INITIAL DECISION RELEASE NO. 435
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14390

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	
	:	INITIAL DECISION
RICHARD L. GOBLE	:	October 5, 2011
	:	

APPEARANCES: Edward D. McCutcheon and Robert K. Levenson for the Division of Enforcement, Securities and Exchange Commission

Eric Lee and Gina Greenwald, Lee & Amtzis, P.L., for Respondent Richard L. Goble

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision grants the Motion for Summary Disposition filed by the Division of Enforcement (Division) and permanently bars Respondent Richard L. Goble (Goble) from associating with a broker, dealer, investment adviser, municipal securities dealer, nationally recognized statistical rating organization (NRSRO), and transfer agent.[1]

PROCEDURAL HISTORY

On May 16, 2011, the Commission issued an Order Instituting Proceedings, alleging that on April 27, 2011, the United States District Court for the Middle District of Florida (Court) entered a final judgment (Final Judgment) against Goble in SEC v. North American Clearing, Inc., et al., 6:08-cv-829-ORL-35KRS (Civil Case). OIP, p. 2. The Final Judgment permanently

[1] The parties have filed the following papers: the Division's Motion for Summary Disposition Against Richard L. Goble (Motion) (with the Final Judgment and a Bench Trial Opinion (Opinion) attached as Exhibits), Goble's Opposition thereto (Opposition) (which includes Goble's appellate brief, attached as Exhibit 1 to his Opposition), and the Division's Reply to Goble's Opposition (Reply).

enjoined Goble from violating Sections 10(b), 15(c)(3), and 17(a) of the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rules 10b-5, 15c3-3, and 17a-3, based on the Court's findings and conclusions that Goble had violated certain provisions of the federal securities laws. OIP, p. 2.

On June 17, 2011, Goble moved to stay this proceeding pending decision on his appeal of the Civil Case to the U.S. Court of Appeals for the Eleventh Circuit. On June 21, 2011, Goble filed his Answer. On July 21, 2011, Goble's motion to stay was denied.

At a telephonic prehearing conference on June 27, 2011, the Division was granted leave to file a motion for summary disposition. The Division filed its Motion on July 11, 2011, Goble submitted his Opposition on July 14, 2011, and the Division filed its Reply on July 19, 2011.

SUMMARY DISPOSITION STANDARD

After the respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP. See 17 C.F.R. § 201.250(a). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noticed pursuant to 17 C.F.R. § 201.323. Id. A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. See 17 C.F.R. § 201.250(b).

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to 17 C.F.R. § 201.323. In particular, Goble is precluded from contesting any findings made against him in the Civil Case. James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713, aff'd, 285 F.App'x 761 (D.C. Cir. 2008) (Commission may not reconsider any factual or procedural issues actually litigated and necessary to the court's decision to issue the injunction); see also Chris G. Gunderson, Exchange Act Release No. 61234 (Dec. 23, 2009), 97 SEC Docket 24040, 24047. Thus, the Court's findings of fact, discussed and relied upon throughout this Initial Decision, are binding.

The parties' motion papers, and indeed, all documents and exhibits of record, have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-104 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

FINDINGS OF FACT

Goble founded North American Clearing, Inc. (North American) in 1995, and served as Trustee of the Goble Family Trust, which held 100% of North American's shares until 2008. Opinion, p. 4. North American was a securities and clearing brokerage firm headquartered in Longwood, Florida. Id. at 2. Goble had no officially designated supervisory responsibilities at

North American, and instead focused on marketing the firm for prospective customers. Id. at 4. He also served on the board of directors. Id.

At the end of each day, North American and National Securities Clearing Corporation (NSCC), an entity that provides clearing and settlement services to broker-dealers, settled their accounts. Opinion, p. 5. This process involved North American keeping a running total of its customers' purchases, sales, and other trades during the business day. Id. As a result of each settlement, either North American would owe NSCC money (if purchases outvalued sales), or NSCC would pay a rebate to North American (if sales outvalued purchases). Id. To meet daily settlement and operating expenses, North American had a loan from U.S. Bank, for which it pledged customer securities as collateral. Id.

Exchange Act Section 15(c)(3) and Rule 15c3-3 required North American to calculate its reserves weekly. Opinion, p. 5; 17 C.F.R. § 240.15c3-3(e)(3). If customer credits (the amount of money owed to customers) exceeded debits (the amount of money owed from customers), North American was required to segregate customer funds into a special reserve account maintained for its customers' exclusive benefit (EBOC Account). Opinion, p. 5; 17 C.F.R. § 240.15c3-3(e). If customer debits exceeded credits, North American could lawfully withdraw money from the EBOC Account to fund legitimate expenses. Opinion, pp. 5-6; 17 C.F.R. § 240.15c3-3(e)(2). Customer cash accounts were considered credits, and would increase North American's required reserves, while money market accounts were not considered credits. Opinion, p. 6. The EBOC Account was maintained at U.S. Bank. Id.

During the second half of 2007, North American experienced a loss of business and a general financial decline. Opinion, p. 6. To meet its daily settlement and operating expenses, North American drew on its U.S. Bank loan; however, because the collateral (customer securities) was considered a credit, North American had to increase the cash reserves in the EBOC Account each time it increased the loan balance. Id. To mitigate this problem, North American automatically placed customer credits into money market accounts, so that the funds would no longer constitute credits. Opinion, p. 7. The firm also manually "swept" funds out of money market accounts, sometimes to pay NSCC and its parent corporation in satisfaction of daily settlement expenses. Id. In one instance, in April 2008, North American liquidated approximately $3 million in customer money market accounts to pay an "illiquid" charge imposed by NSCC on a penny stock transaction. Id.

In August 2007, the Financial Industry Regulatory Authority (FINRA) filed an administrative complaint against North American, alleging that the firm's manual sweeps into and out of money market funds were improper. Opinion, p. 7. In response, North American revised its customer account agreements so that customers could authorize it to sweep funds into and out of money market accounts at its sole discretion. Id.

In April 2008, FINRA conducted an on-site audit. Opinion, p. 8. FINRA learned of NSCC's illiquid charge and North American's way of paying it, and opined to North American that its practice of liquidating customer money market accounts to pay operating expenses and settlement charges was unlawful, notwithstanding the executed customer consent forms. Id.

On May 13, 2008, Goble unsuccessfully attempted to obtain an unsecured loan of approximately $5 million from U.S. Bank and another bank. Opinion, p. 8. That same day, Timothy Ward (Ward), North American's chief financial officer, recorded a sham purchase of approximately $5 million in money market funds in North American's books, to give the appearance that customer credits had decreased by that same amount. Id. Ward's actions were directed by Goble. Id. at 19. North American's money market statement, as reported to NSCC, was then fabricated to show a customer credit balance $5 million less than its true balance. Id. at 9.

On May 14, 2008, Ward entered North American's premises surreptitiously, to avoid the on-site FINRA examiners, and went to another executive's office to perform the reserve calculation based on the fabricated customer credit balance. Opinion, p. 9. This calculation (falsely) entitled North American to withdraw approximately $3.4 million from the EBOC Account. Id. Goble then signed a wire request that transferred the $3.4 million from the EBOC Account into the firm's settlement account. Id.

On May 15, 2008, FINRA examiners discovered the sham transaction and demanded that North American return the money. Opinion, p. 9. Ward then wire transferred the $3.4 million from North American's settlement account back into the EBOC Account. Id. at 10. However, a calculation of the firm's reserve requirements, using the correct numbers, revealed that North American needed to deposit an additional $1.8 million into its EBOC Account. Id. North American could not meet the deposit requirement, and on May 21, 2008, the decision was made to wind down the company's affairs. Id.

On May 27, 2008, the Division filed the Civil Case, asserting violations of Exchange Act Sections 10(b) (15 U.S.C. § 78j(b)), 15(c)(3) (15 U.S.C. § 78o(b)(3)), and 17(a) (15 U.S.C. § 78q(a)) and Exchange Act Rules 10b-5, 15c3-3, and 17a-3 (17 C.F.R. §§ 240.10b-5, 240.15c3-3, and 240.17a-3). Opinion, p. 2. Ward and the two other defendants settled, and Goble's bench trial began on May 17, 2010. Id. at 2-3. The Court held that the Division failed to prove its claims that Goble violated securities laws in connection with North American's general money market sweeps and the April 2008 illiquid charge. Opinion, p. 16. However, the Court held that Goble violated all the asserted Exchange Act provisions and Rules in connection with the May 13, 2008 sham purchase of money market assets and the subsequent May 14, 2008 wire transfer. Opinion, pp. 20-26.

The Court thereafter issued the Final Judgment, which imposed a first tier civil penalty and which contains the following injunction:

1. **Section 10(b) of the Exchange Act and Rule 10b-5.** [Goble] is **PERMANENTLY RESTRAINED AND ENJOINED** from directly or indirectly, by use of any means [or] instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any securities, knowingly or recklessly: (i) employing devices, schemes or artifices to defraud; (ii) making untrue statements of material facts and/or omitting to state material facts necessary in order to make the statements made, in light of the circumstances

> in which they were made, not misleading; or [(iii)] engaging in acts, practices, and courses of business which have operated, are now operating, or will operate as fraud upon the market or purchasers of such securities in violation of Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5).

Final Judgment, pp. 1-2 (emphasis in original). The Court imposed similar injunctions prohibiting violation of Exchange Act Sections 15(c)(3) and 17(a), pertaining to maintenance of customer reserve accounts and of books and records, respectively, and Rules 15c3-3 and 17a-3 thereunder. Id. at 2. The Court also enjoined Goble from obtaining or attempting to obtain a securities license, and from engaging or attempting to engage in the securities business. Id. at 2-3.

CONCLUSIONS OF LAW

Goble is permanently enjoined "from engaging in or continuing any conduct or practice in connection with [activities as a broker or dealer]" and "in connection with the purchase or sale of any security" within the meaning of Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) of the Exchange Act. Goble does not dispute this. Opposition, p. 5 n.2.

Goble's principal arguments are that the underlying judgment is flawed, and that the Court's findings "create factual issues" that warrant denial of summary disposition. Opposition, pp. 1-2. But Goble may not collaterally attack the Final Judgment in this proceeding, and all the Findings of Fact, supra, are based on the Court's findings, which Goble may not now contest. Franklin, 91 SEC Docket at 2713. Because the Court's findings are incontestable, there are no genuine issues of material fact, even as to the appropriate sanction. See John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 77 SEC Docket 3636, 3640 n. 12 ("[A] respondent may present genuine issues with respect to facts that could mitigate his or her misconduct, although we believe that those cases will be rare.").[2]

Goble also argues that a permanent bar is not justified in any event. Opposition, pp. 3-5. This argument, and other specific contentions, are addressed infra.

SANCTIONS

A. A Permanent Associational Bar is Warranted

The appropriate remedial sanction is guided by the well-established public interest factors listed in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Gunderson, 97 SEC Docket at 24048. They include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of

[2] If the underlying injunction is vacated, Goble may request the Commission to reconsider any sanctions imposed in this administrative proceeding. See Charles Phillip Elliott, Exchange Act Release No. 31202 (Sept. 17, 1992), 52 SEC Docket 2011, 2017 n.17, aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994).

scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. Steadman, 603 F.2d at 1140. Deterrence should also be considered, and the sanction may not be punitive. Steven Altman, Exchange Act Release No. 63306 (Nov. 10, 2010), 99 SEC Docket 34405, 34435; Gunderson, 97 SEC Docket at 24048; Johnson v. SEC, 87 F.3d 484, 490 (D.C. Cir. 1996). The inquiry into the appropriate remedial sanction is flexible and no one factor is controlling. Conrad P. Seghers, Investment Advisers Act Release No. 2656 (Sep. 26, 2007), 91 SEC Docket 2293, 2298, aff'd, 548 F.3d 129 (D.C. Cir. 2008).

Goble has offered no assurances against future violations. The remaining five factors are addressed in the Opinion. The Court found that Goble's conduct was egregious, recurrent, and involved a high degree of scienter. Opinion, p. 26. The Court characterized Goble as "impenitent" and noted that he "insists that he is blameless and denies the import of his conduct vis-à-vis the patently fraudulent May 13, 2008 transaction" – that is, he has failed to recognize the wrongful nature of his conduct. Id. Although the Court observed that his securities licenses have expired and his likelihood of acquiring future licenses is "slim," the Court imposed an injunction specifically restraining Goble from obtaining or attempting to obtain such licenses, an expression of the Court's view that the likelihood of future violations was sufficiently high that additional injunctive relief was warranted.[3] Id.; Final Judgment, pp. 2-3.

These holdings may not now be challenged. Demitrious Julius Shiva, Exchange Act Release No. 38389 (March 12, 1997), 64 SEC Docket 157, 159; Franklin, 91 SEC Docket at 2713. Goble argues that the Court did not find that his conduct was egregious and recurrent and involved a high degree of scienter. Opposition, pp. 3-5. This contention lacks merit. Opinion, p. 26 ("The SEC grounds its application for a permanent injunction against Defendant Goble in the fact that his egregious conduct was reoccurring and occurred with the 'highest degree of scienter.' The Court agrees." (citation omitted, emphasis added)). Although Goble correctly notes that the Court "did not find that [Goble's] occupation would present opportunities for future violations," the Court clearly considered the likelihood of future violations sufficiently high to justify an additional injunction, regardless of Goble's occupation. Opposition, p. 4; Final Judgment, pp. 2-3.

The Court also held, for purposes of calculating the civil penalty, that there was no investor loss because the May 13, 2008 transaction was only on "paper," and that Goble violated securities laws only in connection with a "single transaction." Opinion, p. 29; Opposition, p. 4.

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[3] The scope of this particular injunction and of the injunction prohibiting Goble from engaging in or attempting to engage in the securities business do not necessarily coincide with the scope of an associational bar. See, e.g., 15 U.S.C. § 78c(a)(18) (defining "person associated with a broker or dealer"). For example, a broker/dealer associational bar prohibits a person from becoming a director of a broker or dealer, and from being controlled by, or under common control with, a broker or dealer. Id. Such conduct does not necessarily require a securities license, nor does it necessarily qualify as "engaging in" the securities business. Thus, the Court's injunction (assuming it is obeyed) does not necessarily eliminate all opportunities for future violations (inasmuch as, for example, being a director of a broker or dealer presents such opportunities), and Goble's argument to the contrary lacks merit. Opposition, p. 5 n.2.

Nevertheless, the Court held, for purposes of the injunction, that Goble's conduct was egregious and recurrent. Opinion, p. 26. Inasmuch as these two sets of findings could be considered in conflict, it is the Court's findings in connection with the injunction that control. Shiva, 64 SEC Docket at 159 ("collateral estoppel precludes the Commission from reconsidering . . . factual issues that were actually litigated and necessary to the Court's decision to issue the injunction").[4]

In sum, there is no genuine issue of material fact and every Steadman factor weighs in favor of a permanent associational bar. Additionally, a permanent bar will further the Commission's interests in deterrence, particularly general deterrence. See Altman, 99 SEC Docket at 34438 ("Other attorneys, who might be encouraged by a more lenient sanction to act in a similar fashion, must also be deterred."); Steadman, 603 F.2d at 1140 ("even if further violations of the law are unlikely, the nature of the conduct mandates permanent debarment as a deterrent to others in the industry"). It is remedial rather than punitive because it will protect the integrity of regulatory processes, particularly Commission and FINRA audits, and will thereby protect the investing public from future harm.

Goble, citing an unpublished Third Circuit case, argues that analysis of the Steadman factors is not enough, and that the Commission must in addition articulate why a less drastic remedy than a permanent bar will not suffice. Opposition, p. 3 (citing Epstein v. SEC, 416 F.App'x 142, 147, Fed. Sec. L. Rep. P 95,966 (3rd Cir. Nov. 23, 2010)). Epstein will not be followed, for three reasons. First, the Eleventh Circuit, within the jurisdiction of which Goble committed his misconduct, does not require the showing apparently required by Epstein. Sheldon v. SEC, 45 F.3d 1515, 1517 n.1 (11th Cir. 1995) ("the Commission's choice of sanction may be overturned only if it is found 'unwarranted in law or . . . without justification in fact'") (quoting Steadman, 603 F.2d at 1140). Second, the Third Circuit itself has not consistently enforced the "less drastic remedy" requirement it imposed (and found satisfied) in Epstein. E.g., PTR, Inc. v. SEC, 159 F.App'x 338, 344, Fed. Sec. L. Rep. P 93,552 (3rd Cir. Nov. 9, 2005) (listing the Steadman factors but imposing no "less drastic remedy" requirement). Third, to the extent Epstein is good law, it expresses at best a minority position on the proper standard of review; the majority position is that the Commission's discretion as to remedy should not be "curtailed by judge-made rules." Rizek v. SEC, 215 F.3d 157, 161 (1st Cir. 2000). Epstein's requirement is instead best understood as meaning "no more than the well-established rule that agencies must sufficiently articulate the grounds of their decisions." Id.; see also PAZ

[4] It is not especially relevant that the civil penalty was only first tier, both because a court has wide discretion to determine the size of a civil penalty and because the legal standard differs from that for an injunction. SEC v. Whittemore, 691 F. Supp. 2d 198, 209 (D.C. 2010); Robert G. Weeks, Initial Decision Release No. 199 (Feb. 4, 2002), 76 SEC Docket 2609, 2671. Indeed, the Court explicitly found that a higher penalty would have been inappropriate in light of the "penalty in fact incurred by the cessation of the business of [Goble's] company," a factor that is not directly relevant under Steadman. Opinion, p. 29. Moreover, although a second or third tier penalty would not be consistent with a finding that there was no fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, the reverse is not true. 15 U.S.C. 78u(d)(3)(B) (the various penalties "shall not exceed" certain limits). Thus, the Court here was within its discretion to impose a first tier or second tier penalty, because of Goble's fraud, but could not have imposed a third tier penalty, because there was no fraud loss.

Securities, Inc. v. SEC, 566 F.3d 1172, 1176 (D.C.Cir. 2009) (so long as a sanction is remedial and not punitive, "we will not require the Commission to choose the least onerous of the sanctions meeting those requirements"); Lowry v. SEC, 340 F.3d 501, 504 (8th Cir. 2003) ("The court's role is to decide only whether, under the applicable statute and the facts, the agency made 'an allowable judgment in its choice of the remedy.'"). In short, there is no requirement that the Commission must articulate why a less drastic remedy than a permanent bar will not suffice.[5]

B. Legal Standard for Collateral Bars

The Division requests a bar from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and NRSRO. Motion, p. 9. The requested sanction will be granted except as to the municipal advisor bar.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), enacted July 21, 2010, added collateral bar sanctions to Sections 15(b)(6)(A), 15B(c)(4), and 17A(c)(4)(C) of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940. The new sanctions authorize the Commission to simultaneously suspend or bar an individual who has engaged in certain unlawful conduct from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO. Prior to Dodd-Frank, collateral sanctions were generally authorized only on a piecemeal basis, i.e., only when an individual sought association with that particular branch of the securities industry at issue. Teicher v. SEC, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999) (the Commission could not impose sanctions as to any specific branch until it could "show the nexus matching that branch"). The issue is whether Dodd-Frank's broader collateral bar can be applied to Goble, whose misconduct ended before the enactment of Dodd-Frank.

"The presumption against statutory retroactivity is founded on elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." Landgraf v. USI Film Products, 511 U.S. 244, 245 (1994). Under Landgraf, a statute has impermissibly retroactive effect when it "attaches new legal consequences to events completed before [the statute's] enactment." See Landgraf, 511 U.S. at 269-70.

The presumption against retroactivity, however, stands in tension with the principal that a court is to "'apply the law in effect at the time it renders its decision.'" Landgraf, 511 U.S. at 273 (quoting Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974)). The Supreme Court announced the following test for resolving this tension:

> When a case implicates a federal statute enacted after the events giving rise to the suit, a court's first task is to determine whether Congress has expressly prescribed

[5] Even if Epstein were applicable, Goble's misconduct, particularly his "highest degree of scienter," satisfies the example in Epstein that misconduct must be "so egregious that even if further violations of the law are unlikely, the nature of the conduct mandates permanent disbarment." 416 F.App'x at 147; Opinion, p. 26. Any sanction less than a permanent bar therefore will not suffice under Epstein.

> the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result.

511 U.S. at 280.

The Court then examined certain categories of cases, one of which – involving purely prospective relief – is implicated here: "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." Landgraf, 511 U.S. at 273. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." Id. at 269. This is because relief by injunction operates *in futuro* and the affected party has no vested right in the judge's decree. Id. at 274 (quoting American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 201 (1921)).

American Steel Foundries dealt with an injunction imposed against labor picketers, which included a provision prohibiting peaceful "persuasion" while picketing. During the pendency of the appeal, the Clayton Act went into effect, which prohibited injunctions against peaceful persuasion. The Supreme Court held that the Clayton Act's prohibition "introduce[d] no new principle into the equity jurisprudence" because it was "merely declaratory of what was the best practice always." 257 U.S. at 203. The Court therefore applied the Clayton Act retroactively and upheld a modification to the injunction removing the prohibition against persuasion. Id. at 207-08.

Landgraf's Supreme Court progeny suggest that retroactive application of a statute involving purely prospective relief is appropriate only when the "no vested right" element described in American Steel Foundries is present. INS v. St. Cyr, 533 U.S. 289, 321 (2001), found that a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) eliminating discretionary relief from deportation for certain felons did not apply retroactively to felons who pled guilty before AEDPA's effective date, because doing so would attach a new disability to a completed transaction. Martin v. Hadix, 527 U.S. 343, 358 (1999), found that a reduction in attorney fees imposed by the Prison Litigation Reform Act (PLRA) applied to legal work performed after the PLRA's effective date, but not to work performed before its effective date, because imposing the new fees limitations "would attach new legal consequences to completed conduct" (internal quotation omitted). Hughes Aircraft v. U.S. ex rel. Schumer, 520 U.S. 939, 948-49 (1997), found that certain amendments to the False Claims Act (namely, eliminating one particular defense to a qui tam action and permitting a relator's qui tam action without participation by the government as a party) had retroactive effect because pre-enactment legal rights were altered, and the Court accordingly declined to apply the Act retroactively. Fernandez-Vargas v. Gonzales, 548 U.S. 30, 42-43 (2006), by contrast, found that a particular provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) had no retroactive effect, and was therefore retroactively applicable. However, this was, in part, because the predicate act to which IIRIRA applied was remaining in the U.S. (i.e., a continuing violation) after IIRIRA became effective. That is, the Supreme Court examined whether retroactive application of IIRIRA would impair "vested rights," and found that it would not. 548 U.S. at 44 n.10.

Thus, notwithstanding Landgraf's suggestion to the contrary, retroactive application of a new law authorizing or affecting the propriety of prospective relief may be appropriate in certain cases, but requires more than simply identifying the relief as injunctive. It also requires inquiry into whether the new law would impair vested rights – that is, "rights a party possessed when he acted." Landgraf, 511 U.S. at 280; Fernandez-Vargas, 548 U.S. at 44 n.10 (noting that vested rights are "something more substantial than inchoate expectations and unrealized opportunities," and include "an immediate fixed right of present or future enjoyment"). Consequently, in those cases where the question of retroactivity cannot be resolved by statutory construction, and the new law authorizes injunctive relief, the question of retroactive application essentially reduces to the question of whether such application would impair vested rights. Ferguson v. U.S. Attorney General, 563 F.3d 1254, 1261 (11th Cir. 2009) (describing two-step analysis under Landgraf).

Koch and Sacks, on which Goble relies, do not change this analysis.[6] Koch v. SEC, 177 F.3d 784 (9th Cir. 1999); Sacks v. SEC, 648 F.3d 945 (9th Cir. 2011). First, Koch and Sacks were decided by the Ninth Circuit, and are therefore not directly binding on the present proceeding, which falls within the jurisdiction of the Eleventh Circuit. Second, in Koch, the court held that a newly-created penny stock bar provision of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Penny Stock Act) had retroactive effect because it would increase the consequences of the defendant's pre-Penny Stock Act conduct, and therefore would not be applied retroactively. 177 F.3d at 789. However, the court expressly did not consider the prospective relief exception because it had not been argued by the Commission. Id. at 789 n.7. Koch thus did not directly address the Landgraf prospective relief exception. Finally, in Sacks, the court considered the retroactive application of a 2007 Commission rule prohibiting non-attorneys previously banned from the securities industry from representing parties in securities-related litigation. 648 F.3d at 948-49. The court treated the case as closely analogous to Koch and rejected retroactive application of the bar; however, it is not clear whether the Commission raised the prospective relief exception, and the court remained silent on the issue. Id. at 951-52. Thus, even if Koch and Sacks did govern the present proceeding, they would not be directly on point.

[6] Goble's position on this issue is not entirely clear. He cites John W. Lawton, Initial Decision Release No. 419 (April 29, 2011), 2011 WL 1621014, in support of his argument that Dodd-Frank should not be applied retroactively. In fact, Lawton retroactively imposed all the Dodd-Frank collateral bars except as to municipal advisors and NRSRO's. Id. at *4. To give him the benefit of the doubt, Goble's position will be construed as opposing any collateral bar of any kind.

C. Application to Goble

Dodd-Frank lacks an express retroactivity provision, and "'normal rules of [statutory] construction'" do not reveal Congress' intent regarding retroactivity. Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225, 228 (quoting Lindh v. Murphy, 521 U.S. 320, 326 (1997)); see also SEC v. Daifotis, Fed. Sec. L. Rep. P 96,325, 2011 WL 2183314 at *14 (N.D.Cal. June 6, 2011). The requested relief is injunctive, and the question, then, is whether retroactive application of Dodd-Frank's collateral bar would impair vested rights.

Goble plainly had no such vested right to associate with brokers and dealers. Before Dodd-Frank's enactment, any person who was permanently enjoined "from engaging in or continuing any conduct or practice in connection with [activities as a broker or dealer]" and "in connection with the purchase or sale of any security" was subject to a broker and dealer associational bar under Section 15(b)(6)(A)(iii) of the Exchange Act. 15 U.S.C. § 78o(b)(6)(A) (2006).

But the broker and dealer associational bar is direct, not collateral, because Goble was associated with a broker/dealer while he committed the underlying misconduct. The more important question is whether he had vested rights in associating with other securities industry segments, which rights became impaired once Dodd-Frank became effective. Put another way, the question is whether he had a reasonable expectation that his misconduct would not affect his ability to associate with industry segments other than brokers and dealers.

Before Dodd-Frank, the permanent injunction like the one against Goble subjected a person to a collateral bar on associating with investment advisers, municipal securities dealers, and transfer agents, even though the bar could not be imposed until the person actually sought such association. 15 U.S.C. § 78o-4(c)(4) (2002); 15 U.S.C. § 78q-1(c)(4)(C) (2002); 15 U.S.C. § 80b-3(e)(5), (f) (2006); Teicher, 177 F.3d at 1020-21. Goble thus had no vested right to associate with investment advisers, municipal securities dealers, or transfer agents.

The situation is more complicated with respect to NRSRO's and municipal advisors. There is no associational bar or similar provision predating Dodd-Frank with respect to municipal advisors, nor was there a formal associational bar with respect to NRSRO's. See, e.g., Commissioner Kathleen L. Casey, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011) (noting the absence of these two bars before Dodd-Frank). As to association with municipal advisors, therefore, Goble possessed a right approximating an "immediate fixed right of present or future enjoyment." Fernandez-Vargas, 548 U.S. at 44 n.10. However, in 2006, before Dodd-Frank's enactment and before Goble violated the law, there existed a statutory provision for revoking the registration of an NRSRO if any person associated with it was found to have been enjoined as Goble has. 15 U.S.C. § 78o-7(d)(1)(A) (2006). Goble had no reasonable expectation of, and no vested right in, association with an NRSRO, if such an association would subject the NRSRO to revocation of registration. Although this provision is not formally an associational bar, for practical purposes it amounts to one, because it is unlikely any NRSRO would ever hire him or otherwise associate with him.

Thus, Goble had no vested rights in association with a broker, dealer, investment adviser, municipal securities dealer, transfer agent, or NRSRO, but did have such rights with respect to municipal advisors. A permanent bar is therefore warranted, but only with respect to brokers, dealers, investment advisers, municipal securities dealers, transfer agents, and NRSRO's.

ORDER

It is ORDERED, pursuant to Rule 250 of the Commission's Rules of Practice, that the Division's Motion for Summary Disposition is GRANTED; and

It is further ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Richard L. Goble is BARRED from association with a broker, dealer, investment adviser, municipal securities dealer, NRSRO, and transfer agent.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Cameron Elliot
Administrative Law Judge