UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v. **Case No. 09-cv-3333 (MJD/FLN)**

TREVOR G. COOK, et al.,
Defendants,

R.J. ZAYED,
Receiver.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v. **Case No. 11-cv-574 (MJD/FLN)**

JASON BO-ALAN BECKMAN, et al.,
Defendants,

R.J. ZAYED,
Receiver.

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S REPLY TO DEFENDANT BECKMAN'S PRO SE RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Securities and Exchange Commission ("SEC") hereby responds to the *Pro Se Response to Plaintiff's Motion for Summary Judgment by Defendant Beckman* (Doc. #567) ("Response").

INTRODUCTION

The SEC seeks summary judgment against Defendant Beckman, because no material factual issues remain in this case. Beckman has been found guilty of parallel criminal charges based on the same facts that underlie the SEC's claims in this civil case. Beckman was a principal of a vile fraud. His fraud was long-running. He betrayed innocent, vulnerable clients who trusted him to give honest investment advice. He enriched himself. He caused millions of dollars of losses which will never be fully compensated. To this day, Beckman refuses to admit he did anything wrong. Based on the record, the Court should grant the SEC's motion and enter the proposed final judgment against Beckman.

DISCUSSION

In his Response, Beckman raises several arguments in opposition to the SEC's motion. Beckman's arguments are all without merit. In this filing, The SEC replies to Beckman's primary arguments.

1. Despite His Criminal Conviction, Beckman Continues to Protest His Innocence

At the heart of Beckman's Response lies his insistence that he is innocent of the accusations levied against him. In his Response, Beckman acknowledges his criminal conviction and briefly mentions its collateral estoppel effect; but he then proceeds to assert his innocence and to deny the facts, as if the conviction never occurred.

Beckman was convicted of mail fraud and wire fraud for engaging in the very same conduct that underlies the SEC's claims of securities fraud against him. *See*

Declaration of John E. Birkenheier ("Birkenheier Dec."), Ex. 2, Complaint, *SEC v. Jason Bo-Alan Beckman, et al.*, 11-cv-574, Doc. # 1; Ex. 3, Second Superseding Indictment, *United States v. Beckman, et al.*, 11-cr-228, Doc. #162; Ex. 5, Verdict Form, *United States v. Beckman, et al.*, Doc. # 303.

"It is well established that prior criminal proceedings can work as estoppel in a subsequent civil proceeding so long as the question involved was 'distinctly put in issue and directly determined' in the criminal action." *See, e.g., McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 76 (8th Cir. 1976); *SEC v. Blackwell*, 477 F. Supp. 2d 891, 899 (S.D. Ohio 2007).

Courts have frequently entered summary judgment in favor of the SEC against a defendant based upon the collateral estoppel effects of the defendant's conviction in a parallel criminal case. *See, e.g., SEC v. Gruenberg*, 989 F.2d 977 (8th Cir. 1993); *SEC v. O'Hagan*, 901 F. Supp. 1461, 1466 (D. Minn. 1995); *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir. 1997) (noting that "in order to prevail in the civil action, the SEC now needs only to move for summary judgment on the basis of the collateral estoppel effect of [the criminal] conviction").

Courts may enter summary judgment based on the collateral estoppel effects of prior convictions even if the charges are not identical, provided the factual determinations underlying the convictions are sufficient to establish the violations at issue in the subsequent action. *See, e.g., SEC v. Quinlan*, 2008 U.S. Dist. LEXIS 95789 (E.D. Mich. 2008) (granting summary judgment on the basis of the commonality of underlying factual issues in parallel criminal prosecution); *SEC v. Fisher*, 2011 U.S. Dist. LEXIS 92868

(E.D. Mich. 2011) (conviction for conspiracy to commit securities registration violations was basis for collateral estoppel on claims that defendant violated the securities laws' registration provision); *SEC v. Dimensional Entertainment Corp.*, 493 F. Supp. 1270, 1273 (S.D.N.Y. 1980) (granting summary judgment on Section 5, Section 17(a), Section 10(b), and Rule 10b-5 claims based on defendant's conviction for wire fraud even though defendant was acquitted of securities fraud); *SEC v. Pace*, 173 F. Supp. 2d 30, 30-33 (D.D.C. 2001) (granting summary judgment on Section 14(a), Section 10(b), and Rule 10b-5 claims based on defendant's conviction for wire fraud and tax fraud).

Beckman ignores this legal precedent. Instead, he asserts his innocence and denies facts that have already been decided against him by the jury in his criminal case. Among other things, Beckman asserts that he never met some of his victims (Response at 8); that the fraud was "conducted by others" (*id.* at 11); that others created the fraudulent offering documents (*id.* at 12); that he did not trade foreign currencies (*id.* at 10); and that it has not been proved that he acted with the intent to defraud (*id.* at 12). Ignoring the preclusive effect of the jury verdict against him, Beckman argues that the SEC has failed to show the absence of genuine disputes as to material facts (Response at 2, 4-5).

The time for these factual disputes has passed. The relevant factual issues were before the jury in Beckman's criminal case; and the jury decided, beyond a reasonable doubt, that Beckman was guilty. The jury's verdict has been affirmed on appeal. In the wake of the jury's verdict, there no longer is a genuine dispute whether Beckman engaged in the conduct charged in the Superseding Indictment. And just as Beckman's

conduct constituted mail fraud and wire fraud, Beckman's conduct also constituted securities fraud. *Compare* Birkenheier Dec., Ex. 2 and Ex. 3.

2. <u>The Facts Necessarily Found by the Jury in the Criminal Case Establish Securities Fraud</u>

Beckman argues that the SEC has not shown the factual issues decided in his criminal prosecution to be identical to those at issue in the SEC case (*id.* at 2-3) and that the SEC has not "conclusively established" that he violated the various securities statutes (*id.* at 11-12). Beckman is wrong. The truth is that the criminal prosecution and the SEC action were based on the same underlying facts.

The SEC alleges that from at least July 2006 through July 2009 Beckman and several associates took in a total of at least $190 million from at least 1,000 victims. (Birkenheier Dec., Ex. 2, ¶ 3.) Beckman perpetrated the fraud through the fraudulent sale of investments in a purported foreign currency trading venture. (*Id*., Ex. 2, ¶¶ 3-4.) Beckman acted through The Oxford Private Client Group, LLC, a registered investment adviser of which he was the managing member. (*Id*., Ex. 2, ¶¶ 25 and 26; Ex. 8, Registration Status Report for The Oxford Private Client Group, LLC (*SEC v. Beckman*, Doc. # 4.5, pp. 20-21).) The SEC alleges the defendants falsely represented that the investors' money would be deposited into segregated accounts held in the investors' respective names, could be withdrawn at any time, would be used to finance trading by the defendants in foreign currencies, and would generate annual returns of 10% to 12% with little or no risk. (Birkenheier Dec., Ex. Ex. 2, ¶ 8.) The defendants' representations were all false and misleading. The truth was that the investors' money was commingled

in accounts belonging to defendants and their associates. (*Id*., Ex. 2, ¶ 12.) Tens of millions of dollars in investor funds were diverted to the benefit of the defendants and their associates. (*Id*., Ex. 2, ¶¶ 5-6, 9.) Investors were not able to withdraw their money at any time. (*Id*., Ex. 1, ¶ 5-6; Ex. 2, ¶ 14.) And the foreign currency trading that did take place resulted in losses of more than $60 million. (*Id*., Ex. 2, ¶¶ 10, 11, 13.) To conceal their fraud while continuing to raise new money from investors, the defendants lulled investors with false account statements and payments of purported returns that in truth were funded by newly raised investor money. (*Id*., Ex. 2, ¶¶ 97.)

The facts alleged by the SEC are virtually identical to the facts alleged in the Second Superseding Indictment filed against Beckman and his co-conspirators on February 2, 2012. (Birkenheier Dec., Ex. 3.) The Second Superseding Indictment charged the defendants with fraudulently soliciting investors for the foreign currency trading program. (*Id*., Ex. 3, ¶¶ 11, 12.); with misrepresenting that the currency trading program earned double-digit returns, typically 10.5% to 12% annually (*Id*., Ex. 3, ¶ 13); with misrepresenting that the currency trading program was so safe that investors could not lose their principal and could withdraw their assets at any time (*id.*); and with misrepresenting that individual investors' funds would not be commingled but would be held in segregated accounts. (*Id.*) The indictment also charged that the defendants lulled investors by sending the investors false and misleading account statements which, among other things, falsely reported that the investors were receiving the returns promised by the defendants. (*Id*., Ex. 3, ¶¶ 15-16.) According to the indictment, not all the investors' money was used to finance currency trading. (*Id*., Ex. 3, ¶ 19.) Instead, millions of

dollars was diverted to pay compensation, personal expenses, and investments of the defendants (*id*., Ex. 3, ¶ 19), and to make lulling payments to investors. (*Id.*) The indictment also charged that the defendants actually did use some investor money to trade foreign currency, but that trading was risky and oftentimes resulted in significant losses to investor assets. (*Id*., Ex. 3, ¶ 21.) Finally, the indictment alleged that the defendants acted through several companies, including Beckman's firm, The Oxford Private Client Group, LLC. (*Id*., Ex. 3, ¶ 7.)

Nowhere in his Response does Beckman address in detail the factual overlap between the two cases. Instead, he offers only self-serving denials and barebones factual assertions, unsupported by admissible evidence. Even apart from the preclusive effect of the criminal verdict against him, the law is clear that unsubstantiated denials and factual assertions such as Beckman's are not sufficient to defeat a motion for summary judgment. *See, e.g., Becker v. Int'l Bhd. of Teamsters Local 120,* 2012 U.S. Dist. LEXIS 156389, at *6-*7 (D. Minn. 2012) *(citing to Krenik v. County of Le Sueur,* 47 F.3d 953, 957 (8th Cir. 1995).

3. <u>The Question of Negligence Is Moot</u>

Beckman also argues that the SEC has failed to prove negligence by failing to prove the relevant standard of care. (Response at 12). This issue is relevant to Beckman's liability under Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)] and Section 206(2) of the Advisers Act [15 U.S.C. § 80b-6(2)]. Those provisions may be violated by a defendant who acts with *scienter* or with negligence. *See, e.g., SEC v. Shanahan*, 646 F.3d 536, 541 (8th Cir. 2011).

Beckman's point, however, is moot. When the jury in the criminal case found Beckman liable for wire fraud and mail fraud, the jury necessarily found that Beckman acted with the intent to defraud. (*See* Birkenheier Dec., Ex. 3, ¶ 11 and Ex. 5.) In other words, for purposes of the instant securities law charges the criminal verdict establishes that Beckman acted with *scienter*, rendering it unnecessary to reach the question whether he acted negligently.[1]

4. Beckman's Misconduct Occurred in Connection with Securities Transactions

The SEC's claims against Beckman, in one way or another, all require a nexus between Beckman's conduct and transactions in securities. The violative misconduct must have occurred in connection with purchases or sales of securities (Exchange Act Section 10(b) and Rule 10b-5), in the offer or sale of securities (Securities Act Sections 5(a), 5(c), and 17(a)), and while Beckman was acting as an investment adviser (Advisers Act Sections 206(1) and 206(2)).[2]

Beckman argues that the jury in his criminal case did not consider whether his violations occurred in connection with securities transactions (Response at 7), and he

[1] Beckman also asserts that he cannot be found to have engaged in a scheme to defraud unless he engaged in misconduct beyond misrepresentations and omissions. (Response at 11.) Beckman's argument raises the question of how the legal principle he cites applies to the facts and the legal issues raised by this SEC enforcement action. But in any event, Beckman's argument is moot. The indictment against Beckman charged, and the jury necessarily found, that Beckman engaged in misconduct beyond misrepresentations and omissions. The incitement charged Beckman *inter alia* with devising a scheme to obtain money and property under false pretenses, with disseminating false and misleading account statements, and with receiving, pooling, and diverting investor money. (*See* Birkenheier Dec., Ex. 3 at ¶¶ 11, 15-16, 19, 21 and Ex. 5.)

[2] An investment adviser is someone engaged in the business of advising others about investing in securities (Advisers Act Section 202(a)(11)).

denies that securities were involved in his misconduct. (*Id.* at 9-10.) The question whether Beckman's misconduct involved securities—in the form of investment contracts—turns on the three-part test established by the Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). An investment contract exists where (1) a person invests his or her money, (2) in a common enterprise, and (3) is led to expect profits from the efforts of the promoter or a third party.

In making this argument, Beckman again ignores that when the jury in the criminal case convicted him, they necessarily found facts—as alleged in the indictment—which prove his misconduct involved securities. To find Beckman guilty based on the conduct alleged in the indictment, the jury necessarily found that Beckman obtained money from investors; that Beckman commingled investors' money in pooled accounts and used some of those commingled funds to finance the currency trading; and that the investors were promised profits to be derived from the defendants' foreign currency trading. (*See* Birkenheier Dec., Ex. 3, at ¶¶ 9-21 and Ex. 5.) These facts satisfy the *Howey* test and thus establish that Beckman was offering, selling, and providing advice about securities.

5. <u>Injunctive Relief</u>

Beckman argues that no injunction is warranted, because he is serving a lengthy prison sentence and because he has no desire to re-enter the securities industry. (Response at 14.) It is true that Beckman is currently incarcerated. But he is young and healthy, and his sentence will eventually come to an end. And as for his expressed

intention not to return to the securities industry—the Court is not bound, and would be ill-advised, to rely on Beckman.

Beckman's violations were long and repeated. He has a long history of employment in the field of finance. He acted with knowledge and the intent to deceive. He caused devastating financial harm to hundreds of vulnerable victims. And to this day he has shown neither remorse nor acceptance of responsibility for his guilt and the harm he caused. To the contrary, to this day he denies any wrongdoing and portrays himself as a victim. A permanent injunction is abundantly warranted in Beckman's case. *See, e.g.*, *SEC v. Comserv Corp.*, 908 F.2d 1407, 1412 (8th Cir. 1990).

6. <u>The Court Should Enter the Proposed Consent Judgments</u>

Beckman challenges the Receiver's consent to the final judgments proposed against the entity defendants (Response at 17-18), but he offers no good reasons for rejecting the proposed settlements. The proposed settlements are fair, and they are in the public interest. Entry of the proposed judgments would resolve the SEC's claims against most of the remaining defendants and relief defendants and thereby significantly advance this case toward its ultimate conclusion. Moreover, it is well within the Receiver's authority to consent to the proposed judgments.

CONCLUSION

For the reasons set forth above and in its initial motion papers, the SEC respectfully requests that the Court grant summary judgment against Beckman and enter final judgments against him making findings of fact, imposing permanent injunctions, and ordering disgorgement and prejudgment.

Dated: December 3, 2015

Respectfully submitted,

s/John E. Birkenheier

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