INITIAL DECISION RELEASE NO. 459-A
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14532

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

In the Matter of	:	CORRECTED INITIAL DECISION[1]
	:	June 20, 2012
RAN H. FURMAN	:	
	:	

APPEARANCES: Karen Matteson and Janet E. Moser for the Division of Enforcement, Securities and Exchange Commission

Michael A. Piazza, Wayne R. Gross, Lindsay Ayers, and David M. Rhodes, Greenberg Traurig LLP, for Respondent Ran H. Furman

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Corrected Initial Decision grants the Motion for Summary Disposition filed by the Division of Enforcement (Division), and denies Respondent Ran H. Furman (Furman) the privilege of practicing or appearing before the Securities and Exchange Commission (Commission) for a period of seven years.

PROCEDURAL HISTORY

On September 6, 2011, the Commission issued its Order Instituting Public Administrative Proceedings and Imposing Temporary Suspension Pursuant to Rule 102(e)(3) of the Commission's Rules of Practice (OIP). The Commission noted that on July 8, 2011, the United States District Court for the Southern District of California (Court) entered a final judgment (Final Judgment) against Furman in SEC v. Retail Pro, Inc. (fka Island Pacific, Inc.), et al., Civil Action Number 08 CV 1620 WQH (RBB) (Civil Case). OIP, p. 2. The Final Judgment

[1] This Corrected Initial Decision supplements the Initial Decision issued on May 31, 2012, by adding the required language from Commission Rule of Practice 360. See 17 C.F.R. § 201.360.

permanently enjoined Furman from future violations of Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 (Exchange Act) and Rules 10b-5, 13a-14, 13b2-1, and 13b2-2 thereunder, and from aiding and abetting violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder, based on the Court's findings and conclusions that Furman had violated federal securities laws. Id. The Commission believed it necessary and in the public interest to temporarily suspend Furman from appearing or practicing before the Commission. Id. at 4.

On October 6, 2011, Furman petitioned the Commission to lift the temporary suspension. The Division filed its Opposition on October 18, 2011, and Furman replied on October 26, 2011. On November 3, 2011, the Commission issued an Order Denying Motion to Lift Temporary Suspension and Directing Hearing, which Respondent noted he received on November 4, 2011.

I set a briefing schedule at a November 16, 2011, telephonic prehearing conference. In accordance with that schedule, Furman filed his Answer to the OIP on December 2, 2011; the Division filed its Motion for Summary Disposition (Motion)[2] on December 16, 2011; Furman filed his Opposition to the Motion (Opposition) on January 10, 2012; and the Division filed its Reply Memorandum (Reply) on January 17, 2012.

SUMMARY DISPOSITION

After a respondent answers and documents have been made available for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP. 17 C.F.R. § 201.250(a). 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 summary disposition as a matter of law. 17 C.F.R. § 201.250(b). A respondent is precluded from contesting any findings made against him or facts admitted by him in the case underlying a follow-on proceeding, as to which official notice has been taken. 17 C.F.R. § 201.102(e)(3)(iv); Chris G. Gunderson, Exchange Act Release No. 61234 (Dec. 23, 2009), 97 SEC Docket 24040, 24047.

The findings and conclusions herein are based on the entire record. The parties' motion papers and, indeed, all documents and exhibits of record have been fully reviewed and carefully considered. I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this Corrected Initial Decision.

Furman argues that summary disposition is inappropriate because there is a material issue of fact. Opposition, p. 1. But a party opposing summary disposition must present specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Furman has failed to carry this burden because he cannot now contest any findings made against him in the Civil Case. 17 C.F.R. § 201.102(e)(3)(iv). Indeed, he does not contest any of

[2] Attached were four exhibits: Exhibit 1, Final Judgment; Exhibit 2, Summary Judgment Order; Exhibit 3, Relief Order; and Exhibit 4, Directed Verdict Order.

the Court's findings. Opposition, p. 5 n.4. Furman misconstrues the public interest determination, a legal analysis based on established facts, as an issue of material fact. Id., p. 1; see John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 77 SEC Docket 3636, 3640 n.12 ("[A] respondent may present genuine issues with respect to facts that could mitigate his or her misconduct, although we believe that those cases will be rare."). Therefore, because the findings of fact below are incontestable, summary disposition is appropriate.

FINDINGS OF FACT

Furman, age 42, resides in San Diego, California. Answer, p. 1. Furman was licensed as a certified public accountant (CPA) in 1990 by the State of Washington and was employed as an auditor by a public accounting firm for two years. Answer, p. 1, Ex. 2, p. 4. Furman allowed his CPA license to expire in 1993. Ex. 2, p. 4. From August 2003 through January 2005, Furman was the Chief Financial Officer (CFO) of Island Pacific, Inc. (Island Pacific), a computer software developer. Answer at 1; Ex. 2, p. 4. Island Pacific's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the American Stock Exchange until it was delisted on October 25, 2005, as a result of the company's failure to file periodic reports. OIP at 1-2; Ex. 2, p. 4. As Island Pacific's CFO, Furman oversaw Island Pacific's financial operations, participated in the preparation of Island Pacific's financial statements, and certified the accuracy of Island Pacific's quarterly and annual reports, which were filed with the Commission. Answer, p. 1. Both prior to and subsequent to his employment with Island Pacific, Furman was the CFO of other public companies. Answer, p. 2. At least as of June 2011, Furman consulted and provided CFO-type services to smaller companies through his own company, Black Rock Management, including providing services to a public company where he previously was the CFO. Ex. 3, pp. 7-8; see also OIP at 2.

In September 2003, Island Pacific and QQQ Systems Pty Limited (QQQ), a newly-formed Australian corporation, entered into a software license agreement, whereby QQQ would pay Island Pacific $3.9 million for software distribution rights. Ex 2, p. 5-7. The transaction had no economic or business purpose, but was entered into to artificially inflate Island Pacific's revenues. Ex. 2, p. 1-2; see Ex. 1, p. 1; Ex. 4, p. 2. Island Pacific booked that $3.9 million in revenue for the quarter ending on September 31, 2003, increasing that quarter's revenue by 76% year-over-year. Ex. 2, pp. 8, 10. On the day following the positive earnings release, Island Pacific's stock closed at $2.25, up 8.2% from the previous day's close. Id. at 11. Furman signed a version of the QQQ License Agreement whose fee structure allowed for revenue recognition during that quarter. Id., p. 5-7.

In the following quarter, Island Pacific and QQQ entered into a Sublicense Agreement, with Island Pacific agreeing to purchase a sublicense to market QQQ's software for $3.9 million, to be paid by offsetting QQQ's $3.9 million of indebtedness to Island Pacific, plus revenue sharing. Ex. 2, p. 12. Neither transaction between Island Pacific and QQQ was finalized by the end of the quarter in which the transaction was reported. Ex 3, p. 6. Thus, Island Pacific's fiscal 2003 second and third quarter and annual financial information materially misrepresented its financial results. Id.

On February 4, 2004, Furman received an e-mail from Island Pacific's contract administrator Joseph Dietzler (Dietzler), stating that "certain transactions involving the company QQQ appear to be structured in a manner that is intended to inflate the revenues for the purpose of boosting the corporation's share price." Ex. 2, p. 14. Dietzler's email pointed to the up-front fee for a distribution license, rather than a royalty stream, agreed to at the close of a quarter in which revenues would have been far short of estimates, and the fact that QQQ had still not made payment. Id. Furman understood that Dietzler was alleging potential fraud. Id., p. 15. Furman participated in Dietzler's termination the next day. Ex. 3, p.6.

Moreover, Furman participated in the efforts to conceal Dietzler's allegations of potential fraud from Island Pacific's auditors. Ex. 2, pp. 15-16; Ex. 3, pp. 5-6. Furman knowingly circumvented Island Pacific's accounting controls by signing management representation letters to the auditors falsely stating that Furman had no knowledge of any allegations of fraud or suspected fraud affecting Island Pacific received in communications from employees. Ex. 2, p. 16; Ex. 3, p. 5. Furman withheld other material information from the auditors, including the version of the License Agreement signed by Furman, and the documents showing that neither QQQ transaction was finalized by the end of the quarter in which the transaction was reported. Id., p. 6.

On February 13, 2004, Island Pacific announced its financial results for the nine months ending on December 31, 2003. Ex. 2 at 16. The $17.3 million revenue Island Pacific reported in its nine-month summary included the $3.9 million License Agreement revenue. Id. Island Pacific's February 13, 2004, Form 10-Q, signed by Furman and filed with the Commission, also included revenues from the License Agreement. Id., p. 17.

A Commission accountant sent Furman a September 24, 2004, letter requesting additional information on the QQQ transactions. Ex. 2 at 23. On November 15, 2004, Island Pacific restated its financials relating to the QQQ transactions. Id.

The Court in the Civil Case found, on summary judgment, that Furman violated Exchange Act Section 13(b)(5) and Rules 13b2-1 and 13b2-2 when, in his letter to the auditors, he denied knowing of any allegations of fraud. Ex. 2, pp. 42-44. The jury in the Civil Case found that Furman's participation in the QQQ transactions constituted fraud and violated Section 10(b) of the Exchange Act, and rule 10b-5 thereunder, among other provisions. Ex 3, p. 2. The Court entered a Final Judgment permanently enjoining Furman from future violations of the securities laws, imposing a seven-year officer and director bar, and ordering a $75,000 civil penalty. Ex 1, p. 2-4.

DISCUSSION

Once a petition to lift a temporary suspension has been filed in accordance with Rule 102(e)(3)(ii) of the Commission's Rules of Practice, the Commission may, after opportunity for a hearing, censure or temporarily or permanently disqualify the petitioner from appearing or practicing before the Commission. 17 C.F.R. § 201.102(e)(3)(iii). In any such hearing, the Commission (here, the Division) bears the burden of showing that the respondent has either been

found to have willfully violated any provision of the federal securities laws or has been enjoined from such violations. 17 C.F.R. § 201.102(e)(3)(iv). That is, the Division must show that Furman has been (1) permanently enjoined, (2) by a court of competent jurisdiction, (3) by reason of his misconduct, (4) in an action brought by the Commission, (5) from violating federal securities laws. Id.; Gunderson, 97 SEC Docket at 24046-47. If the Division meets its burden, the burden shifts to the respondent to show cause why he should not be censured or temporarily or permanently disqualified. 17 C.F.R. § 201.102(e)(3)(iv); Gunderson, 97 SEC Docket at 24047. Ultimately, any remedial sanction is determined in light of the 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). Gunderson, 97 SEC Docket at 24048 (applying Steadman factors in proceeding under Rule of Practice 102(e)).

The Division satisfied its burden by showing that in the Civil Case, an action brought by the Commission before a court of competent jurisdiction, a jury found that Furman violated the securities laws and the Court enjoined him from future violations. The sole issue, therefore, is whether Furman has shown cause why he should not be disqualified, and if he has not, to determine the appropriate remedial sanction.

I. Furman Has Shown Cause Why He Should Not Be Permanently Disqualified

Furman argues he should not be disqualified because: (1) the restrictions already imposed on Furman provide substantial assurance that he will not violate the securities laws; (2) he would be substantially prejudiced if he were suspended while the judgment is under appeal; and (3) several factors mitigate his misconduct. Opposition, pp. 4-7.

First, the restrictions already imposed on Furman, the injunction and officer and director bar, are not cause to lift his suspension. The injunction is, in fact, the very grounds for the suspension, and the officer and director bar does not prevent Furman from future violations in a non-officer or non-director role. See Vladimir Boris Bugarski, Exchange Act Release No. 66842 (Apr. 20, 2012), 2012 WL 1377357, p. *5 ("While the sanctions imposed by the district court . . . are severe, this simply underscores the seriousness of Respondents' misconduct."). Furman also argues that there is little likelihood of future violations because he is not a CPA, he is not employed by a public company, he does not currently work on Commission filings, any accounting-related work he might do for a public company would be reviewed by someone else, and he is not seeking to become an independent accountant. Opposition, pp. 4-5. However, the Court rejected similar arguments, given Furman's continuing consulting work, and I do as well. Ex. 3, pp. 7-8.

Second, "[i]t is well established that the existence of an appeal of the district court's decision does not affect the injunction's status as a basis for administrative action." Gunderson, 97 SEC Docket at 24047 (quoting Conrad P. Seghers, Investment Advisers Act of 1940 Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293). If the underlying injunction is vacated, Furman may request the Commission to reconsider any sanctions imposed in this administrative proceeding. See Charles Phillip Elliott, Exchange Act Release No. 31202 (Sept. 17, 1992), 52 SEC Docket 2011, 2017 n.17, aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994).

Third, Furman presents the following mitigating factors: (1) Furman's infractions related only to two transactions; (2) Furman relied on Island Pacific's upper management in performing his duties; (3) Island Pacific's correction of its misstated financials had minimal impact on its stock price; and (4) Furman did not have a substantial economic stake in the transaction. Opposition at 6.

Furman's violations pertained to two transactions and were not part of an ongoing violative scheme. Ex. 3, p. 6-7. Yet, the events at issue spanned a period of nine months, during which Furman had ample opportunity to stop participating in, and disclose, the fraud. Id. The Court found this factor to be slightly mitigating, so as to favor a temporary bar, and I agree. Id., p. 10.

While Furman signed the license agreement at issue, he did not participate in its negotiation. Ex. 2, p. 29. Furman also relied upon senior officers' assurance as to the legitimacy of the transaction; he relied on their descriptions of the terms of the agreement; and he used information provided by them in his May 12, 2004, memorandum to the auditors. Id., pp. 29-30. Nevertheless, Furman still had an independent obligation to certify Island Pacific's financial statements, and he acted with scienter in materially misstating them. Ex. 3, p. 11. The Court found this factor, too, to be slightly mitigating, so as to favor a temporary bar, and I agree. Id., pp. 10-11.

The minimal impact Island Pacific's restatement had on its stock price is of little relevance here. The Court considered the restatement's impact in the context of determining the amount of the third-tier civil to impose on Furman. Ex. 3, p. 12-14. There, the issue was whether the fraud "resulted in substantial losses or created a significant risk of substantial losses to other persons." See 15 U.S.C. § 77t(d)(2)(c). That factor is not part of the Steadman calculus. And, while the civil penalty amount was less than what the Division requested, the Court still imposed a third-tier civil penalty because the materiality of $3.9 million revenue and the increase in Island Pacific's share price following its misleading financial results established that Furman's violations "resulted in substantial losses or created a significant risk of substantial losses to other persons." Ex. 3, pp. 12-15. This factor, therefore, does not lean in favor of restoring Furman's privilege to practice before the Commission.

Finally, the Court found Furman's lack of proven substantial economic interest in the violations to be a neutral factor. Ex. 3, p. 11. I find the same here.

Because of the factors that mitigate his misconduct, which I have also considered as part of the Steadman analysis below, Furman has shown cause why he should not be permanently disqualified from appearing or practicing before the Commission. The Court, with its intimate knowledge of the record, imposed a seven-year officer and director bar. Applying the Steadman factors, below, I find a disqualification for a similar duration appropriate.

II. Steadman Analysis Weighs In Favor of a Seven Year Disqualification

Application of the Steadman factors weighs in favor of a seven-year suspension. Furman acted with a high degree of scienter. Id. at 5-6. Furman knowingly participated in Dietzler's

termination and in the subsequent efforts to conceal Dietzler's concerns and allegations of potential fraud from the auditors, and knowingly withheld additional material information from the auditors. Id. As previously noted, although Furman's misconduct occurred over a period of nine months, it involved only two transactions. Ex. 3, p. 6. Furman's misconduct was not especially egregious, particularly in light of his reliance on senior management, as noted above. Id. at 10.

Furman argues that the restrictions already imposed on him, his professional history and current employment, and the nature and temporal remoteness of the violations proven in the Civil Case all provide assurance against future violations and diminish the likelihood of future violations. Opposition, p. 4-5. Although significant, these considerations do not amount to a direct, explicit assurance from Furman against future violations. Moreover, as the Court found, Furman's current consulting work presents an ongoing opportunity to violate the securities laws, and outweighs his claims of decreased likelihood of future violations. Ex. 3, pp. 7-8.

Finally, Furman has not recognized the wrongfulness of his conduct. The underlying judgment in the Civil Case is under appeal, and Furman argues that recognizing any purported wrongfulness of conduct would prejudice his appeal. Opposition, p. 6. Although the Court found this factor to be neutral, I know of no administrative proceedings where it has been considered either neutral or a mitigating factor, nor has Furman pointed to any. Ex. 3, p. 7; see SEC v. Merrill Scott & Assocs. Ltd., 505 F. Supp. 2d 1193, 1208 (D. Utah 2007) (stating that a party asserting the privilege against self-incrimination during civil proceedings may be subject to adverse consequences in civil litigation).

Most Steadman factors weigh in favor of a permanent bar, but two – egregiousness and the isolated nature of the infraction – weigh in favor of leniency. As between the Civil Case and this proceeding, the facts are the same, the arguments made by the parties are almost identical, the applicable legal standard is essentially the same, and, overall, the equities are very similar. I therefore find, analogous to the Court, that it is in the public interest to temporarily disqualify Furman from appearing or practicing before the Commission for a period of seven years.

ORDER

IT IS ORDERED that, pursuant to Rule 102(e)(3) of the Securities and Exchange Commission's Rules of Practice, Ran H. Furman is hereby disqualified from appearing or practicing before the Securities and Exchange Commission for a period of seven years.

This Corrected Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. See 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Corrected Initial Decision within twenty-one days after service of the Corrected Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Corrected 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 Corrected 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 Corrected Initial Decision as to a party. If any of these events occur, the Corrected Initial Decision shall not become final as to that party.

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Cameron Elliot
Administrative Law Judge