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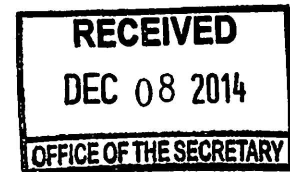
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16134

In the Matter of

JOHN ALLAN RUSSELL

Respondent.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST JOHN ALLAN RUSSELL

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The Division of Enforcement (Division) respectfully submits this Memorandum of Law in support of its Motion for Summary Disposition against John Allan Russell (Respondent), pursuant to Rule 250 of the Commission's Rules of Practice.

I. Preliminary Statement

The Division moves for summary disposition because the pleadings in the criminal case, *Colorado v. John Allan Russell,* Case No. 09CR6137, District Court, City and County of Denver, State of Colorado, (the "criminal proceeding") establish both the predicate facts necessary for an industry-wide collateral bar under Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") and the appropriateness of that bar under the *Steadman* public interest factors. The undisputed facts necessary to granting the Division's request for summary disposition are readily established without a hearing. In short, at the time of his misconduct, Respondent was an associated person with an investment adviser. Respondent admitted pursuant to a plea agreement that he sold eight promissory notes totaling $297,500 with the understanding that he would use the funds for his business, Wealth Preservations Strategies, LLC. Instead, Respondent misappropriated the funds for his own personal use. Respondent was ordered to pay restitution of $441,501.50 and sentenced to five years of probation. These undisputed facts from the criminal proceeding establish Russell's high level of scienter, egregious and repetitive conduct, and the potential for future violations, so it is in the public interest to permanently bar Russell from associating with any registered entity.

II. Facts

On September 17, 2014, the Commission issued an Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 (OIP). The OIP alleges that on July 5, 2013, Respondent pleaded guilty to one count of securities fraud in

violation of Colo. Rev. Stat. § 11-51-501(1)(b), a class three felony. OIP ¶ II.B.1; Exh. 7.[1] On August 19, 2013 a judgment in the criminal proceeding was entered against Respondent. *Id.* Respondent was sentenced to five years of probation and ordered to pay restitution in the amount of $441,501.53. *Id., see also* Criminal Judgment attached as Exh. 7.

From September 2007 to January 2010, Respondent was associated with an investment adviser (Brookstone Capital Management, LLC) that was registered with the Commission. OIP ¶ II.A. The underlying documents relating to Respondent's criminal plea and his resulting conviction establish his securities law violation for securities fraud. Specifically, the Plea Agreement, Defendant's Request to Plead Guilty and the Advisement of Elements of Crime establish that Respondent pleaded guilty to committing securities fraud by intentionally and knowingly making untrue statements of material fact, or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in connection with the offer or sale of a security. *See* Exhs. 2-4 .

Also in connection with his guilty plea, Respondent agreed to a statement of facts that set forth the nature of his offense.[2] Exhs. 5, 6. Those facts establish that from August 2006 through March 2008, Respondent issued eight promissory notes totaling $297,500, which were securities, to an individual investor he met at his church, in exchange for funds. Acting intentionally and knowingly, Respondent represented that the investor's funds were needed as capital for his company, Wealth Preservation Strategies, LLC, when in fact, Respondent misappropriated the

[1] The Division has submitted a Request for Official Notice in Support of Motion for Summary Disposition Against Respondent with the following exhibits attached: Exh. 1, Investment Adviser Public Disclosure Report (IAPD); Exh. 2, Plea Agreement in the criminal proceeding; Exh. 3, Request to Plead Guilty in the criminal proceeding; Exh. 4, Advisement of Element of Crime in the criminal proceeding; Exh. 5, Statement Regarding Factual Basis for Plea in the criminal proceeding; Exh. 6, Supporting Affidavit for Arrest Warrant in the criminal proceeding; Exh. 7, Sentence Order in the criminal proceeding.

[2] Specifically, in connection with his guilty plea, Respondent executed a document entitled, "Statement Regarding Factual Basis for Plea" that referenced and agreed to the facts detailed in his arrest warrant affidavit. Exhs. 5-6.

funds for his own personal use. During the period at issue, Respondent solicited 38 checks from the investor, the last check dated March 31, 2008, cashing the checks and then using the funds for personal purposes. Respondent never disclosed that the funds would not, in fact, be used by Wealth Preservation Strategies, LLC. *See* Exhs. 5, 6. Additionally, Respondent solicited the investor's funds despite the fact that he had filed for Chapter 7 bankruptcy in 2003 and has outstanding civil judgments against him. Respondent did not disclose these facts to the investor.

III. Argument

A. Legal Standards for Summary Disposition.

The Division brings this Motion for Summary Disposition under Rule 250(a) of the Commission's Rules of Practice, which provides in pertinent part:

> [T]he respondent, or the interested division may make a motion for summary disposition of any or all allegations of the order instituting proceedings with respect to that respondent....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 noted pursuant to Rule 323.

Commission's Rules of Practice, Rule 250(a) (March 2006), published at 17 C.F.R. § 201.250(a) (2008).

The hearing officer may "grant the motion for summary disposition 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." *In the Matter of Joseph C. Lavin,* Admin. Proc. File No. 3-13222, 95 SEC Docket 1148, 2009 WL 613543, *5 (March 10, 2009) (granting summary disposition based upon criminal conviction). In considering a motion for summary disposition, the hearing officer may analogize to cases under Fed. R. Civ. P. 56. *Id.* As such, once a party provides specific facts supporting its motion for summary disposition, the opposing party must

offer specific facts showing that there is a genuine issue for a hearing. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Summary disposition is appropriate in cases where respondent has been convicted and the sole determination concerns the appropriate sanction. *Gary M. Kornman*, Admin Proc. File No. 3-12716, 95 SEC Docket 590, 2009 WL 367635, *6 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Jeffrey L. Gibson*, Admin. Proc. File No. 3-12323, 92 SEC Docket 1591, 2008 WL 294717, *5 nn. 21-24, (Feb. 4, 2008), *pet. denied*, 561 F.3d 548 (6th Cir. 2009); *John S. Brownson*, Admin. Proc. File No. 3-10295, 77 SEC Docket 3097, 2002 WL 1438186, *2 n. 12, (July 3, 2002), *pet. denied*, 66 Fed. App'x 687 (9th Cir. 2003) (circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare").

Additionally, Commission's Rules of Practice 323 authorizes official notice of any matter which might be judicially noticed by a district court of the United States. Rule 323; *see also* Fed. R. Evid. 201(b)(2) (permitting judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned"). *See, e.g., In the Matter of David A. Souza*, Admin Proc. File No. 3-14548, 2011 WL 6046243, at *1-2 n. 1 (Dec. 6, 2011) (taking official notice of provisions of district court judgment against respondent). The hearing officer can take official notice, pursuant to Rule 323, of the exhibits submitted herewith including Respondent's Plea Agreement, Defendant's Request to Plead Guilty, Advisement of Elements of Crime, Statement Regarding Factual Basis for Plea, Supporting Affidavit for Arrest Warrant, Sentencing Order, and IAPD, attached to the Division's Request for Official Notice in Support of Motion for Summary Disposition Against Respondent.

B. The Undisputed Facts Establish the Statutory Bases for a Bar Under Advisers Act Section 203(f).

The Advisers Act Section 203(f) authorizes the imposition of remedial relief against individuals who have engaged in certain types of misconduct. 15 U.S.C. § 80b-3(f) (as amended under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act")).[3] Section 203(f) authorizes remedial relief against an individual who 1) has been convicted of an offense specified in Section 203(e)(2) or (e)(3); 2) at the time of the misconduct, was associated or seeking to become associated with an investment adviser; and 3) the sanction is in the public interest.

As established by the underlying documents relating to Respondent's criminal case, he has been convicted of securities fraud, a class three felony, as described in Section 203(e)(2)(A) and has been convicted of a crime that is punishable by imprisonment for 1 or more years, as described in Section 203(e)(3)(A). As such, Respondent's conviction meets the statutory requirements of Advisers Act Section 203(f) authorizing the imposition of a bar against Respondent, so long as it is in the public interest.

C. The Public Interest Factors Support a Strong Sanction Against Respondent.

In considering the appropriateness of sanctions, the hearing officer is guided by the public interest factors set forth in *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981). Those factors include: 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 of future violations. These *Steadman* factors are flexible and no one factor is dispositive. *See Gary M.*

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[3] The Dodd-Frank Act is Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Kornman, 2009 WL 367635, *6-7. In addition, the Commission must consider whether the sanction will have a deterrent effect. *See Schield Mgmnt Co.,* Admin. Proc. File No. 3-11762, 87 SEC Docket 695, 2006 WL 231642, *8 n.46 (Jan. 31, 2006); *Ahmed Mohamed Soliman,* Admin. Proc. File No. 3-7954, 58 SEC 249, 1995 WL 237220, *3 (April 17, 1995) (stating that the selection of an appropriate sanction involves consideration of several elements, including deterrence). Industry bars have long been considered effective deterrence. *See, e.g. Monetta Fin. Servs., Inc.,* Admin. Proc. File No. 3-9546, 86 SEC Docket 1071, 2005 WL 2453949, *3 (Oct. 4, 2005); *Lester Kuznetz,* Admin. Proc. File No. 3-6356, 36 SEC Docket 332, 1986 WL 625417, *3 (August 12, 1986) (noting that the sanction of a bar "serves the purpose of general deterrence").

The Dodd-Frank Act enabled the Commission to authorize bars from associating with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (NRSRO) for a violation enumerated in Section 203(f) of the Advisers Act, (hereinafter "industry-wide collateral bar"). This industry-wide collateral bar is available prospectively under the securities laws and is not impermissibly retroactive. *Ross Mandell,* Admin. Proc. File No. 3-14981, 2013 WL 30144 (Jan. 3, 2013), *aff'd, Ross Mandell,* 2014 WL 907416 (March 7, 2014); *John W. Lawton,* Admin. Proc. File No. 3-14162, 105 SEC Docket 61722, 61737, 2012 WL 6208750 (Dec. 13, 2012).

In this case, the *Steadman* factors demonstrate that Respondent's conduct was egregious, repeated, and conducted with a high degree of scienter, showing a risk of future harm to the public. As such, an industry-wide collateral bar is necessary and appropriate to protect investors and markets. *John W. Lawton,* 2012 WL 6208750, *13. Therefore, it is in the public interest to bar Respondent.

1. Respondent's conduct was egregious.

Respondent was an associated person and in that capacity sold eight promissory notes stating he would use the funds for his business. Instead he misappropriated the funds for his own personal use. Respondent lied to the note purchaser and misrepresented that the monies he collected would go to his business and he failed to disclose his prior bankruptcy and the outstanding civil judgments against him. Such misrepresentations violate "bedrock antifraud principles that apply throughout the securities industry" including the philosophy of full disclosure of accurate and non-misleading information to investors and the prohibition on self-dealing. *Ross Mandell,* 2014 WL 907416, *4. This type of egregious conduct warrants a permanent bar. *See Jason George Rivera, Jr.,* Admin. Proc. File No. 3-14897, 104 SEC Docket 2418, 2012 WL 3986212, *2 (Sept. 11, 2012) (imposing permanent collateral bar on investment advisor who, after Dodd-Frank enactment, continued to raise investor funds through fraudulent statements while using a portion of the funds for his personal expenses); *Joseph C. Lavin,* 2009 WL 613543, at *5 (imposing bar upon investment advisor whose criminal conduct would violate the antifraud provisions of the federal securities laws); *In the Matter of David A. Souza, supra,* 2011 WL 6046243, *1-2 (imposing adviser bar under Section 203(f) based upon adviser's fraudulent scheme to use investor money for his own benefit).

2. Respondent's conduct was recurrent, not isolated.

Respondent issued eight promissory notes in multiple transactions between 2006 and March 2008 without providing material facts necessary to make his statements not misleading. Respondent solicited 38 checks that he cashed and spent for personal purposes while failing to disclose his prior bankruptcy and the outstanding civil judgments against him. This repetitive

behavior represents a long-standing pattern of violative conduct that demonstrates unfitness for the securities industry. His violations were recurrent not isolated.

3. Respondent acted with scienter.

Respondent's guilty plea to a felony demonstrates that he acted with a high degree of scienter. His conviction rests on findings that he acted intentionally and knowingly. Exh. 4. He took funds from his investor, misrepresented their use and in fact enriched himself.

4. Respondent has not offered assurances against future violations.

Respondent has not offered assurances against future violations and does not recognize the wrongful nature of his conduct. Respondent's conduct in the instant case shows a "fundamental misunderstanding of his responsibilities" as a securities professional and he has offered no assurance against future violations. *Ross Mandell*, 2014 WL 907416, *5; *Joseph C. Lavin*, 2009 WL 613543, *5 (imposing bar upon investment advisor whose criminal conduct would violate the antifraud provisions of the federal securities laws); *In the Matter of David A. Souza, supra,* 2011 WL 6046243, *1-2 (imposing adviser bar under Section 203(f) based upon adviser's fraudulent scheme to use investor money for his own benefit).

5. Respondent presents the likelihood of opportunities for future violations.

Respondent is educated in the securities industry and passed his Series 65 exam in 2007. Ex. 1. Respondent was a licensed professional yet his conduct demonstrates a "fundamental misunderstanding of his responsibilities" as a securities professional and demonstrates that he "hold[s] these obligations in contempt." *Ross Mandell,* 2014 WL 907416, *5.

Respondent could enter or reenter the industry at any time, presenting future risks to the investing public. *See Charles Phillip Elliot,* Admin. Proc. File No. 3-7280, 52 SEC Docket 1462, 1992 WL 258850, *3 (Sept. 17, 1992) (industry "presents many opportunities for abuse

and overreaching"), *aff'd,* 36 F.3d 86 (11th Cir. 1994). Respondent lied and defrauded the purchaser of the securities over a period of years, making the likelihood of future violations high.

An industry wide collateral bar in this case will serve the public interest as a prospective remedy to "protect investors against fraud and ...promote ethical standards of honesty and fair dealing" in the securities markets. *McCurdy v. SEC,* 396 F. 3d 1258, 1265 (D.C. Cir. 2005) (finding that the purpose of a securities industry suspension in that case was "not to punish [the respondent], but rather to protect the public from his demonstrated capacity" for violative conduct).

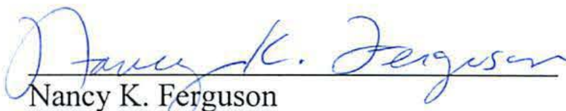
6. Deterrence Supports the Imposition of a Collateral Bar

Considerations of both specific and general deterrence support the imposition of a collateral bar against Respondent. *See, e.g. Monetta Fin. Servs., Inc.,* Admin. Proc. File No. 3-9546, 86 SEC Docket 1071, 2005 WL 2453949, *3 (Oct. 4, 2005); *Lester Kuznetz,* Admin. Proc. File No. 3-6356, 36 SEC Docket 332, 1986 WL 625417, *3 (August 12, 1986) (noting that the sanction of a bar "serves the purpose of general deterrence"). A collateral bar is necessary to prevent Respondent from prospectively harming investors in the securities industry and to deter others from similar misconduct.

IV. Conclusion

For the foregoing reasons, the Division requests that an industry wide collateral bar be entered against Respondent under Advisers Act Section 203(f), barring him from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Respectfully submitted this 5th day of December, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Division of Enforcement's Memorandum of Law in Support of Its Motion for Summary Disposition was served on the following on this 5th day of December, 2014, in the manner indicated below:

Securities and Exchange Commission
Brent Fields, Secretary
100 F Street, N.E.
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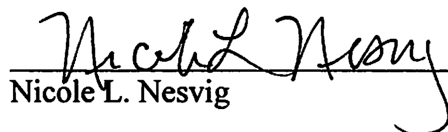
John Allan Russell



Nicole L. Nesvig