INITIAL DECISION RELEASE NO. 335
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12716

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

In the Matter of	:	
	:	INITIAL DECISION
GARY M. KORNMAN	:	October 9, 2007

APPEARANCES: Toby M. Galloway for the Division of Enforcement, Securities and Exchange Commission

Barry S. Pollack of Sullivan & Worcester, LLP, and Janet K. DeCosta of Janet K. DeCosta, P.C., for Respondent Gary M. Kornman

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Gary M. Kornman from association with any broker-dealer or investment adviser. It is based on his 2007 conviction for making a false statement to the Commission, in violation of 18 U.S.C. § 1001.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission or SEC) instituted this proceeding, pursuant to Sections 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and 203(f) of the Investment Advisers Act of 1940 (Advisers Act), on July 30, 2007, with a Corrected Order Instituting Proceedings (OIP). Pursuant to leave granted at the August 24, 2007, prehearing conference and 17 C.F.R. § 201.250, the Division of Enforcement (Division) filed a Motion for Summary Disposition on August 31, 2007. Kornman filed an opposition on September 28, 2007 (Opposition).[1]

[1] Additionally, the Division filed a reply on October 3, 2007. The undersigned did not include a reply filing in the schedule ordered at the August 24, 2007, prehearing conference. See Gary M. Kornman, Admin. Proc. No. 3-12716 (A.L.J. Aug. 24, 2006) (unpublished). Thus, it was not considered.

This Initial Decision is based on (1) the Division's Motion for Summary Disposition, including those attachments admitted into evidence, infra.; (2) Kornman's Opposition, including those attachments admitted into evidence, infra.; and (3) Kornman's August 17, 2007, Answer to the OIP (Answer). 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 Kornman was convicted were decided against him in the criminal 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 Kornman was convicted of making a false statement to the SEC, in connection with its investigation into his trades in MiniMed common stock, in violation of 18 U.S.C. § 1001. The Division urges that he be barred from association with any broker, dealer, or investment adviser.

Kornman argues that summary disposition is inconsistent with due process and states various facts in mitigation. He stresses that he was not convicted of fraud. He states that he very much regrets the conduct for which he was convicted and will not repeat it. He argues that this proceeding cannot be authorized pursuant to the Exchange or Advisers Acts because he was not associated with a broker-dealer or investment adviser at the time of his conviction. Kornman also argues that this proceeding is foreclosed because the United States Government prosecuted him and he was ordered to pay "disgorgement" in the criminal case at the Commission's request. Kornman urges that the charges against him be dismissed, or at the very least, a sanction less than bars, such as a censure, be imposed, that would enable him to continue his occupation of selling variable life insurance and annuities. Also, he urges that the case not be decided by summary disposition, but rather that a full hearing be held so that he can conduct discovery concerning alleged wrongdoing of Commission staff.

C. Procedural Issues

1. Exhibits Admitted into Evidence

The following items included in the Division's Motion for Summary Disposition, at Exhibits 1 through 11, are admitted as Division Exhibits 1 through 11:

> May 1992 application of Heritage Securities Corporation for registration as a broker-dealer and order granting registration (Div. Ex. 1);
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> Certificate of Limited Partnership of Heritage Capital Partners I, L.P. (Div. Ex. 2);

Certificate of Limited Partnership of Heritage Capital Opportunities Fund I, L.P. (Div. Ex. 3);

January 29, 2004, deposition of Kornman (Div. Ex. 4);

August 30, 2007, declaration of Cory D. Childs concerning Private Offering Memoranda (POM), Exs. 5A and 5B (Div. Ex. 5);

October 6, 1998, Heritage Capital Partners I, L.P., POM (Div. Ex. 5A);

October 17, 1999, Heritage Capital Opportunities Fund I, L.P., POM (Div. Ex. 5B);

December 20, 2006, Superseding Indictment of Kornman (Div. Ex. 6);

April 9, 2007, plea agreement in United States v. Kornman, in which Kornman pleaded guilty to one count of violation of 18 U.S.C. § 1001, that is, making false statements to the SEC (Div. Ex. 7);

July 11, 2007, judgment adjudicating Kornman guilty of violating 18 U.S.C. § 1001 and sentencing him to two years of supervised probation and payment of $143,465 in disgorgement (Div. Ex. 8);

April 9, 2007, Factual Resume and Stipulated Facts of parties to United States v. Kornman (Div. Ex. 9);

Transcript of July 11, 2007, sentencing hearing in United States v. Kornman (Div. Ex. 10); and

Transcript of March 9, 2004, investigative testimony of Cory Childs (Div. Ex. 11).

The following items included in Kornman's Opposition, at Exhibits A through I and Certification of Gary M. Kornman, are admitted as Respondent Exhibits A through J:

Transcription of October 29, 2003, telephone conversation (Resp. Ex. A);

Professional listings of attorneys Timothy McCole and John P. Reding (Resp. Ex. B);

Rules 4.02 and 4.03 of the Texas Rules of Disciplinary Procedure (Resp. Ex. C);

Memorandum Opinion and Order in SEC v. Kornman, No. 3:04-CV-1803-L (N.D. Tex. May 31, 2006) (Resp. Ex. D);

Call log entry and handwritten notes (Resp. Ex. E);

April 18, 2007, Declaration of Philip Asquith (Resp. Ex. F);

February 20, 2002, excerpt, Dallas Morning News (Resp. Ex. G);

November 21, 2002, Report and Recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania (Resp. Ex. H);

Letters from various individuals to the Honorable Jorge A. Solis, United States District Judge (Resp. Ex. I); and

Certification of Gary M. Kornman (Resp. Ex. J).

2. Collateral Estoppel

Kornman describes the facts underlying his conviction in a manner that attempts to diminish his culpability. Nonetheless, as found below in the Findings of Fact, Kornman was found guilty of making a false statement to the SEC in violation of 18 U.S.C. § 1001. Kornman is foreclosed from arguing that the facts concerning his involvement in the criminal wrongdoing are not proven. It is well established that the Commission does not permit criminal convictions to be collaterally attacked in its administrative proceedings. See Ira William Scott, 53 S.E.C. 862, 866 (1998); William F. Lincoln, 53 S.E.C. 452, 455-56 (1998).[2]

3. Summary Disposition

Kornman argues that the sincerity of his assurances against future violations and his remorse, which he has articulated in his pleadings, are such personal matters that they cannot be resolved by summary disposition. This argument is unavailing. Pursuant to 17 C.F.R § 201.250(a), the facts of Kornman's pleadings "shall be taken as true," and pursuant to 17 C.F.R § 201.250(b), summary disposition may be granted "if there is no genuine issue with regard to any material fact." See also Conrad P. Seghers, Advisers Act Release No. 2656, slip op. at 7-11 (Sept. 26, 2007).

Kornman requests oral argument. However, the Commission's rules do not provide for oral argument on a motion for summary disposition. Further, Kornman has fully articulated his case in his twenty-nine page brief and ten exhibits admitted supra. Accordingly, his request is denied.

[2] Similarly, the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent. See Michael J. Markowski, 55 S.E.C. 21, 26-27 (2001), pet. denied, No. 01-1181 (D.C. Cir. 2002) (unpublished); John Francis D'Acquisto, 53 S.E.C. 440, 444 (1998); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn.6-7 (1997). See also Marshall E. Melton, 56 S.E.C. 695, 697-700, 709-13 (2003).

II. FINDINGS OF FACT

Kornman, 64, of Dallas, Texas, was associated with Heritage Securities Corporation, a registered broker-dealer, from 1992 to October 2006. Answer at 4, Resp. Ex. J at 1. He also controlled a limited liability company, Heritage Advisory Group, LLC (Heritage Advisory). Answer at 3; Div. Exs. 2 at 2, 3 at 2, 5A at 17, 5B at 17. Heritage Advisory was the general partner of two hedge funds – Heritage Capital Partners I, L.P., according to its October 6, 1998, POM, and Heritage Capital Opportunities Fund I, L.P., according to its October 17, 1999, POM. Div. Exs. 5A at 1, 17, 5B at 1, 17. The POMs set forth the fees the general partner was to receive for managing the funds. Div. Exs. 5A at 18-19, 5B at 18-19. Kornman was the "Managing Member" of the general partner. Div. Exs. 2 at 2, 3 at 2. The two hedge funds were still in existence as of June 9, 2005.[3] Div. Exs. 2 at 3, 3 at 3. Though Kornman has been involved in a variety of business activities, he has recurrently earned a living through the sale of variable life insurance and annuities. Resp. Ex. J at 2.

On July 11, 2007, Kornman was convicted, on his plea of guilty, of one count of making a false statement to the SEC in violation of 18 U.S.C. § 1001.[4] Div. Exs. 7, 8. He was sentenced to two years of supervised probation and ordered to pay $143,465 in disgorgement. United States v. Kornman, 3:05-CR-298-P(01) (N.D. Tex. 2007); Div. Ex. 8 at 2-3, Div. Ex. 10 at 24-25.

The conviction was based on the following underlying facts to which Kornman stipulated in the criminal proceeding:

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[3] Kornman does not take issue with this material fact. In fact, he avoids doing so by stating obliquely, "Nothing in the record suggests that trades of Heritage Advisory Services in the open market did not cease before the telephone call at issue." Opposition at 19.

[4] 18 U.S.C. § 1001 provides:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or . . . both.

> On October 29, 2003, [Kornman] participated in a voluntary telephone interview with investigators from the Securities and Exchange Commission regarding a matter within its jurisdiction. During that interview, [Kornman] stated that he did not know who possessed trading authority over the brokerage account for a hedge fund through which [Kornman] conducted trading activity in publicly-traded stock.
>
> [Kornman's] statement was false. [Kornman] knew that he personally possessed trading authority over the brokerage account for the fund through which he conducted the trading activity that was under investigation by the SEC. In addition, [Kornman] made the statement intentionally, knowing that it was false. Further, the statement was material. Finally, [Kornman] made the false statement for the purpose of misleading the Securities and Exchange Commission in its investigation into his trading activity.

Div. Ex. 9 at 2.

In mitigation, Kornman states that the violation occurred during a single telephone interview and that his statement did not in fact interfere with the Commission's investigation. He did not profit financially from his violation, nor did any investor suffer a loss as a result of it. Answer at 2-4. Kornman regrets his conduct and intends not to repeat it. Div. Ex. 10 at 6-7; Resp. Ex. J at 4. He has suffered business losses due to conflicts with various persons that arose at the same time as the Commission investigation during which his misconduct occurred. Resp. J at 2. Many relatives, friends, and business associates consider him to be a compassionate and righteous person. Resp. Ex. I.

III. CONCLUSIONS OF LAW

Kornman has been convicted, within ten years of the commencement of this proceeding, of a felony that "involves the purchase or sale of any security, the taking of a false oath, . . . conspiracy to commit any such offense, [or] arises out of the conduct of the business of a broker, dealer, [or] investment adviser" within the meaning of Sections 15(b)(4)(B) and 15(b)(6)(A)(ii) of the Exchange Act and Sections 203(e)(2) and 203(f) of the Advisers Act. He was convicted of making a false statement to the SEC, in violation of 18 U.S.C. § 1001.

The OIP was authorized pursuant to Sections 15(b) of the Exchange Act and 203(f) of the Advisers Act. Kornman argues that these statutes are inapplicable because he was not associated with a broker-dealer or investment adviser at the time of his July 11, 2007, conviction. This argument fails. The relevant date is October 29, 2003, the date of his misconduct. See Sections 15(b)(6)(A) of the Exchange Act and 203(f) of the Advisers Act. He was associated with Heritage Securities Corporation, a registered broker-dealer, from 1992 to October 2006. He was also associated with Heritage Advisory, an unregistered investment adviser, on the relevant date. As found supra, Heritage Advisory was the general partner of two hedge funds, Heritage Capital Partners I, L.P., and Heritage Capital Opportunities Fund I, L.P., from October 6, 1998, and October 17, 1999, respectively, through at least June 9, 2005, and received fees for managing the funds. Thus he was associated with an investment adviser within the meaning of the Advisers

Act. See Section 202(a)(11) of the Advisers Act.[5] See also Goldstein v. SEC, 451 F.3d 873, 876 (D.C. Cir. 2006) (holding that the general partner of a hedge fund is an investment adviser within the meaning of the Advisers Act).

Next, Kornman cites Goldstein for the proposition that hedge fund activities are exempt from the Advisers Act. That decision, however, concerns only the Commission's authority to register hedge fund advisers and does not concern its authority to enforce the provisions of the securities laws. It cannot be questioned that the Commission has authority to bar persons from association with registered or unregistered investment advisers or otherwise sanction them under Section 203 of the Advisers Act. Teicher v. SEC, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999).

Next, Kornman cites Hudson v. United States, 522 U.S. 93 (1997), for the proposition that this proceeding violates the Double Jeopardy Clause of the United States Constitution because it is based on a prior criminal conviction. That citation is inapposite as Hudson stands for the opposite proposition. Kornman further argues that this proceeding is foreclosed because the United States Government prosecuted him and he was ordered to pay "disgorgement" in the criminal case at the Commission's request. This argument fails because Sections 15(b) of the Exchange Act and 203 of the Advisers Act specifically authorize a proceeding to bar an individual based on the individual's conviction of specified offenses.

Finally, Kornman urges that a hearing should be held so that he can conduct discovery concerning alleged misconduct of Commission staff in United States v. Kornman and SEC v. Kornman, No. 3:04-CV-1803-L (N.D. Tex.). However, the issues in the OIP in this proceeding concern Kornman, not the Commission, and thus, his allegation of misconduct by Commission staff in SEC v. Kornman and United States v. Kornman is not relevant to the issues in this proceeding. Any challenge to the propriety of the staff's conduct should have been brought before the courts in which those cases were heard. Harold F. Harris, 87 SEC Docket 350, 359 (Jan. 13, 2006).

IV. SANCTIONS

The Division requests that Kornman be barred from association with any broker, dealer, or investment adviser. These sanctions will serve the public interest and the protection of investors, pursuant to Section 15(b) of the Exchange Act and Section 203 of the Advisers Act. They accord with Commission precedent and sanction considerations set forth in Steadman v.

[5] Section 202(a)(11) provides:

> "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . .

SEC, 603 F.2d 1126, 1140 (5th Cir. 1979). When the Commission determines administrative sanctions, it considers:

> 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 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.

Id. (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978), aff'd on other grounds, 450 U.S. 91 (1981)). 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. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. Schield Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006). As the Commission has often emphasized, the public interest determination extends 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). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); see also Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

The unlawful conduct for which Kornman was convicted was isolated. Kornman has acknowledged the wrongful nature of his conduct and is sincerely remorseful as he has experienced the consequences of his wrongdoing and vows not to repeat it. However, his conduct was egregious and involved a high degree of scienter, as indicated by his conviction for making a false statement to the SEC with the intention of misleading it in its investigation into his trading activity. Further, the violation was recent, and absent broker-dealer and investment adviser bars, Kornman's occupation will provide opportunities for future violations. He has significant securities experience, and, absent bars, could return to association with a broker-dealer or investment adviser. It is not possible to quantify the degree of harm to the marketplace and investors caused by Kornman's false statement to the SEC, but a false statement to the agency charged with protection of investors inherently harms investors, and a strong deterrent against making false statements to the Commission in its investigations is essential to the Commission's mission. Broker-dealer and investment adviser bars are essential to avoid the possibility of future violations. While Kornman suggests that a censure would be an appropriate sanction, a conviction involving dishonesty requires a bar.

Kornman argues that Commission precedent imposing bars on individuals based on their convictions involving fraud is not relevant in this proceeding because he was not convicted of fraud. To the contrary, such precedent[6] is relevant because Kornman's conviction involved

[6] See Joseph P. Galluzzi, 55 S.E.C. 1110 (2002); John S. Brownson, 55 S.E.C. 1023, 1027 (2002), pet. denied, Brownson v. SEC, 66 Fed. Appx. 687 (9th Cir. 2003) (unpublished); Ted Harold Westerfield, 54 S.E.C. 25 (1999); Scott, 53 S.E.C. 862; Victor Teicher, 53 S.E.C. 581 (1998), aff'd in part and rev'd in part, 177 F.3d 1016 (D.C. Cir. 1999), cert. denied, 529 U.S.

dishonesty and opportunities for dishonesty recur constantly in the securities industry. See Ahmed M. Soliman, 52 S.E.C. 227 (1995) (barring a respondent based on his conviction involving fraud that was not related to the securities industry). The securities business is "a field where opportunities for dishonesty recur constantly." Soliman, 52 S.E.C. at 231.

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), GARY M. KORNMAN IS BARRED from association with any broker or dealer.

IT IS FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), GARY M. KORNMAN IS BARRED from association with any investment adviser.

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.

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Carol Fox Foelak
Administrative Law Judge

1003 (2000); Lincoln, 53 S.E.C. 452; Meyer Blinder, 53 S.E.C. 250 (1997); Benjamin G. Sprecher, 52 S.E.C. 1296 (1997).