

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

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 3854/May 19, 2016

ADMINISTRATIVE PROCEEDING

File No. 3-16795

In the Matter of

JOSEPH J. FOX

ORDER DENYING RESPONDENT'S MOTION
TO CORRECT A MANIFEST ERROR OF FACT

On September 8, 2015, the Securities and Exchange Commission issued an order instituting proceedings 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 were in the public interest based on Respondent's violations of Section 5(a) and (c) of the Securities Act of 1933. I issued an initial decision (ID) on April 25, 2016, barring Respondent from the securities industry for a period of five years. *Joseph J. Fox*, Initial Decision Release No. 1004, 2016 SEC LEXIS 1515.

On May 6, 2016, Respondent filed a motion to correct a manifest error of fact pursuant to Rule of Practice 111(h), 17 C.F.R. § 201.111(h), to which was attached ten exhibits (Exs. 1-10). A manifest error is "an error that is plain and indisputable, and that amounts to a complete disregard of . . . the credible evidence in the record." *Robert Cord Beatty*, Admin. Proc. Rulings Release No. 618, 2005 SEC LEXIS 359, at *8 (ALJ Feb. 10, 2005) (quoting *Black's Law Dictionary* 563 (7th ed. 1999) (alteration omitted)), *finality notice*, Securities Act of 1933 Release No. 8554, 2005 SEC LEXIS 622 (Mar. 16, 2005). For an error of fact to be manifest, it must be an error that could reasonably affect the outcome of the decision. *See Raymond James Fin. Servs., Inc.*, Admin. Proc. Rulings Release No. 622, 2005 WL 3778678, at *1 (ALJ Oct. 14, 2005), *finality notice*, Exchange Act Release No. 52810, 2005 WL 3108488 (Nov. 21, 2005). A motion contesting the substantive merits of the initial decision may not be brought under Rule 111(h), and must instead be treated as a petition for review. *See* 70 Fed. Reg. 72566, 72567 (Dec. 5, 2005).

Although some of Fox's contentions merit discussion, I find no manifest errors of fact in the ID. I construe each assignment of manifest error liberally because Fox is pro se.

Willfulness:

Fox does not dispute that he consented to the entry of the OIP and to the finding that he willfully violated Section 5(a) and (c) of the Securities Act. *See* ID at 1; Motion at 1. Fox

contends that he only gave such consent because the OIP included a footnote defining willfulness, and, construed liberally, he argues that the ID should have cited that footnote as evidence that he did not act intentionally. *See* Motion at 1. But the finding of willfulness is supported by the record, and the ID noted that Fox “vigorously dispute[d]” that he intentionally violated Section 5. ID at 6.

Public Interest Factors:

Fox raises multiple points regarding the public interest factors. *See* Motion at 1-2. Even construed liberally, however, none of his points identify specific facts that might be manifestly erroneous, and all of his points instead take issue with the substantive merits of the public interest analysis. *See id.*

One of Fox’s points – that I “rever[s]ed [my] prior ruling on scienter with no evidentiary basis” – merits discussion. Motion at 2. I previously ruled that the record was “insufficient to support summary disposition,” and that “[m]ore is required to show that Respondent acted with scienter.” *Joseph J. Fox*, Admin. Proc. Rulings Release No. 3711, 2016 SEC LEXIS 998, at *3 (ALJ Mar. 16, 2016). In the ID, which issued approximately six weeks later, I ruled that the Division had shown that Fox acted at least recklessly, citing *Abraham and Sons Capital, Inc.*, 55 S.E.C. 252, 268 (2001). *See* ID at 6. *Abraham and Sons Capital, Inc.*, holds that it is reckless for a securities professional¹ to fail to be knowledgeable about, and to comply with, regulatory requirements to which he is subject. *See* 55 S.E.C. at 268. *Abraham and Sons Capital, Inc.*, first came to my attention during the six weeks preceding issuance of the ID. That is, I changed my mind in light of newly discovered case law.

Denial of Summary Disposition Motion Without Prejudice:

Fox contends that the ID should have mentioned that I initially denied the Division’s motion for summary disposition without prejudice. *See* Motion at 3. This omission could not reasonably affect the outcome of the proceeding, and therefore is not manifestly erroneous.

Offering Size and Purchasers:

Fox asserts that the ID “intimat[es] that all \$10 million [of Ditto Holdings shares] was sold in offerings where there were both accredited and non-accredited investors,” and contends that \$1.7 million of the sales were to accredited investors. Motion at 4. No such “intimation” can be fairly read into the ID, which explicitly acknowledged that some investors were

¹ More precisely, a securities professional with sufficient experience and training; I do not read *Abraham and Sons Capital, Inc.*, as requiring a finding of scienter in every case where a securities professional violates a regulatory requirement. As noted in the ID, Fox worked for several years as a registered representative, served as CEO of a registered broker-dealer, held several securities licenses at various points in his career, and conducted private offerings and sales and an initial public offering in the 1990s. *See* ID at 2, 7. Under *Abraham and Sons Capital, Inc.*, and in view of the undisputed facts of this proceeding, Fox acted recklessly.

accredited. ID at 3 (“The purchasers of Ditto Holdings stock ultimately included both accredited and non-accredited investors.”).

Dealings with Marc Mandel:

Fox disputes the ID’s finding that Ditto Holdings’ agreements with Marc Mandel were intended to “reach more potential investors.” *See* Motion at 4-5. That finding is a fair inference from the OIP and is not manifestly erroneous.

Fox disputes the ID’s finding that Mandel “distributed an investment newsletter introducing his roughly 350 subscribers to Ditto Holdings’ securities offerings.” *See* Motion at 5. That finding is a fair inference from the OIP and is not manifestly erroneous.

Fox contends that the ID omitted mentioning certain facts about Mandel’s marketing efforts. *See* Motion at 5-6. Such omissions, even if proven, could not reasonably affect the outcome of the proceeding, and therefore are not manifestly erroneous.

Advice of Counsel:

The OIP contains findings which “shall be accepted as and deemed true” for this proceeding. OIP at 7. Such findings include the fact that no exemption from registration was applicable to Fox’s sales of his own Ditto Holdings shares, and that an exemption from registration was not available for all of Ditto Holdings’ securities offerings. *Id.* at 4. The ID explicitly states that “exemptions from registration were not available for all of the transactions” at issue. ID at 3.

Fox nonetheless contends that he relied on advice of counsel in “[a]ll decisions related to the sale of [his] personal shares,” including that an exemption under Section 4(a)(2) of the Securities Act was available. Motion at 6-8; *see also id.* at 9. Fox may not now dispute the findings of the OIP to which he previously agreed for purposes of this proceeding. And the evidence he cites in support of this contention is either cumulative (because it is undisputed that Mandel supplied investors with a stock purchase agreement given to him by Fox) or irrelevant (because there is no allegation that the stock purchase agreement was incomplete or misleading). *See* OIP at 4; Exs. 1-3, 10. Fox’s contention is therefore meritless.

Accredited Investors:

Another finding that Fox may not now dispute is that neither he nor anyone acting on his behalf took any steps to determine whether the purchasers of Fox’s shares were sophisticated investors, despite the fact that at least two had previously identified themselves to Ditto Holdings as non-accredited investors. *See* OIP at 4; ID at 3. Yet Fox nevertheless claims that the OIP is “factually inaccurate” and that only one investor had previously been identified as non-accredited, and suggests that he was unaware at the time of the transaction that the two investors were unaccredited. Motion at 8. Again, Fox may not now dispute the findings of the OIP to which he previously agreed for purposes of this proceeding, and, if anything, his lack of

knowledge of the investors' status supports the finding that he took no steps to determine their status.

Purchases by Mandel's Subscribers:

Fox, citing certain exhibits, describes his sales of \$1.25 million of his own shares of Ditto Holdings in greater detail than what is found in the OIP or the ID. *See* Motion at 8-9; Exs. 4-6. He identifies no manifest error, however, nor is anything he cites inconsistent with the ID's factual findings.

Shareholder Harm:

The ID stated: "It also appears that Ditto Holdings' investors suffered financial losses." ID at 5. Fox contends that such losses were caused by "the malicious efforts of several false 'whistle blowers.'" Motion at 10-11. Even if proven, this contention could not reasonably affect the outcome of the proceeding, and the finding of investor losses is therefore not manifestly erroneous.

Failure to Properly Disclose and Audit Ditto Holdings' Financial Information:

Fox takes issue with the statement in the ID that Ditto Trade was "alleged to be Ditto Holdings' sole operating subsidiary." ID at 5; *see* Motion at 11. This finding was not manifestly erroneous, because Ditto Holdings' financial statements were not timely audited, Ditto Trade was in fact Ditto Holdings' sole operating subsidiary, and the OIP so alleged. *See* OIP at 3 & n.3. And though Fox contends that the egregiousness of his misconduct is mitigated because Ditto Trade's financial statements were audited, that contention is actually a challenge to the substantive merits of the ID. *See* Motion at 11-12.

Lack of Solicitation, Intent:

Similarly, Fox's contention that the egregiousness of his misconduct is mitigated because he did not solicit investors, even if proven, is actually a challenge to the substantive merits of the ID. *See* Motion at 11-12. His argument that I should have given more weight in my analysis of egregiousness to the fact that he did not intentionally violate the securities laws also challenges the substantive merits of the ID and does not identify a manifest error. *See id.*

Technicality:

Fox disputes at length the finding that Section 5 violations are not merely technical in nature and that he previously characterized them as such. *See* Motion at 12-14; ID at 5. Most of Fox's arguments are merely challenges to the substantive merits of the ID. Two of his points, however, merit discussion. First, although the parties apparently disagree on the matter, whether Ditto Holdings was a penny stock was never properly at issue in this proceeding, and the parties' disagreement is therefore immaterial. *See* Motion at 12 & n.3. Nonetheless, a stock priced at less than five dollars per share can be a penny stock, even if it is not traded publicly. *See* 17 C.F.R. § 240.3a51-1. If anything, Fox's suggestion to the contrary further supports the finding

that he is not knowledgeable regarding applicable regulatory requirements. *See* Motion at 12 & n.3; ID at 7. Second, the evidence shows that Fox sent an email to Ditto Holdings investors characterizing his conduct as “inadvertent technical rules violations.” *See* ID at 5; Motion at 13. This finding is not manifestly erroneous.

Recurrence:

Fox apparently argues that sales of unregistered Ditto Holdings stock to non-accredited investors took place over a shorter period of time than all sales of unregistered Ditto Holdings stock, and that his misconduct was therefore not as recurrent as the ID suggests. *See* Motion at 14. But Fox concedes that multiple sales of unregistered stock took place over a period totaling twenty-two months; even taking his argument as true, his misconduct was recurrent. *See id.* The finding of recurrence is not manifestly erroneous. And his claim that I should have found his actions less egregious due to this allegedly shorter time period is a challenge to the substantive merits of the ID. *Id.* at 11-12.

Sincerity, Recognition, and Occupation:

Fox devotes several pages of the motion to contesting the findings that the “evidence is mixed regarding the sincerity of Fox’s assurances against future violations and his recognition of the wrongful nature of his conduct,” and that his occupation “does not weigh heavily in favor of a severe sanction.” ID at 5-6; *see* Motion at 14-20 (citing Exs. 7-9). I have carefully considered all of his points and evidence, even though presenting them in the present context is procedurally improper. Most of his points challenge the substantive merits of the ID, and as to the points that do not, I find no manifest errors of fact as to these three public interest factors.

Scienter:

Fox contests the finding that he acted recklessly, and assigns error to three specific factual findings. *See* ID at 6-7; Motion at 20-22. I find no manifest errors of fact regarding scienter.

Sanction:

Lastly, Fox makes several points regarding the public interest, including that his misconduct did not require use of a securities license, he has never conducted an exempt offering using his principal’s or broker’s licenses, he has a “spotless compliance record,” and FINRA never “questioned the missing disclosures.” Motion at 22-23. I have carefully considered these points, even though presenting them in the present context is procedurally improper, and find no manifest errors of fact.

Respondent’s motion to correct a manifest error of fact is DENIED.

Cameron Elliot
Administrative Law Judge