

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70556 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15191

In the Matter of	:	ORDER PURSUANT TO COMMISSION
	:	RULE OF PRACTICE 102(e)(3)(iii) BY
BRIAN D. FOX	:	DEFAULT
	:	

Background

On April 8, 2011, the Securities and Exchange Commission (Commission) filed a civil complaint against Brian D. Fox (Fox) in the U.S. District Court for the Northern District of Oklahoma.¹ SEC v. Fox, No. 4:11-CV-0211-CVE-PJC (N.D. Okla.). The Complaint alleged that: (1) Fox was Chairman, President, and Chief Executive Officer of Powder River Petroleum International, Inc. (Powder River), from December 2003 through July 2008, and Chief Financial Officer from December 2003 through August 2007; and (2) from the end of 2004 through the first quarter of 2008, Fox misled the investing public by misrepresenting Powder River's assets and liabilities in Commission filings and by false and misleading public disclosures. Fox Am. Comp. at 1-2, 4.

On November 2, 2012, the district court entered a Judgment by consent enjoining Fox from: (1) violating Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 (Exchange Act), and Exchange Act Rules 10b-5, 13a-14, 13b2-1, and 13b2-2; (2) aiding, abetting, or controlling violations of Exchange Act Section 10(b) and Exchange Act Rule 10b-5; and (3) aiding and abetting violations of Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B), and Exchange Act Rules 12b-20, 13a-1, 13a-11, and 13a-13. The Judgment also prohibited Fox from acting as an officer or director of any issuer that has a class of securities registered pursuant to Exchange Act Section 12, or that is required to file reports pursuant to Exchange Act Section 15(d); ordered Fox to disgorge \$320,000, together with prejudgment interest of \$59,841.28 from December 31, 2007, to October 31, 2011, plus interest accruing thereafter from November 1, 2011, to November 2, 2012; and ordered Fox to pay a civil money penalty of \$100,000. Fox, Judgment and Order (Nov. 2, 2012).

¹ An additional claim was added by an amended complaint filed on July 21, 2011.

A district court Opinion and Order issued on Fox's Motion to Reconsider and/or Vacate Order Granting Summary Judgment (Opinion and Order), dated January 2, 2013, describes what occurred on June 20, 2012, where, after "the first half of the deposition had gone badly for Fox," his counsel asked for an adjournment to confer with his client.

After meeting with his attorney for an hour and a half, Fox signed the consent form before a notary public and he agreed to the entry of the proposed judgment. By signing the consent form, Fox agreed to the entry of a judgment awarding plaintiff disgorgement and a civil penalty in an amount to be determined by the Court, and he waived the right to challenge the factual allegations of the amended complaint.

Fox, Opinion and Order at 2 (Jan. 2, 2013).

On January 29, 2013, the Commission issued an Order Instituting Public Administrative Proceedings and Imposing Temporary Suspension Pursuant to Rule 102(e)(3) of the Commission's Rules of Practice (OIP) in this proceeding based on the district court's Judgment in Fox. OIP at 2.

On June 28, 2013, the Commission issued an Order Denying Petition to Lift Temporary Suspension and Directing Hearing on the Petition (Order Denying Petition). In the Order Denying Petition, the Commission waived certain filing deadlines and accepted Fox's petition to lift the temporary suspension, forwarded to the Office of the Secretary by the Commission's Fort Worth Regional office on May 31, 2013, and ordered that: (1) the proceeding be set down for public hearing as specified by Commission Rule of Practice 102(e)(3)(iii); (2) the administrative law judge issue an Initial Decision no later than 210 days from the date the Order Denying Petition was served on Fox; and (3) Fox's temporary suspension remains in effect pending a hearing and decision. Brian D. Fox, Exchange Act Release No. 69886 (June 28, 2013) at 3-4.

The proceeding was assigned to me. On July 2, 2013, I ordered a hearing beginning on Monday, July 29, 2013. On July 24, 2013, I converted the scheduled hearing to a prehearing conference on July 29, 2013. Fox appeared at the prehearing conference pro se with a former attorney friend, John Manolescu, and the Division of Enforcement (Division). Fox asked for an adjournment so he could retain an attorney and insisted that he has never been able to present his version of the facts. I denied his request for additional time because he has had since January 29, 2013, when the OIP was issued to retain legal counsel. Tr. 7. Fox did not deny the district court's determination, but was unaware that on July 18, 2013, the Tenth Circuit Court of Appeals affirmed the district court's judgment and its denial of Fox's post-judgment motion in SEC v. Fox, 2013 WL 3746173 (10th Cir.) (No. 13-5013). Tr. 8. Pursuant to Commission Rule 102(e)(3)(iv), when it has been established that a petitioner has been enjoined or has been found to have committed or aided and abetted a violation, the burden then falls on petitioner to show why he should not be disqualified from appearing or practicing before the Commission. I denied Fox's request for a hearing because it was clear that if a hearing were held he intended to dispute

the factual findings of the district court² rather than the issue of whether he should be disqualified from appearing or practicing before the Commission. Tr. 10.

I issued an Order Requesting Motion for Summary Disposition on August 8, 2013. Brian D. Fox, Administrative Proceedings Rulings Release No. 787. The Division filed a Motion for Summary Disposition with exhibits on August 23, 2013. Exhibit 1 is the November 2, 2012, Judgment in Fox; Exhibit 2 is the First Amended Complaint in Fox; and Exhibit 3 is the OIP. On August 23, 2013, I granted Fox until September 10 to file a motion for summary disposition and noted that he had eight days to reply to the Division's filing.

Conclusion of Law

Fox is in default because he has failed to reply to a dispositive motion within the time provided. 17 C.F.R. § 201.155(a)(2). In a default, a determination can be made based on the record, including the OIP, the allegations of which may be deemed to be true. 17 C.F.R. § 201.155(a). I find the allegations to be true. The evidence in the record and federal court decisions show that Fox has been enjoined from violating, and from aiding, abetting, and controlling violations of, the federal securities statutes and regulations thereunder.

In addition to rulings by the federal courts in Oklahoma, I take official notice of two other determinations which address the public interest. 17 C.F.R. § 201.323. The District Court of Oklahoma County, State of Oklahoma, entered a Final Consent Order, Judgment and Permanent Injunction Against Defendant Fox, which enjoined him from engaging in violations of Section 1-501 of the Oklahoma Uniform Securities Act of 2004 in Okla. Dep't of Sec. ex rel Faught v. Powder River Petroleum Int'l, Inc., Case No. CJ-2008-9048 (Feb. 18, 2009). Also, the Alberta Securities Commission found that Fox violated Sections 54(1) and 81(1) of the Securities Act S.A. 1981 c. S-6.1, as amended; ordered him to resign any position held as a director or officer of an issuer; prohibited him from becoming or acting as a director or officer, or as both a director and an officer of any issuer for a period of eighteen months beginning February 10, 2000; and ordered him to cease trading in securities for six months and to pay costs of \$6,000. Renco Energy Corp., Alberta Securities Commission, Order (Mar. 17, 2000).

In view of the facts set forth above, there is no evidence that Fox should be allowed to appear or practice before the Commission.

² The doctrine of collateral estoppel precludes re-litigation of an issue raised in a prior proceeding when: (1) the issue is identical to the issue litigated and decided in a prior proceeding; (2) the issue previously litigated was necessary to support a valid and final judgment on the merits in the prior proceeding; and (3) the party precluded from raising the issue had a full and fair opportunity to do so in the prior proceeding. See Metromedia Co. v. Fugazy, 983 F.2d 350, 365 (2d Cir. 1992); Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986). This Commission does not permit a respondent to re-litigate issues that were addressed in previous civil proceedings against the respondent. See 17 C.F.R. § 201.102(e)(3)(iv); Michael J. Markowski, Exchange Act Release No. 44086 (Mar. 20, 2001), 74 SEC Docket 1537, 1542, per den., No. 01-1181 (D.C. Cir. 2002) (unpublished); John Francis D.'Acquisto, 53 S.E.C. 440, 444 (1998); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 (1997).

Order

I ORDER, pursuant to Rule 102(e)(3)(iii) of the Commission's Rules of Practice, that Brian D. Fox is permanently denied the privilege of appearing or practicing before the Securities and Exchange Commission.

Brenda P. Murray
Chief Administrative Law Judge