UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 71668 / March 7, 2014

Admin. Proc. File No. 3-14981

In the Matter of

ROSS MANDELL

ORDER SUMMARILY AFFIRMING INITIAL DECISION IN PART AND IMPOSING REMEDIAL SANCTIONS

Ross Mandell, former president, chief executive officer, and majority shareholder of Sky Capital LLC (f/k/a Granta Capital LLC), was convicted of securities fraud, wire fraud, mail fraud, and conspiracy. Following his conviction, the Commission instituted a follow-on administrative proceeding pursuant to Section 15(b) of the Securities Exchange Act of 1934 to determine whether the statutory predicate for an administrative remedy was satisfied and whether remedial action would serve the public interest. The initial decision of an administrative law judge in the follow-on proceeding barred Mandell from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (NRSRO).[1]

Mandell filed a petition for review by the Commission, and the Division of Enforcement filed a motion for summary affirmance of the initial decision. We have reviewed the record of action before the law judge *de novo*, as well as the petition for review and the motion for summary affirmance. We also take official notice of Mandell's disciplinary history information on BrokerCheck.[2]

I. We summarily affirm the law judge's findings with respect to Mandell's conviction and the law judge's holding with respect to the prospective nature of collateral bars.

The law judge found that on July 26, 2011, a jury found Mandell guilty of securities fraud, mail fraud, wire fraud, and conspiracy to commit those offenses. The law judge also found that

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1 *Ross Mandell*, Initial Decision Release No. 478, 2013 WL 30144 (Jan. 3, 2013).

2 BrokerCheck is an electronic database maintained by FINRA and available at www.finra.org/Investors/ToolsCalculators/BrokerCheck (last checked March 5, 2014). *See* 17 C.F.R. § 201.323 (rule of practice relating to official notice).

"[e]ach count in Mandell's conviction . . . is an independent and alternative basis" for proceeding under Exchange Act Section 15(b).[3] Under Rule of Practice 411, we may summarily affirm an initial decision, in whole or in part, when we conclude that further oral or written argument regarding issues raised in the initial decision is not warranted.[4] Based on our review, we find that the law judge's findings regarding Mandell's conviction are correct and do not warrant further argument. We summarily affirm and adopt these findings.

We also affirm the law judge's holding with respect to the prospective nature of collateral bars. The events giving rise to Mandell's conviction occurred prior to the 2010 enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which amended Exchange Act Section 15(b)(4)(B) to authorize bars from associating with any investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO.[5] Mandell challenges the collateral bars the law judge imposed, arguing that they are impermissibly retroactive and "prohibit [him] from associations that [he has] never had, never sought, and never even contemplated."[6] In seeking summary affirmance of the law judge's decision, the Division argues that *John W. Lawton* resolved the retroactivity issue as a matter of law.[7] We agree and find that the law judge appropriately followed our holding in *Lawton*, which stated that collateral bars are available as prospective

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[3] *Mandell*, 2013 WL 30144, at *8 n.7 (further stating that "[e]ven if . . . the Second Circuit Court of Appeals vacates Mandell's securities fraud conviction but upholds his convictions on the other three counts, this action may still be maintained"); *see* 15 U.S.C. § 78o(b)(4)(B)(i), (ii), (iv); *cf. Eric S. Butler*, Securities Exchange Act Release No. 65204, 2011 WL 3792730 (Aug. 26, 2011) (follow-on remedies imposed following convictions for conspiracy to commit securities fraud, wire fraud, and securities fraud, even though the respondent's securities fraud conviction was later reversed on appeal). Mandell appealed his conviction to the United States Court of Appeals for the Second Circuit, where his appeal is still pending. *United States v. Mandell*, No. 12-2090 (2d. Cir. argued May 2, 2013). The Second Circuit granted Mandell bail pending its consideration of his appeal.

[4] 17 C.F.R. § 201.411(a) ("The Commission may affirm, reverse, modify, set aside or remand . . . , in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record."); *id.* at § 201.411(e)(2) ("The Commission may grant summary affirmance if it finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument.").

[5] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[6] Petition for Review at 2. Our analysis centers on Mandell's retroactivity argument, which is the focus of his petition for review. *See* Rule of Practice 411(d), 17 C.F.R. § 240.411(d) (stating that the Commission's review "shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order").

Under Commission Rule of Practice 410(b), we deem any exception to the initial decision not stated in Mandell's petition for review waived. 17 C.F.R. § 201.410(b) (describing the Commission's discretion to deem "any exception to the initial decision not stated in the petition for review, or in a previously filed proposed finding . . . waived by the petitioner").

[7] Investment Advisers Act Release No. 3513, 2012 WL 6208750 (Dec. 13, 2012).

remedies under the securities laws and are not impermissibly retroactive. We conclude that these issues do not warrant further oral or written argument. Accordingly, pursuant to Rule of Practice 411(e)(2), we summarily affirm and adopt these findings.

II. We find, based on our independent review, that the public interest is served by barring Mandell from any association in the securities industry.

The Division seeks summary affirmance of the industry-wide bar against Mandell. We "will decline to grant summary affirmance upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review."[8]

Based on our review of the initial decision, we conclude that summary affirmance of the bars imposed by the law judge would not be appropriate because further analysis articulating whether it is in the public interest to impose the bars sought by the Division is warranted as an exercise of discretion on which we have an interest in articulating our own views. Although we agree with the Division that the initial decision correctly followed the legal holding in *Lawton*, determining whether a bar serves such a remedial purpose in any given case embodies an exercise of discretion and is not solely a question of law.

In order for the Commission to adopt and affirm a law judge's decision to impose an industry-wide bar, the law judge's analysis must explain, based on the facts and circumstances presented in that case, why such bars are in the public interest. As *Lawton* explained, in deciding whether the public interest warrants a collateral bar, the Commission (or an administrative law judge) should "consider the record evidence [presented in that case] to determine whether such a remedy is necessary or appropriate to protect investors and markets . . . ."[9] The decision should "review each case on its own facts" to make findings regarding the respondent's fitness to participate in the industry in the barred capacities.[10] The analysis need not include a "'ritualistic incantation'

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[8] Rule of Practice 411(e)(2), 17 C.F.R. § 201.411(e)(2); *see Andover Holdings, Inc.*, Exchange Act Release No. 68966, 2013 WL 653011 (Feb. 21, 2013) (summarily affirming law judge decision under Rule of Practice 411); *see also A-Power Energy Generation Systems, Ltd.*, Exchange Act Release No. 69439, 2013 WL 1755036 (Apr. 24, 2013) (summarily affirming initial decision in part and imposing remedial sanctions).

[9] *Lawton*, 2012 WL 6208750, at *9.

[10] *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005); *cf. also id*. at 290 (rejecting two-year suspension by finding that it was not "support[ed] . . . with findings and conclusions, and [the decision] provided no meaningful statement of the reasons or basis therefor in support of the discretion it exercised on [the] record"); *cf. also Paz v. SEC*, 566 F.3d 1172, 1175 (D.C. Cir. 2009) (noting the need for the Commission to be "'particularly careful to address potentially mitigating factors' when it affirms an order to expel a firm from the NASD").

regarding [the] remedial effect" of the bars, but it should be grounded in specific "findings regarding the protective interests to be served" by barring the respondent and the "risk of future misconduct."[11]

In this case, although the initial decision discussed the public interest factors in general terms, it did not sufficiently articulate why the facts and circumstances of this case warrant the industry-wide bars imposed or how such bars "protect the trading public from further harm" by this respondent.[12] We have an interest in further explaining why the bars serve the public interest in this case.

A. Mandell led an eight-year scheme that employed three different types of fraud.

We find that Mandell's conduct demonstrates his inability to observe investor protections and market integrity principles that apply throughout the securities industry. Mandell controlled two registered broker-dealers, The Thornwater Company, LP and Sky Capital LLC, and their employees.[13] He also controlled multiple companies ("Sky Capital companies") that issued securities that these broker-dealers offered to and traded for their customers. During the period at issue, two of these companies, Sky Capital Holdings Ltd (SKH) and Sky Capital Enterprises Inc. (SKE), issued securities that were listed for trading on the London Stock Exchange.

Between approximately 1998 and 2006, Mandell used the broker-dealers to engage in at least three types of fraudulent conduct. First, the scheme solicited millions of dollars from investors through fraudulent public and private securities offerings for the Sky Capital companies. Then, after SKH and SKE became publicly listed, Mandell encouraged fraudulent and high pressure trading tactics to manipulate the market price for the SKH and SKE securities. He then used these manipulated stock prices to promote additional fraudulent offerings. Finally, Mandell used funds from the fraudulent offerings and trading practices to enrich himself, incentivize brokers to further the scheme, and placate victims of earlier offerings.

Offering fraud. Mandell and others acting at his direction misled investors about information that went to the heart of any investment decision in the Sky Capital securities, *i.e.*, how the invested funds had been and would be used, expected returns, and the value of the securities.

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[11] *McCarthy*, 406 F.3d at 189 & 190; *cf. also Paz*, 566 F.3d at 1175 (noting that the courts "do not require the Commission to explain itself by reference to 'some mechanical formula'" (quoting *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1113 (D.C. Cir. 1988)).

[12] *Cf. James Gerard O'Callaghan*, Exchange Act Release No. 57840, 2008 WL 2117162, at *11 (Dec. 10, 2009) (remanding NYSE disciplinary proceeding and directing the NYSE to "address the protective interests to be served by removing O'Callaghan from the [trading] floor, the mitigating factors presented in the record, and any other factors related to whether a suspension is appropriately remedial and not punitive").

[13] This summary of Mandell's conduct draws from the allegations in the superseding indictment underlying his criminal conviction. *United States v. Ross H. Mandell*, No 1:09-cr-662 (S.D.N.Y Dec. 14, 2010) (the "Indictment").

They fraudulently promised investors that imminent "liquidity events" would dramatically enhance the value of the securities. But as the district court stated, these "dulcet words were not opinions, or good faith estimates, or optimistic predictions of future events; they were lies."[14] Moreover, Mandell systematically used legitimate broker-dealer business to recruit investors for the scheme; for instance, brokers under his control often initially sold non-Sky Capital securities but later encouraged the investors to exchange their shares for fraudulent Sky Capital securities.

Market manipulation. After SKH and SKE securities began publicly trading in 2002 and 2004 respectively, Mandell and others acting at his direction manipulated the markets for the securities. They artificially inflated the market prices by enforcing firm-wide "no net sales" policies and practices to suppress sell orders without matching buy orders. Their practices included high-pressure tactics to discourage customers from selling their SKH and SKE holdings and in some cases simply refusing to execute customers' sale orders. Brokers also executed corresponding—and unauthorized—purchases for other customers' accounts and manipulated the order, timing, and execution of trades. For instance, the brokers parked stock in customer accounts (often without customer consent) and used error accounts to prevent sales from affecting the stock price.

Mandell used the artificially inflated stock prices created by this manipulative trading to promote additional private SKE and SKH offerings. Maintaining the artificially inflated market prices was a key to promoting these private offerings. In order to persuade investors to purchase securities in private offerings when the stock was already available on the secondary market, Mandell and others acting at his direction told investors that the private placements offered discounts from the market prices (even as the brokers were fraudulently inflating these prices). These investors were not told that there was no actual discount for the private placements because the SKE and SKH market prices were artificially inflated.

Misuse of offering and trading proceeds. Mandell used the proceeds from these fraudulent offering and trading activities to enrich himself and his co-conspirators through payments and reimbursements for non-business personal and entertainment expenses. These payments were not disclosed to investors who purchased securities in the fraudulent offerings or to customers who had accounts with brokers engaged in manipulative trading. Instead, Mandell concealed them as loans, advances, special bonuses, and consulting fees. As investors lost money in the scheme, Mandell also used the proceeds from later offerings to placate them.

B. An industry-wide bar is in the public interest.

In analyzing the public interest, we consider, among other things: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation

[14] *United States v. Ross H. Mandell*, No 1:09-cr-0062, at 6 (S.D.N.Y Nov. 2, 2011) (the "Order") (denying motions for acquittal or new trial).

could present opportunities for future violations.[15] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[16]

1. *Egregiousness of the respondent's actions.*

Mandell's fraudulent scheme was egregious and violated bedrock antifraud principles that apply throughout the securities industry, including the "philosophy of full disclosure" of accurate and non-misleading information to investors;[17] the obligation to deal fairly with investors;[18] and the prohibition on self-dealing.[19] Mandell was convicted for scienter-based conduct that violated antifraud prohibitions that apply to all securities professionals.[20]

Moreover, rather than playing a minor role in the scheme, Mandell was its leader and driving force.[21] He used his control of the broker-dealers, their employees, and the Sky Capital companies

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[15] *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[16] *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *15 (Dec. 21, 1007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (per curiam).

[17] *Santa Fe Indus. v. Green*, 430 U.S. 462, 477 (1977) (explaining that the "fundamental purpose" of the Exchange Act is to "substitute a philosophy of full disclosure for the philosophy of caveat emptor" (internal citations omitted)); *SEC v. Capital Gains*, 375 U.S. 180, 186 (1963) (stating that a "fundamental purpose, common to [the securities law] statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standards of business ethics in the securities industry").

[18] *See Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (stating that the Exchange Act was intended "to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions").

[19] *See Capital Gains*, 375 U.S. at 201 (finding that disinterested advice is a necessary component of the "high standards of business morality exacted by our laws regulating the securities industry"); *Lawton*, 2012 WL 6208750, at *11 (noting that the "industry relies on the fairness and integrity of all persons associated with each of the professions covered by the collateral bar to forego opportunity to defraud and abuse other market participants"); Insider Trading and Securities Fraud Enforcement Act Section 7, 15 U.S.C. § 78b note (noting the "important national interest in maintaining fair and orderly securities trading, assuring the fairness of securities transactions and markets and protecting investors").

[20] *See Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *7 (July 26, 2013) (noting that collateral bar was appropriate when violations were not "based solely on [respondent's] status as a transfer agent" and "apply broadly to the conduct of all participants in the securities industry").

[21] *Cf. McCarthy*, 406 F.3d at 189 (stating that the sanctions analysis must sufficiently address mitigating factors, such as the respondent's role as a relatively minor participant in a larger trading scheme and the short duration of his violations).

to organize and execute a conspiracy to defraud investors. After adopting firm-wide policies to incentivize offering fraud and manipulative trading, Mandell used the money generated from these fraudulent practices to enrich himself and his co-conspirators. For example, Mandell arranged large corresponding block purchases and sales of Sky Capital securities to generate a "spread" in prices, which he then used to compensate the brokers for their manipulative trading.

2. *Isolated or recurrent nature of the violation.*

Mandell's involvement in the scheme was not a momentary lapse in judgment. The scheme continued for approximately eight years through two broker-dealers, defrauded more than 250 investors, and resulted in a twelve year prison term, a $50 million forfeiture order, and a $24 million restitution order.[22]

3. *Degree of scienter.*

Mandell's convictions rest on findings that he acted "unlawfully, willingly, and knowingly" when he engaged in securities fraud, wire fraud, mail fraud, and conspiracy to commit those offenses. He acted with a high degree of scienter in planning and executing this complex web of fraud through firm-wide policies and incentive payments.[23] And his attempts to conceal his leadership of the scheme are further evidence that he acted with a high degree of scienter. He concealed his control of Thornwater by relying on "lie[s] to regulators about who was in charge" of the firm, and caused Thornwater to enter into a "sweetheart—self-dealing contract" with him while he acted as an undisclosed principal.[24] He also misled investors about his control of the scheme by holding himself out as merely a broker-dealer and investment banker, and falsely stating in written marketing materials that he would not "manage[] . . . Sky Capital's securities business or the training [or] supervision of persons associated with Sky Capital . . . ."[25]

Mandell also demonstrated a high degree of scienter by disguising the fraudulent payments fueling the scheme. He mischaracterized self-enriching payments and reimbursements for personal expenses as consulting fees and authorized and directed excessive payments to brokers that were disguised as advances, loans, and special bonuses.[26] When he compensated investors for their losses, Mandell disguised these payments as consulting fees. By seeking to minimize his role and

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[22] Although Mandell's restitution order did not cover any of the other criminal defendants, it stated that his "liability for restitution shall be joint and several with that of any other defendant ordered to make restitution . . . ." As noted, Mandell has been released on bail pending his Second Circuit appeal. *See supra* note 3.

[23] *See Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) (finding that egregious violative conduct supported an inference that violative conduct was likely to be repeated).

[24] Order at 7.

[25] Indictment at 11.

[26] Indictment at 19.

disguise these payments, Mandell demonstrated that he knew that these practices were wrongful and that such deception was necessary to attract investors, avoid regulatory scrutiny, and prevent discovery of his fraud.

4. *Respondent's recognition of the wrongful nature of his conduct.*

During the proceeding below, Mandell did not offer assurances against future violations, recognize the wrongful nature of his conduct, address the *Steadman* factors despite prompting from the law judge to do so, or articulate any mitigating factors. Although Mandell expressed remorse during the criminal sentencing, he also sought to deflect blame by "accus[ing] witnesses of lying and stat[ing] that he was fighting 'lies, bad decisions, innuendo, [and] corruption.'"[27] We do not find any other factors that mitigate the seriousness of Mandell's fraud.[28]

5. *Likelihood of opportunities for future violations.*

Mandell's attempts to deflect responsibility for his fraudulent scheme demonstrate either a fundamental misunderstanding of his responsibilities as a securities professional or that he "hold[s] those obligations in contempt."[29] In either case, these attempts reveal a serious risk he would commit further misconduct if permitted in any area of the industry. Each area of the industry covered by the collateral bar "presents continual opportunities for [similar] dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[30] By organizing conduct that would be unlawful in any area of the industry and hiding and downplaying his responsibility for a multi-million dollar fraudulent scheme, Mandell demonstrates "an attitude toward regulatory oversight that is fundamentally incompatible with [basic] principles of investor protection and with association in any capacity covered by the collateral bar."[31]

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[27] *Mandell*, 2013 WL 30144, at *7.

[28] During the proceeding before the law judge, Mandell focused on the Second Circuit's decision to grant him bail pending his criminal appeal and argued that this decision put his criminal conviction in question. If he successfully overturns the criminal verdicts in his appeal, Mandell may seek modification of the sanctions imposed here. *See Jimmy Dale Swink Jr.*, Exchange Act Release No. 36042, 52 S.E.C. 379 (Aug. 1, 1995). But his pending appeal is not a mitigating factor.

[29] *Barr Fin. Group, Inc.*, Advisers Act Release No. 2179, 56 S.E.C. 1243, 2003 WL 22258489, at *7 (Oct. 2, 2003).

[30] *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 (Sept. 26, 2007); *see also Charles Phillip Elliot*, Exchange Act Release No. 31202, 50 S.E.C. 1273, 1992 WL 258850, at *3 (Sept. 17, 1992) (noting that the industry "presents many opportunities for abuse and overreaching"), *aff'd*, 36 F.3d 86 (11th Cir. 1994).

[31] *Lawton*, 2012 WL 6208750, at *12.

Mandell's disciplinary history is an aggravating factor that strongly weighs in favor of an industry-wide collateral bar.[32] Before this scheme began Mandell was disciplined by the New York Stock Exchange for unauthorized trading, and he has been denied registration in three states.[33] When Sky Capital sought NASD membership, NASD expressly conditioned the firm's membership on its agreement that Mandell would not supervise the firm's other registered representatives. Sky Capital's private placement memorandum made similar assurances directly to investors about Mandell's non-supervisory role at the firm. We find collateral bars particularly appropriate when, as in this case, regulators have previously attempted to limit the respondent's association in the industry, and those regulatory restrictions did not dissuade the respondent from engaging in further misconduct.[34]

Mandell asserts that he has "never even contemplated" entering the securities industry in the capacities covered by the collateral bars. But given his past efforts to conceal his leadership of the fraudulent scheme and the previous false assurances to investors and regulators that his role would be limited, we find that this assertion is outweighed by the unacceptable risk that Mandell would seek to return to the industry in any capacity left open to him, exposing investors and the markets to further fraudulent conduct.

Accordingly, we find an industry-wide bar is appropriate in light of our obligation to "ensure honest securities markets, [and] thereby promot[e] investor confidence."[35] Collateral bars in this case will serve the public interest as a prospective remedy to "protect investors against fraud and . . . promote ethical standards of honesty and fair dealing" in the securities markets.[36]

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32 *Id.* at *13.

33 *See supra* note 2.

34 *See Korem*, 2013 WL 3864511, at *10 n.59 (noting that a long criminal history "compounds our concerns about [the respondent's] integrity and fitness and demonstrates that he poses a substantial threat to investors").

35 *United States v. O'Hagan*, 521 U.S. 642, 658 (1997).

36 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976); *see McCurdy v. SEC*, 396 F.3d 1258, 1265 (D.C. Cir. 2005) (finding that the purpose of a securities industry suspension in that case was "not to punish [the respondent], but rather to protect the public from his demonstrated capacity" for violative conduct).

Accordingly, it is ORDERED that the law judge's findings under Exchange Act Section 15(b) are summarily affirmed; and

It is further ORDERED that Mandell is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN): Commissioner PIWOWAR concurring in part and dissenting with respect to the bars from association with municipal advisors and nationally recognized statistical rating organizations; Commissioner GALLAGHER not participating.

Elizabeth M. Murphy

Secretary