INITIAL DECISION RELEASE NO. 757
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16198

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

In the Matter of GAETON S. DELLA PENNA	INITIAL DECISION March 27, 2015

APPEARANCES: Andrew Schiff for the Division of Enforcement, Securities and Exchange Commission

Gaeton S. Della Penna, *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 Gaeton S. Della Penna (Della Penna) 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 October 15, 2014, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP) against Della Penna, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that on September 24, 2014, a final judgment by default was entered against Della Penna, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Securities Exchange Act of 1934 (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, in the case of *SEC v. Della Penna*, No. 8:14-cv-1203-T-30MAP (M.D. Fla.) (*Della Penna*). OIP at 2.

At a prehearing conference held on December 5, 2014, I found service of the OIP to have occurred on November 10, 2014, and I granted the parties leave to file motions for summary disposition pursuant to Commission Rule of Practice (Rule) 250. *See Gaeton S. Della Penna*, Admin. Proc. Rulings Release No. 2103, 2014 SEC LEXIS 4688 (Dec. 5, 2014). On January 9,

2015, Della Penna submitted a document captioned "Motion for Stay of Proceedings," which I construed as an Answer generally denying the allegations of the OIP.[1] *See Gaeton S. Della Penna*, Admin. Proc. Rulings Release No. 2211, 2015 SEC LEXIS 128 (Jan. 13, 2015).

On February 6, 2015, the Division filed its Motion, to which were attached eight declarations styled as numbered exhibits (Exs. 1-8). Seven of the eight declarations contain attachments designated by letter, which are noted as "Ex. __, Att. __." Della Penna did not file an opposition to the Motion.

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).

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined and the sole determination concerns the appropriate sanction. *See Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *40-41 (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).

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. In particular, I have taken official notice of the filings in *Della Penna*, including those attached to Ex. 8. The Division also filed several declarations of individuals who were investors in promissory notes sold by Della Penna, and one from a Division accountant explaining Della Penna's financial records; these declarations are uncontested and have been considered. Exs. 2-7; *see* 17 C.F.R. § 201.250(a). 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.

Findings of Fact and Conclusions of Law

Advisers Act Section 203(f) authorizes the Commission to impose a full associational bar against Della Penna, if: (1) at the time of the alleged misconduct, he was associated with an investment adviser; (2) he has been enjoined from any action, conduct, or practice specified in

[1] Della Penna's submission stated that he is currently the subject of parallel criminal charges in *United States v. Della Penna*, No. 14-cr-203 (M.D. Fla.).

Advisers Act Section 203(e)(4), which includes any conduct or practice in connection with the purchase or sale of any security; and (3) the sanction is in the public interest. 15 U.S.C. §§ 80b-3(e)(4), (f). There is no genuine issue of material fact that Della Penna has been enjoined from violations of Section 17(a) of the Securities Act "in the offer or sale of any securities," and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder "in connection with the purchase or sale of any security." Ex. 8, Att. F at 3-4. This is sufficient to satisfy the second element. *See Seghers v. SEC*, 548 F.3d 129, 132 (D.C. Cir. 2008).

Della Penna was an investment adviser. Advisers Act Section 202(11) defines an investment adviser as someone who "for compensation, engages in the business of advising others . . . as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(11). Della Penna formed and was the managing member of three Florida limited liability companies: A-G Hedge Group, LLC (A-G Fund); the Contrarian Fund, LLC (Contrarian Fund); and the New Economy Fund, LLC (New Economy Fund) (collectively, the Funds). Ex. 1, Att. F at 1; Ex. 2, Att. A at 1; Ex. 4, Att. A at 1. Della Penna directed the Funds' securities trading, and he was compensated with trading profits and percentages of the Funds' assets under management. *See* Ex. 1, Att. F at 4, 7-8; Ex. 2, Att. A at 1, 4, 8; Ex. 4, Att. A at 5, 11-12. In addition, Della Penna misappropriated money from the Funds for his own personal benefit, in excess of what was owed to him pursuant to the terms of the notes, further satisfying the "for compensation" element.[2] *See Alexander V. Stein*, Advisers Act Release No. 1497, 1995 WL 358127, at *2 & n.13 (June 8, 1995) (The "compensation element [of the definition of investment adviser] is satisfied by the receipt of any economic benefit" and includes "compensation for . . . services when . . . divert[ing] . . . funds for . . . personal use.") (internal quotation marks omitted). Della Penna was also "associated with an investment adviser," as the difference between someone acting as an investment adviser and someone associated with one is "a distinction without a difference." *See Anthony J. Benincasa*, Investment Company Act of 1940 Release No. 24854, 2001 SEC LEXIS 2783, at *6 (Feb. 7, 2001) ("We have held that, where an individual exercises all of the authority for, and holds all beneficial interest in, an investment adviser, that person is associated with an investment adviser.").

Accordingly, the Division's Motion is granted and a sanction will be imposed on Della Penna if it is in the public interest.

Sanctions

The Division seeks a full associational bar against Della Penna. Motion at 11-12. 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*, Exchange Act Release No. 59403, 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

[2] *See infra.*

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 *35-36 & 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 *7-8 (Mar. 7, 2014) (internal quotation marks omitted). After engaging in the analysis mandated by *Ross Mandell*, I have determined that it is appropriate and in the public interest to bar Della Penna from participation in the securities industry to the fullest extent possible.

A. Background of Della Penna's Misconduct

Between November 2008 and September 2013, Della Penna solicited investments in promissory notes for the Funds, mostly from personal acquaintances, several of whom he met through his church. *See, e.g.*, Ex. 2 ¶¶ 2, 4; Ex 3 ¶¶ 2, 5; Ex. 4 ¶¶ 2, 6; Ex. 5 ¶¶ 2, 5; Ex. 6, Att. A. Della Penna represented that investors would receive interest payments in addition to a percentage of trading profits. *See* Ex. 1, Att. F. at 5-7; Ex. 2, Att. A at 5-8; Ex. 4, Att. A at 6-11.

Della Penna made misrepresentations while selling the promissory notes to prospective investors both in private offering memoranda and individually. Specifically, Della Penna misrepresented to prospective investors that: they would receive a return of their principal in eighteen months; they would receive as much as 80% of trading profits, in addition to 5% annual interest; they could expect as high as 30% returns; that no more than 20% or 25% of trading profits would be paid to Della Penna and another member of the Funds; and that expenses for fund and organizational management, solicitation of investors, and legal fees would be capped at specific amounts or percentages of assets under management. *See* Ex. 1, Att. F at 5-8; Ex. 2 ¶ 3, Att. A at 5-8; Ex. 3 ¶ 3; Ex. 4 ¶ 3, Att. A at 6-12. Della Penna also misrepresented to several investors that their investments were earning returns and would be repaid as promised. *See* Ex. 2 ¶¶ 4-5; Ex. 3 ¶¶ 7-8; Ex. 4 ¶ 9.

Della Penna misappropriated a large portion of the Funds' assets for his personal benefit. Ex. 6 ¶ 9. All of the Funds incurred significant net trading losses, but Della Penna paid himself nearly $1.2 million from the Funds, an amount that far exceeded what he was entitled to according to the allowances disclosed in the private placement memoranda, purportedly for trading profits and management and organizational fees. *See* Ex. 6 ¶¶ 4.a.-c., 5.a.-b., 6.a.-c., 7.a.-d., 9. Many investors failed to receive a return of their principal after eighteen months, despite efforts to collect them, and in some cases, Della Penna has ceased responding to those investors' inquiries. *See* Ex. 2 ¶¶ 5-6; Ex. 3 ¶ 9; Ex. 4 ¶ 10; Ex. 7 ¶ 8.

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

1. Della Penna's misconduct was egregious and recurrent

Della Penna's misconduct was recurrent, taking place over a nearly five-year period, during which he obtained investments from at least fifteen different people. *See* Ex. 1, Att. G; Exs. 4-5; Ex. 6 ¶ 5.c. & Atts. A-B. His misconduct was also egregious. Della Penna obtained more than $3 million in investments, misappropriated nearly $1.2 million as payments to himself, and lost much of the remainder. *See* Ex. 6 ¶ 9. Furthermore, Della Penna solicited several investors through his church, suggesting affinity fraud. Ex. 3 ¶ 2; Ex. 4 ¶ 2; Ex. 5 ¶ 2; *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 . . . unfitness to act as a fiduciary." *Id.*

2. Scienter

Della Penna's misconduct evinced scienter, i.e., an "intent to deceive manipulate, or defraud." *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992) (internal quotation marks omitted). In addition to misrepresentations in the private offering memoranda, Della Penna misrepresented to prospective Fund investors that they could expect high returns, knowing they were unreasonable projections. Della Penna told one Contrarian Fund investor that he could expect 20% to 30% returns from trading profits, in addition to 5% interest, shortly after a time when Della Penna had presided over heavy losses in the A-G Fund. Ex. 3 ¶ 3; Ex. 6 ¶ 4; *see SEC v. Constantin*, 939 F. Supp. 2d 288, 309 (S.D.N.Y. 2013) ("It is apparent from the record that [defendants] acted knowingly and intentionally to mislead and defraud their clients" by "routinely l[ying] to clients about . . . the amount of return clients could expect from their investments.") Similarly, Della Penna told prospective investors they could expect a 7% annual return on an investment in the New Economy Fund, in addition to 5% interest, based on a trading strategy that Della Penna knew was unsuccessful, and involving funds from which Della Penna had diverted assets for personal use. Ex. 2 ¶ 3; Ex. 5 ¶ 3; Ex. 6 ¶¶ 5.a., 9; *see SEC v. Coplan*, No. 13-civ-62127, 2014 WL 695393, at *8 (S.D. Fla. Feb. 24, 2014) (finding a "high degree of scienter" where defendant "persuaded investors to purchase securities by promising them that their principal was secure and that they would receive high rates of return on their investments, all the while knowingly omitting that she was actually appropriating investor contributions for her personal use.").

To avoid raising suspicion, Della Penna also misrepresented to investors that their investments were successfully producing returns, and in at least one instance, he provided misleading records to support those misstatements. *See* Ex. 2 ¶ 5 & Att. D; Ex. 3 ¶ 6 & Att. E; Ex. 4 ¶ 9 & Att. F. One investor in the Contrarian Fund, whose note matured, was paid back his principal and purported profits with misappropriated investments from the New Economy Fund. Ex. 3 ¶ 7; Ex. 6 ¶ 5.d. Della Penna used that purported repayment as a pretext to solicit a new investment in the same fund, reminding the investor his investment in the Fund had produced positive returns. Ex. 3 ¶ 8. After reinvesting, the investor was never repaid. *Id.* ¶ 9; *see SEC v.*

Coplan, 2014 WL 695393, at *8 (finding scienter where defendant "persuaded investors to purchase securities" while "utilizing investors' funds to pay earlier investors their purported returns."). Another investor inquired into the status of his investment, and Della Penna used a statement from a third-party brokerage firm to convince the investor falsely that his investment had more than tripled, from $500,000 to about $1.5 million. Ex. 4 ¶ 9 & Ex. F. In reality, that investor's investment was lost, and many funds in the Fund had actually been diverted to Della Penna. *Id.* ¶¶ 9-10; Ex. 6 ¶¶ 6.a., 9; *see Constantin*, 939 F. Supp. 2d at 309 (finding scienter where defendant directed an employee to "send clients account statements that he knew did not reflect clients' true investment holdings" and "diverted client funds to his own use.").

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). Della Penna has made no assurances against future misconduct or offered any recognition of the wrongful nature of his conduct.

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*, Advisers Act Release No. 3628, 2013 SEC LEXIS 2024, at *16-17 (July 11, 2013). Della Penna has provided no assurance that he will never return to work in the securities industry. If Della Penna were to reenter the securities industry, his occupation would present an opportunity for future violations.

5. Other considerations

The degree of harm to investors and the marketplace, which is measured by Della Penna's misappropriations and losses, 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 4166, at *81 & n.107 (Dec. 11, 2009) (collecting cases).

In addition, I have considered Della Penna'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)). Della Penna'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 Della Penna's misconduct also indicates a significant risk of future misconduct. A full associational bar, as opposed to a more limited direct bar, "will

prevent [Della Penna] from putting investors at further risk and serve as a deterrent to others from engaging in similar misconduct." *Montford and Company, 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 [associational] 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 Della Penna.

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 Gaeton S. Della Penna is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Gaeton S. Della Penna 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 a 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.

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Cameron Elliot
Administrative Law Judge