

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66826/ April 18, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14789

In the Matter of	:	
	:	ORDER MAKING FINDINGS AND
BRIAN S. CHERRY	:	IMPOSING SANCTIONS BY DEFAULT
	:	

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP) on March 7, 2012, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act), alleging that Brian S. Cherry (Cherry) was enjoined from future violations of the securities statutes in SEC v. Aubrey, 8:11-cv-01564-JVS-RNB (C.D. Cal. Feb. 3, 2012). Cherry was served with the OIP on March 12, 2012, and he spoke with a representative of the Division of Enforcement (Division) on March 26, 2012. Status Report and Request for Postponement of Hearing, March 29, 2012.

Cherry is in default because he failed to file an Answer, did not appear at the prehearing conference on April 13, 2012, and has not otherwise defended the proceeding. 17 C.F.R. §§ 201.155(a), .220(f), .221(f). I find the allegations in the OIP to be true. 17 C.F.R. § 201.155(a).

Findings of Fact and Conclusions of Law

From about September 2006 to January 2009, Cherry, 43 years old, and a resident of Newport Beach, California, worked as a salesperson for Progressive Energy Partners, LLC (PEP). Cherry was not registered as a broker-dealer or associated with a registered broker-dealer at the time he worked for PEP. He holds no securities licenses and has never been registered with the Commission in any capacity.

On October 11, 2011, the Commission initiated a civil action, Aubrey, naming Cherry and three others as defendants. The complaint alleged that from about September 2005 to December 2009, PEP conducted an \$11 million boiler room fraud that victimized more than 200 investors. The complaint also alleged that in his sales activities for PEP, Cherry fraudulently offered and sold PEP's unregistered securities to investors nationwide by representing that their

money would be used to develop and support oil and gas wells, when, in fact, the bulk of the investors' money was used to pay alleged investor returns, the personal expenses of PEP's principal and manager, and undisclosed sales commissions to PEP salespeople. More specifically, the complaint alleged that in carrying out the fraud, Cherry: (1) misrepresented to investors they could expect a greater than fifty percent annual return on their investment; (2) failed to disclose to investors that up to thirty-five percent of their investment would be used to pay sales commissions; (3) falsely represented to investors that PEP used an accounting firm to assist with investor distributions; and (4) falsely represented that PEP's financial statements were audited. According to the complaint, Cherry received about \$337,450 in total sales commissions from PEP.

On February 3, 2012, the Court entered a Final Judgment on default against Cherry, permanently enjoining him from future violations of Sections 5 and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act, and Exchange Rule 10b-5. I take official notice of the fact that, in addition, the Court found Cherry liable to disgorge \$337,450.00, representing profits gained as a result of the conduct alleged in the complaint, and prejudgment interest of \$107,077.93, and to pay a civil penalty in the amount of \$337,450.00. See 17 C.F.R. § 201.323.

Sanctions

Section 15(b)(6)(A) of the Exchange Act states that the Commission shall impose sanctions on a person where the person, acting as a person associated with a broker or dealer, has been enjoined from engaging in conduct in connection with the purchase or sale of securities, if it is in the public interest to do so. See 15 U.S.C. § 78o(b)(4)(C); see, e.g., Vladislav Steven Zubkis, Exchange Act Release No. 52876 (Dec. 2, 2005), 86 SEC Docket 2618, 2627, recon. denied, Exchange Act Release No. 53651 (Apr. 13, 2006), 87 SEC Docket 2584 (barring an unregistered, associated person of an unregistered broker-dealer from association with a broker or dealer).

The Commission uses the following factors in determining the public interest: (1) the egregiousness of the respondent's actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

Application of the Steadman factors shows that Cherry presents a threat to the public interest because of the likelihood of future violations. Cherry participated for over two years in an organized securities sales operation that was blatantly illegal and raised more than \$10 million from investors. Cherry received well over a quarter of a million dollars in sales commissions. Cherry has given no indication that he acknowledges wrongdoing and did not contest the allegations in Aubrey or in this administrative proceeding. The Commission has held that, "[C]onduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws." Marshall E. Melton, Investment Adviser Release No. 2151 (July 25, 2003), 56 S.E.C. 695, 713.

For all the reasons stated, it is in the interest of the public to bar Cherry from participating in the securities industry as allowed by Section 15(b)(6)(A) of the Exchange Act, except for bars from association with a municipal advisor or nationally recognized statistical rating organization. These collateral bars, added by the Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law on July 21, 2010, are impermissible in this proceeding because they retroactively attach new consequences to conduct that occurred prior to the statute's enactment.¹

Order

I ORDER, pursuant to Section 15(b) of the Securities Exchange Act of 1934, that Brian S. Cherry is barred from association with a broker, dealer, investment adviser, municipal securities dealer, transfer agent, and from participating in an offering of penny stock.

Brenda P. Murray
Chief Administrative Law Judge

¹ I disagree that the prospective application of the restriction eliminates the retroactivity concern in this proceeding. See Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994).