

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 3711/March 16, 2016

ADMINISTRATIVE PROCEEDING  
File No. 3-16795

In the Matter of  
  
JOSEPH J. FOX

ORDER DENYING MOTION FOR SUMMARY  
DISPOSITION WITHOUT PREJUDICE AND  
SCHEDULING PREHEARING CONFERENCE

On September 8, 2015, the Securities and Exchange Commission issued an order instituting proceedings (OIP) against Respondent, directing the determination of what, if any, non-financial remedial sanctions under Section 15(b)(6) of the Securities Exchange Act of 1934 are in the public interest based on Respondent's violations of Section 5(a) and (c) of the Securities Act of 1933. Briefing on the Division of Enforcement's motion for summary disposition was completed in January 2016. I then ordered supplemental briefing on the issue of Respondent's scienter, which was completed on February 26, 2016.

The Division requests that I bar Respondent from associating with any broker, dealer, investment adviser, and certain other securities industry participants and from participating in any offering of penny stock, with the right to reapply for reentry into these areas after five years. Div. Mot. at 4. I must consider six factors when determining whether this sanction serves the public interest: the egregiousness of Respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of Respondent's assurances against future violations, his recognition of the wrongful nature of his conduct, and the likelihood that his occupation will present opportunities for future violations. *See Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at \*22 (Feb. 13, 2009) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)). In order to grant the Division's motion, I must conclude that (1) the Division has put forth sufficient evidence to meet its burden of proof to show that these factors warrant the requested bar, and (2) there are no genuine issues of material fact. *See* 17 C.F.R. § 201.250(b).

Respondent agreed that the findings in the OIP would be deemed true for purposes of this proceeding. OIP at 7. Together with the declaration and two exhibits attached to the Division's motion, there is sufficient evidence for me to evaluate four of the six public interest factors – egregiousness, recurrence, assurances against future violations, and recognition of the wrongful nature of the conduct. While the parties disagree on how the relevant facts should be weighed in my evaluation, there is no genuine dispute about the facts themselves.

The evidence regarding the remaining two public interest factors is much sparser. The Division's argument that Respondent acted at least recklessly is supported only by reference to his previous work experience and the FINRA licenses he has held at various times in his career.

Div. Supp. Br. at 2-4. I must view these facts in the light most favorable to Respondent, the non-moving party. *See Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 SEC LEXIS 3001, at \*8 (Aug. 21, 2014). Having done so, I find the record insufficient to support summary disposition. Many people have significant securities industry experience and licenses; this does not mean that they have acted recklessly any time they violate a securities statute or regulation related to their area of practice. More is required to show that Respondent acted with scienter when committing the violations at issue, or that he acted with any particular state of mind at all.<sup>1</sup>

With respect to opportunities for future violations, the Division again notes that Respondent “has spent a significant portion of his career in the securities industry,” and it observes that he is the CEO of a company which owns a broker-dealer firm. Div. Mot. at 11; *see* Div. Reply at 3. In addition, one of the Division’s exhibits is an email reflecting Respondent’s attempt to raise money to finance the broker-dealer firm in September 2015. Div. Mot. Ex. A. Prior experience in the securities industry is not determinative of a respondent’s future employment; if it were, this factor would tip automatically in the Division’s favor. *Cf. WHX Corp. v. SEC*, 362 F.3d 854, 859 (D.C. Cir. 2004) (criticizing the view that the government has demonstrated a risk of future violations simply because (1) a party has committed a violation of a rule, and (2) that party has not exited the market or in some other way disabled itself from recommitment of the offense.). And according to FINRA records, the broker-dealer firm owned by Respondent’s company terminated or withdrew its registration on December 18, 2015, and is no longer operational. Ditto Trade, Inc., BrokerCheck Report at 2; *see* 17 C.F.R. § 201.323. For his part, Respondent has represented that he has “no intention to affiliate with any Broker/Dealer now, or anytime in the future,” and that he also has no plans to work for any other industry participants or participate in any penny stock offerings. Resp. Opp. at 13; Resp. Supp. Opp. at 2. Nonetheless, he has identified neither how he currently supports himself nor how he expects to do so in the future. The present record, viewed in the light most favorable to Respondent, is insufficient to determine whether Respondent’s occupation will present opportunities for future violations.

Because I do not at this time have sufficient evidence to evaluate all of the public interest factors, it appears that resolution of this proceeding may require a hearing. Accordingly, the Division’s motion for summary disposition is DENIED WITHOUT PREJUDICE. It is ORDERED that a prehearing conference shall be held at 2:00 p.m. EDT on March 21, 2016, at which time the logistics of further proceedings will be discussed.

SO ORDERED.

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Cameron Elliot  
Administrative Law Judge

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<sup>1</sup> While the Division correctly observes that scienter was not a necessary element of Respondent’s violations of Section 5 of the Securities Act, the respondent’s state of mind is nonetheless an important part of the sanctions analysis. *See Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 SEC LEXIS 2973, at \*40 n.58 (Sept. 20, 2012) (“[W]hile scienter is not required to make out violations of several of the statutory sections involved here, the respondent’s state of mind is highly relevant in determining the remedy to impose.” (quoting *Steadman*, 603 F.2d at 1140)).