

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 70318 / September 4, 2013

Admin. Proc. File No. 3-9599

In the Matter of

JOHN GARDNER BLACK and
DEVON CAPITAL MANAGEMENT
1446 Centre Line Road
Warriors Mark, Pennsylvania 16877

ORDER DENYING PETITION TO SET ASIDE ADMINISTRATIVE BAR ORDER

John Gardner Black and Devon Capital Management ("Devon"), a former registered investment adviser of which Black was at all relevant times president, portfolio manager, and sole shareholder (together, "Petitioners"), ask us to set aside our 1998 Order Instituting Proceedings, Making Findings and Imposing Remedial Sanctions, the entry of which Petitioners consented to in order to settle the matter ("Settled Order"). The Settled Order revoked Devon Capital's registration as an investment adviser and imposed an associational bar against Black.¹ The Settled Order was issued in a "follow-on" administrative proceeding that was brought after Petitioners consented to the entry of an injunction against future violations of the antifraud provisions of the federal securities laws. Petitioners assert that the Settled Order is "invalid" for the following three reasons:

¹ *John Gardner Black*, Investment Advisers Act Rel. No. 1720, 1998 SEC LEXIS 845 (May 4, 1998).

Petitioners mailed a "Petition to Reinstate Black and Devon Capital Management as Investment Advisors" to various Commission officials in September 2012. They also sent a single copy of an appendix (the "Appendix") containing documents cited in the petition. Neither the petition nor the Appendix was filed in accordance with Rule of Practice 151(b), which provides that "[f]iling of papers with the Commission shall be made by filing them with the Office of the Secretary." 17 C.F.R. § 201.151(b).

On February 26, 2013, Petitioners filed the petition currently under review with the Office of the Secretary, stating that it "replace[d] the petition filed in September" and "supersede[d] the prior petition." Petitioners did not include a copy of the Appendix, which was mentioned in their transmittal letter, but upon request, they provided one.

(1) The Settled Order does not comply with Sections 203(e) and (f) of the Investment Advisers Act of 1940² because the record does not show that Petitioners caused public harm.

(2) The permanent injunction underlying the Settled Order is invalid because it lacks the specificity required by Rule 65(d) of the Federal Rules of Civil Procedure.

(3) The Commission's impartiality might reasonably be questioned because it failed to disclose certain information to the district court before that court issued the permanent injunction.

The Division of Enforcement opposes Petitioners' request, and for the reasons discussed below, we deny it.³

I.

On December 12, 1997, Petitioners settled civil injunctive proceedings by agreeing to be enjoined from certain violations of the antifraud provisions of the securities laws.⁴ The injunctive complaint alleged that Black, acting through two entities he owned and controlled, Devon and Financial Management Sciences, Inc. ("FMS"), an affiliate of Devon that held the money and securities of Devon's investment advisory clients, perpetrated an ongoing fraudulent scheme that resulted in the loss of millions of dollars of municipal bond proceeds invested by school districts throughout western and central Pennsylvania.⁵ As relevant here, the complaint alleged that Devon represented to those school districts that the investment contract in which their money would be invested, a so-called "Collateralized Investment Agreement" ("CIA"), was fully protected or collateralized by a pool of securities equaling the amount of the client's principal investment. In fact, the complaint alleged, Black misrepresented the value of the assets held as collateral, overstating the actual value of those assets by approximately \$71 million. In addition,

² 15 U.S.C. § 80b-3(e) and (f).

³ We also deny Petitioners' motion that the Division's response to their petition "be stricken as non-responsive." Petitioners' assertion that the Division's response "does not dispute a single point raised in [their] petition" is incorrect. The response addresses all three of Petitioners' principal arguments and additionally addresses the question whether the relief they seek should be granted under the public interest standard we use in making such determinations.

⁴ *SEC v. Black*, 97-CV-2257 (W.D. Pa. Dec. 12, 1997) (order of permanent injunction). We take official notice of this order. *See, e.g., John W. Lawton*, Advisers Act Rel. No. 3513, 2012 SEC LEXIS 3855, at *7 n.3 (Dec. 13, 2012) (taking official notice of three district court orders pursuant to Rule of Practice 323, 17 C.F.R. § 201.323); *John Francis D'Acquisto*, Advisers Act Rel. No. 1696, 1998 SEC LEXIS 91, at *3 n.1 (Jan. 21, 1998) (taking official notice, pursuant to Rule 323, that district court entered an order of disgorgement, assessed prejudgment interest, and entered a final judgment for the Commission).

⁵ Although FMS was a defendant in the injunctive action, it was not a party to the follow-on proceeding.

the complaint alleged that Petitioners and FMS misappropriated a total of approximately \$2 million of client funds to pay personal and business expenses.

Without admitting or denying the allegations in the complaint,⁶ Petitioners consented to the entry of the district court's order enjoining them from future violations of the provisions charged in the complaint. In entering the injunctive order, the district court ruled that there was sufficient basis for the entry of final judgment, and it prohibited Petitioners from contesting the allegations in the complaint in connection with the subsequent determination of the appropriate disgorgement and penalty amounts. Black subsequently consented to a court order requiring him to pay disgorgement of \$3,632,031 (plus \$326,883 in prejudgment interest), and a civil money penalty of \$500,000.⁷

On May 4, 1998, Petitioners consented to the entry of the Settled Order, in anticipation of administrative proceedings, and without admitting or denying the findings contained therein. In issuing the Settled Order, we found that Petitioners had been enjoined and that the complaint in the injunctive proceeding alleged that they had made material misrepresentations and omissions, resulting in millions of dollars in losses to their clients, and that they had benefitted financially from their actions.⁸

In 2000, Black pled guilty to twenty-one counts of investment adviser fraud, three counts of mail fraud, and two counts of making false statements.⁹ These criminal proceedings apparently arose from the same conduct that provided a basis for the civil action that resulted in the consent injunction discussed above. In connection with the criminal proceedings, Black stipulated that he, through FMS, represented to clients and prospective clients that he would "secure or collateralize the investments of the client with securities having a fair market value equal to or greater than 100% of the clients' investments." Black also stipulated that "[a]t no material time as of January 1, 1995, did the collateral accounts hold collateral at a ratio of 100% of the fair market value of client funds invested." The stipulation provided further that, even though Black used collateralized mortgage obligations ("CMOs") to provide collateral for the clients' accounts, he "failed to disclose that client funds had . . . been invested in [CMOs]" when clients asked him if there were CMOs in their accounts. Black was sentenced to forty-one months of imprisonment and three years of supervised release, and was ordered to pay \$61,300,000 in restitution.¹⁰

⁶ Petitioners admitted that the court had jurisdiction over the matter.

⁷ *SEC v. Black*, 97-CV-2257 (W.D. Pa. Apr. 29, 1998) (order of disgorgement and civil penalties). The disgorgement order applied only to Black, not to Devon. We take official notice of this order. *See supra* note 4 (citing authority).

⁸ *Black*, 1998 SEC LEXIS 845, at *3.

⁹ Only Black was charged in the indictment. Devon was not a defendant.

¹⁰ It appears that Black was released from prison on June 13, 2003. *See John Gardner Black, Advisers Act Rel. No. 3015*, 2010 SEC LEXIS 1051, at *6 n.8 (Apr. 13, 2010).

In 2006, Black filed a motion in federal district court under Federal Rule of Civil Procedure 60(b), seeking relief from the injunction and the order requiring him to pay disgorgement and civil penalties.¹¹ The district court denied the motion, and the U.S. Court of Appeals for the Third Circuit affirmed that denial.¹² Black has also sought relief in the U.S. Court of Federal Claims, where he asked the court to find that the Commission "obtained an indictment on allegations that [Black] and his companies committed securities violations based upon an incorrect market value of investment contracts and thereby effectuated a taking of property without just compensation" in violation of the Fifth Amendment.¹³ The court dismissed Black's complaint, ruling that Black could not "recast the valuation issue as a takings claim in the Court of Federal Claims in order to seek an alternative forum in which to raise the same issues that he already presented and to try to obtain a different outcome."¹⁴

In 2009, Petitioners asked us to set aside the Settled Order, asserting that "[t]he factual basis for the proceeding no longer constitute[d] violations" of the provisions charged. We found that, because Petitioners consented to the imposition of the injunction and then consented to the entry of the Settled Order in the follow-on proceeding against him, they were estopped from challenging before the Commission the underlying allegations made in the injunctive complaint.¹⁵ We also found that Petitioners did not identify any compelling circumstances that would justify setting aside the revocation of Devon's registration or the bar prohibiting Black's association with any investment adviser or investment company.¹⁶

¹¹ See *SEC v. Black*, 262 F. App'x 360, 362-63 (3d Cir. 2008) (describing district court filing as made by Black). Rule 60(b) allows a party to ask the district court to grant relief from an injunction on the grounds of "mistake" or "any other reason." Fed. R. Civ. P. 60(b).

¹² *SEC v. Black*, 262 F. App'x at 362-63.

¹³ *Black v. United States*, 84 Fed. Cl. 439, 440 (2003). This action was brought by Black. Devon was not a plaintiff.

¹⁴ *Id.* at 452.

¹⁵ *Black*, 2010 SEC LEXIS 1051, at *9-10.

¹⁶ We initially barred Black from associating with any broker, dealer, municipal securities dealer, investment adviser, or investment company. *Black*, 1998 SEC LEXIS 845, at *4. In April 2010, however, in light of precedent issued after the Settled Order, we set aside the portion of the Settled Order that "collaterally" barred Black from association with a broker, dealer, or municipal securities dealer. *Black*, 2010 SEC LEXIS 1051, at *15 (citing *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999) (vacating collateral bar prohibiting association with investment adviser as beyond the scope of the Commission's statutory authority when bar was ordered)). Black filed a motion for reconsideration, which we denied. *John Gardner Black*, Advisers Act Rel. No. 3040 (June 18, 2010). Black filed a petition for review (not joined in by Devon) of our April 2010 order; the petition was denied by the Court of Appeals. *Black v. SEC*, 462 F. App'x 6 (D.C. Cir. 2012).

II.

Petitioners contend that Sections 203(e) and (f) permit the Commission to impose sanctions on investment advisers and their associated persons only after it has made a determination of public harm on the record. They contend that FMS's tax returns, which were "released" by PriceWaterhouseCoopers after the Commission issued the Settled Order, show, among other things, that the value of the CIA was greater than its cost to the clients, that between January 1995 and June 1997 the clients received more profits than they had contracted for, and that "[t]he \$3.6 million the [Commission] claimed was misappropriated by Black was legitimate business expenses."¹⁷ Thus, they contend, "no public harm was caused by Black or Devon," and "[t]herefore, the [Settled] Order is invalid." Moreover, Petitioners maintain, the Commission was aware of these and other alleged facts before the district court entered the permanent injunction, but it wrongfully failed to disclose them to the district court.¹⁸ Petitioners further contend that this alleged failure to disclose calls into question the Commission's impartiality.

The Division responds that Petitioners' argument is both legally and factually incorrect. Legally, it argues, there is no requirement of "evidence on the record that [Petitioners] caused public harm"; instead, Sections 203(e) and (f) require a finding that the imposition of sanctions is "in the public interest." The Division argues that this "public interest" requirement was satisfied. It points out that the Settled Order quoted allegations from the complaint in the injunctive action

¹⁷ The Appendix includes copies of the returns on which Petitioners rely.

¹⁸ Other alleged facts the Petitioners claim that the Commission knew but failed to disclose to the district court include that: (1) "[t]he liquidation value of the FMS investments was less than the fair value of the CIAs outstanding," (2) the revenues of FMS between January 1, 1995 and July 1, 1997 exceeded \$51 million, (3) Devon was an adviser to municipal bond issuers on the investment of bond proceeds and compliance with the arbitrage regulations, and (4) the CIAs sold "were in compliance with the Arbitrage Regulations including the reporting of fair value of the CIAs." Because we understand Petitioners' argument as a challenge to the injunction that is not appropriately presented in an administrative proceeding such as this one, *see infra* notes 22-23 and accompanying text, we do not address the potential merits of any of these factual assertions. We note, however, that Petitioners fail to explain why some of these alleged facts should have been disclosed to the district court, that Petitioners cite to no evidence supporting their assertion that the Commission was aware of these alleged facts when the district court entered the Settled Order, and that these factual assertions are either entirely unsupported by citations to record evidence or are supported only with vague references to certain tax returns included in the Appendix, with no references to specific parts of the tax returns and no analysis as to how the returns purportedly support the allegations presented. We further note that, since the tax returns were signed in 1999, they could not have been considered by the district court when it granted the injunction in 1998, and that if Petitioners choose to argue that the tax returns support vacating or modifying the injunction, they should address this argument to the district court. *See infra* note 23. Finally, we note that the tax returns Petitioners rely on are not signed by an FMS officer (but merely purport to be signed by a paid preparer); they thus lack the required attestation as to the returns being "true, correct, and complete."

pertaining to Petitioners' "misrepresentations and omissions of material fact in connection with the solicitation and management of Devon's investment advisory clients' funds, resulting in the loss of millions of dollars of municipal bond proceeds invested by school districts and other local government units" and to Petitioners' having "benefi[ted] financially from their actions." And the Division further observes that the Settled Order stated that the Commission deemed it "appropriate and in the public interest" to accept Petitioners' offers of settlement and to impose sanctions. The Division further argues that even if a showing of public harm were required, the record shows that Petitioners' misconduct caused extensive public harm, including the loss of millions of dollars raised for the benefit of local school districts. With respect to Petitioners' attacks on the Commission's impartiality, the Division argues that Petitioners are merely rephrasing arguments that go to the valuation of the securities at issue, that the Commission and courts have previously rejected these arguments, and that Petitioners' statements are merely bald assertions lacking in evidentiary support.

Petitioners further contend, citing *SEC v. Goble*,¹⁹ that the permanent injunction underlying the Settled Order is invalid because it does not comply with Rule 65(d) of the Federal Rules of Civil Procedure which, they allege, requires that an injunction be specific in terms and describe in reasonable detail the acts to be enjoined. Petitioners contend that the injunction "does not state an act or violation to be enjoined. The injunction only refers to the complaint. Therefore, the injunction is invalid" The Division responds that *Goble* does not suggest, much less compel, the conclusion that the Settled Order should be set aside. It points out that in *Goble*, "the Court did not dismiss the action or vacate the findings as to liability because the injunction lacked specificity, but rather directed the district court to craft more precise injunctive language." The Division also notes that as a decision of the Eleventh Circuit, *Goble* is not binding precedent for courts in the Third Circuit, where Petitioners' injunction was entered. Additionally, the Division distinguishes this case from those in which the Commission has granted relief because a sanction underlying a bar order has been set aside, since in this case, the injunction has not been set aside.

III.

Petitioners cite no authority for their argument that the Settled Order does not comply with Sections 203(e) and (f) because it does not contain a finding that the public was harmed by their conduct. Those sections condition the imposition of sanctions on a finding that the sanctions are in the public interest, and the Settled Order contains this required finding.²⁰ We therefore reject Petitioners' first argument.

¹⁹ 682 F.3d 934 (11th Cir. 2012).

²⁰ Because follow-on proceedings presume that the allegations of the injunctive complaint are true, we did not, and were not required to, make any findings of misconduct in entering the Settled Order. But as set forth above, the injunctive complaint alleged, among other things, that Black overstated the value of the assets held as collateral by approximately \$71 million and that Black was involved in misappropriating approximately \$2 million of client funds.

Petitioners' other arguments are—as were the arguments they presented in the petition we decided in 2010—efforts to undermine the Settled Order by attacking the injunction on which it is based. But it has been our policy, since well before the Settled Order was entered, "not to permit a defendant . . . to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint."²¹ As we stated when considering Petitioners' earlier petition, parties to a follow-on proceeding are "estopped from challenging before us the district court's findings or, as here, the allegations made in the complaint in that proceeding."²² Petitioners consented to the imposition of the injunction, and because "[Petitioners] settled the underlying injunctive action[, they remain] bound by the allegations in the injunctive complaint unless and until the district court modifies the injunction."²³

As we stated in determining Petitioners' earlier petition, we have a strong interest in the finality of our settlement orders,²⁴ and we have repeatedly held that administrative bar orders will remain in place in the usual case and are removed only in compelling circumstances.²⁵ In deciding whether to grant relief from such a bar, we consider certain factors related to the public interest involved, including:

the nature of the misconduct at issue in the underlying matter[;] . . . the time that has passed since issuance of the administrative bar; the compliance record of, and any regulatory interest in, the petitioner since issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division of Enforcement, as expressed in response to the petition for relief; and whether there exists any other

²¹ 17 C.F.R. § 202.5(e); *see also* *Marshall E. Melton*, Securities Exchange Act Rel. No. 48228, 2003 SEC LEXIS 1767, at *28-29 (July 25, 2003) (reaffirming policy); *Samuel O. Forson*, Exchange Act Rel. No. 38853, 1997 SEC LEXIS 1507, at *3 (July 21, 1997) ("[H]aving consented to the entry of an injunction based on [certain] allegations, Forson may not question them now in an action based on that injunction." (citation omitted)).

²² *Black*, 2010 SEC LEXIS 1051, at *9-10 (citing additional authority).

²³ *Id.* at *10. As noted, *see supra* note 11, Rule 60(b) allows Petitioners to ask the district court to grant relief from the injunction against them on the grounds of "mistake" or "any other reason." Fed. R. Civ. P. 60(b). They are free to do so. We observe, as set forth above, that Black has thus far failed in his attempts to persuade the courts to grant the relief he seeks. *See supra* notes 11-14, 16 and accompanying text.

²⁴ *Black*, 2010 SEC LEXIS 1051, at *8.

²⁵ *E.g.*, *Linus N. Nwagwe*, Exchange Act Rel. No. 69967, 2013 SEC LEXIS 1997, at *2 (July 11, 2013); *Kenneth E. Mahaffy, Jr.*, Exchange Act Rel. No. 68462, 2012 SEC LEXIS 4020, at *2 (Dec. 18, 2012).

circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.²⁶

Petitioners have presented no compelling circumstances that would make relief appropriate. As we found in 2010, Black was enjoined

in connection with a fraudulent scheme that lasted two years and defrauded clients, mostly rural school districts investing the proceeds from bond issues, of millions of dollars. After [he] agreed to the sanctions imposed by the Settled Order, Black pled guilty to criminal charges arising, it appears, out of the same conduct which led to the injunction and was imprisoned and order to pay more than \$61 million in restitution.²⁷

The bar and revocation were imposed fifteen years ago, but we have previously held, in considering requests to modify sanctions, that substantially longer periods are not unduly long.²⁸ Although Petitioners have no apparent disciplinary record since the imposition of the bar, "a clean disciplinary record is not determinative in our consideration of sanctions."²⁹ Petitioners have not identified any unanticipated consequences of the bar and revocation or provided any additional factors that would support the requested relief. In opposing Petitioners' request, the Division notes that we observed in 2010 that Black showed no remorse for his actions and did not demonstrate that he had learned from his misconduct or show that he was unlikely to engage in future misconduct if permitted to reenter the industry. It also argues that Petitioners' current petition "shows no change in Black's view of his fraudulent conduct, and provides no comfort that granting the requested relief would be consistent with either the public interest or the investor protection purposes of the securities laws."

Considering all these factors, we find that Petitioners have not identified any compelling circumstances to justify the requested relief. We therefore decline to set aside the revocation of Devon's registration or the bar prohibiting Black's association with any investment adviser or investment company.

Accordingly, IT IS HEREBY ORDERED that the petition of Devon Capital Management, Inc. to set aside the revocation order entered against it on May 4, 1998 is DENIED; and it is further

²⁶ *Black*, 2010 SEC LEXIS 1051, at *12 (citing *Kenneth W. Haver, CPA*, Exchange Act Rel. No. 54824, 2006 SEC LEXIS 2735, at *7 (Nov. 28, 2006)).

²⁷ *Black*, 2010 SEC LEXIS 1051, at *14.

²⁸ *See id.* at *13 (discussing cases, including cases where passage of more than twenty years since bar was imposed was held not to weigh significantly in favor of relief).

²⁹ *Id.* at *13 n.17 (citing cases).

ORDERED that the petition of John Gardner Black to set aside the bar order entered against him on May 4, 1998, as it applies to the bar from association with any investment adviser or investment company, is DENIED.

By the Commission.

Elizabeth M. Murphy
Secretary