UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3015 / April 13, 2010

Admin. Proc. File No. 3-9599

In the Matter of JOHN GARDNER BLACK and DEVON CAPITAL MANAGEMENT 1446 Centre Line Road Warriors Mark, Pennsylvania 16877	ORDER DENYING IN PART AND GRANTING IN PART PETITION TO SET ASIDE BAR ORDER

John Gardner Black and Devon Capital Management ("Petitioners") have requested that we vacate our 1998 Order Instituting Proceedings, Making Findings and Imposing Remedial Sanctions ("Settled Order") which revoked Devon Capital's registration as an investment adviser and barred Black from associating with any broker, dealer, municipal securities dealer, investment adviser, or investment company.[1] Petitioners assert that "[t]he factual basis for the proceeding no longer constitute violations" of the provisions alleged. The Division of Enforcement opposes Petitioners' request. For the reasons discussed below, we have determined to deny the requested relief in part and to grant it in part.

I.

On December 12, 1997, Petitioners settled civil injunctive proceedings by agreeing to be enjoined from certain violations of the antifraud provisions of the securities laws.[2] The injunctive complaint alleged that Black, acting through two entities he owned and controlled,

[1] *John Gardner Black*, Investment Advisers Act Rel. No. 1720 (May 4, 1998), 67 SEC Docket 357.

[2] Although neither the injunctive complaint, *SEC v. Black*, 97-CV-2257 (W.D. Pa. Sep. 26, 1997), nor the consent injunction, *SEC v. Black*, 97-CV-2257 (W.D. Pa. Dec. 12, 1997), nor a related disgorgement order, *SEC v. Black*, 97-CV-2257 (W.D. Pa. Apr. 29, 1998), is in the record, we take official notice of them pursuant to Commission Rule of Practice 323. 17 C.F.R. § 201.323.

Devon Capital and Financial Management Sciences, Inc. ("FMS"),[3] "perpetrated . . . an on-going fraudulent scheme" which "resulted in the loss of millions of dollars of municipal bond proceeds invested by school districts throughout western and central Pennsylvania." According to the complaint, Devon Capital represented to these school districts that its investment products would pay a "specified rate of return to clients over a fixed period" and were "fully protected or collateralized by a pool of securities equaling the amount of the client's principal investments." In fact, the complaint asserts, petitioners "misrepresented . . . the value of the assets held as collateral, overstating the actual value of those assets by approximately $71 million." In addition, the complaint alleged that Petitioners had "misappropriated a total of approximately $2 million" of client funds "to pay personal and business expenses."

Petitioners, without admitting or denying the allegations in the complaint, consented to the entry of the district court's order enjoining them from future violations of the antifraud provisions alleged in the complaint. In entering this order, the district court ruled that "there is sufficient basis herein for the entry of this Final Judgment" and prohibited Petitioners from "contest[ing] the allegations in the Complaint" in connection with the subsequent determination of the appropriate disgorgement and civil penalties amount. Black subsequently consented to a court order requiring him to pay disgorgement of $3,632,031 (plus $326,883 in prejudgment interest), and a civil money penalty of $500,000.[4]

On May 4, 1998, Petitioners consented to the entry of the Settled Order, in anticipation of administrative proceedings, and without admitting or denying the findings contained therein. In issuing the Settled Order, we found that Petitioners had been enjoined and that the complaint in the injunctive proceeding alleged that they had made material misrepresentations and omissions, resulting in millions of dollars in losses to their clients, and that they had "benefitted financially from their actions."

In 2000, subsequent to the issuance of the Settled Order, Black pled guilty to twenty-one counts of investment adviser fraud, three counts of mail fraud, and two counts of making false statements. It appears that these criminal proceedings arose from the same conduct that provided the basis for the earlier injunctive proceeding. In connection with the criminal proceeding, Black stipulated that he, through FMS, represented to clients and prospective clients that he would "secure or collateralize the investments of the client with securities having a fair market value

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[3] FMS was a defendant in the injunctive action but is not a party to the instant petition.

[4] The Division represents that "[t]he Commission's records indicate that only $1,500 has been paid" of the disgorgement, interest and civil penalty assessed against him; Black maintains that he has paid $30,000.

equal to or greater than 100% of the clients' investments . . . ."[5] Black also stipulated that "[a]t no material time as of January 1, 1995, did the collateral accounts hold collateral at a ratio of 100% of the fair market value of client funds invested . . . ."[6] The Stipulation provided further that, even though Black used collateralized mortgage obligations ("CMOs") to provide the promised collateral for the clients' accounts, he "failed to disclose that client funds had . . . been invested in [CMOs]" when clients or their auditors asked him if there were CMOs in their accounts.[7] The Division represents that Black was sentenced to forty-one months' imprisonment, three years' supervised release, and was ordered to pay $61,300,000 in restitution.[8]

II.

Petitioners argue in support of their requested relief that the Commission and the Financial Accounting Standards Board ("FASB") have revised the applicable valuation method for securities of the type at issue in this case, so that the Commission's approach is now consistent with that used by Petitioners during the relevant period, between 1995 and 1997. According to Petitioners, "[h]ad the Commission used the current fair value methods now required, the fair value of the CMO derived using present value analysis would have supported the valuations supplied to clients in monthly statements." In light of this change, Petitioners contend, "there can no longer be a public purpose nor [sic] in the public's interest to enforce the [Commission's] orders."

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[5] As part of his guilty plea, Black signed a "Joint Stipulated Factual Basis Pursuant to FRCRP 11(f)" ("Stipulation"). *United States v. Black*, 99-CR-203 (W.D. Pa. Jan. 24, 2000). There is an appendix attached to the Stipulation listing all the counts of the indictment to which Black pled guilty. Petitioners attached a copy of the Stipulation to their reply.

[6] Black further stipulated that "[t]he solicitation materials . . . at times stated to potential clients that their funds would not be pooled." In fact, however, according to the Stipulation, "[i]n January, 1996, the collateral accounts were merged."

[7] Black stipulated that the clients' inquiries about CMOs were prompted by an August 1996 letter to Pennsylvania school districts from Pennsylvania's Auditor General raising "grave concerns" about investing in CMOs.

[8] Black's conviction could have provided an independent basis for administrative sanctions under the Advisers Act. 15 U.S.C. §§ 80b-3(e) and (f). The Settled Order, however, precedes Black's conviction and reflects only the entry of the consent injunction against him. According to information from the Federal Bureau of Prisons website, John Gardner Black, inmate register number 10984-0068, was released from prison on June 13, 2003. U.S. Fed. Bur. of Prisons, *Inmate Locator*, http://www.bop.gov/iloc2/LocateInmate.jsp. The extent to which Black paid restitution is unclear.

The Division argues in response that Petitioners are making a collateral attack on the injunction to which they agreed. According to the Division, there is "no value in re-opening these proceedings simply to entertain conclusory assertions regarding Black and Devon [Capital]'s valuation [of the securities at issue] more than a decade ago, assertions that are unsupported by any evidence whatsoever and are similar to those rejected on other occasions by the courts." The Division argues further that Petitioners take too narrow a view of the conduct at issue in the injunctive proceeding, specifically ignoring the fraud in connection with the marketing and management of their clients' funds as alleged in the injunctive complaint. The Division argues in conclusion that Petitioners have not "demonstrated the compelling facts or circumstances that would support a grant of relief."

III.

As noted most recently in *Kenneth W. Haver, CPA*,[9] we have a "strong interest" in the finality of our settlement orders.[10] In *Haver*, the petitioner sought reconsideration of a Commission order suspending him from practicing as an accountant before the Commission. The order had been entered with Haver's consent, in settlement of administrative proceedings that were brought based on Haver's consent to an injunction against future violations of the antifraud provisions of the securities laws. Haver sought relief because he had recently obtained access, in a separate class action, to "compelling new evidence" that, according to Haver, raised doubts about whether the allegations made in the underlying injunctive proceeding were true.

In rejecting Haver's petition, we noted that he "misconceive[d] the basis for our suspension."[11] Our decision was based not on any finding of violation but "on the district court's injunction and Haver's offer of settlement." We held that Haver, in consenting to the injunction,

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[9] *Kenneth W. Haver, CPA*, Securities Exchange Act Rel. No. 54824 (Nov. 28, 2006), 89 SEC Docket 1237.

[10] "Public policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to [follow] one course of action and, upon an unfavorable [result], to try another course of action." *Id.* at 1240 n.11 (quoting with indicated alterations *David T. Fleischman*, 43 S.E.C. 518, 522 (1967) (finding that "the failure of a respondent to testify and adduce available evidence to meet the charges against him . . . does not entitle him to have the proceedings reopened after the issuance of an adverse decision")). Appellate courts have found that "[i]f sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed." *Haver*, 89 SEC Docket at 1241 (quoting *Miller v. SEC*, 998 F.2d 62, 65 (2d Cir. 1993) (affirming Commission order denying a petition to set aside a censure imposed with respondent's consent)).

[11] *Id.* at 1241.

was "presumed . . . to have been enjoined by reason of the misconduct alleged in the complaint."[12] Because "follow on" administrative proceedings presume that the allegations of the injunctive complaint are true, we did not, and were not required to, make any findings of misconduct. Consequently, because we made no misconduct findings in sanctioning Haver, there was no basis for considering the evidence that, Haver claimed, refuted the allegations made in the underlying injunctive proceeding.

Similarly, there is no warrant here for considering Black's assertion that the basis for the injunctive action in this case is no longer valid. As we have repeatedly held, Petitioners, like any parties to a follow-on proceeding, are collaterally estopped from challenging before us the district court's findings or, as here, in a settled proceeding, the allegations made in the complaint in that proceeding.[13] Like Haver, Black settled the underlying injunctive action and remains bound by the allegations in the injunctive complaint unless and until the district court modifies the injunction.[14]

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[12] *Id.*

[13] *See, e.g.*, *Michael Batterman*, 57 S.E.C. 1031, 1039 n.18 (2004) (precluding respondents from challenging in administrative proceeding findings of underlying injunctive action). We note that it is, and was in 1998, our policy "not to permit a defendant . . . to consent to a judgment . . . or order that imposes a sanction while denying the allegations in the complaint . . . ." 17 C.F.R. § 202.5. We reaffirmed our policy in *Marshall E. Melton*, 56 S.E.C. 695, 712 (2003). In any event, Black's collateral attack is not persuasive. Although Petitioners assert that changes in applicable securities valuation methods exonerate them, they do not provide any evidentiary support for their claim nor do the briefs explain what differences the use of the alternative valuation method would have made in the district court's evaluation of Petitioners' conduct.

[14] As we noted in *Haver*, Petitioners could request that the district court vacate the injunction against them on the grounds of "mistake" or "any other reason" pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 60(b) (entitled "Grounds for Relief from a Final Judgment, Order, or Proceeding"). We do not intend to suggest in this order any view regarding such a petition and observe that, it appears, Black's earlier efforts to persuade the courts to reconsider his case were unsuccessful. *See SEC v. Black*, 262 Fed. Appx. 360, 362 (3d Cir. 2008) (denying relief from consent injunction outside direct appeal process); *Black v. United States*, 84 Fed. Cl. 439, 440 (2008) (asserting civil claims against United States). Black has also attempted, again without success, to have his criminal sentence vacated, set aside, or corrected. *United States v. Black*, 2001 US Dist. LEXIS 26296 (W.D. Pa. 2001), *aff'd* 85 Fed. Appx. 875 (3d Cir. 2003) (unpublished).

Although we will not permit collateral attacks on court decisions providing the basis for follow-on proceedings, we have held that the sanctions imposed in such proceedings may be modified based on a consideration of certain factors related to the public interest involved, including

> the nature of the misconduct at issue in the underlying matter . . . the time that has passed since issuance of the administrative bar; the compliance record of, and any regulatory interest in, the petitioner since issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division of Enforcement, as expressed in response to the petition for relief; and whether there exists any other circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.[15]

In applying these factors, it is our general policy that bars should "remain in place in the usual case and be removed only in compelling circumstances."[16]

Petitioners' arguments that the above-quoted factors favor the requested relief are misplaced. Petitioners focus on Black's asserted compliance with the bar and his thirty years of experience in the industry (before the bar) as reasons to grant the requested relief. We note first that for almost three and one-half years of the time following imposition of the bar, Black was imprisoned. As for the remainder of the time since the bar was imposed, we expect financial industry professionals to comply with our orders.[17]

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[15] *Haver*, 89 SEC Docket at 1240.

[16] *Id.* at 1240 n.9.

[17] In general, a clean disciplinary record is not determinative in our consideration of sanctions. *Marshall E. Melton*, 56 S.E.C. at 708 (imposing bar based on antifraud injunction despite clean disciplinary record); *Martin R. Kaiden*, 54 S.E.C. 194, 209 (1998) (same); *see also Robert Bruce Lohman*, 56 S.E.C. 573, 582 (2003) (imposing bar in insider-trading proceeding despite clean disciplinary record). Although the bar was imposed eleven years ago, we have held that periods substantially longer than eleven years are not unduly long in considering requests to modify sanctions. *See, e.g.*, *Stephen S. Wien*, 57 S.E.C. 162, 172 (2003) (stating that "[i]t has been twenty-one years since the consent order issued, a time frame that is not unduly lengthy and does not weigh significantly in favor of relief"); *Ciro Cozzolino* 57 S.E.C. 175, 183 (2003) (passage of twenty-nine years since bar "does not, standing alone, weigh significantly in favor of relief"); *Mark S. Parnass*, Exchange Act Rel. No. 50730 (Nov. 23, 2004), 84 SEC Docket 727, 729 (same); *see also Victor Teicher*, Exchange Act Rel. No. 58789 (Oct. 15, 2008), 94 SEC

(continued...)

Petitioners were enjoined in connection with a fraudulent scheme that lasted for two years and defrauded clients, mostly rural school districts investing the proceeds from bond issues, of millions of dollars. After Petitioners agreed to the sanctions imposed by the Settled Order, Black pled guilty to criminal charges arising, it appears, out of the same conduct which led to the injunction and was imprisoned and ordered to pay more than $61 million in restitution. Before now, Black has not requested or received from the Commission any relief from the sanctions to which he agreed. Black does not identify any unforseen consequences or hardship resulting from the sanctions and, indeed, represents that he has "no interest and is not planning on becoming involved in the investment advisory business again." Nor is there any evidence that Black, who exhibits no remorse for his actions, has learned from his misconduct or is unlikely to engage in future misconduct if permitted to re-enter the industry.[18]

In sum, we find that Petitioners have not identified any compelling circumstances to justify the requested modification of sanctions. Taking due account of our precedent and our policy not to allow collateral attacks on consent injunctions, we decline to vacate the revocation of Devon Capital's registration or the bar prohibiting Black's association with any investment adviser or investment company.

While we do not believe that circumstances generally favor modification of the sanctions agreed to in the Settled Order, we nevertheless have determined to vacate that portion of the order prohibiting Black from association with a broker, dealer, or municipal securities dealer. We do this in light of precedent issued subsequent to the Settled Order questioning the validity of so-called "collateral bars" such as those involved here.[19]

Accordingly, IT IS HEREBY ORDERED THAT the petition of Devon Capital Management, Inc. to vacate the revocation order entered against it on May 4, 1998, be, and it hereby is, DENIED; and it is further

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[17] (...continued)
Docket 10810, 10812 (stating "when an unqualified bar has been imposed, as is the case here, this 'evidences [our] conclusion that the public interest is served by **permanently** excluding the barred person from the securities industry . . . .'") (quoting *Unqualified Bar Orders*, Exchange Act Rel. No. 34720 (Sept. 13, 1994), 57 SEC Docket 1941, 1941 (emphasis in original)).

[18] We note in this connection that Black has paid very little of the amounts assessed against him by the district court in the injunctive proceeding. *See supra* note 4.

[19] *Victor Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999) (vacating collateral bar); *see also Salim B. Lewis*, Exchange Act Rel. No. 51817 (Jun. 10, 2005), 85 SEC Docket 2472 (same); *Peter F. Comas*, Exchange Act Rel. No. 49894 (Jun. 18, 2004), 83 SEC Docket 251 (same).

ORDERED that the petition of John Gardner Black to vacate the bar order entered against him on May 4, 1998, as it applies to the bar from association with any investment adviser or investment company, be, and it hereby is, DENIED; and it is further

ORDERED that the bar order entered against John Gardner Black on May 4, 1998 be, and it hereby is, VACATED insofar as it bars John Gardner Black from association with any broker, dealer, or municipal securities dealer.

By the Commission.

Elizabeth M. Murphy
Secretary