INITIAL DECISION RELEASE NO. 441
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14408

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

In the Matter of	:	
	:	
	:	INITIAL DECISION
LODAVINA GROSNICKLE	:	November 10, 2011
	:	

APPEARANCES: Donald W. Searles for the Division of Enforcement, Securities and Exchange Commission

Bonita P. Martinez for Respondent Lodavina Grosnickle

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision grants the Motion for Summary Disposition filed by the Division of Enforcement (Division), denies the Motion for Summary Disposition filed by Respondent Lodavina Grosnickle (Grosnickle), and permanently bars Grosnickle from associating with a broker, dealer, investment adviser, municipal securities dealer, nationally recognized statistical rating organization (NRSRO), and transfer agent, and from participating in a penny stock offering.[1]

[1] The parties have filed the following papers: the Division's Motion for Summary Disposition (Div. Motion) (with a Declaration of Donald W. Searles and Exhibits 1 through 7 attached), Grosnickle's Opposition thereto (Resp. Oppo.), Grosnickle's Motion for Summary Disposition (Resp. Motion) (with a Declaration of Lodavina Grosnickle, Separate Statement of Undisputed Facts, Request for Judicial Notice, excerpts of the Deposition of Lodavina Grosnickle, Notice of Lodgment of Exhibits, and Exhibits D through G attached), and the Division's Opposition thereto (Div. Oppo.).

PROCEDURAL HISTORY

On June 2, 2011, the Securities and Exchange Commission (Commission) issued an Order Instituting Proceedings (OIP), alleging that on May 9, 2011, the United States District Court for the Central District of California (Court) entered a final default judgment (Final Judgment) against Grosnickle in SEC v. TG Capital LLC, et al., Civil Action Number 8:07-cv-00579-CJC-AN (Civil Case). OIP, p. 2. The Final Judgment permanently enjoined Grosnickle from violating Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 (Exchange Act), Exchange Act Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933 (Securities Act). OIP, p. 2.

On June 27, 2011, Grosnickle filed her Answer. At a telephonic prehearing conference on July 6, 2011, the parties were granted leave to file motions for summary disposition. The parties filed their respective motions on August 19, 2011, the Division filed its opposition on August 25, 2011, and Grosnickle filed her opposition on August 29, 2011. Neither party filed a reply.

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, Grosnickle is precluded from contesting any findings made against her in the Civil Case. James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713, aff'd, 285 Fed.Appx. 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); 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.[2] Additionally, Grosnickle's Request for Judicial Notice, seeking official notice of the Complaint, Order, and OIP, is granted, and official notice of these documents has been taken.

[2] The Court's Order Granting Plaintiff's Motion for Entry of Default Judgment Against Defendant Lodavina Grosnickle (Order) (Div. Motion, Ex. 4) takes the well-pleaded factual allegations of the Complaint in the Civil Case (Complaint) (Div. Motion, Ex. 3) as true, but otherwise generally contains no separate findings of fact. Order, pp. 3 & 5 n.1. Accordingly, the Findings of Fact, infra, are taken largely from the Complaint.

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

Grosnickle was the co-founder, with Thanh Viet Jeremy Cao (Cao), of TG Capital LLC (TGC), and served as its vice president. Complaint, p. 3. At the time the Complaint was filed, Grosnickle held Series 6 and 63 licenses, but she was not associated with a registered broker-dealer. Id.; Resp. Motion, pp. 9, 18. TGC was a Nevada limited liability company formed in February 2007, with registered business addresses in Irvine, California, and Las Vegas, Nevada. Complaint, p. 3.

Between February and April 2007, Grosnickle and Cao offered and sold "preferred membership units" in TGC, with guaranteed rates of return of 28% to 30%. Complaint, pp. 2, 4. They solicited friends and family, and conducted investment seminars where both Grosnickle and Cao made presentations. Id. at 4. For example, in February or March 2007, Grosnickle and Cao held an investment seminar in San Diego, California, where Cao directed potential investors to TGC's private placement memorandum (PPM). Id. In other instances, Grosnickle discussed TGC with potential investors, referred investors to Cao, and gave investors access to the PPM. Id. at 4, 10. For her efforts, she received commissions of 4% to 10% of the total contributions of investors she brought into TGC. Id. Her commission was not disclosed in the PPM. Id.

Grosnickle and Cao, either directly or through the PPM, represented that TGC made money by (a) investing in banking instruments backed by bank guarantees and gold, (b) investing in gold by purchasing a letter of credit or a standby letter of credit, or (c) loaning money to Wells Fargo Bank. Complaint, p. 5. According to the PPM, these types of investments were TGC's only source of revenue. Id. In soliciting investors, Grosnickle represented, orally and in writing, that TGC's investments were secured by bank guarantees. Id. at 5-6. This representation also appeared in the PPM. Id. at 6. At different times, Grosnickle also represented to investors that TGC's investments were guaranteed by gold. Id. at 8.

In fact, Grosnickle's representations regarding investment guarantees were false, and Grosnickle knew they were false.[3] Complaint, pp. 6-8; Order, pp. 6-7. Grosnickle and Cao failed to obtain bank guarantees, failed to invest in banking instruments, and failed to secure TGC investments with gold, all of which were promised in the PPM. Complaint, p. 5. Grosnickle and Cao also touted strategic relationships between TGC and Wells Fargo Bank and UBS, which were promised in the PPM but which did not exist. Id. at 5-6.

[3] The Complaint alleges alternatively that Grosnickle was reckless in not knowing that her representations were false. Complaint, pp. 6-8. However, the Court explicitly found that Grosnickle acted with scienter, and that her misconduct involved fraud and deceit. Order, pp. 6-7. Accordingly, it is concluded that Grosnickle acted with knowledge, rather than mere recklessness, that her representations were false.

Grosnickle and Cao committed several specific deceitful acts in furtherance of their fraud. For example, the PPM included an exhibit purporting to be a letter on Wells Fargo Bank stationery and signed by a Wells Fargo employee. Complaint, pp. 6-7. This letter refers to "bank guarantee transactions" through Wells Fargo, and was cited in the PPM as evidence that Wells Fargo intended to "work with" TGC. Id. In fact, Cao forged this letter. Id. at 7. Grosnickle disseminated this letter. Id. at 5.

As another example, on April 15, 2007, Cao emailed Grosnickle a cover letter and purported bank guarantee from Bank Negara Indonesia (BNI), and asked her to distribute them to investors. Complaint, pp. 2, 7. The cover letter stated that the "original bank guarantee" was enclosed, but in fact, the BNI guarantee was forged. Id. at 7. Grosnickle forwarded the cover letter and false bank guarantee to at least one investor on April 16, 2007, knowing that the bank guarantee was forged. Id. at 7-8.

As a third example, on April 4, 2007, Cao purportedly loaned $2.5 million in investor funds to a third party who is not named as the borrower in the loan documentation. Complaint, p. 8. Approximately $1.8 million of the loan proceeds were transferred to an account at an HSBC branch in Hong Kong, and Cao unsuccessfully attempted to wire the remaining $720,000 to a domestic account in the borrower's name. Id. TGC is not named in the loan documents, and had no recourse against the borrower in the event of default. Id. Cao signed the loan documents as lender, and Grosnickle signed them "in acknowledgement." Id. Grosnickle represented to investors that the forged BNI bank guarantee secured the loan. Id. The April 15, 2007 letter identified the borrower as TGC's "international agent for service of process," but did not disclose that Cao used investor funds to make a personal loan to the borrower. Id. at 8-9.

In total, Grosnickle and Cao obtained at least $3.78 million from approximately 33 investors. Complaint, p. 4.

On May 22, 2007, the Division filed the Civil Case, asserting violations of Securities Act Section 17(a) (15 U.S.C. § 77q(a)) (prohibiting fraud in the offer or sale of securities), Exchange Act Sections 10(b) (15 U.S.C. § 78j(b)) (prohibiting fraud in the purchase or sale of securities) and 15(a) (15 U.S.C. § 78o(a)(1)) (prohibiting acting as a broker or dealer without registration), and Exchange Act Rule 10b-5 (17 C.F.R. §§ 240.10b-5) (prohibiting fraud in the purchase or sale of securities). Complaint, pp. 10-12. Grosnickle failed to timely file an Answer, and the Clerk of Court issued a default against her on July 13, 2007. Div. Motion, Ex. 5. Grosnickle moved to set aside the default, and the Court denied this motion on October 11, 2007. Div. Motion, Exs. 6, 7. The Division then moved for a final judgment, which was granted on May 9, 2011. Order; Final Judgment.

The Final Judgment imposed a third tier civil penalty of $130,000, ordered disgorgement in the amount of $216,355.93,[4] and enjoined Grosnickle as follows:

[4] This is the total of the basic disgorgement amount plus prejudgment interest. Order, p. 5. In the Final Judgment, the total amount due is stated as $216,366.93, which appears to be a typographical error. Final Judgment, p. 3.

> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that [Grosnickle] and [Grosnickle's] agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, by using 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 security:
>
> (a) to employ any device, scheme, or artifice to defraud;
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Final Judgment, pp. 1-4. The Court imposed similar injunctions prohibiting violation of Exchange Act Section 15(a) and Securities Act Section 17(a). Id. at 2.

There is no genuine dispute over these Findings of Fact. Indeed, Grosnickle concedes that the "well pleaded allegations in the SEC complaint are admitted by Ms. Grosnickle's failure to respond," and "there is no triable issue of material fact." Resp. Motion, pp. 8, 11, 13 (section header). Grosnickle nonetheless disputes a number of facts found against her in the Civil Case, but this does not raise any genuine issues of material fact because the facts the Court found against her cannot be contested in this proceeding. E.g., Resp. Motion, pp. 6-7; see Franklin, 91 SEC Docket at 2713 (Commission may not reconsider any factual or procedural issues actually litigated and necessary to the court's decision to issue the injunction).[5]

Grosnickle has also submitted her own Separate Statement of Undisputed Facts. Resp. Motion, attachment. With two exceptions, all of her "Undisputed Facts" are consistent with these Findings of Fact. The exceptions, that the "claims asserted in the [Complaint] are res judicata" (Statement of Fact No. 8) and "[e]ntry of the [i]njunctions are claims, which have been actually litigated" (Statement of Fact No. 9), are in fact conclusions of law addressed infra.

CONCLUSIONS OF LAW

A. The Division is Entitled to Judgment

[5] Additionally, many of the points Grosnickle now raises in connection with her factual disputes were considered and rejected by the Court. Order, p. 5 n.1. These points are similarly rejected in the present proceeding.

Grosnickle 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. The relevant securities are the TGC membership units. Thus, there is no genuine issue of material fact and the Division's Motion is granted.

B. Grosnickle is Not Entitled to Judgment

Grosnickle argues that the Final Judgment is res judicata and bars the present proceeding. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979). Res judicata precludes parties from relitigating claims that were or could have been raised in the prior action. San Remo Hotel, L.P. v. City and County of San Francisco, California, 545 U.S. 323, 336 n.16 (2005); Allen v. McCurry, 449 U.S. 90, 94 (1980). The party asserting res judicata has the burden of proving it. In re Brawders, 503 F.3d 856, 867 (9th Cir. 2007). Three elements must be proven to establish res judicata: the earlier suit (1) involved the same claim or cause of action as the later suit; (2) reached a final judgment on the merits; and (3) involved identical parties or privies. Mpoyo v. Litton Electro-Optical Systems, 430 F.3d 985, 987 (9th Cir. 2005).

It is well established that an administrative follow-on proceeding does not qualify as the "same claim or cause of action" as its predicate legal proceeding. Gary M. Kornman, Exchange Act Release No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14269; Michael T. Studer, Exchange Act Release No. 50411 (Sept. 20, 2004), 83 SEC Docket 2853, 2858; Barr Financial Group, Inc., Investment Advisers Act Release No. 2179 (Oct. 2, 2003), 81 SEC Docket 828, 840 n.29; Conrad P. Seghers, Initial Decision Release No. 326 (Feb. 5, 2007), 89 SEC Docket 3263, 3267. Indeed, the present proceeding is expressly authorized by (in this case) Section 15(b)(6)(A)(iii) of the Exchange Act. 15 U.S.C. § 78o(b)(6)(A); Studer, 83 SEC Docket at 2858. The present cause of action was not actually litigated in the Civil Case, nor could it have been, because no follow-on administrative action could have been pursued until entry of the Final Judgment. 15 U.S.C. § 78o(b)(6)(A). In other words, the Court had no jurisdiction over the present administrative proceeding. Eichman v. Fotomat Corp., 759 F.2d 1434, 1437 (9th Cir. 1985) (for res judicata to apply under California law, "the court rendering the prior judgment must have had jurisdiction to hear such claims"). Grosnickle has failed to prove her res judicata defense, and her Motion is therefore denied.[6]

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

[6] Grosnickle alludes to other "defenses" in her Motion, but does not argue them. Resp. Motion, p. 13. Accordingly, they do not provide a basis to grant her summary disposition.

respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of 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).

Grosnickle's misconduct was egregious, recurrent, and involved a high degree of scienter. Order, p. 7. She knowingly assisted in the dissemination of forged documents, helped divert investor funds for personal use, and misrepresented material facts to dozens of victims over the course of at least two months, resulting in a fraud loss of approximately $3.78 million. Grosnickle has offered no assurances against future violations. She has failed to recognize the wrongful nature of her conduct, and indeed, she insists that she was merely an investor and did nothing wrong. Order, p. 7; e.g., Declaration of Lodavina Grosnickle. Although Grosnickle's Motion and Opposition argue that she is "remorseful" and has "learned a valuable lesson," her Declaration contains no assurances against future violations, sincere or otherwise, nor is there any other actual evidence of such assurances. Order, p. 7; Declaration of Lodavina Grosnickle. She apparently retains her securities licenses, and the Court found that she "might be tempted to commit future violations based on her professional background." Order, p. 7. The Court's findings on these points may not now be challenged. Demitrious Julius Shiva, Exchange Act Release No. 38389 (Mar. 12, 1997), 64 SEC Docket 157, 159; Franklin, 91 SEC Docket at 2713.

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 and will thereby protect the investing public from future harm.

Grosnickle argues that analysis of the Steadman factors is not enough, and that the Commission must in addition articulate why a remedy less drastic than a permanent bar will not suffice. Resp. Oppo., pp. 8-9. This is not the law. Rizek v. SEC, 215 F.3d 157, 161 (1st Cir. 2000) (the Commission's discretion as to remedy should not be "curtailed by judge-made rules"); PTR, Inc. v. SEC, 159 Fed.Appx. 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); 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.'"); Vernazza v. SEC, 327 F.3d 851, 862 (9th Cir. 2003) (reviewing sanctions only for abuse of discretion); 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); PAZ 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 lease onerous of the sanctions meeting those requirements"). In short, there is no requirement that the Commission must articulate why a less drastic remedy than a permanent bar will not suffice.

B. Legal Standard for Collateral Bars

The Division requests that Grosnickle be barred from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and NRSRO, and from participating in a penny stock offering. Div. Motion, p. 7. 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 cannot 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 Grosnickle, 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). See also Sacks v. SEC, 648 F.3d 945 (9th Cir. 2011); Koch v. SEC, 177 F.3d 784 (9th Cir. 1999). 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 principle 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 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.

This proceeding falls within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, which has considered the retroactivity of Commission sanctions at least three times since Landgraf. In SEC v. First Pacific Bancorp, 142 F.3d 1186 (9th Cir. 1998), the court considered the newly-created officer and director bar of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Penny Stock Act). The court applied the bar retroactively, noting that the Act "merely codified the equitable authority to impose [an] officer and director bar which the courts already possessed and exercised." Id. at 1193 n.8 That is, the court essentially adopted the reasoning of American Steel Foundries. However, it did not take up Landgraf's prospective relief exception, or even cite to Landgraf at all.

The following year, in Koch, the court considered whether the newly-created penny stock bar provision of the Penny Stock Act applied to conduct committed by an individual prior to passage of the act. The court held that the Commission could not retroactively apply the bar because it would increase the consequences of the individual's pre-act conduct. 177 F.3d at 789. Again, the court did not take up Landgraf's prospective relief exception, because it had not been argued by the Commission. Id. at 789 n.7.

Finally, in Sacks, the court considered 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:

> For all intents and purposes, Koch is indistinguishable from the facts here. Like

> Koch, Sacks was barred by the [Commission] from engaging in certain securities-related activities. And, like Koch, Sacks was confronted with the consequences of a new statute or regulation as a result of prior misconduct-- the new rule here bars Sacks, like Koch, from participating in a securities-related activity in which he had previously been allowed to participate. Based on the reasoning in Koch, as well as the "deeply rooted" "presumption against retroactivity," Koch, 177 F.3d at 785, we hold that the rule here cannot be applied retroactively.

Id. at 952. As with First Pacific Bancorp and Koch, the court did not take up Landgraf's prospective relief exception, and it is not clear whether the Commission raised the issue.

Thus, notwithstanding Landgraf, the Ninth Circuit has never recognized the prospective relief exception to retroactive application of a Commission sanction. Consequently, in those Ninth Circuit cases where the question of retroactivity cannot be resolved by statutory construction, and the new law authorizes injunctive relief, the question of retroactive application is limited to the question of whether such application would have retroactive effect. Sacks, 648 F.3d at 951 (describing two-step analysis under Landgraf). That question, in turn, is answered by examining whether the new law codifies or declares an existing practice, as in First Pacific Bancorp, or retroactively bars an individual from "securities-related activity in which he had previously been allowed to participate," as in Koch and Sacks. Id. at 952; 142 F.3d at 1193 n.8.

C. Application to Grosnickle

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 have retroactive effect.

Before Dodd-Frank's enactment (and before Grosnickle began her misconduct), any person who was permanently enjoined "from engaging in or continuing any conduct or practice in connection with [activities as a broker or dealer]" or "in connection with the purchase or sale of any security" was subject, without further action on that person's part, to a broker and dealer associational bar and could not participate in an offering of penny stock under Section 15(b)(6)(A)(iii) of the Exchange Act. 15 U.S.C. § 78o(b)(6)(A) (2002). That is, these two bars were and are direct, not collateral. Under both Koch and Sacks, Dodd-Frank has no retroactive effect on Grosnickle as to the broker, dealer, and penny stock bars, and these bars may lawfully be applied to her.

Before Dodd-Frank's enactment there was no associational bar or similar provision with respect to municipal advisors. See, e.g., Commissioner Kathleen L. Casey, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011) (Casey Address) (noting that the municipal advisor bar did not exist before Dodd-Frank). Grosnickle was "allowed to participate" in this industry segment prior to Dodd-Frank, and imposing a municipal advisor bar would therefore have an impermissible retroactive effect. Sacks, 648 F.3d at 952.

The remaining bars present a different situation. Had Grosnickle sought association with an investment adviser, municipal securities dealer, or transfer agent prior to Dodd-Frank, bars could have been imposed against her because of the permanent injunction. 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(f) (2002). That Grosnickle had to seek such association before being sanctioned demonstrates that Dodd-Frank's new collateral bar is not merely a codification or declaration of "what was the best practice always" – otherwise, the bars for these three industry segments could have been imposed without any affirmative action on Grosnickle's part. American Steel Foundries, 257 U.S. at 203. However, this factor is outweighed by the fact that, as a practical matter, Grosnickle was not "allowed to participate" in these three industry segments because of the injunction against her. Sacks, 648 F.3d at 952. Grosnickle had no reasonable expectation of being able to associate with an investment adviser, municipal securities dealer, or transfer agent, even before Dodd-Frank. Dodd-Frank simply eliminates one step in the process of barring her: that of seeking association.

There was also no formal associational bar predating Dodd-Frank with respect to NRSRO's. See Casey Address (noting that the NRSRO bar did not exist before Dodd-Frank). However, in 2006, before Dodd-Frank's enactment and before Grosnickle began violating 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 Grosnickle has. 15 U.S.C. § 78o-7(d)(1)(A) (2006). Grosnickle had no reasonable expectation of being "allowed" to associate 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 her or otherwise associate with her.

Thus, under Landgraf and its progeny First Pacific Bancorp, Koch, and Sacks, application of the Dodd-Frank collateral bar to Grosnickle is proper as to association with a broker, dealer, investment adviser, municipal securities dealer, NRSRO, and transfer agent, and to participation in a penny stock offering, but not as to association with municipal advisors. A permanent bar is therefore warranted, but only with respect to brokers, dealers, investment advisers, municipal securities dealers, NRSRO's, transfer agents, and penny stock offerings.

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 Grosnickle's Motion for Summary Disposition is DENIED; and

It is further ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Lodavina Grosnickle is BARRED from association with a broker, dealer, investment adviser, municipal securities dealer, NRSRO, and transfer agent, and from participating in a penny stock offering.

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