

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5363 / September 24, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19498

In the Matter of

**STRATEGIC PLANNING
GROUP, INC., DAVID A.
ROURKE, and JARROD A.
SHERMAN,**

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 203(e), 203(f)
AND 203(k) OF THE INVESTMENT
ADVISERS ACT OF 1940, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-DESIST
ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), against Strategic Planning Group, Inc. (“SPG”), David A. Rourke (“Rourke”), and Jarrod A. Sherman (“Sherman”) (collectively “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

SUMMARY

1. This matter involves SEC-registered investment adviser SPG's failure adequately to disclose conflicts of interest to its clients. Beginning in approximately August 2016, SPG's co-principals, Rourke and Sherman, invested SPG clients' funds, over which SPG had discretionary authority, in the publicly-traded stock of Ecoark Holdings, Inc. ("Ecoark"). During this period, Respondents failed to disclose that Rourke and Sherman had been contractually retained by Ecoark for three years beginning in May 2013 to provide consulting services in exchange for each receiving 100,000 shares (later split-adjusted to 50,000 shares) of Ecoark common stock. As a result, Respondents negligently breached their fiduciary duties to SPG's clients in violation of Section 206(2) of the Advisers Act by failing to disclose Rourke and Sherman's connections to Ecoark and the resulting inherent conflict of interest under which Rourke and Sherman had a potential incentive to invest SPG clients' funds in Ecoark to support or increase Ecoark's stock price.

RESPONDENTS AND RELEVANT ENTITY

Respondents

2. SPG is a Massachusetts corporation with its principal place of business in Wellesley, Massachusetts. SPG is registered as an investment adviser with the Commission (File No. 801-72178). Currently, SPG has five non-clerical employees including Rourke and Sherman.

3. Rourke, age 51 and a resident of Wellesley, Massachusetts, is SPG's founder, majority owner, and co-principal.

4. Sherman, age 44 and a resident of Hanover, Massachusetts, is SPG's minority owner and other co-principal. Sherman also serves as the firm's Chief Compliance Officer.

Relevant Entity

5. Ecoark is an issuer with its principal place of business in Rogers, Arkansas. It is a holding company that operates through its subsidiaries, including Zest Labs, Inc., a private agricultural technology company headquartered in San Jose, California, whose product (Zest Fresh) is marketed as monitoring and improving the freshness of produce from harvest through delivery. Ecoark began trading on the OTCQX under the ticker symbol EARK in April 2016. On November 30, 2017, the company changed its ticker symbol to ZEST. As of August 1, 2019, Ecoark stock traded at \$0.60 per share and the

company had an approximate market capitalization of \$37,408,981.

FACTS

Background

6. SPG provides retirement planning for its clients. As of March 2019, SPG advises approximately 300 client families, and its assets under management are approximately \$214 million, approximately \$208 million of which are managed on a discretionary basis. Most clients range in age from 55 to 70 years old. SPG invests client assets almost exclusively in mutual and exchange-traded funds. SPG typically does not invest client assets in individual securities; Ecoark is the only publicly-traded stock in which SPG has invested client assets. SPG's clients collectively own approximately 8.7% of the outstanding shares of Ecoark (approximately 4.5 million shares). SPG's owners and employees all personally invest in Ecoark as well.

Rourke and Sherman as Consultants to Ecoark

7. On May 22, 2013, Rourke and Sherman both executed consulting agreements with Ecoark. Under the agreements, Rourke and Sherman provided, among other things, business, sales and marketing, and financial services to the company, and they both acted as part of a collective advisory group to assist Ecoark's Board of Directors on business operations. Ecoark compensated Rourke and Sherman for performing these advisory and consulting services by granting them each 100,000 shares of common stock. Following a 2:1 reverse stock split, Rourke and Sherman each received 50,000 shares of Ecoark common stock. The agreements terminated on May 22, 2016.

8. During the term of Rourke's and Sherman's agreements, each spent a substantial amount of time working on behalf of Ecoark prior to the company going public in April 2016.

9. After Sherman's agreement terminated in May 2016, he continued to perform consulting services for Ecoark even though he was no longer contractually obligated to do so.

10. Both Rourke and Sherman continue to own the common stock granted to them under the consulting agreements.

SPG's Outside Compliance Consultant

11. Beginning in approximately 2011, SPG hired an outside compliance consultant to assist the firm with various compliance-related obligations.

12. The consultant met with Sherman on an annual basis to assist SPG with its compliance efforts. In advance of each such annual meeting, the consultant provided

Sherman with a list of information for SPG to compile for use at the meeting.

13. For the meeting that occurred on October 16, 2014, the consultant provided Sherman with a list of requested items on October 13, 2014. The consultant instructed Sherman that the “dates in question will be from 10/1/13 through 9/30/14.” One of the items requested was the “names of any joint ventures or any other business in which the Adviser or any officer, director, portfolio manager, or trader participates or has any interest (other than their employment with the Adviser), including a description of each relationship.”

14. At the time of this request, both Rourke and Sherman were actively and contractually engaged by Ecoark to perform consulting services for remuneration. Notwithstanding this, Sherman failed to provide the compliance consultant with copies of his or Rourke’s consulting agreements or any other information describing the relationship between Rourke, Sherman, and Ecoark.

Rourke and Sherman’s Personal Investments in Ecoark

15. In addition to having received stock pursuant to their contracts with Ecoark, Rourke and Sherman also have personally invested in Ecoark, purchasing stock both when it was a private company and after it became publicly-traded.

16. Prior to April 2016, Rourke invested approximately \$350,000 and Sherman invested approximately \$150,000 in several Ecoark private offerings.

17. After April 2016 when Ecoark became a publicly-traded company, Rourke invested approximately \$400,000 and Sherman invested approximately \$200,000 in Ecoark stock.

18. Neither Rourke nor Sherman has ever sold any of their Ecoark stock.

19. Some, but not all, of SPG’s clients were told that Rourke and Sherman had personally invested in Ecoark.

SPG’s Omission of Material Facts in the Firm Brochures

20. SPG, as a registered investment adviser, is required to file with the Commission a “Form ADV.” This form, which must be updated annually and made available as a public record, provides disclosures to current and prospective advisory clients, and includes information such as conflicts of interest. The general instructions for Part 2 of the Form ADV state:

As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of

interest between you and your clients that could affect the advisory relationship. This obligation requires that you provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices in which you engage, and can give informed consent to such conflicts or practices or reject them.

21. In addition to the general instructions, Form ADV Part 2A (known as the “Firm Brochure”) contains several other instructions.

22. Item 11 of the Firm Brochure, which encompasses interest in client transactions, requires investment advisers to describe conflicts of interest and describe generally how the firm addresses conflicts that arise where the firm, among other things, buys for client accounts securities in which the firm or a related person has a material financial interest.

23. Rourke and Sherman had a material financial interest in Ecoark securities as a result of their consulting agreements, through the remuneration they received, and through their own ownership of Ecoark securities. Because Rourke and Sherman advised SPG clients to purchase Ecoark stock, SPG was obligated to fully and fairly disclose -- either in the Firm Brochure or through other means -- Rourke’s and Sherman’s connections to Ecoark, including their consulting agreements, the stock granted to them under the agreements, and their other holdings of Ecoark securities, so that SPG clients and prospective clients could understand the inherent conflict of interest under which Rourke and Sherman had a potential incentive to invest SPG clients’ funds in Ecoark to support or increase Ecoark’s stock price.

24. SPG’s Firm Brochures filed with the Commission from 2016 through February 2018 included no information about Rourke or Sherman’s connections to Ecoark, the consulting agreements, the stock granted to them under the agreements, or their other holdings of Ecoark securities.

25. SPG’s Firm Brochures dated March 7, 2016 and January 20, 2017 stated in Item 11:

We do not recommend individual securities to clients. There is no material financial interest that may be served by our recommending mutual funds to our clients.

26. SPG’s Firm Brochures dated February 1, 2018 and February 26, 2018 stated in Item 11:

We predominantly recommend investing in mutual funds. There is no material financial interest that may be served by our recommending mutual funds to our clients. If we recommend an individual security such as a

common stock, the client order will always take priority over that of an employee.

27. SPG's Firm Brochure dated November 12, 2018 stated in Item 11:

Moreover, from time to time, SPG or its principals may provide consulting or other services to issuers of securities in which the principals of SPG may invest and which they may recommend to the Firm's clients. SPG or its principals may be compensated for such services, including, without limitation, through the issuance to them of securities. Such relationships could pose a potential conflict of interest for SPG and its principals. To mitigate this conflict, prior to first investing for a client, or first advising a client to invest, in securities of an issuer to which SPG or its principals is or has provided compensated consulting or other services, SPG will seek from the client specific acknowledgement that the client is aware of the foregoing disclosure and consent.

28. Separate from the information required by Item 11, Item 8 of SPG's current Firm Brochure, which encompasses investment strategies and risk of loss, requires investment advisers to explain in detail the material risks involved if the adviser recommends a type of security with significant or unusual risks. SPG's current brochure, dated March 2019, states in Item 8:

In rare instances the Firm may become aware of an investment opportunity outside of the typical range of investments for its clients' accounts. In such cases, SPG will ... provide the selected client with all relevant information regarding the investments, [which] includ[es] any conflicts of interest, including the participation of any SPG personnel in the transaction, e.g., as co-investors or as existing holders.

29. Form ADV Part 2B (known as the "Brochure Supplement") requires investment advisers to disclose to clients the facts and nature of their other business activities engaged in for compensation if the other business activities involve a substantial amount of the adviser's time. SPG's Brochure Supplements from 2013 through the present contained no information about Rourke's or Sherman's connections to Ecoark, the consulting agreements, or the work they performed under the consulting agreements.

30. From the time that SPG began purchasing Ecoark publicly-traded stock for its clients' accounts, SPG failed to adequately disclose in its Forms ADV or through other means Rourke's and Sherman's holdings in Ecoark stock, including that they had received some of those shares as compensation for providing consulting services to Ecoark. As a result, SPG clients were not aware of the resulting conflicts of interest, were not able to understand the extent of those conflicts, and were not able to provide SPG with informed consent to the conflicts of interest (that is, to agree to the purchases of Ecoark stock) or reject them (that is, to refuse to purchase Ecoark stock).

VIOLATIONS

31. As a result of the conduct described above, Respondents willfully¹ violated Section 206(2) of the Advisers Act, which makes it unlawful for an adviser to engage in any transaction, practice or course of business that operates as a fraud or deceit upon any client or prospective client.²

REMEDIAL EFFORTS

32. In determining to accept the Offers, the Commission considered remedial acts promptly undertaken by Respondents and cooperation afforded the Commission staff.

UNDERTAKINGS

33. Respondents have undertaken to:

34. Notice to Advisory Clients. Within 30 days of the entry of this Order, Respondents shall provide a copy of the Order via mail, email, or such other method as may be acceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff, to each of SPG's existing or former clients for whose account SPG purchased Ecoark publicly-traded stock. Thereafter, Respondents shall provide a copy of the Order to any existing or new client before SPG purchases Ecoark stock for any such client's account.

35. Certification of Compliance. Respondents shall certify, in writing, compliance with the undertaking set forth above. The certification shall identify the undertaking, provide written evidence of compliance in the form of a narrative, and be

¹ "Willfully," for purposes of imposing relief under Sections 203 (e) and (f) of the Advisers Act "means no more than that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term "willfully" for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has "willfully omit[ed]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

² Respondents violated Section 206(2) of the Advisers Act through negligent conduct. No scienter (intent to deceive or defraud) is required for a violation of Section 206(2) of the Advisers Act. *See SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)).

supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agree to provide such evidence. The certification and supporting material shall be submitted to Michele T. Perillo, Assistant Regional Director, Division of Enforcement, Boston Regional Office, 33 Arch Street, 24th Floor, Boston, Massachusetts, 02110, with a copy to the Office of Chief Counsel of the Enforcement Division (100 F St., NE, Washington, DC 201549), no later than 60 days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act.

B. Respondents are censured.

C. Respondent SPG shall pay a civil money penalty in the amount of \$200,000, Respondent Rourke shall pay a civil money penalty in the amount of \$75,000, and Respondent Sherman shall pay a civil money penalty in the amount of \$75,000, to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury subject to Section 21F(g)(3) of the Securities Exchange Act of 1934. Payment shall be made in the following installments:

SPG

- 1) \$40,000 within 14 days of the entry of the Order;
- 2) \$40,000 within 90 days of the entry of the Order;
- 3) \$40,000 within 180 days of the entry of the Order;
- 4) \$40,000 within 270 days of the entry of the Order; and
- 5) \$40,000 within 360 days of the entry of the Order.

Rourke

- 1) \$15,000 within 14 days of the entry of the Order;
- 2) \$15,000 within 90 days of the entry of the Order;
- 3) \$15,000 within 180 days of the entry of the Order;
- 4) \$15,000 within 270 days of the entry of the Order; and
- 5) \$15,000 within 360 days of the entry of the Order.

Sherman

- 1) \$15,000 within 14 days of the entry of the Order;
- 2) \$15,000 within 90 days of the entry of the Order;
- 3) \$15,000 within 180 days of the entry of the Order;
- 4) \$15,000 within 270 days of the entry of the Order; and
- 5) \$15,000 within 360 days of the entry of the Order.

Payments shall be applied first to post-order interest, which accrues pursuant to 31 U.S.C. §3717. Prior to making the final payment set forth herein, Respondents shall contact the staff of the Commission for the amount due. If any Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order as to that Respondent, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

Payment must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying SPG, Rourke, or Sherman as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Michele T. Perillo, Assistant Regional Director, Division of Enforcement, Boston Regional Office, 33 Arch Street, 24th Floor, Boston, Massachusetts, 02110.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax

purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Action" means a private damages action brought against Respondent based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

E. Respondents shall comply with the undertakings enumerated in Paragraphs 34 and 35 of Section III above.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondents, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondents under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondents of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary