

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3040 / June 18, 2010

Admin. Proc. File No. 3-9599

In the Matter of

JOHN GARDNER BLACK
1446 Centre Line Road
Warriors Mark, Pennsylvania 16877

ORDER DENYING
RECONSIDERATION

John Gardner Black seeks reconsideration of an April 2010 Commission order (the "April Order")¹ denying in part his petition to vacate a 1998 settlement with the Commission (the "Settled Order")² which, among other things, barred Black from associating with any broker, dealer, municipal securities dealer, investment adviser, or investment company.³ For the reasons discussed below, we have determined to deny Black's motion.⁴

¹ John Gardner Black, Investment Advisers Act Rel. No. 3015 (Apr. 13, 2010), __ SEC Docket ___. Although the April Order denied Black's request to vacate the entire Settled Order, it did vacate the broker, dealer, and municipal securities dealer bars that had been imposed "in light of precedent issued subsequent to the Settled Order" regarding so-called "collateral bars." See *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999) (vacating collateral bar).

² John Gardner Black, Investment Advisers Act Rel. No. 1720 (May 4, 1998), 67 SEC Docket 357.

³ The April Order also declined to vacate the Settled Order's registration revocation of Devon Capital Management ("Devon"), an investment advisory firm which Black controlled. Although Black makes no specific reference to Devon in his current motion (other than in the caption and his discussion of the facts), it is not clear whether his request includes Devon. To the extent that Devon requests reconsideration of the April Order, its request is also denied as not meeting the requirements set by our Rules of Practice. See 17 C.F.R. § 201.470(b) (requiring that the reconsideration motion "specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought").

⁴ Our Rule of Practice 470(b), 17 C.F.R. § 201.470(b), provides that "[n]o response to a motion for reconsideration shall be filed unless requested by the Commission." We did not request the views of the Division of Enforcement on Black's motion. The Division opposed Black's original (continued...)

I.

A. Background. In 1997, Black settled civil injunctive proceedings (the "Injunctive Action") by agreeing to be enjoined from certain violations of the antifraud provisions of the securities laws. The injunctive complaint alleged that Black, acting with two entities he owned and controlled (Devon and Financial Management Sciences, Inc., an affiliate of Devon's), "perpetrated . . . an on-going fraudulent scheme" which "resulted in the loss of millions of dollars of municipal bond proceeds invested by school districts throughout western and central Pennsylvania." Black sold the school districts Collateralized Investment Agreements ("CIAs") which were agreements between clients and Devon pursuant to which the clients were guaranteed a specified, fixed, rate of return. The CIA purported to collateralize fully each account with securities. The complaint alleged that Black fraudulently overstated "the value of the assets held as collateral . . . by approximately \$71 million." According to the complaint, Black made other fraudulent misrepresentations and also misappropriated approximately \$2 million of client funds to pay personal and business expenses. Black, without admitting or denying the allegations in the complaint, consented to the entry of an injunction against future violations of the antifraud provisions and an order requiring him to pay disgorgement of \$3,632,031 (plus \$326,883 in prejudgment interest), and a civil money penalty of \$500,000.

On May 4, 1998, Black consented to the entry of the Settled Order, in anticipation of follow-on administrative proceedings, and without admitting or denying its findings. In issuing the Settled Order, we found that Black had been enjoined and that the complaint in the injunctive proceeding, which Black was prohibited from contesting, alleged that he had made material misrepresentations and omissions, resulting in millions of dollars in losses to his clients and ill-gotten gains for himself and his affiliated companies.⁵

B. Motion to Vacate. On May 26, 2009, Black petitioned to vacate the Settled Order. Black argued that sanctions were no longer warranted because a recent change in applicable accounting standards purportedly approved the valuation method that Black used in valuing the collateral at issue, which method had been challenged in the Injunctive Action. According to Black, "[h]ad the Commission used the current fair value methods now required, [it] would have supported the valuation supplied to clients" As a result, Black argued, "there can no longer be a public purpose nor [is it] in the public's interest to enforce the [Commission's] order." The April Order

⁴ (...continued)
motion to vacate the Settled Order.

⁵ As described in the April Order, in 2000, Black pled guilty to twenty-six counts of a federal indictment apparently in connection with the same conduct that provided the basis for the injunctive proceeding. As part of his guilty plea, Black signed a written stipulation that provided factual support for his guilty plea. As noted in the April Order, Black was sentenced to forty-one months' imprisonment, three years' supervised release, and was ordered to pay \$61,300,000 in restitution.

rejected Black's argument and denied most of the relief he requested on the grounds that he "settled the underlying injunctive action and remains bound by the allegations in the injunctive complaint unless and until the district court modifies the injunction."⁶ The April Order also noted that Black provided no evidence to support, or examples to illustrate, his claim that the newly approved valuation method would exonerate him. Nor did Black address the other fraudulent misconduct which provided additional bases for the various proceedings against him.

II.

We consider Black's motion under Rule of Practice 470.⁷ Reconsideration is an extraordinary remedy designed to correct manifest errors in law or fact or permit the introduction of newly discovered evidence.⁸ Motions for reconsideration are not to be used to reiterate arguments previously made or to cite authorities previously available.⁹ Black's motion does not meet the rigorous standard applied in our cases.

Black identifies no manifest factual or legal errors in the April Order, nor does he offer any newly discovered evidence to support his motion. Rather, he seeks to challenge the April Order by questioning the validity of the Settled Order which, he claims, the "Commission had already breached . . . by its failure to disclose . . . the value of the Collateralized Investment Agreement." According to Black, the government has stipulated that "the assets in the CIA program were generating approximately \$23 million per year in profits" with the result that "[a]ny owner of the CIA could have sold the CIA for the value represented in monthly statements." Black also contends that the Commission misled him into believing that the CIA was a "two-party contract" rather than a security. Black suggests that the Commission's alleged mischaracterization of the CIA allowed it to assert jurisdiction over this case improperly. In the alternative, Black claims that "the Commission knew in 1998 [the date of the Settled Order] that the CIA was an investment contract with value to be determined by an expectation of profits and

⁶ As noted in the April Order, it appears that Black's earlier efforts to persuade the courts to reconsider his case were unsuccessful.

⁷ 17 C.F.R. § 201.470. *See supra* n.3.

⁸ *The Rockies Fund*, Securities Exchange Act Rel. No. 56344 (Aug. 31, 2007), 91 SEC Docket 1418, 1420 (denying reconsideration).

⁹ *Id.*

withheld that determination from Black, deceiving him into executing the settlement." Consequently, Black asserts, the Settled Order was issued either "fraudulently or without jurisdiction; or . . . Black entered into [the Settled Order] without full knowledge of the facts."

We find no merit in Black's contentions. There is no basis for his claim that we lacked jurisdiction to issue the Settled Order. The Investment Advisers Act expressly provides for administrative proceedings (and the imposition of sanctions) against investment advisers and persons associated with them based on the entry of an injunction related to investment advisory activities, the situation presented here.¹⁰ Nor is there any basis for finding that Black was deceived into settling these administrative proceedings. Black provides no evidence, and there otherwise is no indication, that he was in any way limited in his ability to challenge the allegations of fraud that were made against him in the various proceedings to which he was subject as a result of the misconduct at issue here. As indicated, the allegations of fraud against Black provided the basis for not only these administrative proceedings but also civil and criminal proceedings and substantial sanctions. Moreover, we have repeatedly rejected efforts to reopen proceedings in which the petitioner "elected to settle the matter and did not develop the record further" and thus could not subsequently "complain that the record is inaccurate or incomplete."¹¹

In any event, as indicated, this administrative proceeding was based on the Injunctive Proceeding. As discussed in the April Order, to the extent that Black seeks to challenge the basis for his industry bars — the allegations of fraud made in the Injunctive Proceeding (which are

¹⁰ 15 U.S.C. § 80b-3(e)(4).

¹¹ *Edward I. Frankel*, 52 S.E.C. 1237, 1239 n.5 (1997); *see also Kenneth W. Haver, CPA*, Exchange Act Rel. No. 54824 (Nov. 28, 2006), 89 SEC Docket 1237, 1242 (denying motion to vacate or reopen proceedings where petitioner settled, thereby "forfeiting his opportunity to adduce his evidence"). *Cf. Gleason v. Jandrucko*, 860 F.2d 556 (2d Cir. 1988) (refusing to set aside a settlement on the basis of allegations that defendants had perjured themselves and concealed evidence because plaintiff "voluntarily chose to settle the action" and could not "be heard now to complain that he was denied the opportunity to uncover the alleged fraud" where "nothing prevented plaintiff during the pendency of the prior proceeding" from attempting to obtain the evidence that plaintiff believed impeached defendants' testimony).

deemed true as a result of his consent to the injunction) — he is collaterally estopped from doing so before us.¹²

Accordingly, IT IS ORDERED THAT Respondent's Request for Reconsideration Of The Commission's April 13, 2010 Order Granting In Part And Denying In Part Petition To Set Aside Bar Order be, and it hereby is, denied.¹³

By the Commission.

Elizabeth M. Murphy
Secretary

¹² We have repeatedly held that a party may not collaterally attack the factual allegations in an injunctive complaint brought by the Commission when, as is the case here, the party has consented to the entry of an injunction on the basis of such allegations. *Martin A. Armstrong*, Investment Advisers Act Rel. No. 2926 (Sep. 17, 2009), 96 SEC Docket 20556, 20560; *Schield Mgmt. Co.*, Exchange Act Rel. No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 859 (precluding respondents from disputing allegations in injunctive complaint after consenting to entry of injunction); cf. *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14257 (finding criminal conviction based on guilty plea has collateral estoppel effect precluding relitigation of issues in Commission proceedings).

¹³ We have considered all of the contentions advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed in this opinion.