SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2334 / December 3, 2004

Admin. Proc. File No. 3-11259

In the Matter of

MICHAEL BATTERMAN

and

RANDALL B. BATTERMAN III

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Injunction

Investment adviser and his son, who was employed with the adviser, were permanently enjoined from violating the antifraud provisions of the federal securities laws. Held, it is in the public interest to bar Respondents from association with any investment adviser.

APPEARANCES:

Michael Batterman, pro se.

Randall B. Batterman III, pro se.

Stephen E. Donahue, Barry W. Rashkover, Helen Glotzer, William J. Estes, Gwen Licardo, and Jayne K. Blumberg, for the Division of Enforcement

Appeal filed: March 9, 2004
Last brief received: June 7, 2004
Oral Argument: October 6, 2004 1/

I.

Michael Batterman ("M. Batterman"), an investment adviser, and Randall B. Batterman III ("R. Batterman"), M. Batterman's son, (collectively "the Battermans") appeal from the decision of an administrative law judge. The law judge found that the Battermans had been permanently enjoined from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940. 2/ The law judge barred the

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1/ Both Respondents initially requested oral argument. However, Michael Batterman determined not to appear and waived his opportunity for oral argument.

Rule of Practice 451(d), 17 C.F.R. § 201.451(d), provides that a member of the Commission who does not attend an oral argument may participate in the decision of proceeding if that member reviews the oral argument transcript. Commissioners Glassman and Goldschmid, who did not attend the oral argument in this matter, have performed the requisite review.

2/ Securities Act Section 17(a) (15 U.S.C. § 77q(a)), Exchange Act Section 10(b), Exchange Act Rule 10b-5 (15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5), and Advisers Act Sections 206(1) and 206(2) (15 U.S.C. § 80b-6(1) and 15 U.S.C. § 80b-6(2)).

Section 17(a) of the Securities Act makes it unlawful for any person to "employ any device, scheme, or artifice to defraud," or "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading," or "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser" in connection with the offer or sale of securities.

Section 10(b) of the Exchange Act makes it unlawful for any person to "use or employ, in connection with the purchase or sale of any security . . ., any manipulative or deceptive device or contrivance in contravention of" the Commission's rules.

Rule 10b-5 makes it unlawful for any person to "employ any device, scheme, or artifice to defraud" or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

(continued...)

Battermans from association with any investment adviser. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

On June 29, 2000, the Commission filed a complaint against the Battermans and Dynasty Fund, Ltd. ("Dynasty"), a foreign investment company that was not registered with the Commission. The complaint alleged that the Battermans defrauded United States investors in connection with the offer and sale of Dynasty's securities. 3/

On September 30, 2002, the district court granted the Commission's motion for summary judgment against the Battermans. 4/ The district court found that, between approximately November 1993 and January 1996, the Battermans solicited several investors for Dynasty. In connection with their offer and sale of Dynasty securities, the Battermans misrepresented and omitted material facts with respect to M. Batterman's criminal and disciplinary sanctions and Dynasty's financial performance. 5/

2/ (...continued)
Section 206 (1) of the Advisers Act prohibits the "employ[ment of] any device, scheme, or artifice to defraud any client or prospective client," and Section 206(2) proscribes "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."

3/ On November 27, 2001, the district court granted a final default judgment against Dynasty.

4/ SEC v. Michael Batterman and Randall B. Batterman III, No. 00 Civ. 4835 (LAP) (S.D.N.Y. Sept. 30, 2002). The court left open pending further proceedings the amount of disgorgement and civil monetary penalties to be paid by the Battermans.

5/ In 1993, M. Batterman pled guilty to two felony counts of income tax evasion. United States v. Batterman, 91 Cr. 395 (KC) (S.D.N.Y. Dec. 22, 1993). During that criminal proceeding, the district court revoked M. Batterman's bail after finding that he had converted for personal use funds entrusted to him by investment advisory clients.

In 1976, the Commission barred M. Batterman from association with any registered broker, dealer, investment company, or investment adviser. SEC v. M. Batterman, Securities Exchange Act Rel. No. 12778 (Mar. 29, 1976), 9 SEC Docket 307, amended, Exchange Act Rel. No. 12278A (Nov. 2, 1976), 10 SEC Docket 843. In the same year, the New York Stock Exchange barred M. Batterman for ten years from employment in any capacity with any member or member firm, and permanently barred him from employment in any supervisory capacity with any member or organization.

After lengthy litigation 6/ and citing the Battermans' failure to respond timely to the Commission's Requests for Admissions ("RFAs") filed by the Commission pursuant to Federal Rule of Civil Procedure ("Fed.R. Civ. P.") 36(b), 7/ the district court deemed admitted the following facts, among others, contained in the RFAs:

- M. Batterman had been convicted of a felony. He also had been sanctioned by the Commission and the New York Stock Exchange. R. Batterman knew about his father's criminal and regulatory history as early as January 1994.

- Between November 1993 and January 1996, M. Batterman, under the name Windsor Group, Ltd. ("Windsor"), engaged, for compensation, in the business of advising clients on investing in securities.

- Between November 1993 and January 1996, M. Batterman, under the name Windsor and with R. Batterman's assistance, acted as Dynasty's investment adviser, controlled transactions in Dynasty's bank and brokerage accounts, and purchased and sold securities in Dynasty's portfolio.

6/ See infra text accompanying note 19.

7/ Fed. R. Civ. P. 36(a) provides that:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters . . . set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request . . . .
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> If the court determines that an answer does not comply with the requirements of this rule, it may order . . . that the matter is admitted . . . .

Fed. R. Civ. P. 36(b) provides that:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission . . . . Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

The district court noted that the Battermans were four months late in responding to the RFAs. The court further found that these responses did not meet the requirements of Fed. R. Civ. P. 36.

- ! In connection with their offer and sale of Dynasty shares, the Battermans knowingly misrepresented to Dynasty investors that M. Batterman was Dynasty's successful money manager who had an unblemished record. The Battermans failed to disclose that M. Batterman was a felon who had been sanctioned.

- ! M. Batterman and R. Batterman drafted and distributed to Dynasty investors a prospectus, which affirmatively misrepresented that Dynasty's investment adviser had never been involved in any criminal, civil, administrative, or investigative proceedings.

- ! M. Batterman and R. Batterman misappropriated funds that they received from investors for Dynasty. Thereafter, the Battermans knowingly made additional misrepresentations to Dynasty's investors concerning Dynasty's financial performance in order to conceal their fraud and induce additional investments in Dynasty's shares.

The district court further found that the Battermans' misrepresentations regarding M. Batterman's disciplinary record and Dynasty's financial status "undoubtedly would have been material to an investor." 8/ The district court determined that the Battermans exhibited a "high degree of scienter."

On July 21, 2003, following further proceedings, the district court entered a final judgment against the Battermans, finding "no genuine issue as to any material fact on liability and that the Commission was entitled to a judgement on liability as a matter of law" pursuant to Fed. R. Civ. P. 56. The district court permanently enjoined the Battermans from violations of Securities Act Section 17(a), Exchange Act Section 10(b), Exchange Act Rule 10b-5 and Advisers Act Sections 206(1) and 206(2). The district court also ordered the Battermans to disgorge $475,000 in ill-gotten gains plus $362,182 in prejudgment interest, and imposed on

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8/ See, e.g., Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)) (fact is material if there is a substantial likelihood that it would significantly alter the "total mix" of information available to a reasonable investor making an investment decision).

each a civil penalty of $250,000. 9/ The Battermans appealed the district court's order to the United States Court of Appeals for the Second Circuit. That appeal is pending. 10/

On September 15, 2003, the Commission instituted this proceeding seeking to bar each of the Battermans based on the injunction. On December 19, 2003, the Division filed a motion for summary disposition pursuant to Rule of Practice 250. 11/

On February 12, 2004, the law judge granted the motion for summary disposition, finding that there was "no genuine issue with regard to any material fact." The law judge held that M. Batterman was an "investment adviser" as defined in Advisers Act Section 202(a)(11). 12/ Noting that the district court had not determined the issue explicitly, the law judge also held that R. Batterman was a "person associated with an investment adviser" within the meaning of Advisers Act Section 202(a)(17). 13/ The law judge determined that there was "no mitigating

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9/ SEC v. Michael Batterman and Randall B. Batterman III, No. 00 Civ. 4385 (LAP)(S.D.N.Y. July 15, 2003). On November 25, 2003, the district court denied the Battermans' motion to stay execution of the judgments against them pending appeal. The United States Court of Appeals for the Second Circuit denied a similar motion on February 26, 2004. The Division states that the Battermans have informed the Commission that they lack the financial ability to satisfy the judgment.

10/ SEC v. Dynasty Fund, Ltd., No. 03-6213 (2d Cir.) (September 5, 2003).

The pending appeal does not affect the injunction's status as a basis for an administrative proceeding. Joseph P. Galluzzi, Exchange Act Rel. No. 46405 (Aug. 23, 2002), 78 SEC Docket 1125, 1130 n.21; Charles Phillip Elliott, 50 S.E.C. 1273, 1276 n.15 (1992), aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994). If the Battermans' appeal were successful, they could apply for modification of this action.

11/ 17 C.F.R. § 201.250. Under Rule of Practice 250, 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." 17 C.F.R. § 201.250(b).

12/ 15 U.S.C. 80b-2(a)(11). "'Investment adviser' means any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities . . . ." The Battermans do not contest that M. Batterman acted as an investment adviser within the meaning of Section 202(a)(11).

13/ 15 U.S.C. § 80b-2(a)(17). Advisers Act Section 202(a)(17) defines a "person associated with an investment adviser" as "any partner, officer, or director of such investment

(continued...)

evidence and no rehabilitation evidence in this case." The law judge concluded that it "is in the public interest to bar the Battermans from association with any investment adviser."

III.

A. Under Section 203(f) of the Advisers Act, 14/ consistent with the public interest, we may discipline a person associated with an investment adviser if, among other things, the associated person has been enjoined from any act or practice specified in Advisers Act Section 203(e)(4). 15/ Section 203(e)(4) permits us to impose sanctions where the person has been enjoined from engaging in conduct in connection with the activity of an investment adviser or in connection with the purchase or sale of a security. The district court order here enjoined the Battermans from further violations of the antifraud provisions of the securities laws in connection with the Battermans' activities in the sale of Dynasty securities. 16/

B. The Battermans assert that the injunction was granted on the basis of Respondents' failure to deny properly the allegations in the Commission's request for admissions pursuant to Fed. R. Civ. P. 36. 17/ The Battermans argue that, pursuant to Fed. R. Civ P. 36(b), admissions may not be used against a party in another proceeding and that the law judge therefore misapplied the principle of collateral estoppel. The Battermans assert that the district court's determination to deem the RFAs admitted does not constitute an admission for any other purpose, nor may the facts thereby deemed admitted be used against the Battermans in this or any other proceeding.

We have held that the existence of the injunction is a sufficient basis for revoking the respondent's registration, if such revocation were in the public interest. We further have stated

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13/ (...continued)
adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser."

14/ 15 U.S.C. § 80b-3(f).

15/ 15 U.S.C. § 80b-3(e)(4).

16/ We note that the record before us also includes excerpts of testimony, Dynasty disclosure documents, correspondence with investors, monthly statements from Dynasty's securities account, the Battermans' statement of disputed material fact filed in the district court pursuant to Local Civil Rule 56.1, an affidavit from R. Batterman, and other documents. In his affidavit, R. Batterman states, among other things, that he has never managed money, never had an active role in the Dynasty Fund, and never misrepresented any data to any potential investor.

17/ See supra note 7.

that, when we consider the particular circumstances presented by the record in assessing the public interest, we will not permit collateral attacks on the decision of a district court. 18/ To the extent that the Respondents wish to challenge the basis of the district court's decision or its use of the RFAs, those matters properly are addressed to the appellate court.

Respondents appear to suggest that the district court's action was based solely on their failure to respond to the RFA's. The Battermans, who were represented by counsel for a substantial part of the district court proceeding, actively litigated the injunctive case before the district court. 19/ The Battermans answered the Commission's injunctive complaint and participated in discovery and prehearing conferences. When the Commission sought summary judgment, the Battermans opposed that motion. In granting summary judgment, the district court noted that Fed. R. Civ. P. 56 required that there be no material issue as to any material fact and that the moving party be entitled to judgment as a matter of law. The district court concluded that, under that standard, granting the Commission's motion for summary judgment was appropriate. 20/

C. Respondents contend that R. Batterman performed only "clerical or ministerial" functions and, therefore, could not be a person associated with an investment adviser as defined

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18/ Marshall E. Melton, Investment Advisers Act Rel. No. 2151 (July 25, 2003), 80 SEC Docket 2812, 2824-25 (footnotes omitted). We have consistently applied the doctrine of collateral estoppel to prevent respondents from relitigating in an administrative proceeding before us factual findings or legal conclusions previously determined. See, e.g. Martin R. Kaiden, 70 SEC Docket 439, 453 and n.39 (July 20, 1999) (applying the doctrine of collateral estoppel on the basis of a consent injunction); Robert Sayegh, 69 SEC Docket 1307, 1312 (Mar. 30, 1999) (applying the doctrine on the basis of an injunction entered after litigation on the merits); John Francis D'Acquisto, 53 S.E.C. 440, 444 (1991) (applying the doctrine on the basis of an injunction entered on summary judgment).

In Kaye, Real & Co., Inc. , 36 S.E.C. 373, 374-75 (1955). the Commission rejected a respondent's proffer of evidence seeking to disprove the facts underlying an injunction that had been based in part on a registrant's failure to deny the factual allegations in requests for admission.

19/ At the argument, R. Batterman asserted that the Battermans had not received the RFAs before their answers were due. The district court rejected this assertion. The district court further found that the Battermans' failure to respond to the RFAs was not the result of any excusable neglect.

20/ Before the law judge, the Battermans suggested that the district court entered judgment by default. In view of the Battermans' participation in the injunctive action, the law judge properly concluded that the underlying district court action had been "actually litigated."

in Advisers Act Section 202(a)(17). 21/ We need not determine whether R. Batterman's functions were "clerical or ministerial" in order to discipline him.

While, as the Battermans note, Section 202(a)(17) generally excludes persons whose functions are "clerical or ministerial" from the requirements of Section 203, that provision excepts "subsection (f) thereof." As noted above, Advisers Act Section 203(f) authorizes us to discipline persons associated with an investment adviser. Thus, we have the power to discipline a person associated with an investment adviser even if that person is associated only in a clerical or ministerial capacity. At the oral argument, R. Batterman conceded that he engaged in "ministerial work."

In any event, the record before us demonstrates that R. Batterman's role was not merely clerical and ministerial. 22/ In his sworn deposition testimony, R. Batterman admitted that he did whatever M. Batterman, his father, asked him to do in connection with Dynasty including: helping to "create [Windsor's] Hong Kong office"; communicating with Barclays, which was Dynasty's administrator; reviewing Dynasty's prospectus; writing letters to clients and prospective clients promoting Dynasty; writing letters to clients advising them of Dynasty's net asset value; and confirming "a lot of things [related to Dynasty]." R. Batterman testified that he viewed himself as a part of the team responsible for Dynasty's investments referred to in the Prospectus, and was confident that others viewed him similarly ("I'm sure [that] I was thought of as part of the team"). 23/

While R. Batterman complains that only selected pages of his deposition are in the record, he did not seek to designate any additional pages. Moreover, his testimony is confirmed by that of his father. M. Batterman testified that R. Batterman did "various things for me," including contacting Barclays to get "information, balances, asset valuations, legal rulings." M. Batterman complained that he was unable to get worthwhile communications from Barclays but that R. Batterman "facilitated things." When he was asked whether R. Batterman helped him at Windsor, M. Batterman replied, "Enormously." The Battermans' sworn testimony establishes

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21/ The district court did not explicitly determine that R. Batterman was associated with an investment adviser when it concluded that R. Batterman aided and abetted M. Battermans' violations of the Advisers Act.

22/ See supra note 16.

23/ R. Batterman suggests that he was unaware of M. Batterman's disciplinary history. We note that the record includes the transcript of M. Batterman's sentencing hearing in connection with his income tax evasion conviction. In that transcript, the Probation Office reported that it had interviewed R. Batterman.

that R. Batterman's role was extensive, important to the fund's operations, and, therefore, not clerical or ministerial in nature. 24/

We find that R. Batterman was a "person associated with an investment adviser" within the meaning of Advisers Act Section 202(a)(17). As set forth above, Advisers Act Section 203(f) authorizes us to impose sanctions in the public interest against an associated person of an investment adviser if that person has been enjoined from engaging in conduct in connection with the purchase or sale of any security.

IV.

We have determined that it is in the public interest to bar the Battermans from associating with any investment adviser. When considering whether an administrative sanction serves the public interest, we consider the factors identified in Steadman v. SEC: the egregiousness of a respondent's conduct, the isolated or recurrent nature of the violation, the degree of scienter, the sincerity of the respondent's assurances against future violations, the respondent's recognition that the conduct was wrongful, and the likelihood of recurring violations. 25/ The appropriate sanction depends on the facts and circumstances of each case. 26/

We have previously stated that "[a]n injunction, by its very nature, is predicated on conduct that would or does violate laws, rules, or regulations." 27/

> The fact that a securities professional has engaged, or was about to engage, in such a violation [of the securities laws] clearly can create a need to discipline the person in the public interest. Congress made a basic public interest determination about the seriousness of an injunction when it specified an injunction as one of the grounds upon which the Commission can take disciplinary action against securities professionals under Advisers Act Sections 203(e)(4) and 203(f) . . . .

24/ See SEC v. Householder, No. 02 Civ. 4128, (N.D. Ill. Oct. 1, 2002) (involvement in "forming and running" investment company not "clerical or ministerial" for purposes of Section 202 (a)(17)).

25/ Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981).

26/ See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); John Francis D'Acquisto, 53 S.E.C. at 445 n.14.

27/ Melton, 80 SEC Docket at 2822.

> We believe that an antifraud injunction can, in the first instance, indicate the appropriateness in the public interest of revocation of registration or a suspension or bar from participation in the securities industry. 28/

Here, in addition to the injunction, the record contains excerpts of the Battermans' testimony, correspondence, and Dynasty securities account records. This record demonstrates that the Battermans' conduct was egregious and evidenced a high degree of scienter.

An investment adviser has "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients." 29/ Over a period of nearly three years, the Battermans solicited investors for Dynasty. They circulated disclosure documents that misrepresented and omitted material facts to their clients regarding M. Batterman's relationship with Windsor and Dynasty and his past misconduct. The Battermans further sent communications to the investors misrepresenting Dynasty's financial status. For example, in 1995, one investor was told that Dynasty "had soared 16% for the year" 1994. However, the Dynasty brokerage statements show that the Dynasty account balance declined from approximately $492,000 to $127,940 between January and December 1994.

When an investor sought to withdraw money from Dynasty in January 1996, M. Batterman claimed that he was attempting to contact the bank to assist the investor. However, the record also includes a letter from the bank indicating that it had ceased to act as agent or registered administrator for the Dynasty in November 1995. On other occasions, M. Batterman denied to an investor that he had any control of withdrawals.

These violations were ongoing, not isolated, and occurred over several years. 30/ M. Batterman has an extensive history of criminal and regulatory violations. 31/ Neither M. Batterman nor R. Batterman has offered any assurance against future securities laws violations or expressed recognition of wrongdoing. Indeed, in his testimony, M. Batterman

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28/ Id. at 2822-23. See Advisers Act Section 209(d) (15 U.S.C. 80b-9(d)) (Commission authority to seek injunction for violations of the Advisers Act).

29/ SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963) (footnotes omitted).

30/ R. Batterman charges that the Division "has incorrectly and falsely accused me of having been involved in previous and recurrent 'wrongdoing.'" Respondent misconstrues the Division's argument. The Division asserts that the Battermans were found to have defrauded at least five investors over three years. As a result, the Division correctly argued that R. Batterman's misconduct was recurrent, not isolated.

31/ See supra note 5.

blamed the customers. These factors demonstrate that their misconduct poses a future threat of harm. Under the circumstances, we believe that it is in the public interest that the Battermans be barred from association with any investment adviser.

An appropriate order will issue. 32/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS).

Jonathan G. Katz
Secretary

32/ We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent with or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2334 / December 3, 2004

Admin. Proc. File No. 3-11259

In the Matter of

MICHAEL BATTERMAN

and

RANDALL B. BATTERMAN III

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Michael Batterman and Randall B. Batterman III be, and they hereby are, barred from association with any investment adviser.

By the Commission.

Jonathan G. Katz
Secretary