INITIAL DECISION RELEASE NO. 750
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16134

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

In the Matter of JOHN ALLAN RUSSELL	INITIAL DECISION March 2, 2015

APPEARANCES: Nancy K. Ferguson for the Division of Enforcement, Securities and Exchange Commission

John Allan Russell, *pro se*

BEFORE: Cameron Elliot, Administrative Law Judge

Summary

This Initial Decision grants the Division of Enforcement's (Division) Motion for Summary Disposition (Motion) and permanently bars Respondent John Allan Russell (Russell) from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (collectively, full associational bar).

Procedural Background

On September 17, 2014, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP) against Russell, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that on July 5, 2013, Russell pled guilty to one count of securities fraud in violation of Colo. Rev. Stat. § 11-51-501(1)(b) (Colorado statute), in the case of *People v. Russell*, No. 2009CR06137 (Colo. Dist. Ct., Denver Cnty.) (*Russell*). OIP at 1. The OIP further alleges that a judgment against Russell was entered on August 19, 2013, and that Russell was sentenced to five years of probation and ordered to pay restitution of $441,501.53. *Id.*

At a prehearing conference held on October 14, 2014, I found service of the OIP to have occurred on October 14, 2014. I also granted the parties leave to file motions for summary disposition pursuant to Commission Rule of Practice (Rule) 250. *See John Allan Russell*, Admin. Proc. Rulings Release No. 1909, 2014 SEC LEXIS 3857 (Oct. 15, 2014). Russell transmitted his Answer by email to this Office on December 11, 2014. Attached to the Answer were four

documents: an Authorization to Disclose Health Information signed by Russell and dated December 9, 2014 (Ex. A); a Victim Impact Statement submitted by Dexter Craig in *Russell* (Ex. B); Russell's baptismal certificate (Ex. C); and a Motion to Withdraw Plea in *Russell*, signed by Russell on August 14, 2013 (Ex. D). Although these documents possess no clear indicia of admissibility, I have considered them in resolving the Motion because doing so does not prejudice the Division.

On December 5, 2014, the Division filed its Motion, with a Memorandum of Law in Support of the Motion (Div. Mem.), along with a Request for Official Notice in Support of the Motion (Request) and seven supporting exhibits; Russell timely filed a response thereto (Opp'n) with no supporting exhibits, and the Division timely filed a Reply in Support of the Motion (Reply), with six supporting exhibits. The following exhibits were attached to the Request: an Investment Adviser Representative Public Disclosure Report for Russell, with data current as of October 16, 2014 (Ex. 1); the plea agreement in *Russell* (Ex. 2); the "Request to Plead Guilty" in *Russell* (Ex. 3); the "Advisement of Elements of Crime" in *Russell* (Ex. 4); the "Statement Regarding Factual Basis for Plea" in *Russell* (Ex. 5); the "Supporting Affidavit for Arrest Warrant" in *Russell* (Ex. 6); and the "Sentence Order" in *Russell* (Ex. 7). The following exhibits were attached to the Reply: a form summarizing the standard terms and conditions of probation in *Russell* (Reply Ex. 2); the "Waiver of Extradition as a Condition of Probation" in *Russell* (Reply Ex. 3); an incomplete Form ADV for Brookstone Capital Management LLC (Brookstone) (Reply Ex. 4); and the docket sheet in *Russell* (Reply Ex. 5).[1]

Summary Disposition Standard

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 summary disposition as a matter of law. 17 C.F.R. § 201.250(b). 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 him, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323. 17 C.F.R. § 201.250(a), .323.

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. *See Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *21 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *19-20 (Feb. 4, 2008) (collecting cases), *pet. denied*, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare." *John S. Brownson*, 55 S.E.C. 1023, 1028 n.12 (2002), *pet. denied*, 66 F. App'x 687 (9th Cir. 2003).

[1] The first exhibit attached to the Reply is identical to the second page of the seventh exhibit attached to the Request (Ex. 7), and the sixth exhibit attached to the Reply is identical to the third exhibit attached to the Request (Ex. 3).

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to Rule 323. *See* 17 C.F.R. § 201.323. The parties' filings and 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, 101-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

Official Notice

The record in this proceeding is unusual, because it contains neither official records from United States courts nor uncontested affidavits. *See* 17 C.F.R. § 201.250(a) (summary disposition may be based on facts officially noticed and uncontested affidavits). Instead, the Division has asked for official notice of various documents, mainly filings in *Russell*. Although Russell does not dispute the admissibility of anything in the record, prudence dictates that I examine each exhibit to determine whether it may be considered.

I may take official notice of any material fact which might be judicially noticed by a district court of the United States, any matter in the official public records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. 17 C.F.R. § 201.323. It is not entirely clear whether state court records may be judicially noticed by a district court of the United States. *See John Moraitis*, Initial Decision Release No. 557, 2014 WL 345339, at *3 (Jan. 30, 2014) (citing *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 982 F. Supp. 388, 395 (E.D. La. 1997)), *finality notice*, Exchange Act Release No. 71707, 2014 WL 954007 (Mar. 12, 2014). However, the Commission has taken official notice of state court criminal records in at least two follow-on administrative proceedings, and I accordingly take official notice of the records in *Russell*. *See Charles Trento*, Exchange Act Release No. 49296, 2004 WL 329040, at *1 n.2 (Feb. 23, 2004); *Stuart E. Winkler*, Exchange Act Release No. 48940, 2003 WL 22971038, at *1 n.2 (Dec. 17, 2003).

I may take official notice of Forms ADV on file with the Commission, as well as of investment adviser forms in the official public records of the Commission. *See Hausmann-Alain Banet*, Initial Decision Release No. 556, 2014 WL 345338, at *2 n.7 (Jan. 30, 2014), *finality order*, Exchange Act Release No. 71709, 2014 WL 954261 (Mar. 12, 2014); *see also Ahmed Mohamed Soliman*, Exchange Act Release No. 35609, 1995 WL 237220, at *1 n.4 (Apr. 17, 1995). I therefore take official notice of the Investment Adviser Representative Public Disclosure Report for Russell (Ex. 1) and the Form ADV for Brookstone (Reply Ex. 4), both of which are available at www.adviserinfo.sec.gov (last accessed February 26, 2015).

Findings of Fact and Conclusions of Law

Section 203(f) of the Advisers Act permits the Commission to sanction any person who, at the time of the misconduct, was associated with an investment adviser, if the Commission finds that the sanction is in the public interest and the person has been convicted of any offense specified in Section 203(e)(2) within ten years of the commencement of proceedings. 15 U.S.C. § 80b-3(e)(2), (f). Russell does not dispute that between September 2007 and January 2010, he was an associated person of Brookstone, an investment adviser registered with the Commission. Ex. 1; Reply Ex. 4 at 1. Nor does he dispute that within the past ten years he was convicted of securities

fraud in violation of the Colorado statute. Answer at 3; Ex. 7. The Colorado statute makes it a class 3 felony to make any untrue statement of a material fact "in connection with the offer, sale, or purchase of any security," or to omit to state a material fact necessary in order to make the statements made not misleading. Colo. Rev. Stat. § 11-51-501(1); Ex. 3 at 6 (of 10). Russell was charged with, in sum, omitting material facts to obtain purportedly commercial loans secured by promissory notes. Exs. 5, 6. Notes and investment contracts qualify as securities under the Colorado statute, just as they do under the Securities Act of 1933. Colo. Rev. Stat. § 11-51-201(17); 15 U.S.C. § 77b(a)(1); *cf. Reves v. Ernst & Young*, 494 U.S. 56, 67 (1990) (a "note is presumed to be a 'security,' and that presumption may be rebutted only by a showing that the note bears a strong resemblance" to "one of the enumerated categories of instrument[,]" which encompass mainly "commercial or consumer purpose[s]."). Russell's conviction was thus a felony "involv[ing] the purchase or sale of any security," within the meaning of Advisers Act Section 203(e)(2)(A). 15 U.S.C. § 80b-3(e)(2)(A). It was also punishable by imprisonment for one or more years. 15 U.S.C. § 80b-3(e)(3)(A), (f); Ex. 3 at 6 (of 10). Accordingly, there is no genuine issue of material fact and this proceeding may be resolved without a hearing. *See Kornman v. SEC*, 592 F.3d 173, 183 (D.C. Cir. 2010) (summary proceedings are appropriate in follow-on cases after a criminal conviction).

Russell raises multiple challenges to the validity of his conviction and to the truth of the charges to which he pled guilty, including: he did not "sell" the promissory notes at issue (Answer at 1); the promissory notes were not investment contracts or securities, they were just meant to memorialize their associated loans (Answer at 1); he intends to pay back the loans, and already paid back a portion of them (Answer at 2; Opp'n); his plea was coerced because he was under the influence of medication at the time (Answer at 2; Opp'n); his public defender provided ineffective assistance (Answer at 2); and he lacked the necessary criminal intent (Opp'n)(Answer at 3-17). I cannot reach the merits of these challenges, however, because in this proceeding the *Russell* judgment may not be collaterally attacked, nor may issues necessarily decided in *Russell* be relitigated. *See Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1108 (D.C. Cir. 1988); *James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at *11 (Oct. 12, 2007), *pet. denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Joseph P. Galluzzi*, 55 S.E.C. 1110, 1115-16 (2002). Thus, Russell's conviction is valid for purposes of this proceeding. Accordingly, summary disposition is appropriate and a sanction will be imposed on Russell if it is in the public interest.

Sanctions

The Division seeks a full associational bar against Russell. Div. Mem. at 1, 9. The appropriateness of any remedial sanction in this proceeding is guided by the public interest factors set forth in *Steadman v. SEC*, namely: 1) the egregiousness of the 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 that the respondent's occupation will present opportunities for future violations (*Steadman* factors). 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Gary M. Kornman*, 2009 SEC LEXIS 367, at *22. The Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. *Gary M. Kornman*, 2009 SEC LEXIS 367, at *22. The Commission has also considered the age of the violation, the degree of harm to

investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46 (Jan. 31, 2006); *Marshall E. Melton*, 56 S.E.C. 695, 698 (2003).

In *Ross Mandell*, the Commission directed that before imposing an industry-wide bar, an administrative law judge must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities," and that the law judge's decision "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *8 (Mar. 7, 2014) (internal quotation marks omitted). In a follow-on administrative proceeding after a criminal conviction based on a guilty plea, a respondent is collaterally estopped from attacking the factual basis for the plea. *See Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *15-17, *26 (Jan. 14, 2011). Thus, the facts Russell conceded at the time he pled guilty are taken as true. Exs. 5, 6. After engaging in the analysis mandated by *Ross Mandell*, I have determined that it is appropriate and in the public interest to bar Russell from participation in the securities industry to the fullest extent possible.

A. Background of Russell's Misconduct

Russell was born in 1964 and started working as an insurance agent in 2002. Answer at 6; Ex. C. Russell obtained a Series 65 license in September 2007, and was associated with Brookstone between September 2007 and January 2010. Ex. 1. Russell had filed for Chapter 7 bankruptcy in 2003, and as of the time he pled guilty he had outstanding civil judgments against him. Ex. 6 at 2.

Russell was baptized into the Russian Orthodox Church Outside Russia in 2004. Ex. C. His godfather was Dexter (a/k/a Michael) Craig (Craig), who was born in 1924 and had retired in 1996. Answer at 6; Ex. 6 at 2; Ex. B at 1; Ex. C. Craig was a widower and the sole trustee of his deceased wife's trust, the Mary Craig Trust (Trust). Ex. 6 at 2. In August 2006, Russell told Craig that Russell's company, Wealth Preservation Strategies, LLC (WPS) was in need of capital, and he asked Craig for a loan of $7,000. Ex. 6 at 2. Craig wrote a check on the Trust account, payable to Russell (not WPS), on August 27, 2006. Ex. 6 at 2. Craig thereafter wrote thirty-seven additional checks on the Trust account payable to Russell; the last check was dated March 31, 2008. Ex. 6 at 2.

The total sum Russell received from Craig was $297,500, none of which had been repaid as of the time Russell pled guilty. Ex. 6 at 1, 2. Beginning in June 2007, Russell "secured the loans" with eight promissory notes, "which called for repayment with interest." Ex. 6 at 1, 2. Russell spent the money "primarily for personal expenses." Ex. 6 at 2.

B. An Industry-Wide Bar Is in the Public Interest

1. Russell's misconduct was egregious and recurrent

Russell's misconduct was unquestionably recurrent. He received thirty-eight loans over a period of over eighteen months, none of which had been paid back at the time of his conviction. Ex. 6 at 1-2. His misconduct was also egregious. He obtained almost $300,000 from an elderly victim, whom he concedes developed "dementia and Alzheimer's" in mid-2008, a few months after the last loan. Answer at 2, 6; Ex. 6 at 2. Russell may also have indirectly defrauded others, because his ill-gotten gains came from the Trust, although the record does not identify the Trust's beneficiaries. Ex. 6 at 2. Russell started his misconduct a few years after Craig, Russell's one clear victim, acted as his godfather at his baptism, which suggests that Russell's scheme may have involved affinity fraud. Ex. 6 at 2; Ex. C; *see Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758, at *15 (Mar. 7, 2014) (describing affinity fraud). The Commission recognizes affinity fraud as an "exacerbating factor" in evaluating sanctions. *Gregory Bartko*, 2014 WL 896758, at *15. Indeed, involvement in affinity fraud, which by definition exploits the trust of investors, is "more than sufficient to demonstrate [an individual's] unfitness to act as a fiduciary." *Id*.

2. Scienter

Russell acted with scienter. A criminal conviction for violation of the Colorado statute requires proof that the defendant "was aware that he omitted to state a material fact necessary to make the statement not misleading in light of the circumstances under which it was made." *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 736 (Colo. App. 2009) (quoting *People v. Riley*, 708 P.2d 1359, 1365 (Colo. 1985)). Thus, like Exchange Act Section 10(b), which it resembles, scienter is an element of criminal securities fraud under the Colorado statute. *Black Diamond Fund*, 211 P.3d at 736; *United States v. Vilar*, 729 F.3d 62, 88-89 (2d Cir. 2013).

The facts bearing on this issue also demonstrate Russell's scienter. Craig trusted Russell "implicitly," and was "[g]reatly" affected emotionally by Russell's fraud. Ex. B. Craig understood that the money he loaned Russell "was needed for Russell's business," and that WPS "was in need of capital." Ex. 6 at 1-2. Although "Russell did not spell out that the money would be used exclusively for his business," Craig "deduced that would be the case from the way Russell made each of his requests for money." *Id*. at 2. In fact, all but one of Craig's checks were presented for cash at Wells Fargo, Craig's bank, rather than at Public Service Credit Union, where Russell and WPS had accounts; the exception was one check deposited into a WPS account. *Id.* at 1. Craig did not suspect that Russell would use the loans for "personal use, travel, etc." *Id.* at 2. Had Craig known that the loans were for personal use he would have stopped giving them. *Id.* Craig felt, given the nature of their relationship, that Russell was applying the money to his business. *Id.* at 2-3. Had Craig known about Russell's bankruptcy and civil judgments he probably still would have loaned money to Russell, but in a "small, finite amount." *Id.* at 3. Craig eventually stopped loaning money to Russell because Russell had not repaid any previous loans. *Id.* at 3.

3. Lack of assurances against future violations and recognition of the wrongful nature of his conduct

Although "[c]ourts have held the existence of a past violation, without more, is not a sufficient basis for imposing a bar[,] . . . 'the existence of a violation raises an inference that it

will be repeated.'" *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *23 n.50 (July 26, 2013) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)) (alteration in internal quotation omitted). Russell makes virtually no effort to rebut that inference. To be sure, in his Motion to Withdraw Plea he wrote that he "is very sorry and remorseful that things went the way they did for everyone involved." Ex. D at 2. But he denied responsibility for his actions in the very same sentence: "the chain of events that occurred certainly was never anything he had ever wanted, anticipated or envisioned." Ex. D at 2. Indeed, the record is replete with Russell's denials of criminal liability and criminal intent. *E.g.*, Answer at 1 ("I've never sold anybody a promissory note!"); Answer at 2 ("I did not break the law!"); Answer at 6 ("someone coached Craig" and "Craig knew everything about Russell's life including his bankruptcy"); Ex. D ("John Allan Russell has vehemently stated since the beginning of this nightmare, 'He Is Not Guilty.'"); Opp'n ("I am not a criminal!"). Failure to make assurances against future violations and to recognize wrongdoing demonstrates the threat of future violations. *See Christopher A. Lowry*, 55 S.E.C. 1133, 1144 (2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003). Russell's own statements amply demonstrate that he presents such a threat.

4. Opportunities for future violations

The final *Steadman* factor is the "likelihood that the [respondent]'s occupation will present opportunities for future violations." *Steadman*, 603 F.2d at 1140; *see also Tzemach David Netzer Korem*, 2013 SEC LEXIS 2155, at *13; *Johnny Clifton*, Exchange Act Release No. 69982, 2013 SEC LEXIS 2022, at *53 (July 12, 2013); *Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 SEC LEXIS 2024, at *16-17 (July 11, 2013). Russell states that "I don't know that I will ever work in the securities industry again." Answer at 2. The record is otherwise devoid of evidence of his current employment or occupational plans. I agree with the Division that this factor weighs in favor of a heavy sanction. Div. Mem. at 8-9. A bar is a prospective remedy, and Russell has provided no assurance that he will never return to work in the securities industry. If Russell were to reenter the securities industry, his occupation would present the opportunity for future violations, notwithstanding his current work status.

5. Other considerations

Although Russell's violations were rather remote in time, the degree of harm to investors and the marketplace, which is measured by Russell's gains, was substantial. *See Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *6 n.44 (Oct. 29, 2014). Also, industry bars have long been considered effective deterrence. *See Guy P. Riordan*, Exchange Act Release No. 61153, 2009 SEC LEXIS 4116, at *71 & n.107 (Dec. 11, 2009) (collecting cases).

In addition, I have considered Russell's current competence and the degree of risk he poses to public investors and the securities markets in each of the industry segments covered by a full associational bar. *See Gregory Bartko*, 2014 WL 896758, at *9 (citing *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *7 n.34 (Dec. 13, 2012)). Russell's total failure to recognize the wrongful nature of his misconduct indicates a significant risk of future misconduct, if given the opportunity to commit it. *See Toby G. Scammell*, 2014 WL 5493265, at *6. The egregiousness of Russell's misconduct also indicates a significant risk of future

misconduct; betraying the trust of an elderly victim demonstrates a complete obliviousness to an investment adviser's fiduciary duties. A full associational bar, as opposed to a more limited direct bar, "will prevent [Russell] from putting investors at further risk and serve as a deterrent to others from engaging in similar misconduct." *Montford & Co., Inc.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *20 (May 2, 2014). This is because

> [t]he proper functioning of the securities industry and markets depends on the integrity of industry participants and their commitment to transparent disclosure. Securities industry participation by persons with a history of fraudulent conduct is antithetical to the protection of investors . . .. We have long held that a history of egregious fraudulent conduct demonstrates unfitness for future participation in the securities industry even if the disqualifying conduct is not related to the professional capacity in which the respondent was acting when he or she engaged in the misconduct underlying the proceeding. The industry relies on the fairness and integrity of all persons associated with each of the professions covered by the collateral bar to forgo opportunities to defraud and abuse other market participants.

John W. Lawton, 2012 WL 6208750, at *11.

On balance, the public interest factors clearly weigh in favor of a permanent and full associational bar against Russell.

Order

It is ORDERED that, pursuant to Rule 250(b) of the Securities and Exchange Commission's Rules of Practice, the Division of Enforcement's Motion for Summary Disposition against Respondent John Allan Russell is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, John Allan Russell is permanently BARRED from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360. *See* 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. *See* 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 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 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 occurs, the Initial Decision shall not become final as to that party.

_____
Cameron Elliot
Administrative Law Judge