UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 49788 / June 1, 2004

INVESTMENT COMPANY ACT OF 1940
Rel. No. 26461 / June 1, 2004

Admin. Proc. File No. 3-9615

In the Matter of

THE ROCKIES FUND, INC.,
STEPHEN G. CALANDRELLA,
CHARLES M. POWELL,
CLIFFORD C. THYGESEN,
and
JOHN C. POWER

ORDER DENYING MOTIONS FOR RECONSIDERATION

I.

On October 2, 2003, we issued an opinion finding that the Rockies Fund, Inc., Stephen G. Calandrella, Charles M. Powell, Clifford C. Thygesen (together, "Rockies Respondents"), and John C. Power violated the federal securities laws (the "October 2 Opinion"). 1/ The Rockies Respondents and Power (together, "Respondents") request reconsideration of our opinion. 2/

In the October 2 Opinion, we found that Calandrella and Power violated Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5 3/ by manipulating the market for Premier Concepts, Inc. ("Premier") securities through the use of matched orders and wash sales. We further found that the Fund, Calandrella, Powell, and Thygesen violated Exchange Act

1/ The Rockies Fund, Inc., Securities Exchange Act Release No. 48590 (Oct. 2, 2003), 81 SEC Docket 703.

2/ The Rockies Respondents and Power filed separate motions. Their arguments are identified as they are discussed.

3/ 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5.

Section 10(b) and Rule 10b-5 by making untrue statements of material facts in the Fund's annual and quarterly reports by misclassifying restricted shares and overvaluing such shares, and that the Fund and Calandrella violated those provisions also by overstating the number of shares in the Fund's portfolio. In addition, we found that, through these actions, the Fund violated, and Calandrella, Powell, and Thygesen aided and abetted the Fund's violations of, Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 4/ by filing reports that made untrue statements of material facts and did not comply with Generally Accepted Accounting Principles ("GAAP") and Regulation S-X. 5/ Finally, we found that Calandrella violated Section 57(k)(1) of the Investment Company Act of 1940 6/ by causing the Fund to purchase Premier stock to settle a legal claim against Calandrella personally, a form of impermissible compensation, and that he violated Exchange Act Section 10(b) and Rule 10b-5 by failing to disclose the settlement to the Fund's independent board members.

We found that it was in the public interest to order all of the Respondents to cease and desist from committing or causing any further violations of the provisions they were found to have violated or to have aided and abetted the violation of; to order Calandrella to pay a civil penalty of $500,000 and Thygesen and Powell each to pay a civil penalty of $160,000; and to bar Calandrella permanently, and Thygesen and Powell with the right to reapply after three years, from associating with or acting as an affiliated person of an investment company.

4/ 15 U.S.C. § 78m(a) and 17 C.F.R. §§ 240.12b-20, 240.13a-1, and 240.13a-13.

5/ 17 C.F.R. § 210.

6/ 15 U.S.C. § 80a-56(k)(1).

II.

We evaluate the Rockies Respondents' and Power's motions for reconsideration under Rule of Practice 470. 7/ Rule of Practice 470 provides that the Commission may reconsider its decisions in "exceptional" cases. 8/ This remedy is designed to correct manifest errors of law or fact or to permit the presentation of newly discovered evidence. 9/ Respondents may not use motions for reconsideration to reiterate arguments previously made or to cite authorities previously available. 10/ Here, the Respondents' motions do not meet the rigorous standard required and thus afford no basis for reconsideration of the October 2 Opinion. 11/

Arguments Previously Made

Many of the Respondents' arguments are simply reiterations of arguments previously made. For example, the October 2 Opinion considered and rejected the Rockies Respondents' argument that the misclassification of restricted Premier shares as unrestricted was not a material misrepresentation. The October 2 Opinion made no finding regarding Power's argument that Ranald

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7/ 17 C.F.R. § 201.470.

8/ The Comment to Rule 470 explains that "[a] motion for reconsideration is intended to be an exceptional remedy." Rules of Practice, 60 Fed. Reg. 32,738, 32,780 (June 23, 1995).

9/ KPMG Peat Marwick LLP, Order Denying Request for Reconsideration, Securities Exchange Act Rel. No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, 1352-53 n.7 (citing "settled principles of federal court practice" in supporting the rejection of motions for reconsideration unless correction of manifest errors of law or fact or presentation of newly discovered evidence is sought).

10/ See Feeley & Willcox Asset Mgmt. Corp. and Michael J. Feeley, Order Denying Request for Reconsideration, Securities Act Rel. No. 8303 (Oct. 9, 2003), 81 SEC Docket 919, 921 & n.8 (quoting KPMG, 74 SEC Docket at 1352-53 n.7).

11/ Compare Robert Sayegh, Exchange Act Rel. No. 41762 (Aug. 19, 1999), 70 SEC Docket 1126 (motion for reconsideration granted in order to take into account change in applicable law).

Butchard, a friend and business associate of Calandrella and Power, sold his Premier shares for the purpose of eliminating the restriction on them, concluding that Butchard's motivation for selling his shares was not relevant in determining whether Power and Calandrella engaged in manipulative conduct. Power's repeated assertion that the trades at issue were not "shams" since purchasers actually bought the shares and no portion of the sales proceeds were kicked back to the purchasers is not relevant to whether the trades were manipulative. 12/

Untrue Statements in the Fund's Quarterly and Annual Reports

The Rockies Respondents claim that the October 2 Opinion "misreads the evidence as to the meaning of the 'quoted market price' referenced in the Fund's board minutes and other records of the valuations to conclude that there was no attempt to fair value Premier." They argue that the "seeming irregularity" in the values placed on Premier -- the use, variously, of prices between the bid and the ask and the highest bid -- in each quarterly report somehow evidences that they were attempting to fair value Premier at each quarter. However, the October 2 Opinion determined merely that the Rockies Respondents did not follow their own disclosed valuation procedures. Those procedures dictated that the Fund's restricted Premier securities should have been valued at a discount from fair market value, which the Fund's prospectus stated was to be determined by the bid price. 13/

12/ See Markowski v. S.E.C., 274 F.3d 525, 528-29 (D.C. Cir. 2002). The Rockies Respondents also reiterate various procedural and evidentiary claims made in their briefs on the merits and addressed in the October 2 Opinion. The Rockies Respondents also claim that we "misapprehended" their reliance on counsel and auditor arguments as defenses to liability rather than as mitigating factors in determining sanctions. In fact, we found that such reliance, if any, did not mitigate the sanctions imposed here.

13/ The Rockies Respondents also claim that we failed to consider two studies referenced by the law judge which they assert support their contention that the valuations of Premier securities were not overstated. See William L. Silber, Discounts on Restricted Stock: The Impact of Illiquidity on Stock Prices, Fin. Analysts J., July-Aug. 1991 at 60 (citing 5 U.S. Securities and Exchange

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The Rockies Respondents contest our finding that, in September 1995, the Fund had no agreement to purchase 200,000 Premier shares and, therefore, that the claim of ownership of those shares in the Fund's Form 10-Q for the period ended September 30, 1995, was fraudulent. The Rockies Respondents question how, if there had not been an agreement prior to December 1995, the date the subscription agreement for the shares was signed, the Fund could "identify the precise number of shares for its September 1995 from [sic] 10-Q?" The Form 10-Q's report that the Fund owned 200,000 shares may suggest that 200,000 was the number the Fund hoped to obtain, but it does not establish that the Fund had entered into a binding agreement to purchase the shares. The October 2 Opinion concluded that the agreement was executed after the period covered by the Form 10-Q.

Calandrella Settlement

Regarding the settlement of legal claims against Calandrella, the Rockies Respondents now assert that "the Board" "ratified" the settlement agreement which directed the Fund to purchase from Ray Stanz 85,000 shares of Premier in return for Stanz's agreement to forgo a potential legal claim against Calandrella and Premier. This claim is unsubstantiated. In any event, such a claim is not relevant to a violation of Investment Company Act Section 57(k)(1), which proscribes an associated person of a business development company ("BDC") from accepting compensation for the sale of property to the BDC regardless of whether the compensation is disclosed. Nor does any purported disclosure to the Board after the settlement eliminate liability for the Exchange Act Section 10(b) and Rule 10b-5 violations. 14/

13/(...continued)
Commission, Institutional Investors Study Report (1971)). These studies were not part of the record but were cited by the law judge to support the proposition that restricted shares are discounted by approximately 34% from the price of unrestricted shares of the same class. The Rockies Respondents used their interpretation of the studies in their briefs on appeal to support their valuation of Premier. We reviewed these studies and noted in the October 2 Opinion that they support our finding that restricted shares typically have a lower value than unrestricted shares.

14/ Cf. William C. Piontek, Securities Act Rel. No. 8344 (Dec. 11, 2003), 81 SEC Docket 3044, 3055-56 (finding that
(continued...)

Prior disclosure was necessary to provide the Board with an opportunity to decline the purchase of the Premier shares.

Manipulation

Power contests certain factual findings made in the October 2 Opinion concerning the manipulation charges. He argues that we found that the bid price of Premier rose with every transaction. We made no such finding and instead found that, during the course of the manipulative trading, the bid price for Premier rose steadily.

Power also claims that the finding that Butchard's shares were purchased at or near the ask price was manifestly erroneous. Power is correct that Butchard's shares in fact were purchased at or near the bid price. However, this misstatement, included in the factual discussion along with a footnote that accurately provided the actual prices, is not legally significant. The significance of the prices at which Buchard's shares were purchased is that they rose consistently, contributing both to the appearance of market activity in an otherwise thinly traded security and to a rapid surge in prices despite the absence of any known prospects for the issuer or favorable developments affecting it.

Power also faults the finding in the October 2 Opinion that his brother, Brian Power, spent almost $28,000 more on the purchases of Premier shares than he received from the sales of such shares. Power claims that Brian Power spent almost $28,000 more for Premier purchases than he realized from the sales simply because he still held 15,750 shares of Premier at the end of the manipulative period. This misses the point. Brian Power's purported reason for the trades was to generate cash to cover cash-flow issues, yet the trades he made to generate funds required $28,000 more than he received. Thus, he in fact had to employ the funds necessary to engage in these transactions at a time when he claims he needed temporary cash and wished to take advantage of more lenient Canadian settlement rules. Moreover, as discussed in the October 2 Opinion, the record amply supports the conclusion that the hallmarks of manipulation were present even without this finding.

14/(...continued)
subsequent ratification of an unauthorized trade does not transform the trade into an authorized one).

Power also claims that the October 2 Opinion was inconsistent in finding that Premier was a thinly traded stock while also finding that the Premier trades were made in order to provide an appearance of active trading. We reject this reasoning. The October 2 Opinion recognized that, although Premier was a thinly traded stock, the substantial rise in the bid price and the reporting of the transactions during the period of manipulation created the appearance of a more active market than would have existed otherwise.

Power contests the October 2 Opinion's reasoning that the trades of Butchard's stock were placed in the public market, rather than effected through private transactions, so that the trades would be reported by NASD, thereby creating an appearance of market activity in Premier. Power incorrectly asserts that NASD Marketplace Rule 6550 requires that all transactions in OTCBB-eligible securities, including private transactions, must be reported. Contrary to Power's assertion, Rule 6550 requires merely that NASD member firms must report any transactions effected by the member in such securities. Had the Butchard sales been traded through purely private transactions between the parties, rather than through Hanifen, an NASD member firm, those trades would not have been reported, would not have given a false appearance of market activity, and would not have had a similar effect on bid prices.

Power cites Markowski v. S.E.C., 15/ decided after the briefing in this matter was concluded but prior to the oral argument, to support his contention that, "where matched orders and wash sales are alleged to be manipulative within the meaning of Section 10(b), the 'purpose' requirements of Section 9(a) of the Exchange Act must be applied." Power's interpretation of Markowski is incorrect. Rather, the court in Markowski found that, where fraudulent devices such as matched orders and wash sales have not been alleged, it may still be possible to find a manipulation "solely because of the actor's purpose." 16/ The court did not hold that manipulative intent must be shown in instances where manipulation occurs through the use of fraudulent devices. In any event, the October 2 Opinion found that Power and Calandrella acted with a manipulative intent.

Sanctions

15/ 274 F.3d 525 (D.C. Cir. 2002).

16/ Id. at 529.

The Rockies Respondents object to the sanctions imposed on them because they claim they have made assurances against future violations. 17/ They assert that the basis for our finding that they have not made assurances against future violations "is unclear," but they do not cite to anything in the record that demonstrates that they have made such assurances. 18/ In addition, our findings with respect to the sanctions were based on multiple factors, including the serious nature of the fraud the Respondents committed, the fact that their occupations present opportunity for future violations, and the lack of mitigating circumstances.

Accordingly, IT IS ORDERED that the motions for reconsideration filed by the Rockies Fund, Inc., Stephen G. Calandrella, Charles M. Powell, Clifford C. Thygesen, and John C. Power be, and they hereby are, denied.

By the Commission.

Jonathan G. Katz
Secretary

17/ They also reiterate all of their earlier objections to the sanctions: that their occupations do not present an opportunity for future violations, that the Fund withdrew its registration as a BDC, that their misconduct did not pose a significant risk of loss to others, and that they have not been charged with further misconduct since the 1994-1995 conduct at issue.

18/ We have considered the additional arguments raised by the Respondents and find them equally lacking in merit.