

INITIAL DECISION RELEASE No. 375
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13345

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
: INITIAL DECISION
ALBERTO W. VILAR and : April 17, 2009
GARY ALAN TANAKA :
:

APPEARANCES: Mark D. Salzberg and Paul G. Gizzi for the Division of Enforcement,
Securities and Exchange Commission

Robert R. Leinwand and David C. Burger for Alberto W. Vilar

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Background

The Order Instituting Proceedings (OIP), issued January 16, 2009, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act), alleges that on November 19, 2008, a jury found Respondent Alberto W. Vilar (Vilar) guilty on two counts of securities fraud; two counts of wire fraud; four counts of money laundering; one count of investment adviser fraud; one count of mail fraud; one count of making false statements; and one count of conspiracy to commit securities fraud, investment adviser fraud, wire fraud, mail fraud, and money laundering in United States v. Vilar, No. 1:05-cr-621 (RJS) (S.D.N.Y.). Vilar filed an Answer on February 25, 2009. The Commission issued an Order Making Findings and Imposing Remedial Sanctions as to Gary Alan Tanaka on March 27, 2009. See Alberto W. Vilar, Advisers Act Release No. 2859A.

At a telephonic prehearing conference on February 13, 2009, I granted the Division of Enforcement (Division) leave to file a motion for summary disposition. On March 23, 2009, the Division filed a Motion for Summary Disposition (Motion), a Memorandum of Law in Support of Its Motion for Summary Disposition (Mem.) and the Declaration of Mark D. Salzberg (Decl.) with three exhibits: Exhibit 1: Amerindo Investment Advisors, Inc., Form ADV, Rev. 05/2003; (2) Exhibit 2: Superseding Indictment in Vilar, filed Aug. 15, 2006; and (3) Exhibit 3: transcript pages 5719-5742 of court hearing on November 19, 2008 in Vilar.

Vilar submitted a Declaration of David C. Burger, dated March 31, 2009, in opposition to the Motion. The Division filed a Reply, dated April 15, 2009.

Ruling

There is no dispute that, on November 19, 2008, following a nine-week jury trial, Vilar was convicted of the twelve criminal counts involving securities fraud set out above and described in the OIP. See Vilar, No. 1:05-cr-621 (RJS) (S.D.N.Y.). (Mem. 2-3, Decl., Ex. 3.) During the time period when the violations occurred, Vilar was the president, a director, and a shareholder of Amerindo Investment Advisors, Inc., a registered investment adviser. (Mem. 2; Decl., Ex. 1.)

Rule 250(b) of the Commission's Rules of Practice specifies that 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." Those conditions are present in this situation.

Section 203(f) of the Advisers Act states that the Commission shall censure or place limitations on the activities of any person associated with an investment adviser at the time of the alleged misconduct, or suspend for a period up to twelve months, or bar such person from being associated with an investment advisor, if it is in the public interest and the person has been convicted within ten years of a felony that involves the purchase and sale of a security. The factors used to determine the public interest are set out in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Vilar's violations were so egregious that they resulted in his conviction on twelve criminal counts and they consisted of multiple actions taken over an extended period that stretched from at least July 1986 to about May 2005. (Mem. 6; Decl., Ex. 2.) Vilar has failed to show that his situation is distinguishable from the many cases where the Commission has found that, "absent 'extraordinary mitigating circumstances,' an individual who has been criminally convicted in connection with activities related to the purchase or sale of securities cannot be permitted to remain in the securities industry." Jose P. Zollino, 89 SEC Docket 2598, 2608-09 & n.34 (Jan. 16, 2007) (citing Frederick W. Wall, 86 SEC Docket 857, 863 (Sept. 19, 2005)); see also, Marshall E. Melton, 80 SEC 2812, 2825-26 (July 25, 2003).

Vilar has consistently requested that any Commission action specifically provide for reconsideration if he should succeed in challenging the underlying conviction. The manner in which these matters are handled is that a person must apply to the Commission to reconsider sanctions if the underlying criminal conviction is no longer valid, and, then the Commission will reconsider its action. There is no case law that supports Vilar's request. See Michael T. Studer, 57 S.E.C. 890, 897 (2004); Jimmy Dale Swink Jr., 52 S.E.C. 379 (1995) (order granting application to vacate bar, where respondent's underlying conviction, which was the basis for the Commission's bar order, was reversed by the court of appeals and dismissed by the district court on remand); C.R. Richmond & Co., 46 S.E.C. 412, 414 n.11 (1976) (citations omitted).

Order

I GRANT the Motion and ORDER that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Alberto W. Vilar 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 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 motion to correct 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.

Brenda P. Murray
Chief Administrative Law Judge