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

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65267 / September 6, 2011

Admin. Proc. File No. 3-14015

In the Matter of the Application of FCS SECURITIES and DALE EDWARD KLEINSER 417 E. 90th Street Suite 8C New York, NY 10128-5175 For Review of Disciplinary Action Taken by FINRA	ORDER DENYING MOTION FOR RECONSIDERATION

I.

On July 11, 2011, we issued an opinion (the "Opinion") sustaining the findings of violations and sanctions imposed by the Financial Industry Regulatory Association ("FINRA") on Applicants Dale Edward Kleinser and FCS Securities ("FCS"), of which Kleinser is the sole proprietor.[1] We found that Applicants failed to file audited financial reports for fiscal years 2006 and 2007 in violation of Section 17(e) of the Securities Exchange Act of 1934, Exchange Act Rule 17a-5, and NASD Rule 2110,[2] and failed to show that an exemption permitted them to file

[1] *FCS Sec.*, Securities Exchange Act Rel. No. 64825 (July 11, 2011), __ SEC Docket __.

[2] Section 17(e), 15 U.S.C. § 78q(e), and Rule 17a-5(d), 17 C.F.R. § 240.17a-5(d), require registered brokers and dealers to file audited financial information with the Commission on an annual basis unless an exemption applies. NASD Conduct Rule 2110 requires NASD members to observe high standards of commercial honor and just and equitable principles of trade. A violation of any Exchange Act rule also constitutes a violation of Conduct Rule 2110.

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unaudited annual reports for those years. We sustained FINRA's $5,000 fine, imposed on Applicants jointly and severally, and FINRA's four-month suspension of FCS from membership, which will convert to an expulsion from membership if FCS does not file audited annual reports for 2006 and 2007 before the suspension ends. On August 4, 2011, after receiving an extension of time in which to file, Applicants filed a Motion for Reconsideration of the Opinion (the "Motion").[3]

We consider the Motion under Rule 470 of the Commission's Rules of Practice.[4] The "exceptional remedy" of a motion for reconsideration is designed to correct manifest errors of law or fact, or to permit the presentation of newly discovered evidence.[5] Applicants may not use motions for reconsideration to reiterate arguments previously made or to cite authority previously available,[6] nor may they advance arguments that they could have made previously but chose not to make.[7] Absent extraordinary circumstances, a motion for reconsideration is not an

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[2] (...continued)
See, e.g., Paul Joseph Benz, 58 S.E.C. 34, 41 (2005) (holding that a violation of the net capital rule, Exchange Act Rule 15c3-1, 17 C.F.R. § 240.15c3-1, is also a violation of Conduct Rule 2110); *see also, e.g., William M. Gerhauser, Sr.*, 53 S.E.C. 933, 942 (1998) ("[W]e have consistently maintained that a violation of another SEC . . . rule or regulation constitutes a violation of the requirement to adhere to 'just and equitable principles of trade . . . .'").

[3] In their Motion, Applicants request "more time to respond to the DECISION." We have already determined that an extension until August 4 was appropriate, and Applicants have filed their Motion. Our Rules of Practice do not provide for successive motions for reconsideration. We therefore deny this request for additional time.

[4] 17 C.F.R. § 201.470. The Comment to Rule 470 states that "[a] motion for reconsideration is intended to be an exceptional remedy." Exchange Act Rel. No. 35833 (Jan. 9, 1995), 59 SEC Docket 1546, 1588.

[5] *E.g., Manuel P. Asensio*, Exchange Act Rel. No. 62645 (Aug. 4, 2010), 99 SEC Docket 30990, 30991 (denying reconsideration); *John Gardner Black*, Investment Advisers Act Rel. No. 3040 (June 18, 2010), 98 SEC Docket 29486, 29488 (same); *Perpetual Sec., Inc.*, Exchange Act Rel. No. 56962 (Dec. 13, 2007), 92 SEC Docket 472, 473 (same).

[6] *E.g., Asensio*, 99 SEC Docket at 30991; *Black*, 98 SEC Docket at 29488; *Perpetual*, 92 SEC Docket at 473.

[7] *See KPMG Peat Marwick LLP*, 55 S.E.C. 1, 3 n.7 (2001) (denying reconsideration; noting that "settled principles of federal court practice establish that a party may not seek rehearing of an appellate decision in order to advance an argument that it could have made previously but elected" not to (citing cases) and holding that a party is foreclosed from resurrecting, as part of a motion for reconsideration, an argument made and lost below and

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appropriate vehicle for the submission of new evidence,[8] and we will not accept such additional evidence unless "'the movant could not have known about or adduced [the evidence] before entry of the order subject to the motion for reconsideration.'"[9] Applicants' Motion does not meet this rigorous standard.

In general, Applicants' Motion reiterates arguments already made and specifically considered by us, including the assertions that (1) certain purported transactions we found to lack economic substance instead reflect genuine sales and purchases, (2) Applicants should have been allowed to adduce certain evidence after the hearing because they had no reason to introduce the evidence at an earlier stage of the proceeding, and (3) FINRA is impeding Applicants' efforts to show that they are entitled to file unaudited annual reports. We will not readdress those matters here.

The only new point in Applicants' Motion that requires a brief response is the argument that documents establishing the validity of certain business relationships relevant to the issue whether the purported transactions at issue had any economic substance "were in SEC files years before the exemption was even needed, or found, consider[ed], or employed." Thus, Applicants argue, "FINRA and SEC, have proof of everything [Applicants] have said, from the beginning." Applicants attached to their Motion a letter from Kleinser to the NASD dated September 11, 1997 and a letter to Kleinser from an examiner in our Office of Small Business Policy dated May 4, 1994 (together, the "Attachments") that, they contend, support this argument.

Applicants have not shown that they could not have known about or adduced the Attachments (or other documents that allegedly were in the Commission's files "years before the exemption was . . . employed") before we issued the Opinion. We therefore will not accept them as newly discovered evidence.[10] Moreover, Applicants' argument that FINRA or the

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[7] (...continued)
abandoned on review).

[8] *John Montelbano*, 56 S.E.C. 372, 378 (2003) (denying reconsideration).

[9] *Perpetual*, 92 SEC Docket at 473 n.4 (quoting *Feeley & Wilcox Asset Mgmt. Corp.*, 56 S.E.C. 1264, 1269 n.18 (2003) (denying reconsideration)).

[10] Even if we were to consider the Attachments, they do not establish that the purported transactions at issue had economic substance. The statement in the 1997 letter that "FCS Ventures, Inc. has exclusive control over shareholder assets as well as the assets of FCS Ventures" does not establish, as Applicants argued, that Ventures shareholders held separate transferable interests in notes for which FCS Ventures was identified as the promissory note holder, and in any event, our finding that the purported transactions lacked economic substance was based on many aspects of the purported transactions, not just that one. The 1994 letter
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Commission had documents on file that would support their position could have been made earlier and therefore is not properly raised in a motion for reconsideration.[11]

Therefore, IT IS ORDERED that Applicants' August 4, 2011 Motion for Reconsideration be, and it hereby is, denied.

By the Commission.

Elizabeth M. Murphy
Secretary

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[10] (...continued)
shows that a staff examiner found FCS Ventures's Form D filing deficient, a matter with no recognizable relevance to the filing of unaudited annual reports at issue in this proceeding.

[11] *Perpetual Sec., Inc*., 92 SEC Docket at 475 (citing *Feeley & Wilcox*, 56 S.E.C. at 1269 n.18). If this argument were properly before us, we would reject it. Applicants could not have satisfied their burden of proof that they were entitled to rely on the exemption by such sweeping references to unspecified documents allegedly on file with the Commission or FINRA.

Applicants include in their Motion a request for access to a "case file" pertaining to certain requests for no-action relief, contending that the file "is far more than [the] No-Action Letters" discussed in the Opinion. We have already considered – and, in the Opinion, we rejected – Applicants' reliance on the No-Action Letters. There is no reason to think that any documents contained in such a case file would be relevant to this proceeding, and in any event, the time for introducing new evidence in this proceeding is long past. We therefore deny Applicants' request for access to the file.