

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
: INITIAL DECISION
MARK FEATHERS : May 30, 2014

APPEARANCES: John B. Bulgozdy for the Division of Enforcement,
Securities and Exchange Commission

Respondent Mark Feathers pro se

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Mark Feathers (Feathers) from the securities industry. He was previously enjoined from violating the antifraud and registration provisions of the federal securities laws.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on February 18, 2014, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The undersigned granted the parties leave to file motions for summary disposition at a March 24, 2014, prehearing conference, pursuant to 17 C.F.R. § 201.250(a). Mark Feathers, Admin. Proc. Release No. 1333, 2014 SEC LEXIS 1057 (A.L.J. Mar. 25, 2014). The Division of Enforcement (Division) filed a motion for summary disposition, Feathers filed an opposition, and the Division filed a reply.

This Initial Decision is based on the pleadings and Feathers's Answer to the OIP and other filings. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Feathers was enjoined were decided against him in the civil case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that Feathers was enjoined from violating the antifraud and registration provisions of the federal securities laws, in SEC v. Small Business Capital Corp., No. 5:12-cv-3237 (N.D. Cal. Nov. 6, 2013), appeal docketed, No. 13-17304 (9th Cir. Nov. 12, 2013). The Division urges that he be barred from the securities industry. Feathers argues that Small Business Capital Corp. was wrongly decided, that his constitutional rights were violated, and that Commission staff engaged in misconduct in that case.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 is taken of the docket report and the court's orders in Small Business Capital Corp., as well as of the Commission's public official records.

2. Collateral Estoppel

The Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against a respondent, whether resolved by consent; by summary judgment, like Small Business Capital Corp.; or after a trial. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2108 (injunction entered by consent); John Francis D'Acquisto, 53 S.E.C. 440, 444 (1998) (injunction entered by summary judgment); James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713 (injunction entered after trial); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn.6-7 (1997). See also Marshall E. Melton, 56 S.E.C. 695, 697-700, 709-13 (2003). Nor does the pendency of an appeal preclude the Commission from action based on an injunction. See Franklin, 91 SEC Docket at 2714 n.15.

3. Due Process

In addition to arguing that Small Business Capital Corp. was wrongly decided, Feathers alleges that Commission staff engaged in misconduct in that case. However, the issues in the OIP in this proceeding concern Feathers, not the Commission, and thus his allegation of misconduct by Commission staff in Small Business Capital Corp. is not relevant to the issues in this proceeding. Any challenge to the propriety of the staff's conduct should be brought before the court in which that case was heard, which Feathers is doing.¹ See Harold F. Crews, 87 SEC Docket 350, 359 (Jan. 13, 2006). Further, Feathers's means of challenging the validity of the

¹ The U.S. District Court has retained jurisdiction over Small Business Capital Corp. for the purpose of implementing and carrying out the terms of all of its orders and decrees and to entertain any suitable application or motion for additional relief within its jurisdiction. Small Bus. Capital Corp. (N.D. Cal. Nov. 6, 2013) at 7, ECF No. 622.

injunction against him is through an appeal to the Court of Appeals for the Ninth Circuit, which he is pursuing. Vladislav Steven Zubkis, 58 S.E.C. 1014, 1020-21 & n.19 (2005). If he is successful in his appeal, he can request the Commission to vacate any sanctions ordered in this proceeding (or to dismiss the proceeding, if it is still pending).²

Feathers also argues that his due process rights have been violated, including by the initiation of this proceeding following Small Business Capital Corp. However, Section 15(b) of the Exchange Act specifically authorizes an administrative proceeding such as this one based on a respondent's injunction.

II. FINDINGS OF FACT

Feathers is permanently enjoined from violating the antifraud and registration provisions of the federal securities laws: Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. Small Bus. Capital Corp., No. 5:12-cv-3237 (N.D. Cal. Nov. 6, 2013), ECF No. 622. Additionally, he was ordered to pay disgorgement of \$7,497,402.51 plus prejudgment interest of \$285,558.56 and a second-tier civil penalty of \$10,000. Id.

The wrongdoing underlying the injunction was as follows: Feathers managed two mortgage investment funds that he established in 2007: Investors Prime Fund, LLC (IPF), and SBC Portfolio Fund, LLC (SPF) (collectively, the Funds). Small Business Capital Corp., No. 5:12-cv-3237 (N.D. Cal. Aug. 16, 2013) at 2, ECF No. 591. The manager of the Funds was Feathers's company, Small Business Capital Corporation (SBCC), as stated in the Funds' Feathers-approved offering documents. Id. at 2. Feathers and SBCC employed investor representatives who were paid a salary and a commission for sales of securities of IPF and SPF. Id. at 28. Beginning in 2009, Feathers caused the Funds to transfer millions of dollars to SBCC to pay SBCC's operating expenses, to generate management fees, and to make cash distributions to investors in excess of the income and profits that the Funds generated. Id. at 2, 9-16. These loans, transfers, and distributions were in violation of the Funds' offering documents, circulars, and other representations made to investors. Id. at 2-3, 8-16. Feathers actively disguised the true

² See Jilaine H. Bauer, Esq., Securities Act of 1933 Release No. 9464, 2013 SEC LEXIS 3132 (Oct. 8, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, reversed and remanded district court's judgment that was basis for OIP); Richard L. Goble, Exchange Act Release No. 68651, 2013 SEC LEXIS 129 (Jan. 14, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, vacated injunction that was basis for OIP); Evelyn Litwok, Investment Advisers Act of 1940 Release No. 3438, 2012 SEC LEXIS 2328 (July 25, 2012) (dismissing follow-on proceeding after court of appeals, while petition for review was pending before Commission, reversed certain convictions and vacated and remanded other convictions, all of which were basis for OIP), Kenneth E. Mahaffy, Jr., Exchange Act Release No. 68462, 2012 SEC LEXIS 4020 (Dec. 18, 2012) (vacating bar issued in follow-on administrative proceeding where court of appeals vacated criminal conviction that was basis for proceeding after Commission had issued bar order).

financial performances of the Funds, evincing his intent to deceive investors, or at least an extreme recklessness in his management of the Funds. Id. at 16, 18-21, 24-26. The court found abundant evidence of intentional or reckless actions by Feathers in support of its conclusion that he acted with scienter. Id. at 18-21. Neither Feathers, SBCC, IPF, nor SPF have ever been registered with the Commission. Official Notice.

III. CONCLUSIONS OF LAW

Respondent has been permanently enjoined “from engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security” within the meaning of Sections 15(b)(4) and 15(b)(6) of the Exchange Act.

IV. SANCTION

As the Division requests, a collateral bar will be ordered.^{3,4}

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See Section 15(b) of the Exchange Act. The Commission considers factors including:

the egregiousness of the defendant’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant’s assurances against future violations, the defendant’s recognition of the wrongful nature of his conduct, and the likelihood that the defendant’s occupation will present opportunities for future violations.

³ The fact that neither Feathers, SBCC, nor the Funds were registrants is not a barrier to imposing a broker-dealer and collateral bar. See 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 (unregistered associated person of an unregistered broker-dealer barred from association with a broker or dealer).

⁴ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which became effective on July 22, 2010, provided collateral bars in each of the several statutes regulating different aspects of the securities industry. Feathers’s wrongdoing continued after July 22, 2010. Additionally, the Commission has determined that sanctioning a respondent with a collateral bar for pre-Dodd-Frank Act wrongdoing is not impermissibly retroactive, but rather provides prospective relief from harm to investors and the markets. John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722; see also Alfred Clay Ludlum, III, Advisers Act Release No. 3628 (July 11, 2013), 2013 WL 3479060; Johnny Clifton, Securities Act Release No. 9417 (July 12, 2013), 2013 WL 3487076; Tzemach David Netzer Korem, Exchange Act Release No. 70044 (July 26, 2013), 2013 WL 3864511.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. at 698. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. See Schild Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46.

In proceedings based on an injunction, the Commission examines the facts and circumstances underlying the injunction in determining the public interest. See Marshall E. Melton, 56 S.E.C. at 698. “An injunction, by its very nature, is predicated on conduct that . . . violate[s] laws, rules, or regulations.” Id. at 709. The Commission considers an antifraud injunction to be particularly serious. Id. at 710, 713. The public interest requires a severe sanction when a respondent’s past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. See Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

B. Sanctions

In determining to enjoin Feathers, the court in SEC v. Small Business Capital Corp. analyzed Feathers’s conduct in light of the factors articulated in SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980), which are the same as the Steadman factors. As the court concluded, Feathers’s conduct was recurrent and involved at least a reckless degree of scienter. His actions were egregious. The lack of assurances against future violations and recognition of the wrongful nature of the conduct goes beyond a vigorous defense of the charges. His previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. The violations are recent. The degree of harm to investors and the marketplace is indicated in the \$7,497,402.51 of ill-gotten gains he was ordered to disgorge. Further, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent’s conduct 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, 55 S.E.C. 1133, 1145 (2002), aff’d, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). A bar is also necessary for the purpose of deterrence. Arthur Lipper Corp., 46 S.E.C. at 100.

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Exchange Act, MARK FEATHERS IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.⁵

⁵ Thus, he will be barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, pursuant to Exchange Act Section 15(b)(6)(A), (C).

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 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. 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.

Carol Fox Foelak
Administrative Law Judge