

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
: INITIAL DECISION
GORDON A. DRIVER : September 22, 2011
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APPEARANCES: Spencer E. Bendell and Susan F. Hannan for the Division of Enforcement, Securities and Exchange Commission.

Gordon A. Driver, pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

INTRODUCTION

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on December 10, 2010, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that on December 14, 2009, a final judgment was entered by consent against Respondent Gordon A. Driver (Driver or Respondent) permanently enjoining him from future violations of the federal securities laws. The Commission instituted this proceeding to determine whether these allegations are true and, if so, to decide whether remedial action is appropriate in the public interest. The Division of Enforcement (Division) seeks to bar Driver from association with any broker or dealer. Additionally, the Division seeks to collaterally bar Driver under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)¹ from association with any investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (NRSRO).

The Office of the Secretary and the Division have provided evidence that Respondent was served with the OIP on April 4, 2011, in accordance with 17 C.F.R. § 201.141(a)(2)(i). Respondent's Answer was due April 27, 2011. See OIP at 2; 17 C.F.R. §§ 201.160(b), .220(b). Respondent requested additional time to file his answer and hire a new attorney. On May 3,

¹ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2011, a thirty-day continuance was granted and Respondent's Answer was ordered due on May 31, 2011. Respondent failed to file an Answer by May 31, 2011.

At the June 6, 2011, prehearing conference², and in a Scheduling Order issued the same day, Respondent's time to file an Answer was further extended to June 13, 2011. (Tr. 7-8.) On June 13, 2011, Respondent filed his Answer with the Office of the Secretary. Additionally, the Division was granted leave to file a Motion for Summary Disposition (Motion), if any, by June 30, 2011, pursuant to 17 C.F.R. §201.250. (Tr. 5-8; Scheduling Order of June 6, 2011.)

The Division filed its Motion along with a brief in support, the Declaration of Susan F. Hannan, and five exhibits.³ Exhibit 1 is the Complaint for Violations of the Federal Securities Laws filed May 14, 2009 (Complaint), in SEC v. Driver, No. 2:09-CV-09-03410-ODW-RZ (C.D. Cal. Dec. 14, 2009). Exhibit 2 is the Consent of Defendant Gordon A. Driver to Judgment of Permanent Injunction and Other Relief filed December 9, 2009 (Consent). Exhibit 3 is the Judgment of Permanent Injunction and Other Relief against Gordon A. Driver (Judgment), filed December 14, 2009. Exhibit 4 is the transcript (without exhibits) of the April 28, 2011, Deposition of Gordon Alan Driver (Deposition). Exhibits 1-4 included in the Division's Motion are admitted into evidence as Division Exhibits (Div. Ex.) 1-4.

Driver's Opposition to the Motion, if any, was due by July 15, 2011. (Tr. 8-9; Scheduling Order of June 6, 2011). Driver did not file an Opposition to the Motion.

Standards for Summary Disposition

After a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. See 17 C.F.R. § 201.250(a). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to 17 C.F.R. § 201.323. Id. A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. See 17 C.F.R. § 201.250(b).

The Commission has repeatedly upheld use of the summary disposition procedure in cases such as this one where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 (collecting cases); Jeffrey L. Gibson v. SEC, 561 F.3d 548 (6th Cir. Mar. 11, 2009) (petition for review denied). Under Commission

² References to the transcript of the June 6, 2011, telephonic prehearing conference will be cited as "(Tr. ___.)"

³ Exhibit 5 is a January 6, 2011, letter to Mark J. Geragos making documents available pursuant to Rule 230 of the Commission's Rules of Practice. Exhibit 5 is not relevant to the outcome of this administrative proceeding.

precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate “will be rare.” See John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 55 S.E.C. 1023, 1028 n.12.

Findings of fact and conclusions of law made in the underlying action are immune from attack in a follow-on administrative proceeding. See Ted Harold Westerfield, Exchange Act Release No. 41126 (Mar. 1, 1999), 54 S.E.C. 25, 32 n.22 (collecting cases). The Commission does not permit a respondent to relitigate issues that were addressed in previous proceedings against the respondent. See William F. Lincoln, Exchange Act Release No. 39629 (Feb. 9, 1998), 53 S.E.C. 452, 455-56. To the extent that Driver’s Answer raises such challenges, his collateral attack provides no basis for denying the Motion.

There is no genuine issue with regard to any fact that is material to this proceeding. Driver consented, and the Judgment was entered based upon Respondent’s consent, permanently enjoining him from future violations of the federal securities laws. All of Respondent’s affirmative defenses included in his Answer were considered and rejected.

FINDINGS OF FACT

Pursuant to the Consent, Driver is not permitted to contest the factual allegations of the Complaint in this action, he is precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint, and he is not permitted to challenge the validity of the Consent or Judgment. (Div. Ex. 2 at 2-3.)

Driver, age fifty-one as of May 14, 2009, was a resident of Las Vegas, Nevada, and Hamilton, Ontario, Canada. (Div. Ex. 1 at 3.) From 1998 to 2007, during which Driver engaged in part of the conduct underlying the Judgment against him, Driver resided in Southern California. (Id.)

From February 2006 to May 2009, Driver, acting as an unregistered broker, engaged in the misconduct underlying the Judgment against him. During this time, Driver was associated with Axxess Automation, LLC (Axxess), an entity registered as a Nevada limited liability company since October 17, 2007. (Id.) Driver acted as Axxess’ manager, was a signatory on the bank accounts into which investors wired funds, and had sole discretionary authority over the accounts through which he traded investor funds. (Id.)

Driver raised at least \$14.1 million from over 100 investors in the United States and Canada from approximately February 2006 to May 2009. (Div. Ex. 1 at 3.) Driver fraudulently misrepresented to investors that he would use their funds to trade “e-Mini S&P 500 futures” using proprietary software, and that he would provide investors with between one percent and five percent weekly return. (Id. at 3-4.) Driver solicited friends, neighbors, and business acquaintances, and hired “finders” personally to recruit additional investors. (Id. at 4.) Driver directed investors to wire transfer their funds into his personal bank account or into an account held in Axxess’ name. (Id.)

Driver used \$3.7 million of the \$14.1 million deposited into these accounts to engage in futures trading, ultimately resulting in a cumulative loss of \$3.55 million. (Div. Ex. 1 at 5.) Additionally, Driver operated a “ponzi scheme” and misappropriated approximately \$10.7 million of the \$14.1 million by using funds received from new investors to pay existing investors. (Id.) Further, over \$1.1 million of the \$14.1 million collected from investors was misappropriated by Driver and used by him to pay his personal expenses. (Id. at 5-6.)

In February 2009, Driver prepared and provided a false annual statement, on Access letterhead, to forty-eight investors falsely showing an account balance of \$9.6 million as of December 31, 2008, when, in fact, Driver only held a total of approximately \$276,000 in all its bank accounts. (Id. at 4-5.) Further, Driver fabricated and provided a trading account statement to at least one “finder” in October 2008, falsely stating an account balance of approximately \$34.7 million when, in fact, the account balance was approximately \$11,000. (Div. Ex. 1 at 5.)

On December 3, 2009, Driver consented to the entry of the Judgment permanently restraining and enjoining him from violating Sections 5 and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder. (Div. Ex. 2 at 1.) Additionally, Driver was ordered to pay disgorgement. (Id.) On December 14, 2009, the Judgment was filed.

In his Answer, Driver attempts to relitigate the facts of the underlying Judgment. Specifically, Driver denies each allegation raised by the Division in the OIP and seeks to assert several affirmative defenses.⁴ As stated previously, Driver is barred from contesting the factual allegations of the Complaint⁵, arguing that he did not violate the federal securities laws as alleged in the Complaint, and challenging the validity of the Consent or Judgment. (Div. Ex. 2 at 1-2.) Additionally, all of Respondent’s affirmative defenses included in his Answer to the OIP were considered and rejected.

⁴ Driver raises several affirmative defenses. He claims that, “[e]ach and every alleged claim for relief or cause of action against Defendant is barred because all actions taken by Defendant that the SEC asserts were wrongful, if taken at all, were in good faith and justifiable reliance on third parties in connection with the matters alleged in the Complaint”; “[t]he damages allegedly sustained were proximately caused, in whole or in part, by the negligent conduct, intentional conduct, and/or intervening conduct of persons or entities other than Defendants, for which Defendants are not liable or responsible”; and “[p]laintiff lacks standing, authority, or power to assert the alleged claims against Defendant.” (Answer at 1-2.)

⁵ In In re Marshall E. Melton, Exchange Act Release No. 2151 (July 25, 2003), 56 S.E.C. 695, 712, the Commission construed “the ‘neither admit nor deny’ language as precluding a person who has consented to an injunction in a Commission enforcement action from denying the factual allegations of the injunctive complaint” in follow-on proceedings.

CONCLUSIONS OF LAW

This proceeding was instituted pursuant to Exchange Act Section 15(b). In relevant part, Section 15(b)(6) of the Exchange Act authorizes the Commission to impose remedial sanctions on a person associated with a broker or dealer at the time of the misconduct, consistent with the public interest, if the person is enjoined from an action, conduct, or practice specified in 15 U.S.C. §78o(b)(4)(C), including, but not limited to, enjoinder by order, judgment or decree from acting as a broker or dealer. See 15 U.S.C. §§ 78o(b)(4)(C), (b)(6)(A)(iii). At the time of his underlying misconduct, Driver was acting as an unregistered broker within the meaning of the Exchange Act, as he was “engaged in the business of effecting transactions in securities for the account of others.” 15 U.S.C. § 78c(a)(4)(A). Driver consented, and a Judgment was issued, permanently enjoining Driver from further violations of Section 15(a) of the Exchange Act.

The Division seeks to collaterally bar Driver from association with any investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO under the Dodd-Frank Act, as well as from participating in an offering of penny stock. (Motion at 1, 8.) Prior to the Dodd-Frank Act, the only sanctions authorized by Exchange Act Section 15(b)(6)(A) were the suspension or bar of a person from association with a broker or dealer. Section 925 of the Dodd-Frank Act amended Exchange Act Section 15(b)(6)(A) to permit the Commission to bar a broker-dealer, including those acting as one, from association with the various industry groups stated previously. The issue is whether the broader collateral bar under Exchange Act Section 15(b)(6)(A) may be applied to a Respondent whose misconduct occurred prior to the enactment of the Dodd-Frank Act.⁶

The Division takes the position that the collateral bar under the Dodd-Frank Act is a “prospective remedy . . . that would limit the scope of Respondent’s conduct only *in futuro*.” (Motion at 9.) The Division states that a collateral bar is “indistinguishable from the prospective injunctive relief that the Supreme Court has held does not raise retroactivity concerns.” (*Id.*) Further, the Division argues that the application of a collateral bar generally, and in this case, is not punitive but rather is in the public interest. (Motion at 9-10.) The Respondent did not file an Opposition to the Motion and thus, does not challenge the sanction sought by the Division..

Based on the foregoing, Driver is subject to Section 15(b)(6) of the Exchange Act, and the Administrative Law Judge has grounds to impose remedial sanctions, including a collateral bar under the Dodd-Frank Act, if such sanctions are in the public interest.

The Public Interest

To determine whether sanctions under Section 15(b) of the Exchange Act are in the public interest, the Commission considers six factors: (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,

⁶ The Dodd-Frank Act became effective on July 22, 2010.

603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). No one factor is controlling. Conrad P. Seghers, Investment Advisers Act of 1940 (Advisers Act) Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2298. Remedial sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

Driver's actions were egregious and recurrent. Driver engaged in a "ponzi scheme" spanning more than three years causing substantial harm to over 100 investors. He provided false and misleading information to certain of those investors and "finders." Additionally, Driver used significant investor funds for his own benefit.

Driver acted with scienter. Driver had sole discretion and authority over the bank accounts into which he directed investors to wire transfer their funds. He had actual knowledge of the trading losses he was incurring, while at the same time continuing to provide false and misleading information to investors regarding the account balances.

Driver has not admitted the wrongful nature of his conduct. In his Answer, he denies the Division's allegations to which he previously consented, asserting several affirmative defenses. Likewise, he has made no assurances against future violations. Throughout his Deposition, Driver asserted his privilege against self-incrimination under the Fifth Amendment. (Div. Ex. 4 at 5-40.) Without an associational bar, the potential for Driver's future violations remains. Further, the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, Advisers Act Release No. 2052 (Aug. 30, 2002), 55 S.E.C. 1133, 1145, aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., Exchange Act Release No. 11773 (Oct. 24, 1975), 46 S.E.C. 78, 100.

In view of the Steadman factors in their entirety, a collateral bar is necessary and appropriate in the public interest.

ORDER

IT IS ORDERED that, pursuant to Section 15(b)(6)(A) of the Securities Exchange Act of 1934, Gordon A. Driver is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and NRSRO, and from participating in an offering of penny stock.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111(h) of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The

Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Robert G. Mahony
Administrative Law Judge