideration of certain evidence, including his own prior sworn admission that he "sold away" and the Form U5. He also makes incorrect legal arguments that to be found liable under the broad wording of Section 15(a)(1) he must have "executed" the transactions in Facebook shares.

1. Eldaher's Disavowal of His Prior Admission Is Not Credible

Central to Eldaher's assertion that the Division has failed to meet its burden is his claim that his own prior sworn investigative testimony admitting that he "sold away" is "completely unreliable." (*Id.* at 9.) He now claims that he made the statement "without understanding what 'selling away' meant," and because "he was simply trying to be helpful" to Division counsel conducting the investigation. (*Id.* at 9.) But Eldaher also claims that prior to the start of that examination, Division counsel "informed Mr. Eldaher that the

SEC was *accusing* Mr. Eldaher of *having violated rules* against 'selling away.'" (*Id.* at 6 ¶ 15 [emphasis supplied].)

Eldaher's present claim that he was "simply trying to be helpful" to a government attorney who was "accusing" him of violating the law by directly admitting the violations is creative, but not credible. Likewise, his claim that he did not understand what "selling away" is, after having been a broker for over twenty years, lacks credibility, particularly given his obvious efforts to conceal his arrangement with Prima Capital Group, Inc. ("Prima") from ACAP, including by using a non-ACAP email address. Moreover, Eldaher's attempt to explain away his prior admission is not probative of whether he in fact was selling away. It is, however, probative with regard to whether he recognizes the wrongful nature of his conduct. He clearly does not – which, as explained below, is a factor favoring imposition of a collateral bar.[1]

2. Eldaher's Assertion that the U5 Was "Amended" Is Unsupported and Irrelevant, as He Does Not Dispute Its Accuracy

Eldaher also argues that the Form U5 – certified as an authentic business record by FINRA's Senior Vice President and Secretary – should

---

[1] Eldaher also argues, in a heading, that his previous testimony was "not admitted into evidence." (Respondent's Brief at 9.) This ignores that the Division did not offer the transcript. Rather, it used portions of Eldaher's prior testimony to refresh his recollection and to impeach him, all of which is reflected in the hearing transcript. (See Transcript ("Tr.") at 8:16-8:20; 10:14-11:16.)

similarly be disregarded as "unreliable." (*Id.* at 10-11.) Specifically, Eldaher claims, without corroborating evidence, that the U5 he received from his employer, ACAP, upon his termination did not contain the comment by his employing broker that: "Khaled [Eldaher] was paid a finder's fee for referring people to someone selling shares of Facebook. He did not run the business through ACAP." (*Id.* at 11.) Eldaher claims that the U5 was "amended," and that "In all likelihood, the amendment was made at the behest of the SEC itself." *Id.* This outrageous claim that the Commission instructed FINRA to "amend" the U5 is wholly unsupported by any evidence. Moreover, Eldaher ignores his own admission at the hearing that he did, in fact, "receive a copy of the U5 that was amended." (Tr. 9:19-9:21.)

Eldaher's counsel also received a copy of the U5 by email on February 20, 2015, from the Division pursuant to the January 15, 2015, Order Following Prehearing Conference that the parties exchange exhibits by that date. He did not object to its admission, either before or during the hearing. Tr. at 8:21-8:25 & 18:11-18:18.) Any objection to the admission of evidence must be made on the record. *See* Rule of Practice 321(a).[2]

---

[2] Eldaher's aside that the email from Argyropoulos setting forth their agreement "would likely be excluded as hearsay in a district court" should also be disregarded. (Respondent's Brief at 1.) Not only was no objection made to admission of Exhibit 37 at the hearing, but Eldaher admitted its authenticity at the hearing, and that it was the email he referred to in a letter

Oddly, Eldaher nowhere denies the truth of the quoted portion of the U5 he does not want considered. He himself claims he was paid a "finders" or "referral" "fee," for investors he referred to Prima and admits he did not run that business through ACAP.

3. Even if Eldaher's Admission and the U5 Are Not Considered, the Evidence Establishes His Liability

The Supreme Court has explained, quoting the House Report expressly adopting a preponderance of the evidence standard of proof in administrative proceedings, that:

> "[Where] a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide 'in accordance with the evidence.' Where there is evidence pro and con, the agency must weigh it and decide *in accordance with the preponderance.* In short, these provisions require a conscientious and rational judgment on the whole record in accordance with the proofs adduced."

Steadman, 450 U.S. at 101 [emphasis original].

---

he prepared and sent to Division counsel during the investigation. (Tr. 17:1-17:19.) Moreover, as the Commission recently reiterated, hearsay is admissible in administrative proceedings, and is evaluated based on its probative value, its reliability, and the fairness of its use. *In re Fields*, 2015 SEC LEXIS 662 *84-85 (February 20, 2015); *see also* Rule of Practice 320 (broadly permitting the hearing officer to admit "relevant evidence"). Assuming the correctness of Eldaher's dubious assertion that a district court would likely exclude the email, that assertion is not relevant to whether the email is admissible in this proceeding.

Here, there is no question that the Division has come forward with a "prima facie and substantial case." Putting aside Eldaher's prior admission that he "sold away" and was terminated as a result, and his contorted arguments seeking to retract that admission, and the U5, the actual facts regarding his arrangement with Efstratios "Elias" Argyropoulos ("Argyropoulos") and his entity, Prima, are undisputed. Eldaher had an arrangement with Prima whereby he was paid a fee for investors he referred to Prima who subsequently invested with Prima. This arrangement was unknown to Eldaher's employing broker, ACAP. Whether Eldaher admits it or not, as a legal matter, his conduct constituted "selling away" from his employing broker in violation of Section 15(a)(1).

It appears that Eldaher's legal arguments as to why this arrangement did not constitute selling away are that: (1) he received a "fee" rather than a commission and (2) he had no involvement with the actual sales process and did not directly sell or "execute" sales of Facebook shares to investors. Neither argument has merit.

As explained in the Division's Post-Hearing Brief, a number of factors are relevant to whether a person is acting as a broker. The evidence unequivocally establishes that Eldaher received transaction-based compensation – a particularly strong indicator of brokering. *See In re*

Meissner, Initial Decisions Release No. 768, 2015 SEC LEXIS 1267 *18 (April 7, 2015). "Transaction-based compensation means 'compensation tied to the successful completion of a securities transaction.'" *Id.*, *18-19 (citation omitted). Eldaher's agreement with Prima was that he would receive a percentage of the mark-up on Facebook shares that was dependent on the number of Facebook shares sold. (*See* Division's Post-Hearing Brief at 3-4 ¶ 7.)[3] This is clearly "transaction-based compensation." It is not legally relevant whether the monies Eldaher received were termed "commissions" or "fees."

As the Division also previously explained, actual "execution" of orders by Eldaher is not required to establish that he was acting as a broker. Section 15(a)(1) requires that any person who "effect[s] any transactions in, *or* . . . induce[s] or attempt[s] to induce the purchase or sale of, any security" be registered. [Emphasis supplied.] Assuming that Eldaher did not "effect" the

---

[3] The Eldaher Brief at 8 purports to quote or paraphrase *In re Gebhart*, 58 S.E.C. 1133, 2006 SEC LEXIS 93 (Jan. 18, 2006) as saying "Selling away involves private securities transactions that associated persons **recommend and execute** without formal written approval of their brokerage firms," supplying emphasis to the boldfaced words. No page reference is provided; the Division has been unable to locate the quoted language. It should be noted, however, that *Gebhart* was a review of an NASD disciplinary proceeding interpreting an NASD rule, not a Commission Opinion analyzing "selling away" as a violation of Section 15(a)(1).

transactions in Facebook because he did not directly execute them, he clearly induced or attempted to induce those transactions.

Moreover, as explained in the Division's Post-Hearing Brief, the evidence establishes that Eldaher's conduct satisfied other factors indicating that he was acting as a broker. In particular, contrary to Eldaher's arguments, he did act as an intermediary between Argyropoulos and investors who had not received their Facebook shares as promised by Argyropoulos, when Argyropoulos sought to substitute shares for a different company for Facebook shares. (*See* Division's Post-Hearing Brief at 6-7 ¶¶ 20-21.)

B. It Is in the Public Interest to Collaterally Bar Eldaher

The Division seeks four forms of relief – a cease-and-desist order, disgorgement, a civil penalty and a collateral bar. Eldaher explicitly concedes at the outset of his Post-Hearing Brief that "if found liable disgorgement would be reasonable, as would a cease-and-desist order." (Respondent's Brief at 2.) Eldaher challenges only the imposition of a collateral bar. He argues that it is too onerous a sanction, claiming, among other things, that his violations were not serious, that he lacked scienter, that he has acknowledged

wrongdoing, and that in his current position he does not interact directly with investors.[4]

Eldaher's arguments are unavailing. As set forth below, each of his arguments is contradicted by the evidence, contrary to case law, or both.

1. Eldaher's Conduct Was Egregious

Eldaher asserts that his violations are not egregious because he "engaged in no duplicitous conduct." (Respondent's Brief at 13.) He appears to base this argument on the fact that this case does not involve fraud allegations. He ignores that the Commission has explicitly stated that "[w]e have repeatedly held that selling away is a serious violation." *Siegel*, 2008 SEC LEXIS 2459 at *36. As the Commission explained, "selling away" is prohibited both to protect investors from unsupervised sales, and to protect securities firms from liability and loss from such sales, and "Such misconduct

---

[4] Eldaher does not explicitly argue that the $24,000 civil penalty requested by the Division is inappropriate. He does state in passing that the Division "requests imposition of a civil penalty of a maximum of $90,000." (Respondent's Post-Hearing Brief at 7 ¶ 18.) This misconstrues the Division's analysis that it is permissible to impose a maximum first tier penalty of $90,000 ($7,500 times twelve investors) or maximum second tier penalty of $900,000 for reckless disregard of a regulatory requirement ($75,000 times twelve; a typographical error in the Division's Brief results in an incorrect statement that $90,000 is the maximum second tier penalty as well). Notwithstanding these possible maximums, the Division explained that it is seeking first tier penalties of $24,000 based on the facts and circumstances of this case, including Eldaher's apparent financial condition.

deprives investors of a firm's oversight, due diligence, and supervision, protections investors have a right to expect." *Id.*

In fact, Eldaher did engage in duplicitous conduct. He deliberately concealed from his employer his "selling away" activities by not using his ACAP email address and deliberately not telling ACAP he was "selling away." Additionally, Prima issued the 1099 (Ex. 36) to Eldaher's wife, not to Eldaher. Given that the 1099 included her Social Security number, it is evident that Eldaher provided the information to Prima necessary to cause the Form 1099 to issue to his wife rather than to him. Eldaher also attempted to aid Argyropoulos in persuading investors who had not received their Facebook shares to invest with Black Motor Corp., even though Eldaher did not "know exactly what it is." (Division's Post-Hearing Brief at 6-7 ¶ 20.)

Eldaher argues that a permanent collateral bar is unreasonable when compared to sanctions imposed for far more egregious and fraudulent conduct, randomly citing cases with widely disparate facts where permanent bars were imposed and arguing that those facts were more egregious than those in the instant case. This ignores that "the Commission has consistently held that the 'appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings.'" *In re Lorenzo*, 2015 SEC LEXIS

1650 *53 (April 29, 2015) (citations omitted). It also ignores that the fact that the maximum sanction that may be imposed in the most egregious of fraud cases – a permanent collateral bar – is also in the public interest in many less egregious cases, to protect the investing public and to deter future violations.

Eldaher tries to minimize his role, ignoring that he was responsible for referring a dozen investors whose investments in Facebook shares totaled more than $349,248.50. (*See* Division's Post-Hearing Brief at 4 ¶ 8.) On the other hand, Eldaher's "minimal" involvement included his utter failure to perform any due diligence with regard to Argyropoulos and Prima, with whom he had no prior relationship. (*Id.* at 3 ¶ 5.) Eldaher's failure to investigate before referring investors reduced his role, but placed investors in greater jeopardy.

2. Eldaher Acted with Scienter

Eldaher's argument that he acted without scienter is, in fact, not true. Although proof of scienter is not required to prove that Eldaher "sold away," the evidence in fact does establish that Eldaher acted at least recklessly. Eldaher had over twenty years of brokerage experience when he entered into his arrangement with Prima. He utterly failed to protect his clients by performing no due diligence with regard to Prima or Argyropoulos before referring investors to them. Moreover, that Eldaher actively concealed his

arrangement with Prima from his employing broker, ACAP, by, among other things, using a non-ACAP email address in his dealings with Prima and with his clients he was referring to Prima, evidences that he knew very well that he was "selling away."

3. Eldaher Fails to Acknowledge His Wrongdoing

Eldaher has also utterly failed to acknowledge his wrongdoing, and continues to dispute that he did anything wrong. He has attempted to blame Division counsel for his sworn admission that he "sold away" and he has complained that "ACAP never provided any express warning that the practice he engaged in was prohibited," and that he therefore lacked scienter. (Post-Hearing Brief at 15.) As the Commission explained in affirming NASD sanctions for selling away in another case, "[the respondent's] claimed misunderstanding of his obligation to comply with Conduct Rule 3040 [prohibiting "selling away"] is especially not mitigating because of his seventeen years of experience as an associated person in the securities industry. . . ." *In re Siegel*, 2008 SEC LEXIS 2459 *41 (Oct. 6, 2008). In fact, the length of an associated person's tenure in the industry may be construed as an *aggravating* factor in such cases. *See id.* *41 n.43. *See also Siegel v. SEC*, 592 F.3d 147,156 (D.C. Cir. 2010) (affirming Commission

ruling that Siegel's purported "misunderstanding" of the NASD "selling away" rule was not mitigating.)

4. Eldaher's Argument that His Current Position Does Not Involve Direct Investor Contact Is Unavailing

Eldaher argues that because his current position with an investment advisor does not involve direct interaction with investors and he tells clients that he is contacting them on behalf of his employer, his current occupation does not present opportunities for future violations. (Respondent's Brief at 17.) Eldaher argues that this latter fact establishes "the impossibility of recidivism," oddly ignoring that "selling away" involves contact with investors other than on behalf of one's employer.

The Commission recently rejected a similar argument in *Lorenzo*. Lorenzo contended that his occupation would not present opportunities for future violations because his communicating with retail customers "was a unique occurrence that was outside the scope of his investment banking responsibilities." 2015 SEC LEXIS 1650 at * 49. The Commission, however, concluded that Lorenzo's admission that sending emails to customers was not within his normal duties in fact *heightened* its concern that he would engage in future misconduct if allowed to remain in the industry, "no matter the scope of that employment." *Id.* The Commission accordingly imposed a collateral bar on Lorenzo. *Id.*

A similar analysis would apply here. Eldaher's past illegal actions outside the supervision of his employer suggest that he will engage in similar misconduct outside other employers' supervision in the future. Given his past history of dishonesty, the likelihood of future misconduct is even greater.

5. Even If Eldaher's Violations Are "Isolated," a Collateral Bar is Nevertheless Appropriate

Eldaher also asserts that his violations are isolated. By itself, however, this factor is insufficient to mitigate against imposing a collateral bar. The Commission imposed a collateral bar in *Lorenzo* notwithstanding Lorenzo's "relatively clean disciplinary history[y]" because it found that the egregiousness of his violations, his high degree of scienter, and his continued attempts to shift blame onto others, along with other considerations, were sufficient to require imposition of a collateral bar in the public interest. 2015 SEC LEXIS 1650 at * 53. Notably, Lorenzo only received a modest $150 in ill-gotten gains. *See id.* at *59; *see also Fields*, 2015 SEC LEXIS 662 * 96 (the fact that respondent apparently never profited directly from his misrepresentations does not justify a reduced sanction in light of his serious misconduct; imposing collateral bar).

6. Eldaher's Arguments that He Has Been Punished and a Bar Will Not Serve as Deterrence Are Unavailing

Eldaher complains that he has already been punished and is unemployable as a registered broker because his U5 is a "Scarlet Letter." He also points out that he supports his wife and children. These are not arguments that mitigate against imposition of a bar. The Commission recently stated in *Fields* that it did not find mitigation in the respondent's contentions that a bar would destroy his ability to invest in his family's future:

> How a respondent might in other respects suffer as a result of his or her misconduct or the sanctions that follow – e.g., loss of money, unemployment, or harm to reputation – is not a mitigating factor. . . .In short, the "hardship [Fields] asserts he has and will continue to suffer is outweighed by the necessity of ensuring that public investors are protected from him."

2015 SEC LEXIS 662 at *95-96 [citations omitted].

7. FINRA's Sanctioning Guidelines are Legally Irrelevant

Eldaher concludes by delving into the factors that FINRA would consider under its Guidelines in imposing sanctions if this were a FINRA proceeding. (Respondent's Brief at 21.) These are not the relevant factors in determining the appropriateness of a bar in a Commission proceeding, where the factors set forth in *Steadman v SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) must be considered to determine the appropriateness of a bar in the public interest.

Eldaher's final footnote, arguing that because the Commission has oversight authority over FINRA, including approval of FINRA rules, it has "implicitly accepted FINRA's guidelines," and those sanctioning guidelines must be considered in this case, is simply incorrect. As the Commission explained in *Siegel*, the Guidelines are not, in fact, rules that are approved by the Commission, and the Commission is not bound by them. 2008 SEC LEXIS 2459 at *33 n.30. The Commission does consider those Guidelines in reviewing FINRA sanctions pursuant to Section 19(e)(2) of the Exchange Act. *See id.* Presumably, however, the Commission considers the Guidelines in its reviews of FINRA proceedings because it must make a determination whether the sanction is "excessive or oppressive," among other things. Eldaher cites to no cases where the Commission has looked to FINRA Guidelines in imposing relief in the public interest in a Commission administrative proceeding. Nor does he attempt to reconcile consideration of those Guidelines with the required consideration of the public interest factors articulated in *Steadman.*

III. CONCLUSION

For the reasons stated above and in the Division's Post-Hearing brief, the evidence establishes that Eldaher should be found liable for violating Section 15(a)(1) of the Exchange Act. Additionally, the relief requested by

the Division, including a full collateral bar, should be imposed because it is in the public interest.

Date: May 29, 2015

Respectfully submitted,

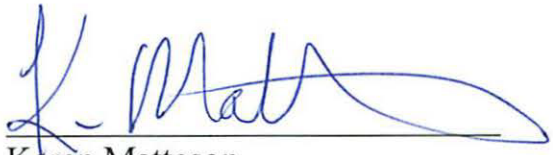
Karen Matteson
Senior Trial Counsel
Los Angeles Regional Office
Securities and Exchange Commission
444 South Flower Street
Suite 900
Los Angeles, CA 90071
Telephone: (323) 965-3840
Facsimile: (213) 443-1904
Email: [redacted]
Counsel for the Division of Enforcement

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule of Practice 150(c), I caused copies of the **POST-HEARING REPLY BRIEF OF THE DIVISION OF ENFORCEMENT** to be filed with the Office of the Secretary of the Commission and copies of it to be served on the following persons on May 29, 2015, by UPS overnight delivery and by email:

Honorable Brenda P. Murray
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E., Mail Stop 2557
Washington, DC 20549
Email: [redacted]

Jonathan C. Uretsky, Esq.
Phillipson & Uretsky, LLP
111 Broadway, 8th Floor
New York, NY 10006
Email: [redacted]



Karen Matteson