

No. 07-1031

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SECURITIES EXCHANGE COMMISSION
Plaintiff-Appellee

V.

JOHN GARDNER BLACK
Defendant-Appellant

On Appeal from the United States District Court
For the Western District of Pennsylvania

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION

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BRIEF OF THE SECURITIES AND EXCHANGE
COMMISSION, APPELLEE

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to Section 22 of the Securities Act of 1933, 15 U.S.C. 77v, and Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered an order denying appellant John Gardner Black's motion for relief pursuant to Fed. R. Civ. P. 60(b)(3) on December 15, 2006. The notice

of appeal from that order was timely filed on January 3, 2007.

COUNTERSTATEMENT OF THE ISSUES

Black, a defendant in this civil law enforcement action brought by the Securities and Exchange Commission, moved in the district court under Rule 60(b)(3) to vacate orders entered against him in the action. He claimed that the orders – orders of permanent injunction, disgorgement and civil penalties – had been obtained as a result of fraud allegedly committed by the Commission. The question presented is whether the district court correctly denied Black’s motion.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

Appellant John Gardner Black controlled a registered investment adviser, Devon Capital Management, Inc. (“Devon”). Devon invested the proceeds of municipal bond offerings on behalf of school districts in Pennsylvania. Due to a massive fraud orchestrated by Black, more than \$60 million belonging to the school districts were lost.¹

The Commission brought this civil enforcement action against Black in 1997, alleging, inter alia, that he had violated antifraud provisions of the Securities

¹ Much of the school districts’ losses were eventually recouped through litigation.

Act and the Securities Exchange Act. Without admitting or denying the allegations in the complaint, Black consented, at a time when he was represented by counsel, to the entry of a permanent injunction that enjoined him from future violations of the antifraud provisions and also consented to the entry of an order directing him to disgorge \$3,632,031, to pay prejudgment interest of \$326,883 and to pay a civil penalty of \$500,000.² The United States Attorney for the Western District of Pennsylvania subsequently brought a criminal prosecution against Black for the same misrepresentations alleged in the Commission's complaint; Black pled guilty and was sentenced to imprisonment.

Now, nine years after he consented to the entry of a permanent injunction and other relief, Black has asked the district court to set aside all its orders in the civil enforcement action.³ Black's grounds for his request in the district court differ from his grounds in this Court. In the district court, Black cited Fed. R. Civ. P. 60(b)(3), the rule that authorizes a court to relieve a party from a final

² There were also two other defendants, Devon and another entity controlled by Black, Financial Management Services ("FMS"). Judgments were entered against them in October 2006.

³ In his papers filed in this Court, Black asks for slightly different relief; he asks the Court to "dismiss" the Commission's complaint. Informal Brief, p. 4. Apparently, though, Black expects that the dismissal of the Commission's complaint would result in the vacation of all the district court's orders.

judgment, order, or proceeding because of fraud, misrepresentation, or other misconduct of an adverse party. He claimed that the Commission had defrauded the district court when it filed its complaint because that complaint “contained significant misrepresentation of facts including a failure to disclose that Black’s business practices were in compliance with and controlled by published Internal Revenue Service Regulations.” Motion to Set Aside (attached to Appellant Brief), p. 1.⁴

On appeal, Black does not argue that the Commission committed fraud.⁵ Having abandoned the fraud theory, his current theory is that the Commission’s complaint did not allege a violation of the federal securities laws because his conduct was “required under existing federal rules and regulations issued by the Internal Revenue Service.” Informal Brief, p. 2. Essentially, Black argues that the Commission’s complaint failed to state a claim.

⁴ In this Court, Black has filed an “Informal Brief” and an “Appellant Brief.”

⁵ He does argue in this Court that the Commission’s complaint omitted certain “facts” that he claims were relevant but he does not argue that he was unaware of these “facts” at the time such that he could have been deceived. Appellant Brief, pp. 3-7.

B. The Facts

The facts set forth infra were alleged in the Commission's complaint. Since Black did not seek summary judgment or a trial but rather consented to the district court's orders, there is no other pertinent factual record in the case. Furthermore, Black executed a consent in which he agreed to withdraw "any papers filed in this proceeding to the extent that they deny any allegation in the Complaint." Dkt. no. 275, p. 2.

Black controlled a registered investment adviser, Devon; Devon's business was chiefly the investment of the proceeds of municipal bond offerings on behalf of school districts in Pennsylvania. Complaint (copy attached to Appellant Brief), paras. 1-2, 12-13, 15-17. Devon put \$233 million that it managed on behalf of school districts into "Collateralized Investment Agreements" (CIAs) that were issued by another entity that Black controlled, FMS. Id., paras. 2, 14, 18, 21. According to materials Devon sent to prospective clients, these CIAs were backed by collateral securities worth 100 percent of the monies invested; this collateral was to be marked to market every week. Id., paras. 3, 22, 23. Pennsylvania law required that the value of the collateral had to equal the value of the funds invested. Id., para. 22.

Black, Devon and FMS suffered more than \$50 million in trading losses in the accounts that held the collateral securities; consequently, the value of the collateral for the CIAs was much less than 100 percent of the monies invested. Id., para. 30. They attempted to conceal the shortfall by overvaluing by almost \$70 million the value of a security that FMS held as collateral, a security known as an “inverse floater,” a type of collateralized mortgage obligation. Id., paras. 33-34.⁶ Even though he had purchased the inverse floater for approximately \$14 million and the actual market value at the time was between \$12 and \$14 million, Black valued it at as much as \$83 million when he calculated, in internal documents, the value of the assets that served as collateral for the CIA. Id., paras. 33-34. Thus, he was able to report to his client school districts in the monthly

⁶ A collateralized mortgage obligation is a security derived from pools of private home mortgages usually backed by U.S. government-sponsored enterprises. A collateralized mortgage obligation often represents a right to some portion of the income stream from a pool of home mortgages, either of the interest payments or the principal payments. Since home owners frequently refinance their homes when interest rates drop but do not refinance when interest rates rise, investing in some portions of the interest payment income stream is risky. To help distribute the risk, issuers of collateralized mortgage obligations issue inverse floaters that pay interest based on a rate that moves inversely to a specified floating index rate. That is, inverse floaters lose value when interest rates rise; they gain value if interest rates fall. See Supplemental Report to the Thirty-Day and Ninety-Day Reports of the Trustee, dkt. no. 223, pp. 12-13.

account statements he sent them that their investments in the CIA were fully collateralized, as required by the terms of the CIA and by state law. Id., paras. 31, 35.

Furthermore, on at least two occasions, Black provided to school districts, for use by their auditors, false collateral statements in which he reported the inflated value for the inverse floater. Complaint, para. 39.

C. The Proceedings Below and the Criminal Proceedings Against Black

The Commission filed this civil enforcement action against Black, Devon and FMS on September 26, 1997. During the initial stages of the action, Black was represented by counsel. See Dkt. no. 275 (consent executed by Black and “[a]pproved as to form” by his counsel). While he was represented by counsel, Black, without admitting or denying the allegations in the Commission’s complaint (except as to jurisdiction), agreed to the entry of an Order of permanent injunction against him, which the district court entered on December 16, 1997. Dkt. nos. 151, 154. While he was still represented by counsel, Black also agreed to the entry of an Order of Disgorgement and Civil Penalties against him, which the district court entered on April 29, 1998. Dkt. nos. 275, 278.

The United States Attorney for the Western District of Pennsylvania subsequently brought a criminal proceeding against Black for the same

misrepresentations alleged in the Commission's civil enforcement action. On January 24, 2000, Black pled guilty to the criminal charges, and was subsequently convicted. Case No. 2:99-cr-00203-DWZ01, Dkt. Nos. 51, 54, 60 (W. Dist. Pa. Jan. 24, 2000). In connection with his guilty plea, Black made a number of specific admissions in a document entitled "Joint Stipulated Factual Basis Pursuant to FRCRP 11(f)." Supra, dkt. no. 50 (Jan. 24, 2000)(copy attached). He admitted:

- (a) that he had represented to his clients that, for investments in the CIA, "collateral would be maintained at 100% of the fair market value of the client's outstanding investment" (para. 33);
- (b) that, between late 1994 and September 26, 1997, there was a "shortfall between the face amount of the CIA and the liquidation value of assets [that served as collateral]" and that, as of September 26, 1997, the amount of the shortfall was \$61.3 million (para. 37);
- (c) that, in reports to clients, Black did not mark the collateral to "liquidation value as promised in the collateralized investment agreement and in solicitation materials" (para. 46);
- (d) that, in reports to clients, Black valued the inverse floater "at a price of \$96.50 per share" (paras. 47-51); and
- (e) that, using "the correct fair market valuation" of the inverse floater, the value of the collateral for the CIA as of September 1997 was only approximately \$164,000,000 and the value of other pertinent assets as of that date was only approximately \$7,000,000, resulting in a shortfall of approximately \$61,000,000 (the pertinent clients had invested approximately \$233,000,000) (para. 53).

Subsequent to his guilty plea, Black, who was by then pro se, attempted to attack the orders entered in the Commission's civil enforcement case by filing a lengthy series of motions for various kinds of relief. Three of these motions, including the present one, were for relief under Fed. R. Civ. P. 60(b). Thus:

- Black filed his first Rule 60(b) motion on April 6, 2001, dkt. no. 383; it was denied, dkt. no. 389 (May 9, 2001) (Black filed an appeal but it was dismissed for failure to timely prosecute, dkt. no. 414);
- Black filed his second Rule 60(b) motion on June 18, 2001, dkt. no. 393; it too was denied (on June 22, 2001);
- Black filed a motion "to vacate order," dkt. no. 404 (January 4, 2002); the district court denied this motion on January 11, 2002;
- Black filed a motion for the district judge, Judge Ambrose, to recuse herself, dkt. no. 406 (January 18, 2002); the district court denied this motion on January 22, 2002;
- Black filed a motion requesting Findings of Fact and Conclusions of Law, dkt. no. 411 (February 7, 2002); the district court denied this motion on February 7, 2002;
- Black filed a motion to release assets, dkt. no. 415 (April 18, 2003); the district court denied this motion on May 6, 2003;
- Black filed a motion to hold hearing, dkt. no. 418 (October 5, 2005); the district court denied it, dkt. no. 419 (December 15, 2005); and
- Black filed yet another motion for recusal, dkt. no. 420 (October 25, 2006); the district court denied it, dkt. no. 423 (October 31, 2006) (Black appealed this denial but the appeal was administratively closed, dkt. no. 431 (December 5, 2006)).

Finally, Black filed the motion which is the subject of this appeal, a “Motion to Set Aside Orders entered in this Case on and Since September 26, 1997.” Dkt. no. 432 (December 13, 2006). The district court denied the motion without opinion. Dkt. no. 433 (December 15, 2006).

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

STANDARD OF REVIEW

A district court decision whether to grant relief under Fed. R. Civ. P. 60(b) is reviewed for abuse of discretion. Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir. 1991). A litigant who moves for relief under Rule 60(b) “‘bears a heavy burden’”; such relief “‘should be granted only where extraordinary justifying circumstances are present.’” Bohus v. Beloff, 950 F.2d at 930 (3d Cir. 1991) (quoting Plisco v. Union R. Co., 379 F.2d 15, 17 (3d Cir.), cert. denied, 389 U.S. 1014 (1967)). Furthermore, the evidence supporting Rule 60(b) relief “must be clear and convincing.” Brown v. Pennsylvania R.R. Co., 282 F.2d 522, 527 (3d Cir. 1960).

SUMMARY OF ARGUMENT

In his motion for relief under Rule 60(b)(3), Black argued that he was fraudulently induced into consenting to the district court’s orders. The district court properly denied Black’s motion. Black had not shown either that the

Commission committed fraud or that he had been deceived into consenting to the district court's orders.

Black's theory was that the Commission fraudulently failed to disclose that his practices were in accord with an Internal Revenue Service regulation. The Internal Revenue Service regulation Black cites, 26 C.F.R. 1.148-5(d), however, has nothing to do with valuation of assets for purposes of disclosures to an investment adviser's clients but rather governs valuation of investments made with proceeds of tax-exempt bonds in order to determine the tax-exempt status of the bonds.

Black appears to argue not only that the Commission committed fraud but also that the Commission's complaint failed to state a claim. He is precluded from making this argument because he previously consented to the entry of the district court orders and because he is collaterally estopped from contesting the truth of the Commission's allegations by his guilty plea in which he admitted making the very misrepresentations that the Commission alleges.

Finally, Black's argument that the Commission's complaint did not state a claim fails because he nowhere contests the central allegation of that complaint, that he misrepresented the value of the one of the securities that served as collateral, the inverse floater. Black only claims that the total value of the

collateral exceeded the amount of his clients' initial investments. He does not, however, provide any evidence that the collateral was as valuable as he says it was.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED BLACK'S MOTION BECAUSE HE HAS NOT SHOWN THAT THE COMMISSION COMMITTED FRAUD.

Although Black has not pursued his claim of fraudulent inducement on appeal, that was his primary argument to the district court. The district court ruled before the Commission responded, and therefore we first address Black's fraud argument in the event this Court is inclined to consider it.

In order to prevail on a Rule 60(b)(3) motion, a movant must produce "clear and convincing" evidence that he was deceived by fraudulent conduct. Brown v. Pennsylvania R.R. Co., *supra.* Furthermore, a movant who claims that he was deceived into entering into a settlement must show that it was the fraud that caused him to enter into the settlement. Bandai America Inc. v. Bally Midway Mfg. Co., 775 F.2d 70, 74 (3d Cir. 1985) (no right to relief under Rule 60(b)(3) where movant could not establish that the purported fraud caused it to enter into a settlement); *cf.* Stridiron v. Stridiron, 698 F.2d 204, 207(3d Cir. 1983) (Rule

60(b)(3) allows relief only where fraud on an adverse party “prevented [it] from fully and fairly presenting [its] case”).

Black has not shown either that the Commission committed fraud or that he was deceived into settling. In the district court, his theory apparently was that the Commission’s complaint was fraudulent because it failed “to disclose that Black’s business practices were in compliance with and controlled by published Internal Revenue Service Regulations.” Motion to Set Aside (attached to Appellant Brief), p. 1. The Commission did not commit fraud because: (a) it had no obligation to make such a disclosure in its complaint, when at most such an issue would be a defense that could be asserted in an answer; and (b) the only Internal Revenue Service regulation cited by Black has no pertinence to the issue of whether he made misrepresentations to his investment advisory clients.

The Internal Revenue Service regulation Black cites is 26 C.F.R. 1.148-5(d). See Appellant Brief 4, 6. That regulation has nothing to do with valuation of assets for purposes of disclosures to an investment adviser’s clients. Rather, that regulation, subsection 5(d) of section 148, governs valuation of investments made with proceeds of tax-exempt bonds where the purpose of the valuation is to determine the tax-exempt status of the bonds. The goal of section 148 as a whole

is to limit the arbitrage opportunities created by the tax-exempt nature of the bonds. Section 148 itself describes its purposes and means:

Section 148 was enacted to minimize the arbitrage benefits from investing gross proceeds of tax-exempt bonds in higher yielding investments and to remove the arbitrage incentives to issue more bonds, to issue bonds earlier, or to leave bonds outstanding longer than is otherwise reasonably necessary to accomplish the governmental purposes for which the bonds were issued. To accomplish these purposes, section 148 restricts the direct and indirect investment of bond proceeds in higher yielding investments and requires that certain earnings on higher yielding investments be rebated to the United States. Violation of these provisions causes the bonds in the issue to become arbitrage bonds, the interest on which is not excludable from the gross income of the owners

26 C.F.R. 1.148-0(a). Thus, section 148 establishes caps on the earnings on investments made with proceeds of tax-exempt bonds; and subsection 5(d), the regulation Black cites, sets forth rules for calculating the value of investments to determine whether they are in accord with the caps. As is readily apparent, subsection 5(d) of section 148 has nothing to do with valuing investments for purposes of making disclosures to clients of an investment adviser.⁷

Not only does Black fail to show that the Commission committed fraud, he also does not show that he was deceived into settling. Any omission regarding

⁷ The Commission in any event does not mean to concede that the valuation contained in Black's briefs represents a valid application of subsection 5(d) principles. See Appellant Brief, p. 4. Black has provided no basis for the numbers that appear in his valuation.

whether Black conducted his business in accordance with, and under the guidance of, Internal Revenue Service regulations would concern a matter that Black knew all about: how he conducted his business. He therefore could not have been deceived by any such omission. Furthermore, when he consented to the entry of the district court orders, he knew that he was settling and relinquishing all rights to litigate, including conducting discovery and participating in a trial, where he could identify facts he deemed relevant. At the time of signing the consent, Black was assisted by counsel.

II. BLACK IS PRECLUDED BY HIS CONSENTS TO THE DISTRICT COURT ORDERS AND BY HIS GUILTY PLEA IN THE CRIMINAL CASE FROM CONTESTING THE COMMISSION'S ALLEGATIONS.

Having failed to show that the Commission committed fraud, and apparently having abandoned the argument on appeal, Black's main position now, construed in the most favorable light to Black as a pro se litigant, is that the allegations in the Commission's complaint were not true. He is precluded from making such an argument for two independent reasons: (a) he previously consented to the entry of the district court orders; and (b) he is collaterally estopped from contesting the truth of the Commission's allegations as to his misrepresentations by his guilty plea in which he admitted making those very misrepresentations.

A. Black Previously Consented to The Entry of Orders of Permanent Injunction, Disgorgement and Civil Penalties.

Black's current theory, asserted nine years after he consented to the entry of orders of permanent injunction, disgorgement and civil penalties, appears to be that the allegations as to his misrepresentations in the Commission's complaint were not true because his conduct was "required under existing federal rules and regulations issued by the Internal Revenue Service." Informal Brief, p. 2; see also id. ("The Securities Exchange Commission does not have the jurisdiction to introduce a complaint in district court which does not allege a violation of securities laws. . .).⁸ A party who has agreed to a consent judgment, however, cannot turn around and argue that the allegations in the complaint are not true. Cf. Atlantic Richfield Co. v. Sharon Steel Corp., 918 F.2d 434, 437 n.3 (3d Cir. 1990)

⁸ Black also argues that "the market value" of the CIA was determined in "litigation" conducted by the district court in which he was not allowed to participate. See Informal Brief, p. 3; see also id., p. 4; Appellant Brief, p. 7. Black, however, was never prevented from participating in any litigation. Black appears to be referring to the statement of the district court in rejecting one of his earlier motions that the issue of the market value had been "previously litigated and resolved." See Appellant Brief, p. 7; Ex. 1 to Appellant Brief (order of the district court dated Dec. 13, 2005, dkt. no. 419). As far as Black was concerned, the issue had been resolved when (a) he had consented to the orders of permanent injunction, disgorgement and civil penalties and (b) he pled guilty in the criminal case.

(a party to a consent judgment cannot challenge that judgment on appeal).⁹ When a litigant agrees to settle, he must abide by the terms of his agreement.

Furthermore, a consent that Black executed explicitly provided that he withdrew “any papers filed in this proceeding to the extent that they deny any allegation in the Complaint.” Supra, pp. 4-5.

B. Black Has Pled Guilty to Criminal Charges Arising From the Same Facts and is Therefore Collaterally Estopped from Denying the Truth of the Commission’s Allegations.

Black is further precluded from challenging the Commission’s complaint by his entry of a guilty plea in a federal criminal case in which he was charged with making the same misrepresentations as those alleged in the Commission’s complaint. There is no question that the criminal case involved the same misrepresentations: when Black entered his guilty plea, he executed a stipulation agreeing to pertinent facts, and the essential parts of his admissions in that

⁹ A party who purportedly consented to a judgment can challenge the judgment (a) where the party did not actually consent, and (b) where the district court lacked subject matter jurisdiction. Atlantic Richfield Co. v. Sharon Steel Corp., supra. This Court has also recognized that a party to a consent judgment can appeal where that party has explicitly reserved its right to appeal in the stipulation agreeing to the entry of the judgment. Keefe v. Prudential Property and Casualty Ins. Co., 203 F.3d 218, 222-223 (3d Cir. 2000). None of these circumstances is present here.

stipulation establish the primary claim of securities fraud in the Commission's complaint.

The Supreme Court has held that the collateral estoppel effect of a criminal conviction is determined by the law of the jurisdiction in which the conviction was entered. See Haring v. Prosise, 462 U.S. 306, 312-314 (1983) (federal courts look to state law to determine preclusive effect of state court judgments). To the Commission's knowledge, every federal court of appeals to have considered the collateral estoppel effect of a guilty plea in a federal criminal proceeding has concluded that such a plea does have collateral estoppel effect in civil proceedings. Webb v. Internal Revenue Service, 15 F.3d 203, 208 n.6 (1st Cir. 1994); Blohm v. Commissioner, 994 F.2d 1542 (11th Cir. 1993); Apply v. West, 832 F.2d 1021, 1026 (7th Cir. 1987); Gray v. Commissioner, 708 F.2d 243, 246 (6th Cir. 1983); Fontneau v. United States, 654 F.2d 8, 10 (1st Cir. 1981); Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978); Nathan v. Tenna Corp., 560 F.2d 761, 763-64 (7th Cir. 1977). While some states have provided that a guilty plea in a criminal proceeding in one of their courts does not have collateral estoppel effect in a subsequent civil proceeding, the rule is different for a guilty plea in a federal criminal proceeding.

This Court has not yet addressed the issue of the collateral estoppel effect of a guilty plea entered in a federal criminal proceeding, although it has, in three cases, applied state or territorial law to determine the effect of guilty pleas in state or territorial criminal proceedings. In those three cases, it held that, under the pertinent law, the guilty pleas in question did not have collateral estoppel effect.¹⁰ Since Black entered his guilty plea in a federal rather than a state criminal proceeding, this Court should follow the positions of other courts of appeals and hold that he is collaterally estopped from re-litigating any matter which he admitted when he made his guilty plea.

As noted supra, pp. 7-8, Black admitted in connection with his guilty plea:

- (a) that he had represented to his clients that “collateral would be maintained by 100% of the fair market value of the client’s outstanding investment”;
- (b) that there was a shortfall of \$61.3 million in the collateral account;
- (c) that, in reports to clients, Black did not mark collateralized mortgage obligations to market as promised;
- (d) that, in reports to clients, Black valued the inverse floater at a price of \$96.50 per share; and

¹⁰ Linnen v. Armainis, 991 F.2d 1102 (3d Cir. 1993)(applying law of Pennsylvania); Anela v. City of Wildwood, 790 F.2d 1063 (3d Cir. 1986)(applying law of New Jersey); Bower v. O’Hara, 759 F.2d 1117 (3d Cir. 1985)(applying law of the United States Virgin Islands).

- (e) that, using the correct fair market valuation of the inverse floater, the value of the collateral as of September 1997 was only approximately \$164,000,000 and the value of other pertinent assets as of that date was only approximately \$7,000,000, resulting in a shortfall of approximately \$61,000,000 (the pertinent clients had invested approximately \$233,000,000).

These admissions are obviously contrary to his current contention that he properly valued the collateral for the CIA. They also established that, as alleged in the Commission's complaint, he did misrepresent the value of the inverse floater. Black is thus precluded from denying either that he misrepresented the value of the collateral or that he misrepresented the value of the inverse floater. He is also precluded from arguing, as he does in his current appellate brief, that the "fair market value of the CIA" as of September 26, 1997, was "\$269 million," or that the "CIA's market value, determined pursuant to regulations issued by the IRS. . . was \$233 million," see Appellant Brief, p. 4.

III. EVEN IF BLACK WERE NOT PRECLUDED FROM CONTESTING THE COMMISSION'S ALLEGATIONS, HIS CHALLENGE TO THE COMMISSION'S COMPLAINT WOULD HAVE TO BE REJECTED BECAUSE BLACK HAS NOT DENIED THAT HE MISREPRESENTED THE VALUE OF A SECURITY THAT SERVED AS COLLATERAL FOR HIS CLIENTS' INVESTMENTS.

Nowhere in Black's appellate briefs does he contest the central allegation of the Commission's complaint, namely, that he misrepresented the value of the one of the securities that served as collateral, the inverse floater. The Commission's

claim against Black was very simple: to conceal at least \$50 million in trading losses, he “substantially overstated” the value of the inverse floater. Even though he had purchased the inverse floater for approximately \$14 million and the actual market value at the time “was between \$12 and \$14 million,” Black valued it at \$83 million when he calculated the value of the assets that served as collateral for the CIA. Supra, p. 6. Thus, he was able to report to the school districts that were his clients that their investments in the CIA were fully collateralized, as required by the terms of the CIA and by state law. Id. He was also able to provide to school districts, for use by their auditors, false collateral statements in which he reported the inflated value for the inverse floater. Id.

Black nowhere claims that the Commission’s allegation regarding his over-valuation of the inverse floater was without basis or was not in fact true. Instead, he appears to argue that, regardless of any over-valuation of the inverse floater, the total value of the collateral exceeded the amount of his clients’ initial investments, and therefore he did not make any misrepresentations when he told his clients that their initial investments were fully collateralized. See Appellant Brief, p. 4. In his appellate briefs, however, Black does not point to any evidence that the collateral was as valuable as he says it was (he makes only unsupported contentions about the purported value of the collateral, see id.), and he did not

submit any such evidence in the district court, see dkt. no. 418. Furthermore, his argument does not answer the Commission's allegation that Black communicated to school districts an inflated value for the inverse floater itself when the districts needed collateral statements for their auditors. Supra, pp. 6-7.

CONCLUSION


For the foregoing reasons, the district court's denial of Black's motion should be affirmed.

Respectfully submitted,

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COMBINED CERTIFICATES

I, Christopher Paik, hereby declare:

- (a) that Jacob H. Stillman, one of the lawyers whose names appear on the brief, is a member of the bar of the Third Circuit Court of Appeals;
- (b) that the text of the Brief of the Securities and Exchange Commission, Appellee, submitted in accord with F.R.A.P. 32(a)(7), contains, exclusive of tables, approximately 5100 words, as counted by the word processing program WordPerfect 11;
- (c) that on April 16, 2007, I caused to be served by Federal Express copies of the Brief of Securities and Exchange Commission, Appellee on John Gardner Black, 1446 Centre Line Road, Warriors Mark, PA 16877, pro se;
- (d) that the PDF version of the brief sent electronically to the clerk of the Court is identical to the paper versions sent to the Court and to the appellant; and
- (e) that the PDF version has been checked for viruses with the McAfee virus-detection program and is virus-free.

s/ Christopher Paik
Christopher Paik

