UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-14700

In the Matter of

GREGORY BARTKO, ESQ.

BRIEF OF THE DIVISION OF ENFORCEMENT IN OPPOSITION TO PETITION FOR REVIEW

Robert K. Gordon
Attorney for the Division of Enforcement
Securities and Exchange Commission
950 East Paces Ferry Road, N.E., Suite 900
Atlanta, Georgia 30326-1232
Tel: (404)842-7600
Fax: (404)842-7679

November 21, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION

The Division of Enforcement of the Securities and Exchange Commission ("Division") respectfully submits this brief in opposition to the Brief in Support of Petition for Review of Initial Decision of Respondent Gregory Bartko, Esq. ("Bartko"). The Initial Decision granted the Division's Motion for Summary Disposition, and determined that it was in the public interest to bar Bartko from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, or transfer agent, based upon the facts established in a federal criminal prosecution against Bartko. Bartko was convicted upon a jury verdict on November 18, 2010 of conspiracy, mail fraud, and the sale of unregistered securities, and he is currently serving a 23-year term of incarceration. As demonstrated below, the Initial Decision was supported by the record in all respects and should be upheld.

II. RESPONDENT

Bartko, age 59, was an attorney licensed to practice law in Georgia, Michigan, and North Carolina, and has represented clients before the Securities and Exchange Commission ("Commission"). From 1999 through the date of his conviction, Bartko was also the president and chief executive officer of Capstone Partners, LC ("Capstone"), a broker-dealer registered with the Commission. Capstone was a registered investment adviser in the states of Georgia and North Carolina at the time of the acts alleged in the Superseding Indictment against Bartko.

III. FACTS

A. Criminal Action

1. The Superseding Indictment

On January 6, 2010, a federal grand jury in the Eastern District of North Carolina returned a Superseding Indictment against Bartko and co-defendants Darryl Lynn Laws ("Laws") and Rebecca Plummer. The Superseding Indictment charged Bartko with leading an interstate criminal scheme "to profit from fraudulent sales of investments to individual members of rural Baptist churches and others, and to conceal those profits." (See Ex. A to Division's Motion for Summary Disposition ["MSD"]). The Superseding Indictment contained the following charges: Count One - conspiracy to commit mail fraud, to sell unregistered securities, and to launder monetary instruments; Counts Two through Five - mail fraud; Count Six - sale of unregistered securities.[1]

The Superseding Indictment alleged as follows: Beginning in early 2004, Bartko and Laws participated in an interstate criminal scheme to profit from fraudulent sales of investments. (Ex. A to MSD at 2). Bartko held himself out as an investment banker operating through Capstone. (Id. at 1). Laws, who falsely purported to have a Ph.D. in finance, held himself out as an investment banker operating through Charlotte Square Capital Ventures. (Id. at 1-2). Numerous entities were formed and/or used in conducting the scheme, including "Franklin Asset LLC Fund I"; "Caledonian Partners LLC"; and "Capstone Private Equity Bridge & Mezzanine

[1] On October 29, 2010, upon the government's motion, the Court dismissed Counts Seven and Eight of the Superseding Indictment and certain objects of the conspiracy in Count One, namely, false statements and obstructing proceedings of the Securities and Exchange Commission. (See Ex. B to MSD).

Fund, LLC." (Id. at 2). Bartko and Laws used bank accounts controlled by Bartko in Georgia to collect hundreds of thousands of dollars in proceeds from fraudulent sales of investments. (Id. at 5, 7, 8). Nearly all of the money collected by Bartko and Laws as part of the scheme had been obtained by a single salesman, Scott Bradley Hollenbeck ("Hollenbeck"), whom the Superseding Indictment named as an unindicted co-conspirator. (Id. at 6). In making these sales, Hollenbeck made numerous materially false statements and omissions, including false promises to investors designed to conceal the true risk of the investment, such as "guarantees" of yearly earnings of at least 12 percent, and the promise that the investment was insured when it was not. (Id.)

2. Conviction Upon Jury Trial

On November 18, 2010, following a 13-day jury trial in the United States District Court for the Eastern District of North Carolina, Bartko was found guilty of Counts One through Six of the Superseding Indictment. (See Ex. C to MSD at 5;[2] see also, Ex. D and Ex. E to MSD).

At trial, the Government's evidence showed the following:

In January 2004, Bartko and Laws formed the Caledonian Fund. (Ex. C to MSD at 5). John Colvin, who was convicted in a trial in the United States District Court for the Eastern District of North Carolina in June 2010 for related mail fraud and conspiracy charges (id. at 79-80), had discussions with Bartko and Laws about providing funding for the Caledonian Fund. (Id. at 5). Colvin sent sample brochures to Bartko and Laws about how the money was being raised. (Id.). The brochures contained numerous false statements promising that the investment was insured and that the principal and 14.4 percent interest on the investment were secure and

[2] The Court's Order denying Bartko's motions for new trial contained detailed findings regarding the trial evidence. (See Ex. C to MSD).

guaranteed. (Id.) . Colvin also sent materials to Bartko identifying Hollenbeck as the founder and creator of the entities raising the money. (Id.). On January 15 and 16, 2004, Bartko performed a NASD record check of Colvin; the records referenced fraud committed by Colvin in the securities industry (Id. at 7-8). On February 17, 2004, Bartko performed a NASD record check of Hollenbeck; the records referenced Hollenbeck's prior sanctions for forgery and misconduct concerning the sale of securities. (Id. at 6-7).

Bartko nevertheless entered into a letter of intent, and subsequently, a notes subscription agreement, for Colvin to provide money to the Caledonian Fund. Hollenbeck, acting at Colvin's direction, sent the Caledonian Fund $701,000 between February 27, 2004 and May 6, 2004. (Id. at 8-10, 17). This money had been raised using many of the very same fraudulent documents that Bartko had received in January 2004. (Id.)

On April 26, 2004, the North Carolina Secretary of State's office entered a cease and desist order against Hollenbeck for his sale of Mobile Billboards of America. (Id. at 10-14). On May 6, 2004, Bartko began to represent Hollenbeck as his attorney. (Id. at 16-17). In the course of this representation, Hollenbeck provided Bartko with information about how he was selling his investments--including the money that had gone to the Caledonian Fund. (Id. at 17-21). Hollenbeck told Bartko that he had promised investors that their money was guaranteed and insured. (Id.). On June 8, 2004, Hollenbeck faxed Bartko a copy of the promotional materials he was using and the application for the insurance policy that he claimed to be relying upon in his promises that the investment was insured. (Id. at 18-19). On June 11, 2004, in a letter copied to Bartko, Bartko's co-counsel, Wes Covington, told Hollenbeck that the insurance policy he was

relying on did not cover the investment and that Hollenbeck should stop using promises of insurance to sell the investment. (Id. at 19-20).

Nonetheless, on October 20, 2004, Bartko told Laws that he wanted Hollenbeck to raise $4.3 million for their fund in the last two months of the year. (Id. at 26-27). Evidence in the record shows that Bartko was aware that Hollenbeck was using promises of insurance to sell the investment. (Id. at 31-32). In November 2004, the Caledonian Fund ceased operations after spending nearly all of the $701,000 received from Colvin and Hollenbeck through Franklin Asset Exchange. (Id. at 27). That same month, Bartko started a new fund, the Capstone Private Equity Bridge and Mezzanine Fund (the "Capstone Fund"). (Id. at 28). Hollenbeck was Bartko's main fundraiser for this new fund. (Id.). In an e-mail responding to an investor's inquiry on December 1, 2004, Hollenbeck told the investor to feel free to talk with Bartko about the "insurance bonds" because Bartko was aware of them. Bartko admitted at trial that on December 7, 2004 he had a conversation with this investor about "insurance bonds," but Bartko claimed that he could not understand what the investor meant about insurance bonds. (Id. at 32).

Hollenbeck was selling his false promises of insurance by using documents that he had altered from a Directors' and Officers' Liability Errors and Omissions Liability Insurance Policy from AIG obtained through insurance broker Arthur J. Gallagher & Co. (Id. at 10). On December 7, 2004, the same day that Bartko had talked to an investor about insurance bonds, he also called a representative of Arthur J. Gallagher & Co. and asked about extending the AIG policy to cover his newest investment fund, the Capstone Fund. (Id. at 32-33). He had this conversation despite his knowledge that Hollenbeck had used this very policy to falsely promise insurance to investors in the past. (Id. at 31-32). The next day, December 8, 2004, Hollenbeck

was deposed by the Division as part of its investigation of Mobile Billboards of America. (Id. at 33). In that deposition, Hollenbeck, who was represented by Bartko, admitted that he had been using the surety bond--his promises of insurance--to claim to investors that their investment was insured. (Id.). He also admitted that he now knew that these claims were false. (Id.). Despite being asked what investments Hollenbeck was currently selling, Hollenbeck did not mention the Capstone Fund, and Bartko did not correct his client's omission. (Id. at 33-34).

On January 11, 2005, Bartko met with potential investors in the offices of Legacy Resource Management, a business run by Rebecca Plummer ("Plummer") and Levonda Leamon ("Leamon"). (Id. at 44). After his meeting with investors, Bartko told Plummer and Leamon that he could no longer do non-legal business with Hollenbeck. (Id. at 44-45). Bartko spoke with Leamon and Plummer about forming an investment club and having Hollenbeck's clients invest their soon-to-be returned money back in the Capstone Fund. (Id. at 45). Bartko told Leamon and Plummer that Legacy Resource Management would receive a six percent finder's fee from the Capstone Fund for any investments from Legacy Resource Management or its clients. (Id.).

On January 12, 2005, during the same trip in which Bartko met with Leamon and Plummer, Bartko and Hollenbeck met with Robin Denny, whose mother, Judy Wright Jarrell, had invested $800,000 to $900,000 with Hollenbeck and Colvin via Franklin Asset Exchange. (Id. at 47). According to Denny, who testified at trial, Bartko and Hollenbeck met with Denny, her two brothers, her sister-in-law, and her mother, and assured them that Jarrell's money was safe, insured by AIG, and would be returned within two weeks if Jarrell wanted to liquidate the investment. (Id.).

On January, 19, 2005, Leamon and Plummer opened a bank account for the purpose of receiving the money that Bartko determined to return to investors. (Id. at 52). On January 19, 2005, Bartko sent money that he had received from non-accredited investors, which had been raised by Hollenbeck, back to the investors. (Id. at 53-54). Bartko, however, did not have addresses for six of the investors, so he sent their checks to Hollenbeck. (Id. at 53-54). Hollenbeck forged the investors' names on the checks, deposited the money, and used the proceeds to pay his earlier investors their December 2004 "distribution." (Id.). Ten of the non-accredited investors to whom Bartko returned checks endorsed them over to Legacy Resource Management in order to invest in the Capstone Fund. (Id. at 54-55). These checks totaled nearly $700,000. (Id. at 55). An e-mail exchange between Bartko and an investor, in which the investor referred to the "work-around" devised by Hollenbeck, and in which Bartko acknowledged having discussed the same with Hollenbeck, showed that Bartko knew Hollenbeck was contacting the non-accredited investors in order to persuade them to pool the money and immediately reinvest in the Capstone Fund. (Id. at 56). The Court found that the foregoing evidence, together with evidence that Bartko and Hollenbeck spoke on the telephone 40 times and exchanged eleven fax transmissions between January 18, 2005 and January 21, 2005, provided ample support for the jury's verdict on the conspiracy count. (Id.).

In February 2005, the North Carolina Secretary of State's office learned that Hollenbeck was continuing to sell investments using the surety bond, and that he was selling them for Bartko's Capstone Fund. (Id. at 62). The North Carolina Secretary of State's Office forwarded this information to the Commission. (Id.). On March 14, 2005, an attorney for the Division met with Bartko and discussed with him evidence that Hollenbeck had fraudulently raised money for

the Capstone Fund. (Id. at 66). On May 26, 2005, Bartko filed an interpleader action on behalf of the Capstone Fund in United States District Court for the Middle District of North Carolina. (Id. at 71). Bartko tendered $1,346,926.00 to the court, representing the investors' money less a six percent finder's fee paid to Legacy Resource Management. (Id. at 71-72). In the interpleader action, Bartko claimed that no investors had been promised that their money was guaranteed and that Legacy Resource Management had been a direct investor. (Id. at 72).

Bartko testified at trial in his own defense. Bartko claimed that Hollenbeck's role was strictly limited to being a "finder" and that Bartko did not want Hollenbeck to sell securities for the Capstone Fund. (Id. at 30). Further, Bartko testified that he had no knowledge that Hollenbeck was making false promises in connection with the sale of the investment. (Id. at 7). Bartko claimed that he had not read the NASD records that he accessed regarding Hollenbeck's and Colvin's respective regulatory histories (id. at 6-8), and that he did not carefully review the fraudulent materials that he received starting in January 2004. (Id. at 7).

On November 18, 2010, the jury reached a verdict of guilty on all counts in approximately four hours. (Id. at 81). Following the verdict, the Court granted the government's request to remand Bartko to the custody of the United States Marshals pending sentencing. In deciding to incarcerate Bartko immediately upon the guilty verdict, the Court stated on the record its belief that Bartko committed perjury while testifying in his own defense. (Ex. C to MSD at 5).

3. January 17, 2012 Order and Opinion of the Court Denying Bartko's Motions for A New Trial

Following his conviction, Bartko filed a series of motions for a new trial. Bartko's sentencing was postponed pending the disposition of the motions. On January 17, 2012, the Court denied Bartko's motions for a new trial. (See Ex. C to MSD). In its Order, the Court found that "Bartko's case was not a close one. The trial record reveals overwhelming evidence of Bartko's guilt." (Id. at 118). Further, the Court wrote: "The mountain of evidence marshaled against Bartko demonstrated his guilt beyond any shadow of a doubt. Moreover, if the jury had any doubts, Bartko's testimony destroyed them." (Id.).

4. Sentencing

On April 4, 2012, following a sentencing hearing, the Court sentenced Bartko to a total of 23 years' imprisonment to be followed by three years of supervised release. In addition, Bartko was ordered to pay $885,946.89 in restitution. (See Ex. E to MSD).

IV. PROCEDURAL HISTORY

A. Order Instituting Proceedings

On January 18, 2012, the Commission issued an Order Instituting Proceedings ("OIP") against Bartko pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Advisers Act. The OIP essentially pleaded Bartko's November 18, 2010 conviction in the Criminal Action (OIP ¶¶ II.B.2.-3.), and Bartko's association with Capstone. The purpose of the administrative proceeding was to determine: (1) the truth of the allegations concerning the Criminal Action and Bartko's association with a broker-dealer and an investment adviser during the pertinent period; and (2) what, if any, remedial action was

appropriate in the public interest against Bartko pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act.

In his Answer to the OIP, Bartko admitted the entry of the judgment of conviction (Answer at ¶ II.B.2), and he further admitted his association with a broker-dealer and investment adviser during the pertinent period. (Answer at ¶ I.A.1).

B. Bartko's Motions For Issuance Of Subpoenas And For A Stay

Bartko incorrectly asserts that the Division failed to respond to his request for the production of documents pursuant to 17 C.F.R. § 201.230 following the March 8, 2012 pre-hearing conference. (See Brief in Support of Petition for Review of Initial Decision ["Bartko Brief"] at 2). The Division stated at the pre-hearing conference that it had no investigative file to produce because the proceeding was based on certain public record documents filed in the criminal case against Bartko. (Transcript of Hearing of March 8, 2012 pre-hearing conference ["Tr. 3/18/12"], attached hereto as Ex. A, at 7). Bartko stated that he understood, and he represented to the ALJ that he had access to documents filed in the PACER system. (Tr. 3/18/12 at 6, 7). Bartko said he planned to seek discovery relating to certain factual issues that he raised in his answer. (Id. at 6).

In fact, on March 29, 2012, Bartko filed a motion for the issuance of a subpoena or an order of production to compel the Staff to produce certain documents that were not part of the investigative file in the follow-on proceeding. The Division filed a brief in opposition the same day (which Judge Elliot opted not to consider, as Bartko was incarcerated and filed no reply). Bartko's motion was properly denied by the ALJ on the grounds that his request was unreasonable, excessive in scope, and unrelated to the well-established public interest factors set

forth in Steadman v. SEC, 603 F.2d I126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981), that govern the hearing officer's consideration of appropriate sanctions. (See March 30, 2012 Order Denying Motion for Issuance of Subpoena).[3]

Bartko also filed a motion for stay, and he asserts in his brief that the Division failed to respond to the motion and that the hearing officer never addressed it. (Bartko Brief at 2). Bartko's assertions are incorrect. Upon Bartko's filing of his Motion for Stay pending the outcome of his appeal of the underlying criminal case on April 20, 2012, the Division filed its notice of its opposition the same day without briefing. On April 23, 2012, Judge Elliot denied Bartko's motion for stay. The Division acknowledges the possibility that Bartko, who was incarcerated and may have been in transit, did not received the Division's opposition or the ALJ's Order, but the docket in the administrative proceeding will show conclusively that Bartko's motion was not ignored.

[3] Bartko's argument in this appeal that "the Commission should also require the Division to provide Bartko with all of the documents he seeks pursuant to Rule 230" is without merit. (See Bartko Brief at 12). Bartko stated on the record that he understood the Division's representation that there was no investigative file to be produced pursuant to Rule 230 because of the narrow scope of the follow-on proceeding; he did not take issue with that representation. (Tr. 3/18/12 at 6). Bartko's assertion that that documents relating to his allegations of government misconduct fall within the scope of Rule 230 is incorrect. Rule 230 requires the Division to make available "documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings." The documents sought by Bartko in order to establish his allegations of government misconduct are beyond the scope of Rule 230. The only possible avenue for obtaining the documents sought by Bartko was a request for subpoena, but the ALJ correctly rejected Bartko's motion for the issuance of a subpoena on the grounds that his request was unreasonable and excessive in scope. (See March 30, 2012 Order).

C. Motion For Summary Disposition

On April 23, 2012, the Division filed a Motion for Summary Disposition, having first obtained authorization from Administrative Law Judge Cameron Elliot to do so. Bartko opposed the Division's motion.

D. Initial Decision

On August 21, 2012, Judge Elliot issued an Initial Decision granting the Division's motion. In the Initial Decision, Judge Elliot correctly noted the standard for summary disposition:

> A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323 of the Commission's Rules of Practice. 17 C.F.R. § 201.250(a).

(Initial Decision at 2).

The findings and conclusions in the Initial Decision were based on the record and on facts officially noticed. (Id.). Judge Elliot accurately noted that the findings and conclusions made in Bartko's criminal action were binding in the follow-on administrative proceeding. (Id., citing Phillip J. Milligan, Exchange Act Release No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26796-97; Ted Harold Westerfield, Exchange Act Release No. 41126 (Mar. 1, 1999), 54 S.E.C. 25, 32 n.22 (collecting cases); William F. Lincoln, Exchange Act Release No. 39629 (Feb. 9, 1998), 53 S.E.C. 452, 455-56). The ALJ noted that Bartko did not dispute this proposition. (Initial Decision at 2). Accordingly, many of the factual findings contained in the

Initial Decision were properly gleaned from the Court's Order of January 17, 2012 denying Bartko's motions for a new trial. (Ex. C to MSD).

The Initial Decision correctly stated that the sole issue before the Court was what sanction, if any, against Bartko was in the public interest. (Initial Decision at 5). Based on the factual record that was developed in the underlying criminal action, Judge Elliot considered the public interest factors set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981), and determined that it was in the public interest to bar Bartko from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, or transfer agent. (Initial Decision at 6-8).[4]

Upon reviewing the record, Judge Elliot determined:

> Bartko's conduct was egregious, recurrent, and involved a high degree of scienter. Over an extended period of time, he violated numerous federal laws by perpetuating an interstate criminal scheme to fraudulently obtain funds from investors through the use of material misrepresentations. The egregiousness of Bartko's conduct is further demonstrated by the fact that he was sentenced to 276 months of imprisonment, followed by three years of supervised release, and ordered to pay approximately $886,000 in restitution. . . . Bartko has failed to offer assurances against future violations and to recognize the wrongful nature of his conduct. . . .

(Initial Decision at 6).

In opposing the Division's request that the Court impose certain collateral bars against Bartko upon its Motion for Summary Disposition, Bartko argued that a hearing was necessary for him to develop his allegations of misconduct by employees of the Department of Justice and

[4] Judge Elliot determined not to bar Bartko from association with a municipal advisor or recognized statistical rating organization (NRSRO) based on his conclusion that the retroactive application of the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, in regard to these particular aspects of a collateral bar would improperly impair vested rights of Bartko. (Initial Decision at 6-7).

the Commission because these facts would demonstrate that the associational bars against Bartko were not in the public interest.

Judge Elliot properly rejected this argument: "Even assuming that the alleged prosecutorial misconduct should be considered in mitigation . . . the evidence against Bartko is so 'overwhelming' and his misconduct so shameless, that a permanent bar is plainly warranted." (Initial Decision at 6). Judge Elliot correctly noted that if Bartko's criminal conviction was vacated, he could petition the Commission to reconsider the collateral bars. (Initial Decision at 5 n.10, citing Charles Phillip Elliott, Exchange Act Release No. 31202 (Sept. 17, 1992), 50 S.E.C. 1273, 1277 n. 17, aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994)).

The Initial Decision also pointed out that the Commission has repeatedly approved the use of summary disposition where the respondent had been enjoined or convicted and the sole determination was the appropriate sanction. (Initial Decision at 2, citing Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 (collecting cases), petition for review denied, 561 F.3d 548 (6th Cir. 2009)). Judge Elliot further noted: "Under Commission precedent, the circumstances in which summary disposition in a 'follow-on' proceeding involving fraud is not appropriate 'will be rare.'" (Initial Decision at 2, citing John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 55 S.E.C. 1023, 1028 n.12, petition for review denied, 66 F. App'x 687 (9th Cir. 2003)).

V. DISCUSSION

Bartko's appeal is based largely on his refusal to accept the law judge's conclusion that, given the egregiousness of his fraud and the high degree of scienter involved, the collateral bars were warranted—even accepting Bartko's allegations of government misconduct as true. The

law judge's findings of fact were based on the record, and his conclusions were well-reasoned and sound. Accordingly, the Division respectfully requests that the Commission adopt the law judge's reasoning and affirm his ruling on the Division's Motion for Summary Adjudication. The Division responds to the principal arguments raised by Bartko in his brief below:

A. Bartko's Argument That The Law Judge Erred By Imposing The Collateral Bars Upon The Division's Motion for Summary Disposition Lacks Merit

Bartko contends that he is entitled to develop his allegations of government misconduct at a hearing so that the law judge can take the facts relating to the alleged misconduct into account in determining what sanctions against Bartko, if any, are in the public interest. Judge Elliot, however, considered all of the parties' submissions and determined that, even assuming (1) the truth of Bartko's allegations of prosecutorial misconduct and (2) that such alleged misconduct should be considered in mitigation, the evidence relating to Bartko's fraudulent scheme was so overwhelming and so shameless that "a permanent bar is plainly warranted." (Initial Decision at 6). Judge Elliot's conclusion was sound and well-supported by the record. A hearing would serve no purpose given that the collateral bars would still be imposed even if the Respondent could prove his allegations relating to government misconduct.

In his brief, Bartko acknowledges that the ALJ cited the correct legal standards regarding summary disposition, but he maintains that the ALJ's recitation of the applicable standards was "hollow" for various reasons, among them that the Initial Decision did not include sufficient discussion of the allegations of government misconduct that Bartko included in his Answer. (See Bartko Brief at 8). This argument is without merit. Judge Elliot's representation that he

considered all of the parties' submissions must be credited, as must his representation that he would have imposed the challenged collateral bars even assuming the truth of Bartko's allegations of prosecutorial misconduct.[5]

In opposing the Division's Motion for Summary Disposition, Bartko did not dispute that the findings and conclusions made in the underlying criminal action were immune from attack in the follow-on administrative proceeding. (See Initial Decision at 2). In fact, in his Response to the motion, Bartko noted that the Division had attached the Court's Order denying his motions for a new trial—cited numerous times in the Divison's motion—among other exhibits. Bartko suggested that the Division had wasted its efforts establishing the proposition that the findings and conclusions in his criminal action were not subject to challenge in the administrative proceeding:

> The Division consumes a seventeen page brief *attaching over 150 pages of court filings from Bartko's criminal case* in order to establish that a permanent bar from the securities industry may be granted as a matter of law. Nowhere in the Division's Motion will there be found any legal authority supporting this proposition. Instead, *the Division's Motion establishes a principle of law which Bartko does not even dispute, which is that Bartko is collaterally estopped from relitigating his criminal case in this proceeding.*

Memorandum of Law in Response to Division's Motion for Summary Disposition, at 1 (emphasis supplied). Bartko changes tack in this appeal, however, arguing that the ALJ improperly relied on

---

[5] Because the collateral bars would have been appropriate even if Bartko's allegations about the government's conduct were established, it is unnecessary to reach the question of whether such alleged conduct must be considered in determining the appropriate sanction. It is worth noting, however, that Bartko's contention that alleged misconduct must be considered in the sanctions analysis is unsupported by authority and finds no support in the Steadman decision itself. The public interest factors listed in Steadman include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. Steadman, 603 F.2d at 1140.

the district court's order denying Bartko's motions for new trial because the order was the result of motions practice following the jury's verdict. (See Bartko Brief at 14). Bartko's argument finds no support either in case law or logic. The district court's order denying Bartko's motion for new trial contained findings and conclusions necessary for the motion's resolution, and these findings and conclusions pertained to issues actually litigated. In order to decide the motion before it, the district court had to make findings relating to the evidence supporting the jury's guilty verdict and to weigh the strength of that evidence. Accordingly, it was appropriate for Judge Elliot to treat the district court's findings and conclusions in its order as binding for purposes of the follow-on proceeding.

Nor is there any merit to Bartko's argument that it was error for the ALJ not to independently review the testimony presented at Bartko's criminal trial. (See Bartko Brief at 12). Bartko argues that by failing to independently review the testimony, the ALJ failed to consider "highly relevant mitigating information in determining an appropriate remedial sanction." (Id.). Bartko, however, was free to bring any such mitigating evidence to the attention of the ALJ in his response to the Division's Motion for Summary Disposition. Accordingly, he should not now be heard to complain about the ALJ's failure to consider such evidence. In any event, the best example that Bartko is able to offer of such "mitigating evidence" is highly unimpressive. Specifically, Bartko contends that a "fair reading" of the trial testimony warrants the conclusion that he did not mislead the Commission's examiners during their examination of Capstone or withhold documents or other information from them. (Id.). Even if Bartko's interpretation of the trial testimony is correct, Bartko's level of compliance with the Commission's examiners is highly tangential or completely irrelevant to the Steadman analysis, particularly in light of the overwhelming evidence of egregious fraudulent conduct by Bartko.

B. Bartko's Argument That The Commission Had No Authority To Sanction Him Under Section 203(f) Of The Advisers Act Was Not Raised In Bartko's Petition for Review And Is Not Properly Before The Commission

The first argument set forth in Bartko's Brief is that the Commission lacked authority to sanction him under Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"). Bartko contends that he was not "at the time of the alleged misconduct, associated with or seeking to become associated with an investment adviser" (Bartko Brief at 7), and the Commission therefore lacked a proper statutory basis to sanction him.

Bartko's argument regarding the Commission's authority to sanction him under Section 203(f) of the Advisor's Act is not properly before the Commission, and, accordingly, should be disregarded. Rule 411 of the Rules of Practice ("*Limitations on Matters Reviewed*") states: "Review by the Commission of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to Rule 450(a)." Rules of Practice, Rule 411(d). Bartko raised no issue regarding the Commission's authority to sanction him under Section 203(f) in his petition for review (nor did the Commission raise any such issue in its briefing schedule order). Although Bartko is pro se in this appeal, he has, by his own account, extensive experience defending enforcement actions brought by the Commission (see Bartko Brief at 4), and should be held to the Rules of Practice.

Finally, the Division notes that Bartko has previously admitted that he was associated with an investment adviser at the time of the misconduct. The OIP alleged:

> From 1999 through the date of his conviction, Bartko was also the president and chief executive officer of Capstone Partners, LC, ("Capstone"), a broker-dealer registered with the commission. During the relevant time, Capstone was also was [sic] registered

> as an investment adviser with the states of Georgia and North Carolina but has since failed to renew its registration with these states.

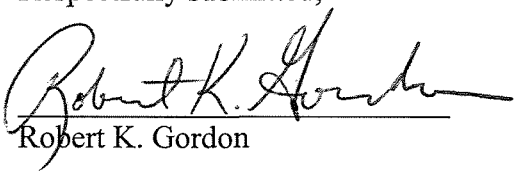
OIP ¶ II.A.1. In his Answer, Bartko responded to the allegations in ¶ II.A.1. of the OIP as follows: "Bartko admits the information set forth in this subparagraph of the Order." Respondent's Answer to OIP ¶ II.A.1. Thus, the argument is not only improperly raised, but is also contrary to Bartko's admission on the record.

CONCLUSION

For the foregoing reasons, the Commission should issue an order upholding the findings of the Adminstrative Law Judge and the sanctions imposed against Bartko.

This 21st day of November, 2012

Respectfully submitted,



Robert K. Gordon

Attorney for the Division of Enforcement
Securities and Exchange Commission
950 East Paces Ferry Road, N.E., Suite 900
Atlanta, Georgia 30326-1232
404-842-7600

EXHIBIT A

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

GREGORY BARTKO, ESQ.) File No. 3-14700

PAGES: 1 through 20

PLACE: Securities and Exchange Commission
950 E. Paces Ferry Road, Suite 900
Atlanta, Georgia 30326

DATE: Thursday, March 8, 2012

The above-entitled matter came on for prehearing conference call, at 2:00 p.m.

BEFORE:

HON. CAMERON ELLIOT, Administrative Law Judge

Diversified Reporting Services, Inc.

(202) 467-9200

APPEARANCES:

On behalf of the Securities and Exchange Commission:
ROBERT GORDON, Trial Counsel
Securities and Exchange Commission
950 E. Paces Ferry Road, Suite 900
Atlanta, Georgia 30326

APPEARANCES BY PHONE:
GREGORY BARTKO, Pro Se

PROCEEDINGS

JUDGE ELLIOT: Let's go on the record.

We are here in the matter of Gregory Bartko, Securities and Exchange Commission Administrative Proceeding File Number 3-14700.

My name is Cameron Elliot, presiding as Administrative Law Judge.

May I have appearances from counsel, please?

MR. GORDON: Yes, Robert Gordon for the Division of Enforcement.

MR. BARTKO: Gregory Bartko, the respondent, appearing pro se, Your Honor.

JUDGE ELLIOT: All right.

The first question -- and let me direct this to Mr. Gordon -- are there any settlement discussions that I should be made aware of?

MR. GORDON: We have not had any settlement discussions, Your Honor.

JUDGE ELLIOT: All right.

So next question, it's not entirely clear to me when Mr. Bartko was served with the OIP. Let me ask Mr. Bartko, have you been -- how long have you been incarcerated?

MR. BARTKO: Sixteen months.

JUDGE ELLIOT: And do you recall when you received a copy of the Order Instituting Proceedings?

MR. BARTKO: Well, let me sort of put that issue to rest. I don't think that I received it from the Commission directly but I did receive it from my criminal counsel in Atlanta, which I think Mr. Gordon probably sent a copy to, courtesy copy or whatever have you.

I don't have any objections to actual service. I think I've had it since -- I'm sure I've had it at least 30 days, maybe more.

JUDGE ELLIOT: All right. And was this Mr. Samuel, was your lawyer in Atlanta?

MR. BARTKO: Well, he's my -- hold on --

JUDGE ELLIOT: All right.

MR. BARTKO: We have some chaos here.

He's my criminal defense attorney. He's not appearing for me in this action.

JUDGE ELLIOT: Okay, I understand. The reason I ask is, first of all, I want to know when you were served because I have a deadline to get this case resolved.

MR. BARTKO: Oh, yeah.

JUDGE ELLIOT: It's based upon when you were served and my records show -- and by records I mean a certified mail receipt -- show that Mr. Samuel received the certified mailing from the Division no later than January 30.

Mr. Gordon, do you have any better information than that?

MR. GORDON: I do not, Your Honor.

Service happens from the Secretary's office, so I don't have any further information about that.

MR. BARTKO: Your Honor, I can tell you this, that the material that was served on Mr. Samuel, the letter you're referring to, return receipt requested, was forwarded to me by first class mail by him to me.

JUDGE ELLIOT: All right. So January 30th is actually not the date stamped on this receipt that Mr. Samuel received it, it's actually the date that the receipt was received by the Secretary's office.

So I think just for simplicity since it's a little unclear, I'm just going to say that January 30th is the date of service. I think that will give us plenty of time to resolve the case in any event.

So with that in mind, let me turn to the question of how we're going to resolve this case.

Mr. Bartko, I don't know if you're aware of this, but in cases like this where you've already been involved in some sort of legal matter with the SEC or with the DOJ, in your case, usually these cases are resolved by motion and we call them summary disposition motions. It's possible, it's unusual, very unusual, but it's possible that we have to have a hearing. But usually we resolve them by way of summary disposition motions.

Page 6

So what I would like to do today is set a schedule for filing whatever summary disposition motions the parties want to file. Mr. Bartko, you have an option, you have a choice. You can file your own motion basically seeking to have me rule entirely in your favor or you can simply oppose the Division's motion. The choice is up to you, but I'm going to give a date -- we need to pick a date actually -- by which the initial motions are filed and you'll need to get something in by that date.

So let me first ask Mr. Gordon, when do you think you could get a motion for summary disposition filed?

MR. GORDON: Your Honor, do you think I could have 30 days?

JUDGE ELLIOT: Yes. Mr. Bartko, would you be able -- if you want to file a motion -- and you don't have to decide that today, but if you did want to file your own summary disposition motion, could you get it to me within 30 days?

MR. BARTKO: Well, before I answer that and determine time frames, can we talk about whether or not the Commission is going to make available to me the investigative file?

JUDGE ELLIOT: Mr. Gordon.

MR. GORDON: I have inquired with the staff that worked on this matter -- I'm in the trial unit, so there are

Page 7

other folks who worked on this. I have inquired and I am informed that because this administrative proceeding is based on Mr. Bartko's conviction, that there is no investigative file.

JUDGE ELLIOT: Okay, so what that means is there's no -- you mean there's no investigative file beyond the records and the papers that were filed in the underlying case?

MR. GORDON: Yes, Your Honor. And we don't necessarily have all of the papers that were filed in the DOJ case. We have papers relating to the conviction, which is what this action is premised on.

JUDGE ELLIOT: All right. Mr. Bartko --

MR. BARTKO: Well, I'm sure Your Honor is familiar with my answer and I've raised a number of substantive points that can only be the subject -- hopefully can be the subject of discovery, a limited amount of discovery, primarily producing documents and so on and so forth. If there's no investigative file, I sort of understand that. I'm not sure how the Commission keeps its files, that doesn't surprise me. But with respect to the factual issues raised in my answer, I do need some short period of discovery before I can be able to meaningfully be involved in motion practice.

JUDGE ELLIOT: Well, let me say -- let me ask you one thing before I get to discovery.

Page 8

Are you appealing your criminal conviction?

MR. BARTKO: Yes -- well, my sentencing date is not until the 4th of April, so I think the technical answer is we will be appealing. But you can rest assured there will be an appeal.

JUDGE ELLIOT: Okay, I understand. And do you have access to the -- you know, whatever is available to you from the criminal case, whether it's -- whatever the prosecutors produced to you and the various motions and so forth in your criminal case, do you have access to that?

MR. BARTKO: Well, I have access to the materials that are filed in the PACER system because I have people that can copy it and send it to me, but I don't have access to any of the discovery that the U.S. Attorney has in their possession, and let me tell you why. When the case was processed, it was not quite an open discovery, but it was, as it should have been, almost an open discovery. In other words, we had to go to the prosecutor's office and examine materials.

JUDGE ELLIOT: Okay. Well --

MR. BARTKO: But can I add to that?

JUDGE ELLIOT: Yes.

MR. BARTKO: The time frame that is recited in my answer and the allegations that are in my answer relate to a time frame that is a little bit different than the criminal

Page 9

case.

JUDGE ELLIOT: Okay.

MR. BARTKO: It's preceding the criminal case.

JUDGE ELLIOT: Okay. Well, the criminal case is the basis of not just your conviction but also the basis for this case.

MR. BARTKO: Right, I understand that.

JUDGE ELLIOT: Right. So the most relevant matters I think are going to be those arising from the criminal case.

Now let me just explain a little bit about discovery in administrative proceedings. I'm not trying to be funny when I say this, but we literally don't have it. And you can, if you -- you know, if you want to file a motion with me, which attempts to demonstrate that you need information by way of subpoena of anybody in order to demonstrate that you should not be found liable in this case, you can do that, but you're going to have to actually request it from me before I'm willing to grant it. Because the only way that you can actually get anything from anybody in the way of subpoenas is if we have a hearing.

MR. BARTKO: Right.

JUDGE ELLIOT: So you're going to have to demonstrate to me that we really ought to have a hearing --

MR. BARTKO: Okay.

Page 10

JUDGE ELLIOT: -- before I'll actually issue any subpoenas.

MR. BARTKO: Let me bring another fact to your attention that is in my answer that plays on discovery to some extent. It would be paragraph 2(v) as in victor, and I have tried to obtain materials directly from the SEC through FOIA requests and -- I sent two FOIA requests actually, and I recite in paragraph (v) the results of those requests. And they're sort of confusing to me.

In fact, I was told by my criminal attorneys in Atlanta that the Atlanta Regional Office or the District Office has responded and indicated that they have no materials that I requested. So I'm caught between having the Commission say one thing from FOIA in Washington and the District Office in Atlanta saying all the materials were destroyed.

JUDGE ELLIOT: Okay. Well, I'm not sure that we're in a position to really do anything about that, and mainly because of timing. FOIA requests -- well, I'm sorry, let me inquire a little further.

The people in Washington, when they responded to your FOIA request, did they say there was stuff and they would produce it to you at a later time?

MR. BARTKO: I don't have that particular -- those letters with me, but I have them pretty much in my head. My

Page 11

first FOIA request was responded to by telling me that they had approximately 11 boxes of materials that they thought would include responses to my request. And then they asked me to narrow down that request, I did. And sent in an amended request and never -- you know what, I can't remember why I had to appeal. I don't know if they denied having the materials or whatever have you. But anyway, I went to the next step with General Counsel's office and appealed. And within the last 30 days I've got the results of the appeal and they say the material you want, the subfile that I want, is contained within the 11 boxes of material.

But repeating again, I have another response over here from Atlanta that says that the subfile that I'm looking for was destroyed or was not retained.

JUDGE ELLIOT: All right. Well, the timing issue that I have is that I've got to get this case resolved within essentially seven months, actually six months because the Order Instituting Proceedings was served on you over a month ago. And sometimes these FOIA issues get resolved very quickly and sometimes they don't. And it may take a very long time to get a straight answer out of whoever you're asking for with FOIA.

MR. BARTKO: Right.

JUDGE ELLIOT: And getting the materials as well. So I really don't think that I can delay anything for the

Page 12

purpose of giving you a chance to submit something that you get from a FOIA request.

MR. BARTKO: Well, I don't -- and I understand that, it's been almost a year that it's been pending, so I don't expect you to. And also let me mention that I think that some of the file materials I'm looking for may be in the hands of the U.S. Attorney here in Raleigh, North Carolina. However, I don't think I have any access to that, but the confusing thing to me is that material would have been given to the U.S. Attorney by associates of Mr. Gordon and so that's what I thought was going to be available for the investigative file, but apparently he says it's not. That's what I'm looking for, is that material.

JUDGE ELLIOT: All right. Well, I mean we know already from what Mr. Gordon said that there basically is no investigative file. So --

MR. BARTKO: Right.

JUDGE ELLIOT: -- there's nothing that the SEC can produce to you that they're required to produce pursuant to the rules and assuming that you have access to at least some of the materials associated with your criminal case, then -- and since that really is probably the most important thing that we're going to have to grapple with in this case, is your criminal conviction, you should be in a position to at least respond intelligently to whatever motion for summary

Page 13

disposition the Division files.

MR. BARTKO: Yeah, well, I guess we agree I have at least other sources I can tap and I hope you have the impression that I'm obviously going to tap those sources.

Would you permit me a short time period to file a motion for discovery after I make an inquiry through my criminal lawyers on whether or not I'm going to be able to get material from the U.S. Attorney, perhaps maybe 10 days, two weeks.

JUDGE ELLIOT: Well, I'll tell you what we can do. We can do this in parallel. Let's set a date for filing a motion for summary disposition and you can get me the motion for discovery whenever you want to file it, but of course, you should file it as soon as possible. But I'll give you even more than what Mr. Gordon is asking for. I'll give the parties six weeks to file motions for summary disposition. So let's say April 23.

MR. BARTKO: April 23, okay.

JUDGE ELLIOT: That's a Monday. Mr. Gordon, any objection to that?

MR. GORDON: No, that works well; thank you.

JUDGE ELLIOT: All right, so April 23, motions for summary disposition are due. Technically, oppositions to the motions are due five days later, I usually like to give a little more time though, so I'm going to give you two weeks

Page 14

and the oppositions will be due May 7 and then replies -- that's a Monday. April 23 is a Monday, May 7 is a Monday and then replies will be due May 18, which is a Friday.

Mr. Gordon, any objection to that schedule?

MR. GORDON: None, Your Honor.

MR. BARTKO: 18th is reply, okay.

JUDGE ELLIOT: All right. Mr. Gordon, any objection to that schedule?

MR. GORDON: No, that's great.

JUDGE ELLIOT: All right. So again, you can file a motion with me for discovery and I urge you to get it in as soon as possible and -- because of course obviously the sooner we get that resolved, then the sooner you might have something to add to your own motion for summary disposition or to oppose the Division's.

MR. BARTKO: Right, right.

JUDGE ELLIOT: And other than that, I don't have anything else that I have to talk about.

Mr. Gordon, is there anything else we need to discuss here today?

MR. GORDON: I don't have anything further, Judge.

JUDGE ELLIOT: All right. Mr. Bartko.

MR. BARTKO: Well, I have nothing really of substance, but I did want to bring to both of your attention, because Mr. Gordon may not have been privy to some of this

Page 15

information, when the Commission first sent me a request and, Robert, help me out here, it was a request for me to consent to suspension of my registration or something along those lines. I wrote back, and I don't remember the young lady in your office that sent that to me, but it was a consent process, and I wrote back and I made some changes in the order and also included a letter indicating some language changes that I would like to see before I would consent. And I never heard anything back. I assume that because you filed the action, there was no interest in pursuing that. But I did want the Judge to know that there had been some exchange of correspondence before the action was filed in trying to resolve the case. And what I was trying to protect, as I remember, is simply that if my conviction is reversed or I'm granted a new trial or some other similar relief, that -- I think I put in there that I would have the right to re-petition the Commission -- you know, I just don't remember what I put in there, it would be pretty obvious to you, I think.

MR. GORDON: So the staff attorney who worked on this matter was Penny Morgan.

MR. BARTKO: Right.

MR. GORDON: And I have not been privy to the correspondence that you're speaking of. I wasn't aware of it until you just mentioned it.

Page 16

Did I correctly understand you to say that the request had to do with a consent to -- in the 102(e) matter only or would it have related to the entire AP?

MR. BARTKO: The 102(e) matter is what?

JUDGE ELLIOT: Well, okay, I think -- actually if I remember -- let me jump in here. Mr. Bartko, you're referring to essentially giving up your licenses, is that right?

MR. BARTKO: I understand the Commission has already suspended my privilege to practice law before the Commission. And so I don't think that's even a part of this AP. What I believe is a part of this AP are my SEC/FINRA licenses.

JUDGE ELLIOT: Right.

MR. BARTKO: Okay, so that's where I'm coming from. And so the name you mentioned, Robert, is exactly the lady or woman that wrote me the letter, and I did correspond back to her. I would have obviously no problem with you going, you know, and getting that correspondence because it will show you what I was trying to do at that time.

MR. GORDON: Okay. Well, I suppose if it relates to the suspension of your ability to practice before the Commission, I don't know what the relevance would be at this point.

MR. BARTKO: No, you misunderstood me.

Page 17

MR. GORDON: Okay.

MR. BARTKO: Unless I'm confused myself. What it related to was the AP proceeding that I knew was coming, regarding my broker-dealer and other licenses through FINRA.

MR. GORDON: Okay. I will request that correspondence and I'll be happy to review it.

MR. BARTKO: I'm just pointing it out to you. It may not mean anything to you, it may mean something to you.

The only other issue I have, Judge, is with respect to whether or not the petitioner here has a conflict in having Mr. Gordon represent the Commission when the witnesses and the participants involved in the facts giving rise to the allegations and the answer practice law with him.

JUDGE ELLIOT: Well, the Order Instituting Proceedings is based upon an investigation done by attorneys and others at the SEC and Mr. Gordon is a trial attorney and it's possible that some of the people who participated in the investigation, to the extent that there was an investigation separate from the DOJ proceeding, may end up being witnesses, but it's very common practice in these kinds of cases and in other administrative proceedings for the people who litigate the cases -- in this case, Mr. Gordon -- to be working in the same office as the people who investigate the cases. And I don't think there would be -- it's not apparent to me that there would be a conflict of interest unless there's some

specific circumstance about this case that would create one.
MR. BARTKO: I'm not making a request nor do I expect to make a written request to disqualify counsel, I'm just bringing it to everybody's attention. I think that if this case were disposed of on summary judgment -- a summary judgment basis, then my perceived conflict is weak. If we actually have a hearing, then I'm hoping the procedure could allow me to bring the issue back up, if we actually have live witnesses and so on.
JUDGE ELLIOT: Well, yes, you have the right to raise any motion in the way of a conflict or a motion to disqualify if we do have a hearing. At this point, I don't see any basis for it unless you can give me some evidence. But as I say, it's very common practice.
If we do end up having a hearing, then you can raise whatever motions you want to raise.
MR. BARTKO: Okay, that's fine.
I don't want to raise an issue that I don't have the facts to support and we've already discussed some of the information that I would like to obtain, so I think it's a little premature. I just raise the concern.
JUDGE ELLIOT: All right.
Very well, so I think we're done here and I look forward to seeing the parties' submissions.
Thank you very much.

U.S. SECURITIES AND EXCHANGE COMMISSION
REPORTER'S CERTIFICATE

I, Peggy J. Warren, reporter, hereby certify that the foregoing transcript, consisting of 19 pages is a complete, true and accurate transcript of the testimony indicated, held on March 8, 2012 at Atlanta, Georgia
In the Matter of: Gregory Bartko, Esq., AP 3-14700
I further certify that this proceeding was recorded by me, and that the foregoing transcript has been prepared under my direction.

Date: March 19, 2012

_____
Official Reporter

MR. GORDON: Thank you, Judge.
MR. BARTKO: Thank you. Thank you, Robert.
MR. GORDON: Take care.
(Whereupon, the prehearing conference was concluded at 2:24 p.m.)