UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9311 / April 5, 2012

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66752 / April 5, 2012

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3393 / April 5, 2012

Admin. Proc. File No. 3-13532

In the Matter of ERIC J. BROWN, MATTHEW J. COLLINS, KEVIN J. WALSH, and MARK W. WELLS	ORDER DENYING COLLINS'S MOTION FOR RECONSIDERATION OF CIVIL PENALTIES

On February 27, 2012, we issued an opinion and order (the "Opinion") finding, in part, that Matthew J. Collins violated Section 17(a) of the Securities Exchange Act of 1934 and Exchange Act Rule 17a-3 (the "books and records provisions")[1] and failed to supervise within the meaning of Exchange Act Sections 15(b)(4)(E) and 15(b)(6).[2] We found that Collins failed to adequately supervise salesperson Eric J. Brown, whom we found in our Opinion to have violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5 (collectively, the "antifraud provisions")[3] in connection with the sale of variable annuities to elderly customers. Among other things, we found that Collins's failure to supervise Brown included Collins's "falsifying documents that misled his employer and the issuing insurance companies about what Brown was doing, [thus] creat[ing] an environment where Brown could defraud his clients with impunity."[4] For these violations, we found it to be in the public interest to bar Collins from associating with any broker, dealer, or investment adviser, provided, however, that he may apply to become so associated in a non-supervisory capacity after two years; to impose a cease-and-desist order; to order disgorgement; and to impose a civil

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[1] 15 U.S.C. § 78q(a); 17 C.F.R. § 240.17a-3.

[2] 15 U.S.C. § 78*o*(b)(4)(E), (b)(6).

[3] *Id.* §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

[4] *Eric J. Brown*, Securities Exchange Act Rel. No. 66469, at 19 (Feb. 27, 2012), http://www.sec.gov/litigation/opinions/2012/33-9299.pdf.

penalty of $310,000 (which represented a maximum second-tier civil monetary penalty for each of the five customers that Brown defrauded because of Collins's failure to supervise).

On March 9, 2012, Collins filed the present motion asking us to reconsider the imposition of $310,000 in civil penalties. Collins submitted four arguments in support of his request: (1) that imposition of a $310,000 sanction is "anomalous and inequitable"; (2) that the Commission erred in imposing a civil penalty for misconduct related to a customer who, Collins argues, never purchased or sold a security; (3) that the Commission did not adequately address his argument that "the large civil penalties . . . violate the Eighth Amendment's prohibitions against excessive fines"; and (4) that the Commission did not provide Collins an opportunity to demonstrate financial hardship or an inability to pay.

I.

We analyze Collins's request for reconsideration under Rule of Practice 470.[5] That rule requires a motion for reconsideration to "briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought."[6] Reconsideration is an extraordinary remedy "designed to correct manifest errors of law or fact, or to permit the presentation of newly discovered evidence."[7] Applicants may not use motions for reconsideration to reiterate arguments previously made or to cite authority previously available; moreover, we will accept only such additional evidence that "the movant could not have known about or adduced before entry of the order subject to the motion for reconsideration."[8] Motions for reconsideration, therefore, are granted only in exceptional cases.[9] As explained below, Collins's motion does not establish such bases for reconsideration.

II.

A. Collins first argues that we should reconsider our imposition of a $310,000 civil penalty because it was "contrary to basic equity" for the Commission to have "dramatically increase[d]" the $130,000 sanction that the administrative law judge imposed in her initial decision (the "Initial Decision"). In making this argument, Collins interprets our Opinion as

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[5] 17 C.F.R. § 201.470.

[6] *Id.*

[7] *Perpetual Sec., Inc.*, Exchange Act Rel. No. 56962 (Dec. 13, 2007), 92 SEC Docket 472, 473; *see also Laminaire Corp.*, Exchange Act Rel. No. 56789 (Nov. 15, 2007), 91 SEC Docket 3221, 3223; *Feeley & Wilcox Asset Mgmt. Corp.*, 56 S.E.C. 1264, 1265 (2003).

[8] *Perpetual*, 92 SEC Docket at 473 n.4 (quoting *Feeley*, 56 S.E.C. at 1269 n.18).

[9] *Feeley*, 56 S.E.C. at 1265.

finding that his misconduct was "less egregious than what was found in the Initial Decision." Collins points, in particular, to our conclusion that the record did not support a finding that Collins was a primary violator of the antifraud provisions and that Collins's misconduct did not support a third-tier civil penalty because the nominal amount of customer losses was not large. He concludes that, because of these findings, it is inequitable for the Opinion to impose a civil penalty that is "almost triple" the single $130,000 third-tier civil penalty imposed in the Initial Decision. Collins adds that he "already paid a [$5,000] civil penalty to the State of Florida's Department of Financial Services for the same conduct at issue here and that his license was placed on probation for one year." He further asserts that the "likelihood of future violation is slight" because "the conduct is old and occurred in isolated instances" and because Collins "has had no other regulatory issues other than the matters that occurred in this proceeding."

These arguments are essentially reiterations of claims Collins made during his appeal and are claims that we considered when determining that a $310,000 civil penalty was in the public interest. These repackaged arguments, therefore, provide no basis for reconsideration. We nevertheless address several points below.

First, the civil penalty imposed in the Initial Decision is irrelevant. We have stated repeatedly that a law judge's opinion ceases to have any force or effect once the respondent files a petition for review.[10] Moreover, our briefing order expressly stated that we had determined, on our own initiative, to review what sanctions were appropriate in this matter.[11] Second, and more important, failures to supervise are serious violations.[12] Supervisors are the first line of defense against wrongdoing by their subordinates. Collins not only abandoned this responsibility, but he also intentionally profited from his misconduct by retaining a portion of Brown's commissions from the underlying variable annuity sales. Nor was Collins's misconduct isolated, as he claims. Each defrauded customer, as we noted in our Opinion, presented Collins with "a unique

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[10] *See, e.g., Gregory M. Dearlove*, Exchange Act Rel. No. 57244 (Jan. 31, 2008), 92 SEC Docket 1867, 1884 n.42 ("The law judge's opinion ceased to have any force or effect once Dearlove filed his petition for review."), *petition denied*, 573 F.3d 801 (D.C. Cir. 2009); *Fundamental Portfolio Advisers, Inc.*, 56 S.E.C. 651, 679 n.44 (2003) (stating that, "because we granted the Division's petition for review, the initial decision ceased to have any force or effect"), *petition dismissed*, 167 F. App'x 836 (2d Cir. 2006).

[11] Order Granting Petition for Review and Scheduling Briefs, *Prime Capital Servs., Inc.*, Admin. Proc. File No. 3-13532 (Aug. 5, 2010) ("Pursuant to Rule of Practice 411(d), the Commission, on its own initiative, has determined to review what sanctions, if any, are appropriate in this matter.").

[12] *See, e.g., Clarence Z. Wurts*, 56 S.E.C. 430, 441 (2001) (noting "the seriousness with which we view failures to supervise").

opportunity to violate the securities laws."[13] Collins repeatedly took advantage of these opportunities, thus benefitting himself at the expense of the firm's customers. This conduct, our Opinion explained, "displayed a blatant failure to deal fairly with elderly, unsophisticated customers and exhibited a clear disregard for their customers' interests."[14] And, as we also concluded in our Opinion, we are concerned about Collins committing future violations and noted that the securities industry "presents continual opportunities for dishonesty and abuse."[15] Collins's allegedly clean disciplinary history does not lessen that concern.[16] In fact, Collins's continued assertion that his misconduct was not egregious adds yet more support to our concern, as expressed in our Opinion, that Collins's misconduct will continue in the future.[17]

Nor did the $5,000 fee and one-year probation outweigh the reasons for imposing a $310,000 civil penalty. The fee and probation concerned a settlement stipulation that Collins entered with Florida's Department of Financial Services. As Collins testified, that settlement involved the Florida regulator's investigation into his sales practices related to two customers, not five customers as at issue in our Opinion. Moreover, the settlement involved allegations by the Florida regulator that Collins "made misrepresentations on insurance applications." It did not allege that Collins failed to supervise, which was the primary basis for our imposition of civil penalties. The $5,000 penalty and one-year probation to which Collins agreed, therefore, do not address the scope and egregiousness of Collins's misconduct as described in our Opinion.

B. Collins next contends that our imposition of the $310,000 civil penalty improperly relied on misconduct related to customer Lenore Jaye. Collins alleges that Mrs. Jaye "never purchased or sold a variable annuity or any other security" and that "a purchase or sale of securities is one of the required elements of a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder." Collins claims that, "[b]ecause there can be no underlying violation of the antifraud provisions of the federal securities laws relating to Lenore Jaye, Collins cannot be sanctioned for causing a violation by Brown or failing to reasonably supervise Brown with respect to Brown's conduct towards Lenore Jaye." We disagree. Even if, as Collins claims, Mrs. Jaye did not consummate a securities purchase, our

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13 *Brown, supra* note 4, at 26.

14 *Id.* at 25.

15 *Id.* at 19 (quoting *Conrad P. Seghers*, Investors Advisers Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2304, *petition denied*, 548 F.3d 129 (D.C. Cir. 2008)).

16 *Cf., e.g.*, *John A. Carley*, Exchange Act Rel. No. 57246 (Jan. 31, 2008), 92 SEC Docket 1693, 1740 (imposing a maximum second-tier penalty for respondent's failure to supervise despite respondent's lack of disciplinary history), *rev'd in part on other grounds sub nom. Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009).

17 *See supra* note 13 and accompanying text.

Opinion held that Brown not only violated Exchange Act Section 10(b) and Rule 10b-5, but he also violated Securities Act Section 17(a). Liability under that provision requires only the "offer" of a security,[18] and Brown clearly offered Mrs. Jaye a security. A violation of Securities Act Section 17(a) alone is thus sufficient to impose a civil penalty with respect to misconduct related to Mrs. Jaye.

C. Collins further contends that, in imposing a civil penalty, our Opinion did not adequately address his argument that a large civil penalty would violate the Eighth Amendment's prohibition against excessive fines.[19] In making this argument, Collins suggests that our Opinion "essentially conclud[ed] that the civil penalties that it imposed on Collins complied with the Eighth Amendment because they were authorized by Congressional statute." To the contrary, our Opinion expressly rejected Collins's Eighth Amendment argument on grounds that went beyond just our statutory authority, noting that the imposition of a $310,000 civil penalty was "consistent with the seriousness of . . . Collins's misconduct."[20]

In his motion for reconsideration, Collins also cites to "new legal authority decided in February 2012 that found a violation of the Eighth Amendment's Excessive Fines Clause when a small civil penalty was imposed on a per-violation basis and added up to a disproportionately large civil penalty." That case – *Bunk v. Birkart Globistics Gmbh & Co.*[21] – is inapposite. *Bunk* involved wholly different statutory schemes, harms, misconduct, and fines than were present in the case before us.[22] The U.S. District Court in *Bunk* expressly relied upon a crucial difference

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[18] 15 U.S.C. § 77q; *see SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996) (noting that liability under Securities Act Section 17(a) involves fraud "in connection with the offer *or* sale of a security" (emphasis added)).

[19] U.S. Const. amend. VIII.

[20] *Brown, supra* note 4, at 27; *cf. SEC v. Colonial Inv. Mgmt. LLC*, 381 F. App'x 27, 32 (2d Cir. 2010) (concluding that a district court did not abuse its discretion when imposing a $25,000 second tier civil penalty per securities law violation (for a total civil penalty of $450,000) where defendant was head trader "responsible for all of Colonial's trading and investment decisions" and "the evidence clearly established that [defendant] engaged in conduct that was, at the very least, in 'reckless disregard of [the] regulatory requirement'" (quoting 15 U.S.C. § 78u(d)(3)(B)(ii))).

[21] No. 1:02cv1168 (AJT/TRJ), No. 1:07cv1198 (AJT/TRJ), 2012 WL 488256 (E.D. Va. Feb. 14, 2012).

[22] *Bunk*, 2012 WL 488256, at *4-11 (concluding, in part, that imposition of approximately $50,000,000 in fines pursuant to the False Claims Act was unconstitutionally

(continued...)

between that case and ours when reaching its decision. In concluding that an approximately $50,000,000 fine under the False Claims Act[23] was unconstitutionally excessive, the U.S. District Court differentiated the False Claims Act (which states only that civil penalties shall be not less than $5,500 and not more than $11,000) from other federal statutes that expressly state that a civil penalty shall be assessed for each claim or violation. That same distinction is present here, as both of the statutes governing the civil penalty we imposed against Collins – Exchange Act Section 21B(b) and Section 203(i)(2) of the Investment Advisers of 1940 – specify that civil monetary penalties can be issued by the Commission "for each act or omission."[24]

D. Collins concludes by arguing that the Commission never "provided him with any procedure to demonstrate an inability to pay the significantly higher penalty" that the we imposed against him. In support, Collins claims that "Rule 410(c) of the Commission's Rules of Practice is the only rule that addresses inability to pay arguments and that rule relates only to petitions to the Commission that challenge an initial decision's imposition of a civil penalty."[25] Collins, however, misreads Rule 410(c). That rule requires simply that, when a party files a petition for review in which the party asserts an "inability to pay disgorgement, interest, or a penalty," that party must then include a sworn financial disclosure form with the opening brief. Nothing in Rule 410(c), however, limits a party's ability to present evidence of an inability to pay to only those instances where the party specifically challenges the imposition of a civil penalty.

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[22] (...continued) excessive where the defendant had submitted 9,136 invoices under a fraudulent government contract and where that misconduct involved no harm to the U.S. Government).

[23] 31 U.S.C. § 3729(a)(1)-(3) (2000).

[24] *Bunk*, 2012 WL 488256, at *10 ("Congress chose to say only that a person who violates the FCA is liable to the United States for a civil penalty of not less than $5,500 and not more than $11,000. Congress did not say, as it did in other federal statutes, that a civil penalty shall be assessed for each false claim or that a Court, in its discretion, may impose a civil penalty up to a certain amount."); *cf. also, e.g.*, *Steven E. Muth*, 58 S.E.C. 770, 813 (2005) (imposing penalty for each customer that respondent defrauded (for a total penalty of $770,000) in a matter where respondent's unjust enrichment of approximately $14,000 was "relatively small and w[ould] be disgorged").

[25] 17 C.F.R. § 201.410(c).

In fact, Rule 630(a) expressly allows a party to present evidence of an inability to pay in "any proceeding" in which a party "may" be ordered to pay disgorgement, interest, or penalties.[26] That avenue was available here. Collins knew that these proceedings could result in his having to pay higher sanctions, as the Division of Enforcement filed a cross-appeal seeking civil penalties of $620,000 (an amount twice what we ultimately imposed against Collins and nearly five times what the law judge imposed), and we noted in our briefing order that we, on our own initiative, had also "determined to review what sanctions, if any, are appropriate in this matter."[27] Collins was thus well aware that we could impose a larger sanction than the law judge had imposed and had ample opportunity to present evidence of an inability to pay such a penalty during these proceedings.

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For these reasons, it is ORDERED that the motion for reconsideration filed by Matthew J. Collins be, and it hereby is, denied.

By the Commission.

Elizabeth M. Murphy
Secretary

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[26] *Id.* § 201.630(a) ("In any proceeding in which an order requiring payment of disgorgement, interest or penalties may be entered, a respondent may present evidence of an inability to pay disgorgement, interest or a penalty.").

[27] *See supra* note 11 and accompanying text.