Release No. IA - 1497, 59 S.E.C. Docket 1115

S.E.C. Commission (S.E.C.)
Investment Advisers Act of 1940

SECURITIES AND EXCHANGE COMMISSION (S.E.C.)

IN THE MATTER OF ALEXANDER V. STEIN

Admin. Pro.
File No. 3-8112

June 8, 1995

OPINION OF THE COMMISSION
INVESTMENT ADVISER PROCEEDINGS

Ground for Remedial Action
Criminal Conviction

Where individual engaged in the investment advisory business was convicted of securities, mail, and wire fraud, held, in the public interest to bar him from association with any investment adviser.

APPEARANCES:
Alexander V. Stein, pro se.
Lawrence L. Kiser, for the Commission's Division of Enforcement.

Appeal filed: July 15, 1994

Briefing completed: October 26, 1994

I.

Alexander V. Stein, president and sole shareholder of both AVS Research, Inc. (“AVS Research”) and AVS Capital Fund (“AVS Capital” and, together with AVS Research, “AVS”), appeals from the decision of an administrative law judge. The law judge determined that, given Stein's recent conviction on numerous securities, mail, and wire fraud charges, the public interest requires that Stein be barred from association with any investment adviser. Our findings are based on an independent review of the record, except for findings that Stein does not challenge on review. As a result of that review, we agree that the conviction requires Stein's exclusion from the investment advisory business.

II.

On May 20, 1993, a jury convicted Stein on thirty-five counts of securities fraud, mail fraud, wire fraud, and money laundering in connection with a scheme which defrauded fourteen victims of more than $6 million through two companies Stein organized and controlled, AVS Capital and AVS Research. [FN1] On August 23, 1993, Chief Judge James A. Redden, of the United States District Court for the District of Oregon, sentenced Stein to six years in pris-on, followed by three years of supervised release, and ordered him to make restitution in the amount of $5.26 mil-lion. Judge Redden added to this sentence an additional eleven months in prison based on Stein's use, during the criminal trial, of a forged defense exhibit.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed Stein's convictions for securities and wire fraud, affirmed Stein's convictions on all but one of the mail fraud counts, and reversed Stein's convictions on three counts of money laundering (reasoning that the district court's jury instructions essentially relieved the government of its burden to prove an essential element of these counts).[FN2] The Court of Appeals specifically found “appropriate” the district court's determination to enhance Stein's sentence for obstruction of justice, based on the court's factual finding that Stein wilfully submitted to that court a forged document. [FN3] Because the Court of Appeals reversed four of the

thirty-five counts on which Stein's sentence was based, it vacated Stein's sentence and remanded for resentencing.

III.

The factual background of Stein's multi-count conviction, which is derived from the superseding indictment filed with the U.S. District Court, the testimony of the attorney who prosecuted the case against Stein, and the Court of Appeals' decision on review of that conviction, follows. [FN4] Between 1983 and 1988, Stein sold to the public interests in what he falsely misrepresented to be a “fully-hedged arbitrage program” involving securities listed on the New York Stock Exchange (“Exchange”) and options on those securities. Stein advised his clients that the investments offered were totally risk free and would return up to 50% per year. As part of his scheme to induce investors to part with their funds and then lull them into maintaining accounts with AVS, Stein made material misrepresentations of fact which he supported through the use of numerous forged documents. [FN5]

***2** Specifically, Stein sent to his clients false periodic account statements and false and misleading letters purporting to reflect that their assets had been invested in “fully-hedged arbitrage,” [FN6] when in fact they had not been so invested. Moreover, in order to convince certain investors of the legitimacy of their AVS investments, Stein provided these investors with copies of forged brokerage statements purporting to show AVS investment positions. These statements inflated AVS Capital's account balance from $63,750 to over $9 million.

Stein further induced a false sense of security about AVS's investment success by showing to a customer three forged checks made payable to AVS reflecting amounts of $5.95 million, $1.486 million, and $1.818 million. These three checks were forgeries Stein created from copies of two original checks, each in the amount of $500. Stein also failed to disclose material facts to investors, including that he had placed some client funds in highly speculative investments, and subsequently diverted other client funds for his personal use. [FN7]

Additionally, Stein forged a series of contracts that gave the appearance that AVS was to be the beneficiary of certain highly lucrative stock purchase arrangements. Stein then lied to the Securities Commission for the State of Oregon and permitted that commission's lead securities examiner to mail a Consent to Cease and Desist Order and Agreement (“Consent Order”), executed by Stein, to Stein's clients. The Consent Order included the misrepresentation that millions of dollars soon would be paid to AVS in connection with the putative stock purchase arrangements and that these funds would be used to satisfy Stein's obligations to investors. Sending the Order lulled investors and thereby delayed the discovery of and action upon Stein's earlier fraudulent solicitations of investor funds. [FN8]

IV.

Under Section 203(f) of the Investment Advisers Act of 1940 (“Advisers Act”), we may sanction any person who is, or at the time of the alleged misconduct was, associated with, an “investment adviser,” if we find that the sanctions we impose are in the public interest and that, among other things, the person has wilfully violated provisions of the federal securities laws or been convicted, within ten years of the commencement of our proceeding, of certain enumerated crimes including securities, mail, or wire fraud.

Stein concedes the fact of his conviction for securities, mail, and wire fraud. He disputes, however, our authority to institute this proceeding on the basis that he was neither himself a registered investment adviser nor associated with a registered investment adviser during the time of his misconduct. [FN9] Our authority to proceed under Section 203(f), however, does not rest on whether or not an entity or individual has registered with this Commission. [FN10] It does rest on whether or not an entity or individual in fact acted as an investment adviser. While Stein claims that there is insufficient evidence on this record from which to conclude that he acted as an investment adviser, we cannot agree. [FN11] The record reflects that Stein held himself out as an investment adviser to members of the public when he recommended, in the course of his business activities undertaken through the AVS companies he controlled, that clients invest their funds in his “fully hedged arbitrage program.” [FN12] Stein received the requisite compensation for his services when he subsequently diverted certain of these funds for his personal use. [FN13] We conclude, in sum, that Stein's conviction and the nature of Stein's activities

provide the requisite predicates for this proceeding.

V.

***3** Stein contends that he was not given adequate notice of the hearing before the law judge, that he unfairly was denied a postponement, and that, as a consequence, he was unable to present a defense in these proceedings. We find Stein's contentions meritless. [FN14]

Prompt service of the Order Instituting Proceedings ("Order") in this matter was thwarted due to Stein's incarceration and his relocation from a local detention facility to a federal facility. [FN15] Stein, however, received the Order, dated August 5, 1993, sometime before August 31, 1993, the date on which he prepared and mailed a motion for additional time to file his answer to the order. By mid-September 1993, Stein also received the law judge's order granting the Division of Enforcement's motion for postponement of the September 14, 1993 initial hearing date. This order specifically set the new hearing date for October 12, 1993. The hearing was postponed once again for an additional week, and occurred on October 19, 1993.

Stein thus had well over a month to prepare any defense to the allegations in the Order, and to request, pursuant to Rule 14(b) of our Rules of Practice, that witnesses be subpoenaed on his behalf and that the law judge afford him assistance in obtaining any documents he required for his defense. [FN16] Stein chose instead to wait until October 14, 1993 (once he learned that the October 12, 1993 date had been postponed for an additional week), to request a 30– or 90–day postponement of the hearing, on the ground that he had not had adequate time to prepare a defense. [FN17] As the law judge found, Stein failed to claim in any of his pretrial motions or in a supplemental statement filed with his answer that he could not defend himself without certain materials or witnesses. Moreover, as the law judge also found, Stein failed to specify in his motion to postpone those materials he claimed to need. Under all the circumstances, we conclude that the law judge's decisions to deny Stein's motion for postponement (when Stein made this request in person on commencement of the hearing), to proceed with the hearing (for which she had travelled from Washington, D.C. to Sheridan, Oregon), and to keep the hearing record open for Stein to add supplemental material as he saw fit were not the "unreasoning and arbitrary insistence upon expeditiousness" that invalidates a refusal to postpone a hearing. [FN18]

In any event, Stein's conviction provides a basis for this proceeding. Stein asserts that the evidence that he now as-serts that he would have introduced would rebut the criminal prosecutor's testimony regarding his misuse of investor funds, the willfulness of his misconduct, the conditions under which investors gave him money, whether his scheme involved forgeries, and whether he in fact had the intent and ability to repay investors. The specific allegations in the indictment that led to Stein's conviction demonstrate that Stein wilfully engaged in a scheme to defraud inves-tor-clients. He solicited clients to invest in his "program," and failed to disclose that investor funds would be diverted for his personal investments, assets, and expenses. Stein kindled reliance on his scheme through numerous forgeries and false representations as to his ability and intent to repay those he had defrauded. Stein may not negate these conclusions; indeed, Stein's conviction has been established, and Stein may not challenge its validity. [FN19]

VI.

***4** We believe that a bar from the investment advisory business is appropriate to protect the public interest. [FN20] Stein was convicted of serious violations of the securities laws and of other blatantly criminal activity that spanned a five-year period. His dishonesty was apparent to the district court that heard the evidence and to the court of ap-peals that reviewed the record of his criminal trial. Moreover, Stein has failed to acknowledge guilt, which indicates to us that rehabilitation cannot be expected. [FN21] Stein must not be permitted to be in a position to misuse inves-tor funds again, and others who might be encouraged by a more lenient sanction from acting in this fashion must be deterred.

Given Stein's multi-count conviction, our sanction here would be no different if Stein in fact conclusively had established to us, as he asserts in his brief that his "evidence" would have demonstrated, that he, among other things, used little of the investors' funds for personal luxury items, accepted very little retirement income for investment, made some attempt to repay those he defrauded but had little ability to do so, and may now have control of cer-tain assets that he intends to make available to defrauded

investors. Cf. Blinder, Robinson & Co., Inc. v. SEC, 837 F.2d 1099, 1109 (D.C.Cir.1988) (in deciding "nature and scope of sanctions that are appropriate in the public inter-est ..."evidence relating to a party's degree of culpability must be considered").

Under all the circumstances, the public interest will be served by Stein's bar from the investment advisory business.

An appropriate order will issue. [FN22]

By the Commission (Chairman LEVITT and Commissioners ROBERTS and WALLMAN).

Jonathan G. Katz
Secretary

FN1 United States v. Alexander V. Stein, CR 92–150 (D.Or.) (convicting Stein for violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and for violations of 18 U.S.C. sections 1341, 1343, and 1956).

FN2United States v. Stein, 37 F.3d 1407 (9th Cir.1994), cert. denied, 115 S.Ct. 1170 (1995).

FN3 37 F.3d 1411.

FN4 Throughout the course of the criminal proceedings, and in connection with this administrative proceeding, Stein has asserted his Fifth Amendment privilege against self-incrimination.

FN5 The testimony of the criminal prosecutor before the law judge highlighted that Stein's activities involved "numerous instances of false, fraudulent, and forged documents."The court of appeals similarly observed that "[t]he record is replete with examples of Stein using forged documents as a means of evading detection."37 F.3d at 1411.

FN6 Stein represented that investor funds would be invested in securities and futures contracts, to hedge both AVS-owned Exchange-listed securities and loans made by AVS to other entities that owned Exchange-listed securities. Stein further represented that AVS investors would receive periodic account statements accurately reflecting the value of each investor's account.

FN7 Specifically, the indictment alleged that Stein diverted investor funds to pay personal expenses and purchase personal investments. The criminal prosecutor testified that certain funds used by Stein for personal items such as automobiles, jewelry, and a fur coat had been traced to investors.

FN8 The court of appeals' decision describes this aspect of Stein's scheme in some detail. See 37 F.3d at 1408–09.

FN9 AVS Research, one of the firms through which Stein conducted his fraudulent scheme, was registered as an investment adviser between 1972 and 1982. Stein withdrew AVS's investment adviser registration on August 24, 1982. The law judge took official notice of the adviser registration application filed on behalf of AVS Research in 1979. While a Commission database entry reflects that we received this application, we have determined that a copy of the application is no longer maintained in the Commission's official files.

FN10 See Section 203(f) (conferring authority on this Commission to proceed against "any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser," without reference to whether the person or investment adviser is registered with us). This broad statutory language may be contrasted with the more limited language found in other Advisers Act prov-sions. See, e.g., Sections 204 (governing "[e]very investment adviser ... other than one specifically exempted from registration pursuant to section 203(b)" and 205 (addressing every investment adviser, "unless exempt from registration pursuant to Section 203(b)"). See also Pub.L. No. 86–750, § 8, 74 Stat. 885, 887 (1960); S.Rep. No. 1760, 86th Cong., 2nd Sess. 7–8 (1960) (explicitly amending Section 206 to provide that it cover all investment advisers, not simply those registered with this Commission). Cf. John Kilpatrick, 48 S.E.C.

481, 486–87 (1986) (noting that Section 15(b)(6) of the Securities Exchange Act of 1934, which authorizes us, if we make certain findings, to sanction "any person associated, or seeking to become associated, with a broker or dealer,""does not limit us to proceeding against persons associated with registered broker-dealers").

Certainly this is not the first instance in which we have proceeded, under authority of Section 203(f), against an individual neither registered as an investment adviser nor associated with a registered investment adviser. See, e.g., Joseph D'Angelo, 46 S.E.C. 736 (1976) (in action brought under Section 203(f), we barred individual not registered as an investment adviser who had failed to disclose in an application for such registration, that he had been permanently enjoined from violating registration and antifraud provisions).

FN11 Our analysis here is governed by Section 202(a)(11) of the Advisers Act (defining "investment adviser" as a person, who for compensation, engages in the business of advising others, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities) and Section 202(a)(17) of the Advisers Act (defining "person associated with an investment adviser" as including any officer or director of that investment adviser or any person directly or indirectly controlling or controlled by that investment adviser). Like Section 203(f), these definitional sections, by their terms, are not limited to persons registered with the Commission. See also Advisers Act Rel. No. 1092 (October 8, 1987), 39 SEC Docket 653 (clarifying elements of the definition of "investment adviser").

FN12 The criminal prosecutor recounted that various AVS investors testified at the criminal trial that Stein "gave them a sales pitch on how much money [he] could make them, and what [he] wanted to do with their money, if they invested with him."

FN13 See Advisers Act Rel. No. 1092, 39 SEC Docket at 661–62 ("compensation element [of definition of investment adviser] is satisfied by the receipt of any economic benefit"). It is unclear whether Stein charged his clients a fee or commission for his services. It is clear that he, in effect, paid himself from his clients' funds, when he diverted a portion of these funds to his personal use. That Stein may have declined to "charge" his clients for his services, knowing he would compensate himself with client funds, cannot place him outside the definition of "investment adviser." See SEC v. Capital Gain Research Bureau, Inc., et al., 375 U.S. 180, 195 (1963) (footnote omitted) ("Congress intended the Investment Advisers Act of 1940 to be construed like other securities legislation 'enacted for the purpose of avoiding frauds,' not technically and restrictively, but flexibly to effectuate its remedial purpos-es.").Compare SEC v. Lauer, 1995 U.S.App. LEXIS 8124, *5, reh'g denied, 1995 U.S.App. LEXIS 11609 (7th Cir.) ("It would be a considerable paradox if the worse the securities fraud, the less applicable the securities laws.").

FN14 We also reject as meritless Stein's additional contentions that the hearing in this matter was inadequate be-cause it lasted only two hours, and that the law judge's rulings evidence her bias against Stein.

FN15 There is nothing in this record to indicate, as Stein contends, that the Division of Enforcement deliberately misrouted Stein's mail in order to deny him proper notice of this proceeding.

FN16 At other points in this proceeding, Stein has displayed a facility for utilizing our Rules of Practice and for rep-resenting himself both aggressively and ably. For instance, Stein relied on Rule 8(d) as a basis for his September 15, 1993 motion, filed with the law judge, requesting that the Division of Enforcement be ordered to furnish an outline of its case against Stein, its legal theories, the identity of its witnesses and a list of documents it intended to intro-duce. Indeed, Stein advised the law judge that he had purchased "on the outside" his own copy of our Rules.

FN17 The law judge had not received this request by the date of the hearing.

FN18Morris v. Slappy, 461 U.S. 1 (1983); see also, e.g., Richard R. Perkins, Securities Exchange Act Rel. No. 32188 (April 21, 1993), 53 SEC Docket 3944, 3954.

Stein's post-hearing correspondence indicates that, during the time in which the hearing record remained open, Stein had in hand the transcripts of his criminal trial and sentencing hearings he now

asserts he was precluded from introducing on his own behalf. Stein apparently chose not to furnish these to the law judge as late-filed exhibits. Pending before us is Stein's motion that we now adduce these transcripts. Although the Commission's Secretary recently directed Stein to provide a copy of the materials he seeks to adduce, Stein did not respond to this request or furnish the materials. We therefore deny Stein's motion. See Rule 21(d) of the Rules of Practice, 17 C.F.R. 201.21(d).

FN19 See, e.g., Elliot v. S.E.C., 36 F.3d 86, 87 (11th Cir.1994) (stating that a criminal conviction cannot be collaterally attacked in an administrative proceeding); Wolfson v. Baker, 623 F.2d 1074 (5th Cir.1980) (issues which were essential to the verdict must be regarded as having been determined when a criminal conviction is based on a jury verdict).

In other pleadings Stein has contended, contradictorily, that all of the witnesses he would have subpoenaed and the thrust of all pieces of evidence he would have introduced would have addressed directly the issue of whether he was acting as an investment adviser or as principal in an investment advisory business. Our conclusion on this issue as set forth in IV, supra, similarly is based on the description of Stein's conduct set forth in the indictment, on the criminal prosecutor's testimony as to what was proven at trial, and on the findings of the court of appeals on review of the conviction.

We address infra the relevance to our public interest determination of Stein's "evidence."

FN20 Cf. In the Matter of Richard C. Spangler, 46 S.E.C. 238, 252–53 (1976) (explaining that, when past misconduct involves fraud, fidelity to the public interest requires that we be mindful of the fact that the securities business is one in which opportunities for dishonesty recur constantly).

FN21 The criminal prosecutor testified that Stein was exceptionally persuasive in defrauding victims through "charm, wit, lies, elaborate forgeries and broken promise[s]" and given the opportunity Stein would probably return to the investment advisory business because it had been extremely profitable for him.

FN22 All of the contentions advanced by the parties have been considered. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed in this opinion.