SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 99084 / December 5, 2023

Admin. Proc. File No. 3-19740

In the Matter of

DONALD J. FOWLER

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

Grounds for Remedial Action

Injunction

Respondent was permanently enjoined from violations of antifraud provisions of the federal securities laws. *Held*, it is in the public interest to bar respondent from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in an offering of penny stock.

APPEARANCES:

John Dellaportas and *Beth Khinchuk*, for the Respondent.

David Stoelting, *Jorge G. Tenreiro*, and *Kristin M. Pauley*, for the Division of Enforcement.

On March 31, 2020, the Securities and Exchange Commission instituted an administrative proceeding against Donald J. Fowler, pursuant to section 15(b) of the Securities Exchange Act of 1934.[1] After Fowler filed an answer, the Division of Enforcement filed a motion for summary disposition. We grant the Division's motion and find that it is in the public interest to bar Fowler from the securities industry and from participating in an offering of penny stock.

I. Background

In January 2017, the Commission brought a civil action against Fowler in the United States District Court for the Southern District of New York.[2] The Commission alleged in its complaint that, from 2011 to 2014, while he was associated with broker-dealer J.D. Nicholas & Co., Inc., Fowler recommended a pattern of high cost, in-and-out trading to thirteen customers with no reasonable basis to believe that his recommendations were suitable. The Commission further alleged that Fowler made unauthorized trades and that his recommendations resulted in significant losses for his customers and ill-gotten gains for Fowler.[3]

On June 20, 2019, a jury returned a verdict that Fowler had violated the antifraud provisions as alleged.[4] Specifically, the jury found that Fowler recommended an investment strategy with no reasonable basis to believe the strategy was suitable for any customer and that he did so with scienter. The jury further found that Fowler had engaged in unsuitable trading in all of the customer accounts that were examined and in unauthorized trading in all but one of those customers' accounts.

Following the jury's verdict, the court enjoined Fowler from future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5. The court also ordered Fowler to disgorge $132,076.40, plus prejudgment interest, and imposed a $1,950,000 third-tier civil money penalty. In its opinion supporting the imposition of sanctions, the court found Fowler's conduct to be "egregious."[5] The court also noted that "the evidence of prior complaints" suggested that Fowler "may have engaged in similar practices with other customers not examined" during the trial.[6] The court further found that Fowler knowingly ignored customer complaints regarding the suitability of his strategies.[7]

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1 *Donald J. Fowler*, Exchange Act Release No. 88529, 2020 WL 1545537, at *1 (Mar. 31, 2020).

2 *SEC v. Fowler*, 440 F. Supp. 3d 284, 289 (S.D.N.Y. 2020).

3 The Complaint also included the allegation that Fowler churned two customers' accounts, but the churning charges were not pursued at trial.

4 *Id.* at 290.

5 *Id.* at 300.

6 *Id.* at 302.

7 *Id.* at 301.

The court emphasized that Fowler's "testimony showed him to be alternatively dismissive, or fundamentally ignorant of, the problematic nature of the trading strategy he implemented."[8] In addition, the court highlighted "Fowler's apparent lack of interest in learning from past mistakes" and found that "the evidence of the events proven at trial amply support the court's conclusion that an injunction is warranted."[9]

After the district court entered the injunction and imposed the monetary sanctions, Fowler appealed to the U.S. Court of Appeals for Second Circuit, which on July 22, 2021, issued an opinion affirming the district court's judgment.[10]

II. Analysis

A. The threshold requirements for the imposition of a bar are satisfied.

Exchange Act Section 15(b)(6) authorizes the Commission to suspend or bar a person from associating in the securities industry and from participating in an offering of penny stock if it finds, on the record after notice and opportunity for hearing, that (i) the person was enjoined from engaging in any conduct or practice in connection with the purchase or sale of a security; (ii) the person was associated with a broker or dealer at the time of the alleged misconduct; and (iii) such a sanction is in the public interest.[11]

No genuine issue of material fact exists as to the first two of these elements. The record establishes, and Fowler does not dispute, that Fowler was associated with a broker (J.D. Nicholas) at the time of his misconduct. There is also no dispute that Fowler was enjoined from future securities violations in connection with the purchase or sale of a security. Therefore, the threshold statutory requirements for the imposition of industry and penny stock bars are satisfied.

B. We find that barring Fowler from the securities industry and from participating in the offering of penny stock is in the public interest.

In analyzing whether sanctions are in 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 or her conduct, and

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8 *Id*. at 292.

9 *Id.* at 302.

10 *SEC v. Fowler*, 6 F.4th 255 (2d Cir. 2021). The parties agreed that the district court miscalculated the disgorgement award, so the court of appeals modified the disgorgement amount consistent with that agreement. *Id.* at 266.

11 15 U.S.C. § 78o(b)(6)(A) (cross-referencing Exchange Act Section 15(b)(4), 15 U.S.C. § 78*o*(b)(4)); *id.* § 78*o*(b)(4)(C) (discussing applicable injunction).

the likelihood that the respondent's occupation will present opportunities for future violations.[12] Our public interest inquiry is flexible, and no one factor is dispositive.[13]

Here, we find no genuine dispute that Fowler's misconduct was egregious and recurrent. Indeed, the district court expressly found Fowler's conduct to be "egregious" and that he pursued "abusive investment strategies" that were "unsuitable to any investor."[14] As the district court found, Fowler "bilk[ed]" his clients by taking advantage of their "relative lack of sophistication" and "disregarded the outrageously high cost-to-equity and turnover ratios of his customers' accounts, which exceeded his firm's guidance for risk-seeking customers by many multiples."[15]

The district court also found that Fowler "engaged in this course of misconduct with 13 clients over the course of three years."[16] This included trading in twelve customers' accounts without authorization. The court further noted that a record of complaints suggested that Fowler may have engaged in similar practices with customers not examined during the trial.[17]

There is also no genuine dispute that Fowler acted with a high degree of scienter. In fact, the district court specifically found that "Fowler acted with a high degree of scienter,"[18] and noted that "in all instances in which the jury was asked the question, Mr. Fowler was found to have engaged in his misconduct with scienter."[19]

Nor is there any genuine dispute that Fowler provides no specific assurances against future violations. And the district court found that "there is a substantial likelihood that Mr. Fowler will again violate the securities laws,"[20] and noted that Fowler presents "a substantial risk of future injury to his customers" and is "a danger to future customers."[21]

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12 *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *4 (Apr. 20, 2012) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)).

13 *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *4 (July 26, 2013).

14 *Fowler*, 440 F. Supp. 3d at 300.

15 *Id.*

16 *Id.* at 301.

17 *Id.*

18 *Id.*

19 *Id.* at 291.

20 *Id.* at 288.

21 *Id.* at 301-02.

Fowler also has not acknowledged the wrongfulness of his conduct in this proceeding, and before the district court he insisted that "his conduct was blameless."[22] Having failed to recognize the wrongful nature of his misconduct, Fowler cannot claim mitigation on this basis.[23]

In a motion to stay these proceedings that the Commission earlier denied,[24] Fowler stated that he does not currently work in the securities industry and does not intend to do so in the future absent a successful appeal of the underlying civil proceeding (an appeal that was ultimately unsuccessful). But even accepting the sincerity of his expressed intentions, we still find a risk of future misconduct warranting a bar when weighed against the balance of the other public interest factors.[25] Without a bar there is nothing to prevent him from entering the industry again, and if Fowler is sincere in his intent not work in the securities industry, then a bar will impose no substantial burden on him while at the same time protecting the investing public should he change his mind.[26]

C. Fowler's challenges to the proceedings lack merit.

In opposing the Division's motion for summary disposition, Fowler argues that it would be "an abuse of discretion" for the Commission to grant summary disposition without waiting for the Second Circuit to decide his appeal of the district court's judgment. Fowler also filed a supplemental brief that simply cross-references the arguments he made to the Second Circuit and attaches his Second Circuit appellate brief.[27] But the Second Circuit has since issued its

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22 *Id.* at 301.

23 *See George Charles Cody Price*, Advisers Act Release No. 4631, 2017 WL 405511, at *5 (Jan. 20, 2017).

24 *See Donald J. Fowler*, Exchange Act Release No. 89226, 2020 WL 3791560 at *1 (July 6, 2020).

25 *See, e.g.*, *Korem*, 2013 WL 3864511, at *6 (holding that a bar was in the public interest despite respondent's promise to not work in the securities industry again); *Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *6 (Oct. 29, 2014) (holding that a bar was in the public interest despite respondent's claim that at that time he had no intention of working in the securities industry), *vacated in part on other grounds*, Advisers Act Release No. 5272, 2019 WL 2775920 (July 2, 2019); *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *6 (Dec. 12, 2013) (holding that a bar was in the public interest while "accepting the sincerity of [the respondent's] assurances against future misconduct," which included his promise to limit his involvement in the securities industry), *petition denied*, *Siris v. SEC*, 773 F.3d 89 (D.C. Cir. 2014).

26 *Korem*, 2013 WL 3864511, at *6 ("If, however, Korem's promise to remain out of the securities industry is sincere, a bar imposes no substantial burden on him while prophylactically protecting the investing public.").

27 *See* 17 C.F.R. § 201.450 ("No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Commission"). Although Fowler did not seek leave to file this extra brief, we have in our discretion considered it and thus deny the Division's motion to strike.

decision, rejecting Fowler's arguments on appeal.[28] And, as we have frequently explained, collateral estoppel prevents a party from re-litigating the factual findings or the legal conclusions made during the underlying civil injunctive action in a follow-on proceeding.[29]

* * *

The Commission may impose bars to protect the investing public from a respondent's future actions by restricting access to areas of the securities industry where a demonstrated propensity to engage in violative conduct may cause further investor harm. Here, the record establishes that Fowler is unfit to be in the securities industry and that his participation in it in any capacity would pose a risk to investors.[30] Fowler has not opposed the imposition of any particular associational bar or a bar from participating in an offering of penny stock. Moreover, Fowler took advantage of his customers by engaging in wholly unsuitable trading in his customers' accounts that was often unauthorized. We thus grant the Division's motion for summary disposition and conclude that it is in the public interest to bar Fowler from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.[31]

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28 *See supra* note 10 and accompanying text.

29 *See, e.g.*, *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *5 (Dec. 13, 2012) (explaining that "[f]ollow-on proceedings are not an appropriate forum to revisit the factual basis for, or legal challenges to, an order issued by a federal court, and challenges to such orders do not present genuine issues of material fact in our follow-on proceedings" (internal quotation marks and footnote omitted)), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 WL 3030847 (May 27, 2016); *James E. Franklin*, Exchange Act Release No. 56649, 2007 WL 2974200, at *4 (Oct 12, 2007) ("It is well established that Franklin is collaterally estopped from challenging in this administrative proceeding the decisions of the district court in the injunctive proceeding.").

30 *See Price*, 2017 WL 405511, at *5 (barring respondent on the ground that the misconduct underlying the respondent's injunction demonstrated that the respondent was unfit to participate in the securities industry and posed a risk to investors).

31 *James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *6 (Feb. 15, 2017) (imposing associational and penny stock bars where necessary to protect the public).

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners CRENSHAW, UYEDA and LIZÁRRAGA; Commissioner PEIRCE concurring in part and dissenting with respect to the imposition of a bar from participating in an offering of penny stock).

Vanessa A. Countryman
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 99084 / December 5, 2023

Admin. Proc. File No. 3-19740

In the Matter of

DONALD J. FOWLER

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Donald Fowler be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and it is further

ORDERED that Donald Fowler is barred from participating in an offering of penny stock, including acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Vanessa A. Countryman
Secretary