INITIAL DECISION RELEASE NO. 499
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15189

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

In the Matter of	:	
	:	INITIAL DECISION
STEFAN H. BENGER	:	July 25, 2013

APPEARANCES: Daniel J. Hayes, Jonathan S. Polish, and Eric A. Celauro for the Division of Enforcement, Securities and Exchange Commission

Howard J. Stein for Respondent Stefan H. Benger

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Stefan H. Benger (Benger) 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 January 28, 2013, 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 21, 2013, prehearing conference, pursuant to 17 C.F.R. § 201.250(a). Stefan H. Benger, Admin. Proc. No. 3-15189 (A.L.J. Mar. 21, 2013) (unpublished). The Division of Enforcement (Division) timely filed its Motion for Summary Disposition on April 29, 2013. Benger timely filed his Opposition on June 26, 2013, and the Division, a Reply on July 3, 2013.[1] The administrative law judge is required by 17 C.F.R. § 201.250(b) to act "promptly" on a motion for summary disposition.

[1] The due dates for the responsive pleadings had been extended due to settlement negotiations, which ultimately failed. Stefan H. Benger, Admin. Proc. No. 3-15189 (A.L.J. May 21, 2013) (unpublished).

This Initial Decision is based on (1) the Division's Motion for Summary Disposition; (2) Benger's Opposition; (3) the Division's Reply; and (4) Benger's Answer to the OIP. 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 Benger 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 Benger was enjoined on January 15, 2013, from violating the antifraud and registration provisions of the federal securities laws, in SEC v. Benger, No. 1:09-cv-00676 (N.D. Ill. Jan. 15, 2013), based on his wrongdoing from 2007 through February 2009, when he and others operated a penny stock boiler room. The Division urges that a collateral bar be imposed on Benger. Benger argues that a three-year bar is sufficient.

C. Procedural Issues

1. Exhibits Admitted into Evidence

The following items, of which official notice is taken pursuant to 17 C.F.R. §§ 201.250(a), .323, which are also included in the Division's Motion for Summary Disposition at Exhibits A, B, and D, are admitted as Division Exhibits A, B, and D:

December 20, 2011, Second Amended Complaint, SEC v. Benger (Div. Ex. A);

July 2, 2012, Consent of Defendants Stefan H. Benger and SHB Capital, Inc., SEC v. Benger (Div. Ex. B); and

January 15, 2013, Corrected Final Judgment as to Defendants Stefan H. Benger and SHB Capital, Inc., SEC v. Benger (Div. Ex. D).

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, like SEC v. Benger; by summary judgment; or after a trial. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104 (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). Yet Benger argues that the allegations of the complaint in SEC v. Benger should not be considered in this proceeding because they were not spelled out in the OIP. To the contrary, in cases in which the injunction was entered by consent, the Commission considers the facts alleged in the injunctive complaint. Marshall E. Melton, 56 S.E.C. 695, 698-700 (2003).

II. FINDINGS OF FACT

Benger, 46, resides in Chicago, Illinois. Answer at 1. Benger and others operated an international boiler room scheme that raised approximately $44.2 million from more than 1,400 investors, primarily through the sales of U.S. penny stocks. Div. Ex. A at 1. Benger was president of SHB Capital, Inc. (SHB), through which he acted as distribution agent for several of the boiler room offerings. Div. Ex. A at 3. SHB was never registered as a broker-dealer. Id. The boiler room operation preyed largely on less sophisticated foreign investors, including elderly Europeans, employing high pressure sales tactics and myriad misrepresentations to induce the purchase of the penny stocks. Div. Ex. A at 7-9. Benger and his co-defendants retained more than 60% of the investor proceeds and remitted the remainder to the issuers of the penny stock. Div. Ex. A at 10. The exorbitant commissions were concealed from the investors. Div. Ex. A at 1-2.

Benger was (and is) permanently enjoined from violating the antifraud provisions of the federal securities laws – Section 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder – as well as registration provisions –Section 15(a) of the Exchange Act – and barred from participating in an offering of penny stock; he was also ordered to pay a civil penalty of $250,000 and to disgorge $422,004.10 in ill-gotten gains plus prejudgment interest of $26,869.79. Div. Ex. D.

III. CONCLUSIONS OF LAW

Benger 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)(C) and 15(b)(6)(A)(iii) of the Exchange Act.

IV. SANCTION

The Division requests a collateral bar (exclusive of a penny stock bar, which was imposed in SEC v. Benger). Benger urges that the bar be limited to three years. As the Division requests, a bar will be ordered.[2]

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See Section 15(b)(6) 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

[2] The fact that SHB was not a registered broker-dealer 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).

> 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.

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 Schield 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. 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

Benger's conduct was egregious and recurrent. At a minimum, a reckless degree of scienter is a necessary element of his violations of the antifraud provisions of the Exchange Act.

Benger's 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 $250,000 civil penalty that Benger was ordered to pay and the $422,004.10 in disgorgement that he was ordered to pay. 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.

In arguing for a three-year bar, Benger cites various Commission settlements. However, it goes without saying that settlements are not precedent.[3] Benger does not cite any litigated follow-on case in which a respondent had been enjoined against violations of the antifraud provisions and

[3] The Commission has stressed many times that settlements are not precedent. See Richard J. Puccio, 52 S.E.C. 1041, 1045 (1996) (citing David A. Gingras, 50 S.E.C. 1286, 1294 (1992), and cases cited therein); Robert F. Lynch, 46 S.E.C. 5, 10 n.17 (1975) (citing Samuel H. Sloan, 45 S.E.C. 734, 739 n.24 (1975); Haight & Co. Inc., 44 S.E.C. 481, 512-13 (1971), aff'd without opinion, (D.C. Cir. 1971); Sec. Planners Assocs., Inc., 44 S.E.C. 738, 743-44 (1971)); see also Mich. Dep't of Natural Res. v. FERC, 96 F.3d 1482, 1490 (D.C. Cir. 1996) and cases cited therein (settlements are not precedent).

received a sanction less than a bar. None exists. From 1995 to the present there have been over thirty follow-on proceedings based on antifraud injunctions in which the Commission issued opinions. All of the respondents were barred[4] – thirty-two unqualified bars and three bars with the right to reapply after five years.[5]

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), STEFAN H. BENGER IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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

[4] The historic cases imposed industry-specific bars, such as a bar from association with an investment adviser on a respondent who had been associated with an investment adviser at the time of his violation. However, 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. The Commission has determined that sanctioning a respondent with a collateral bar for pre-Dodd-Frank 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).

[5] Those three were Richard J. Puccio, 52 S.E.C. 1041 (1996), Martin B. Sloate, 52 S.E.C. 1233 (1997), and Robert Radano, Advisers Act Release No. 2750 (June 30, 2008), 93 SEC Docket 7495. The Commission's opinions do not make clear the factors that distinguished these cases from those in which unqualified bars were imposed, but there is little difference between a "bar" and a "bar with the right to reapply in five years."