UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 11264 / January 11, 2024

SECURITIES EXCHANGE ACT OF 1934
Release No. 99322 / January 11, 2024

INVESTMENT ADVISERS ACT OF 1940
Release No. 6528 / January 11, 2024

INVESTMENT COMPANY ACT OF 1940
Release No. 35088 / January 11, 2024

Admin. Proc. File No. 3-14680

In the Matter of

CALHOUN ASSET MANAGEMENT, LLC, and
KRISTA LYNN WARD a/k/a KRISTA LYNN KARNEZIS

ORDER DENYING MOTION TO VACATE SETTLED ORDER BUT VACATING COLLATERAL BARS

Krista Lynn Ward moves to vacate a 2012 settlement order (the "2012 Settlement), which the Commission entered into with her and her former firm, Calhoun Asset Management, LLC ("Calhoun" and, collectively with Ward, "Respondents").[1] The Division of Enforcement opposes Ward's motion. Because Ward has not shown the necessary compelling circumstances for setting aside such a settled order, we deny her motion.[2] But because the bars we imposed against Ward in the 2012 Settlement were based solely on conduct that occurred before the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act, we in our discretion vacate the 2012 Settlement to the extent it imposes certain collateral bars against her.[3]

1 *Calhoun Asset Mgmt., LLC*, Exchange Act Release No. 67377, 2012 WL 2786344 (July 9, 2012).

2 *See, e.g., Gregory T. Bolan Jr.*, Exchange Act Release No. 85971, 2019 WL 2324336, at *3 (May 30, 2019) (explaining that movant must establish "'compelling circumstances'" for the Commission to justify vacating a settled order) (quoting *Richard D. Feldmann*, Exchange Act Release No. 77803, 2016 WL 2643450, at *2 (May 10, 2016)).

3 *See infra* notes 31–33 and accompanying text.

I. Background

On December 29, 2011, the Commission issued an order instituting administrative and cease-and-desist proceedings ("OIP") against Respondents.[4] At the time, Ward was Calhoun's managing member, sole owner, and sole full-time employee. The OIP alleged that Ward exaggerated Calhoun's assets under management; made misleading statements about Calhoun's due diligence process; filed false Forms ADV with the Commission; and failed to maintain records to support Calhoun's performance claims made in marketing materials.[5] According to the OIP, this conduct violated Section 17(a) of the Securities Act of 1933; Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; and Sections 203A, 204, 206(4) and 207 of the Investment Advisers Act of 1940, and Rules 204-2(a)(16) and 206(4)-8 thereunder.[6]

On July 9, 2012, the Commission issued an order settling proceedings against Ward and Calhoun and finding that they willfully violated the provisions of the securities laws alleged in the OIP.[7] As part of that settlement, Respondents consented to cease and desist from future violations of the provisions that the Commission found they violated; Ward consented to being barred from "association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent," and "from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter," with the right to reapply after five years; and Respondents consented to pay, jointly and severally, a $50,000 civil money penalty.[8]

On July 15, 2020, Ward filed this motion to vacate the 2012 Settlement.

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4 *Calhoun Asset Mgmt. LLC*, Exchange Act Release No. 66066, 2011 WL 7413927 (Dec. 29, 2011).

5 *Id.* at *1.

6 *Id.* at *4.

7 *Calhoun Asset Mgmt.*, 2012 WL 2786344.

8 *Id.* at *4-6. The parties disagree about whether Ward and Calhoun paid the entire civil money penalty. We need not, and do not, resolve that dispute in deciding Ward's motion.

II. Analysis

The Commission has long explained that it has a "'strong interest' in the finality of our settlement orders."[9] As a result, to modify or vacate a settled order, one must show "compelling circumstances" to justify doing so.[10] Ward has failed to make such a showing here.

A. Ward's personal circumstances at the time of the settlement do not provide compelling circumstances.

Ward claims that she only agreed to the settlement because she was in a "very ugly divorce and custody battle" at the time and "did not have the time or energy to fight" the Commission's allegations after dealing with health issues. She also cites reputational consequences as a reason she is seeking to vacate the settlement, while acknowledging that such consequences were "not unexpected." But Ward does not identify any precedent, nor are we aware of any, where the Commission has vacated a settlement under similar circumstances; nor does Ward otherwise provide an adequate basis for why these circumstances qualify as compelling circumstances for vacating the settled order now. To the contrary, while we acknowledge that her divorce proceedings may have burdened Ward at the time, she nevertheless voluntarily chose to settle the Commission's proceedings against her fully aware that the settlement could have reputational consequences. Indeed, agreeing to settle provided Ward the security of a definite resolution, while "avoiding a potentially worse outcome . . . and expense of additional litigation."[11] We also note that Ward was represented by counsel at the time of the settlement, and she has not claimed inadequate representation.[12] We therefore find that Ward's personal circumstances at the time she decided to settle the Commission's proceeding against her do not provide compelling circumstances to vacate the settled order.[13]

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[9] *Michael H. Johnson*, Exchange Act Release No. 75894, 2015 WL 5305993, at *4 (Sept. 10, 2015) (quoting *Kenneth W. Haver, CPA*, Exchange Act Release No. 54824, 2006 WL 3421789, at *3 (Nov. 28, 2006)); *cf. Ford Motor Co. v. Mustangs Unlimited*, 487 F. 3d 465, 469-70 (6th Cir. 2007) (holding that, because settlement agreements are "solemn undertakings" and are "strongly favor[ed]" by public policy, such agreements should "be upheld whenever equitable and policy considerations so permit.") (quoting *Aro Corp. v. Allied Witan Co.*, 531 F. 2d 1368, 1372 (6th Cir. 1976)).

[10] *Gregory T. Bolan Jr.*, Exchange Act Release No. 85971, 2019 WL 2324336, at *3 (May 30, 2019); *Richard D. Feldmann*, Exchange Act Release No. 77803, 2016 WL 2643450, at *2 (May 10, 2016).

[11] *Feldmann*, 2016 WL 2643450, at *2.

[12] *See Ballard ex rel. Ballard v. Phila. Sch. Dist.*, 273 F. App'x 184, 188 (3d Cir. 2008) (noting that representation by counsel during settlement negotiations is a factor that weighs against that party's later request to vacate a settlement agreement).

[13] *Cf. Lannan v. Reno*, 139 F.3d 901, 1998 WL 90843, at *2 (7th Cir. 1998) ("While Lannan may have felt that the financial, personal, and medical stress in her life necessitated the acceptance of the defendant's offer of settlement, there is no evidence that the defendant exploited her, oppressed her, took undue advantage of her financial or personal problems, or otherwise wrongfully pressured her into signing the settlement agreement."); *Gregory Osborn*,

B. The outcome in a private civil case brought against Respondents by a former investor does not provide compelling circumstances.

Ward also argues that she was "vindicated" in a private investor suit brought against her in a federal district court, where she prevailed on what she claims were the "same exact allegations" involved in the Commission proceeding. As an initial matter, we note that, even if a subsequent court's decision is somehow inconsistent with our prior order, it would not by itself provide compelling circumstances to justify vacating the settlement into which Ward knowingly entered.[14] And the lack of compelling circumstances is even more evident in this case because none of the district court's rulings in that private action, *Meyer v. Ward*,[15]contradicts—or, in many cases, has any relevance to—the Commission's findings against Respondents in the 2012 Settlement.[16]

The district court, for example, dismissed the plaintiff's claims against Ward for breach of her fiduciary duty and breach of contract—but neither of those claims are relevant to Ward's 2012 Settlement, as none of the Commission's findings were dependent on Ward's having a fiduciary duty to or a contractual relationship with the plaintiff.[17] The district court also granted summary judgment for Ward and Calhoun on the plaintiff's allegations that Respondents violated Exchange Act Section 10(b) and committed common law fraud.[18] But the court dismissed these claims because the plaintiff failed to prove that Respondents' alleged

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Exchange Act Release No. 86001, 2019 WL 2324337, at *3 (May 31, 2019) (rejecting argument that settlement order should be modified because respondent entered it for "financial and medical concerns," observing that respondent's choice to settle "was a risk, but calculated and deliberate and such as follows a free choice," and he "cannot be relieved of such a choice now" (citation omitted)).

14 *See SEC v. NIR Group, LLC*, 11-CV-4723, 2022 WL 900660, at *3 (E.D.N.Y Mar. 28, 2022) (rejecting defendant's argument that subsequent litigation, which he argued showed that the calculation of his fine was incorrect, was a sufficient basis to vacate his settlement); *SEC v. Conradt*, 309 F.R.D. 186, 188 (S.D.N.Y. 2015), *aff'd* 696 F. App'x 46 (2d Cir. 2017) (rejecting motion to vacate a settlement because such relief "is not intended to allow one side of a settlement agreement to obtain the benefits of finality while placing the other side at risk that future judicial decisions will deprive them of the benefit of their bargain").

15 *Meyer v. Ward*, No. 13-C-3303, 2017 WL 6733726, at *1 (N. D. Ill. Dec. 18, 2017).

16 The eight counts brought against Ward and Calhoun were 1) failure to appropriately register securities; 2) violations of the anti-fraud provisions of Exchange Act Section 10(b); 3) violations of the anti-fraud provisions of the Illinois Securities Law of 1953; 4) breach of fiduciary duty; 5) material misstatements of fact and omissions of material facts amounting to common law fraud; 6) breach of contract; 7) rescission based upon Ward and Calhoun's failure to appropriately register as investment advisers and failure to appropriately register securities; and 8) unjust enrichment. *Meyer v. Ward*, No. 13-C-3303, 2016 WL 5390953, at *2 (N. D. Ill. Sep. 27, 2016).

17 *Id.* at *2.

18 *Id.* at *4-5.

misrepresentation proximately caused the plaintiff's losses.[19] And it is well established that the Commission need not find causation when concluding, as it did in the 2012 Settlement with Ward and Calhoun, that one committed securities fraud.[20]

The district court further found that the plaintiff had failed to establish that Respondents violated Securities Act Section 12(a)(1) by selling unregistered securities. But none of the Commission's findings in the 2012 Settlement involved Section 12(a) or selling unregistered securities.[21] The district court also found that plaintiff failed to establish that Respondents violated an Illinois state law, which closely mirrors Securities Act Section 17(a)(2),[22] because the plaintiff failed to prove reasonable reliance.[23] But this again does not undermine the 2012 Settlement because, although the Commission found that Respondents violated Section 17(a), reliance is not an element of a Section 17(a) claim brought by the Commission.[24]

Finally, the district court set aside the plaintiff's unjust enrichment and rescission claims because those claims depended on plaintiff's succeeding on the underlying securities law claims, which the court had already rejected. But the 2012 Settlement involved neither an unjust enrichment nor a recission claim. And while the court's ruling on the underlying securities law claims may have negated the plaintiff's unjust enrichment and recission claims, it does not, as discussed, undermine Ward's settlement with the Commission.[25]

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19 *Id.*

20 *See, e.g.*, *SEC v. Goble*, 682 F.3d 934, 943 (11th Cir. 2012) ("Because this is a civil enforcement action brought by the SEC, reliance, damages, and loss causation are not required elements.").

21 *Meyer*, 2017 WL 6733726, at *6.

22 *Compare* 815 Ill. Comp. Stat. 5/12(G) (making it unlawful to "obtain money or property through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading"), *with* 15 U.S.C. § 77q(a)(2) (making it unlawful "in the offer or sale of any securities . . . to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading").

23 *Meyer*, 2016 WL 5390953, at *6.

24 *See, e.g.*, *SEC v. GenAudio Inc.*, 32 F.4th 902, 953 (10th Cir. 2022) ("[I]t is a well-established principle that the SEC, as a government agency, need not prove that a securities buyer or seller relied on, and was injured by, a violator's misleading statements."); *N. Sims Organ & Co. v. SEC*, 293 F.2d 78, 80 n.3 (2d Cir. 1961) ("The Commission is quite correct in its conclusion that reliance is not an element" of a violation of Section 17(a) in a proceeding brought by the Commission).

25 *Meyer*, 2017 WL 6733726, at *11-12.

C. The assertion that Ward's clients were not harmed by her conduct does not provide compelling circumstances.

Finally, Ward argues that the settlement should be vacated because, she claims, her clients were not harmed by her conduct.[26] She argues that, to the contrary, her "clients lost less than 25%" in 2008, "[w]hile all of the worldwide markets were down by over 50%." But Ward provides no support for these claims, and we have consistently rejected such collateral attacks on the merits as a basis for undoing the terms of a settlement.[27] Moreover, even if we were to assume that Ward's clients were not harmed, that would not undermine the Commission's underlying findings of violations, as the Commission need not prove investor harm to find that Ward violated the antifraud provisions of the federal securities laws.[28]

* * *

[26] Ward also collaterally attacks her settlement by vaguely claiming that the Commission's "investigative proceedings were an overreach and handled in an unconstitutional manner." She does not offer any further explanation about this allegation, stating only that she will address it "in a court of law." Such a vague and unsubstantiated claim cannot serve as a basis for vacating a settled order. *See Meyers Assocs., L.P.*, Exchange Act Release No. 86497, 2019 WL 3387091, at *19 (July 26, 2019) (rejecting arguments about alleged misconduct in the proceeding because they were vague and unsubstantiated); *see also Brett Thomas Graham*, Exchange Act Release No. 84526, 2018 WL 5734348, at *6 (Nov. 2, 2018) ("We have consistently held that a respondent may not collaterally attack a Commission final order by asserting a constitutional challenge that could have been raised when the order was entered.").

[27] *See, e.g., Brett Thomas Graham*, Exchange Act Release No. 84106, 2018 WL 4348490, at *4 (Sept. 12, 2018) (denying request to modify settlement order by, in part, rejecting Graham's argument that his misconduct was isolated, unintentional and immaterial and explaining "[w]e will not consider Graham's collateral attack on the Commission's findings"); *Michael H. Johnson*, Exchange Act No. 75894, 2015 WL 5305993, at *4-5 (Sept. 10, 2015) (finding that it would weigh against the finality of settlement orders to modify bar where, by settling, respondent had waived the "opportunity to adduce evidence" he sought to admit in his modification request and noting that he had "forfeited any claim that the Commission was working with incorrect facts when he consented" to the settlement he challenged); *cf. Sidney I. Shupack,* Advisers Act Release No. 1061, 1987 WL 757575, at *4 (Mar. 23, 1987) (denying application for consent to associate, explaining that Preliminary Note to Rule of Practice 193 states that Commission will not consider an application that attempts to reargue or collaterally attack findings that resulted in bar order).

[28] *See Graham v. SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000)("[U]nlike a plaintiff in a private damages action, the SEC need not prove actual harm."); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993) ("Conduct may be fraudulent and so violate Rule 10b-5, exposing the perpetrator to liability, but may not result in the types of harm necessary to subject the actor to liability to a particular private plaintiff.").

Ward has not demonstrated compelling circumstances to justify vacating the settled order against her and Calhoun. Accordingly, IT IS ORDERED that the request of Krista Lynn Ward to vacate the 2012 Settlement is DENIED.[29]

However, we note that the 2012 Settlement imposed bars on Ward from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, based solely on conduct occurring before July 22, 2010, the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[30] Of those associations, Ward was, at the time, only associated with or seeking association with an investment adviser.[31] She was also affiliated at the time with the investment adviser to registered investment companies, and the 2012 Settlement further prohibited her from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.[32] Accordingly, in our discretion, IT IS ORDERED that the 2012 Settlement be vacated to the extent it prohibits Ward from associating with a broker, dealer, municipal securities dealer, or transfer agent, but that the 2012 Settlement is otherwise unmodified.[33]

By the Commission.

Vanessa A. Countryman
Secretary

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29 Nothing in this order prevents Ward from reapplying for association notwithstanding the bar, as it is more than five years since the entry of our prior order.

30 *See Calhoun Asset Mgmt.*, 2012 WL 2786344, at *2-4, *6.

31 *See id.* at *1-2.

32 *See id.* at *1-2, *6.

33 *See Bartko v. SEC*, 845 F.3d 1217, 1225 (D.C. Cir. 2017); Commission Statement Regarding Decision in *Bartko v. SEC* (Feb. 23, 2017), *available at* https://www.sec.gov/news/statement/commission-statement-regarding-bartko-v-sec.html.