INITIAL DECISION RELEASE NO. 442
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14472

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
DALE E. ST. JEAN	:	November 17, 2011
	:	
	:	

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

Dale E. St. Jean, pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

INTRODUCTION

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on July 20, 2011, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that on June 30, 2011, the United States District Court for the Middle District of Florida entered a final judgment (Final Judgment) against Respondent Dale E. St. Jean (St. Jean or Respondent) in SEC v. St. Jean, 8:10-cv-02859-JDW-MAP (Civil Case). OIP at 2. The Final Judgment permanently enjoined St. Jean, by default, from violating Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder, and from violating Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. Id.

The Commission instituted this proceeding to determine whether these allegations are true and, if so, to decide whether remedial action is appropriate in the public interest. The Division of Enforcement (Division) seeks to collaterally bar St. Jean under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)[1] from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (NRSRO).

St. Jean was served with the OIP on August 17, 2011, in accordance with 17 C.F.R. § 201.141(a)(2)(i), and filed his Answer on August 18, 2011. A prehearing conference was held on August 23, 2011, at which the Division was granted leave to file a Motion for Summary

[1] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Disposition (Motion), pursuant to 17 C.F.R. § 201.250. The Division filed its Motion on September 16, 2011. The Motion includes two exhibits: Exhibit A is the Final Judgment and Order granting the Commission's Motion for Entry of Default Judgment of Permanent Injunction and Other Relief Against Respondent (Order); Exhibit B is the Complaint in the Civil Case (Complaint).

Respondent submitted his Opposition, dated October 21, to my Office on November 2, 2011, and the Division filed its Reply on October 31, 2011.[2] On August 17, 2011, the Division filed its Notice That Documents Are Available for Inspection and Copying.

Standards for Summary Disposition

After a 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 with respect to that respondent. 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.

The Commission has repeatedly upheld use of the summary disposition procedure in cases such as this one where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 (collecting cases); Jeffrey L. Gibson v. SEC, 561 F.3d 548 (6th Cir. Mar. 11, 2009) (petition for review denied). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare." See John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 55 S.E.C. 1023, 1028 n.12.

Findings of fact and conclusions of law made in the underlying action are immune from attack in a follow-on administrative proceeding. See Phillip J. Milligan, Exchange Act Release No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26796-97; Ted Harold Westerfield, Exchange Act Release No. 41126 (Mar. 1, 1999), 54 S.E.C. 25, 32 n.22 (collecting cases). The Commission does not permit a respondent to relitigate issues that were addressed in previous proceedings against the respondent. See William F. Lincoln, Exchange Act Release No. 39629 (Feb. 9, 1998), 53 S.E.C. 452, 455-56. To the extent that St. Jean's Answer raises such challenges, his collateral attack provides no basis for denying the Motion.

There is no genuine issue with regard to any fact that is material to this proceeding. The Final Judgment was entered based upon Respondent's default, permanently enjoining him from

[2] Respondent was granted a two-week extension of time to file his Opposition to the Division's Motion. See Scheduling Order, Aug. 24, 2011; Order, Oct. 12, 2011.

future violations of the federal securities laws. All of Respondent's defenses included in his Answer and Opposition were considered and rejected, as discussed more fully below.

FINDINGS OF FACT

Pursuant to the Final Judgment, St. Jean is deemed to have admitted the well-plead allegations of the Complaint, and liability is established against him. Order at 2.

St. Jean, age 51 as of July 20, 2011, is a Canadian citizen and resides in Alberta, Canada. Complaint at 3; OIP at 1. St. Jean was a managing member of Arcanum Equity Fund, LLC (Arcanum), and treasurer, vice president, and managing member of Vestium Management Group. Complaint at 3. Vestium Management Group served as the managing member of Vestium Equity Fund, LLC (Vestium, and together with Arcanum, the Funds). Complaint at 1-2, 7. St. Jean was also the principal of Transcap Corporation (Transcap), a Canadian investment company that received millions of dollars from the Funds. Id. at 3.

Between April 2008 and July 2009, St. Jean, among others, engaged in a fraudulent scheme to misappropriate $34 million in capital raised for the Funds. Id. at 1, 6, 10. St. Jean participated in the Funds' investment decisions, signed investment contracts on behalf of the Funds, and traded for the Funds. Id. at 5. Arcanum's offering materials stated that Arcanum would use the capital raised only to buy medium-term notes with a credit rating of "A+". Id. at 6-7. Vestium's private placement memorandum and trust indenture similarly restricted its use of investment capital to medium-term notes with a credit rating of "A" or better, certificates of deposit, or money market funds. Id. at 7.

In December 2008, St. Jean, among others, solicited investors to sign an "Exchange Agreement" to convert their Arcanum notes into Vestium membership interests; forty-seven Arcanum investors agreed to do so, exchanging approximately $9 million of Arcanum notes for Vestium membership interests. Id. at 8. The offering materials for the conversion limited investment of the approximately $9 million to highly-rated medium-term notes, certain bank debt instruments such as certificates of deposit, or "physical commodities investments." Id.

Respondent, among others, blatantly disregarded the investment parameters in the Funds' offering materials, and steered millions of dollars to companies in which he had a financial interest. Id. at 9. In addition, St. Jean and others commingled Arcanum and Vestium funds without regard to which of the two Funds the money came from. Id. Between October 2008 and July 2009, St. Jean and others approved transfers of more than $12.9 million from the Funds to Transcap. Id. at 10. Respondent and others failed to disclose to investors the conflict of interest posed by the $12.9 million in transfers to Transcap, or the fact that such transfers violated the Funds' investment parameters. Id. at 11. St. Jean and another managing member also took undisclosed loans of approximately $1.5 million through Transcap. Id. at 19.

The managing members, including St. Jean, improperly took fees based on the Funds' fictitious profits. Id. at 16-17. Arcanum sent investors monthly account statements reporting that the fund was profitable in every month from July 2008 through December 2008. Id. at 16. Vestium similarly reported profits to investors in every month from January 2009 through July

2009. However, the Funds were not profitable during 2008 and 2009; they lost approximately $8.1 million during this time period. Id. at 17. St. Jean was made aware of issues suggesting the Funds were not profitable, yet he took partner draws from Arcanum totaling $141,500 in 2008 and 2009, without taking any steps to determine if Arcanum was profitable. Id.

In his Answer, St. Jean denies the factual findings in the Complaint, including, among other things, his participation in the Funds' investment decisions, his execution of contractual documents, and his authority and control over the Funds, including trading decisions. See generally, Answer. Similarly, St. Jean's Opposition denies the allegations of egregious and recurrent conduct, or that he acted with scienter. Opp. at ¶¶ 22, 23. St. Jean further states that he "was not an investment adviser," "there was no multi-million dollar fraud," and he "has not committed securities violations." Id. at ¶¶ 33, 36, 39. St. Jean also generally contends that his intent to file a motion to set aside the default Final Judgment precludes judgment in this administrative proceeding. See generally, Opp. Respondent's defenses fail. As discussed previously, St. Jean is not permitted to relitigate the facts of the underlying Final Judgment. Moreover, "[i]t is well established that the existence of an appeal of the [d]istrict [c]ourt's decision does not affect [an] injunction's status as a basis for administrative action." Conrad P. Seghers, Advisers Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2297.

CONCLUSIONS OF LAW

This proceeding was instituted pursuant to Advisers Act Section 203(f). In relevant part, Section 203(f) of the Advisers Act authorizes the Commission to impose remedial sanctions on a person associated with an investment adviser at the time of the misconduct, consistent with the public interest, if the person is enjoined from engaging in any act, conduct, or practice in connection with the purchase or sale of securities. See 15 U.S.C. §§ 80(b)(3)(e) and 80(b)(3)(f). At the time of his underlying misconduct, St. Jean was acting as an investment adviser. See Complaint at 5, 22. A default Final Judgment was issued, permanently enjoining St. Jean from further violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. The Division seeks to collaterally bar St. Jean from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or NRSRO. Motion at 9.

This case involves an application of the collateral bar sanctions in Section 203(f) of the Advisers Act, added by Section 925 of the Dodd-Frank Act, based on St. Jean's conduct that occurred before Dodd-Frank was signed into law.[3] Prior to the Dodd-Frank Act, the only sanctions authorized by Section 203(f) of the Advisers Act were to suspend or bar a person from association with an investment adviser; 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 Dodd-Frank Act amended Section 203(f) to authorize the Commission to suspend or bar a person from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or NRSRO. The issue is

[3] Dodd-Frank was signed into law on July 21, 2010.

whether this collateral bar can be applied to St. Jean's pre Dodd-Frank Act conduct. The Commission has not yet ruled on this issue. [4]

The Division argues that a collateral bar is appropriate here because it is a remedial measure that constitutes "prospective relief designed to protect the public '*in futuro*'" and, therefore, does not raise retroactivity concerns. Motion at 7-8. Respondent argues that a collateral bar is impermissibly "retrospective and may not be applied except in certain extenuating circumstances." Opp. at ¶ 41.

The leading case on retroactivity is Landgraf v. USI Film Products, 511 U.S. 244, 245 (1994), where the Court stated:

> 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, there is no need to resort to judicial default rules . . . Even absent specific legislative authorization, application of a new statute to cases arising before its enactment is unquestionably proper in many situations. However, where the new statute would have a genuinely retroactive effect–*i.e.*, where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed–the traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result.

"The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." Id. See also Sacks v. SEC, 2011 WL 590308 (9th Cir. 2011), amended, 2011 WL 3437088 (9th Cir. 2011); Koch v. SEC, 177 F.3d 784 (9th Cir. 1999). Under Landgraf, a statute is impermissibly retroactive when it "attaches new legal consequences to events completed before [the statute's] enactment." See Landgraf, 511 U.S. at 269-70.

St. Jean's permanent injunction while acting as, or associating with, an investment adviser clearly subjects him to an associational bar within the investment adviser industry. 15 U.S.C. § 80b-3(e)(4). Thus, an investment adviser associational bar against St. Jean is direct.

The question, however, is whether St. Jean had a reasonable expectation that his misconduct would not affect his ability to associate with industry segments other than investment advisers. Before the Dodd-Frank Act, a permanent injunction like the one against St. Jean subjected a person to a bar on associating with brokers, dealers, 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(b)(6)(A) (2006); 15 U.S.C. § 78o-4(c)(4) (2002); 15 U.S.C. § 78q-

[4] See e.g., Petitions for Review (Petitions) in John W. Lawton, Initial Decision Release No. 419 (April 29, 2011); Evelyn Litwok, Initial Decision Release No. 426 (Aug. 4, 2011). These Petitions are pending before the Commission.

1(c)(4)(C) (2002). Therefore, as to these collateral bars, St. Jean had no pre-existing right to associate with brokers, dealers, municipal securities dealers, or transfer agents, and such collateral bars do not attach new legal consequences to pre Dodd-Frank Act conduct.

Amended Section 203(f) of the Advisers Act also includes two newly-created associational bars: municipal advisors and NRSROs. Because such bars did not exist at the time of Respondent's conduct,[5] I find that they attach new legal consequences to Respondent's conduct and are impermissibly retroactive.[6]

Based on the foregoing, St. Jean is subject to Section 203(f) of the Advisers Act, and grounds exist to impose remedial sanctions, including a collateral bar under the Dodd-Frank Act, if such sanctions are in the public interest.

The Public Interest

To determine whether sanctions under Section 203(f) of the Advisers Act are in the public interest, the Commission considers six factors: (1) the egregiousness of the respondent's actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). No one factor is controlling. Conrad P. Seghers, Advisers Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2298. Remedial sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

St. Jean's actions were egregious and recurrent, as demonstrated by the facts underlying the Complaint.[7] St. Jean, acting as an investment adviser to two hedge funds, repeatedly breached his fiduciary duty to investors by selecting and approving investments in which he had

[5] The Division acknowledges that the municipal advisor bar did not exist prior to Dodd-Frank, but argues that this bar should still be applied solely because it would protect the investing public. Reply at 5.

[6] Landgraf provides an exception to statutory retroactivity: "[w]hen 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. Application of the Landgraf exception requires determining whether a Commission bar is a form of prospective remedial relief or a punitive sanction. Such a determination is fact-specific and the case law is ambiguous. See e.g., Commissioner Kathleen L. Casey, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011); SEC v. Johnson, 87 F.3d 484 (D.C. Cir. 1996) (vacating the Commission's order imposing a six-month suspension of a securities industry supervisor as time barred under 28 U.S.C. § 2462 because the sanction sought operated as a penalty and was not remedial). I therefore decline to apply the Landgraf exception with respect to the municipal advisor and NRSRO industry bars.

[7] As noted previously, pursuant to the Final Judgment, St. Jean is deemed to have admitted the well-plead allegations of the Complaint.

a financial interest, and accepting performance-based compensation when St. Jean knew, or should have known, that the Funds were not profitable. St. Jean acted with scienter in participating in a multi-million dollar fraud against investors over a two-year period. The Final Judgment ordered that St. Jean pay a civil money penalty and disgorge approximately $1.6 million in illicit profits, plus prejudgment interest. Order at 3-4.

St. Jean has not provided any meaningful assurances that he will not commit future violations of the securities laws, nor has he recognized the wrongful nature of his conduct. Instead, St. Jean continues to attack the facts in the Complaint underlying his civil injunction. Without an associational bar, the potential for St. Jean to commit future violations remains. Further, the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, Advisers Act Release No. 2052 (Aug. 30, 2002), 55 S.E.C. 1133, 1145, aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., Exchange Act Release No. 11773 (Oct. 24, 1975), 46 S.E.C. 78, 100.

In view of the Steadman factors in their entirety, a collateral bar is necessary and appropriate in the public interest.

ORDER

IT IS ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Dale E. St. Jean is barred from association with any investment adviser, broker, dealer, municipal securities dealer, 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(h) of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). 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 a 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 a motion to correct a 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.

Robert G. Mahony
Administrative Law Judge