INITIAL DECISION RELEASE NO. 431
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14394

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

In the Matter of	:	
	:	INITIAL DECISION
TOM HIRSCH,	:	September 15, 2011
BERTA WALDER,	:	
HOWARD WALDER, and	:	
HARISH P. SHAH	:	

APPEARANCES: Spencer E. Bendell and David S. Brown for the Division of Enforcement, Securities and Exchange Commission

Michael J. LaVelle and Matthew K. LaVelle for Tom Hirsch, Berta Walder, Howard Walder, and Harish P. Shah

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

The Securities and Exchange Commission (Commission) issued an Order Instituting Proceedings (OIP) on May 17, 2011, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that Tom Hirsch (Hirsch), Berta Walder (B. Walder), Howard Walder (H. Walder), and Harish P. Shah (Shah), (collectively, Respondents) were enjoined from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 (Securities Act), and Sections 10(b) and 15(a) of the Exchange Act and Exchange Act Rule 10b-5 in SEC v. Radical Bunny, LLC, No. 2:09-CV-01560-SRB (D. Ariz. Apr. 28, 2011). Respondents filed an Answer to the OIP on June 2, 2011.

At a telephonic prehearing conference on June 22, 2011, I denied Respondents' request to dismiss or delay this administrative proceeding in view of their appeal to the Ninth Circuit. See Michael Batterman, Investment Advisers Act of 1940 (Advisers Act) Release No. 2334 (Dec. 3, 2004), 57 S.E.C. 1031, 1036-37 n.10; Joseph P. Galluzzi, Exchange Act Release No. 46405 (Aug. 23, 2002), 55 S.E.C. 1110, 1116 n.21; Charles Phillip Elliott, 50 S.E.C. 1273, 1276-77 (1992). I granted the Division of Enforcement (Division) leave to file a Motion for Summary Disposition (Motion). Tr. 9; 17 C.F.R. § 201.250(a).

The Division filed its Motion and accompanying Declaration of David S. Brown in Support (Declaration) on July 5, 2011. The Declaration includes three exhibits: (1) the Commission's Complaint for Violations of the Federal Securities Laws (Complaint) in the underlying civil action, Radical Bunny; (2) the Order granting summary judgment against Respondents in Radical Bunny (Order); and (3) the Final Judgment of Permanent Injunction and Monetary Relief (Final Judgment) against Respondents in Radical Bunny. Respondents filed a Response to the Division's Motion (Response) on July 20, 2011.

I take official notice of the facts that the court in the underlying civil action issued an Order on April 12, 2011, granting summary judgment against Respondents, and issued a Final Judgment against Respondents on April 27, 2011, ordering them to pay disgorgement and prejudgment interest in the amount of $1,560,184.48 (Hirsch); $1,560,180.73 (B. Walder and H. Walder); and $927,375.20 (Shah); and a civil penalty in the amount of $120,000 each. See 17 C.F.R. § 201.323.

Respondents concede that a Final Judgment was entered against them and that they "have no present defense." Response at 1-2. Respondents reiterate that they are appealing the Final Judgment and that they are not "engaged in any securities activities of any kind." Response at 1. Respondents do not contend that any material facts are in dispute.[1]

Findings

It is well established that the doctrine of collateral estoppel prohibits Respondents' attack on the findings in the underlying civil action, and an appeal is no basis for delaying an administrative proceeding. See Michael Batterman, Advisers Act Release No. 2334 (Dec. 3, 2004), 57 S.E.C. 1031, 1036-37 n.10; Joseph P. Galluzzi, Exchange Act Release No. 46405 (Aug. 23, 2002), 55 S.E.C. 1110, 1116 n.21; Michael J. Markowski, Exchange Act Release No. 44086 (Mar. 20, 2001), 74 SEC Docket 1537, 1542, pet. denied, No. 01-1181 (D.C. Cir. 2002) (unpublished); John Francis D'Acquisto, Advisers Act Release No. 1696 (Jan. 21, 1998), 53 S.E.C. 440, 444; Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 (1997); Kimball Securities, Inc., 39 S.E.C. 921, 924 n.4 (1960).

The Division has established that Respondents were enjoined from violating provisions of the Securities Act, the Exchange Act, and Exchange Act Rule 10b-5. See Motion, Exhibit 3. Because there are no material facts in dispute, I GRANT the Division's Motion. 17 C.F.R. § 201.250

[1] If the Final Judgment is reversed or modified on appeal, Respondents may seek modification of the sanctions imposed herein by applying to the Commission. See Michael T. Studer, Exchange Act Release No. 50411 (Sept. 20, 2004), 57 S.E.C. 890, 897; Jimmy Dale Swink, Jr., 52 S.E.C. 379 (1995); C.R. Richmond & Co., 46 S.E.C. 412, 414 n.11 (1976) (Commission stating that "[i]f the appellate court vacates either injunction, we will entertain an appropriate application to reconsider the sanctions herein.").

Sanctions

The Division requests that Respondents be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, nationally recognized statistical rating organization (NRSRO), and from participating in any penny stock offering pursuant to Section 15(b) of the Exchange Act. Motion at 10. Respondents concede that the Final Judgment "provides a basis for barring Respondents from involvement in the securities industry." Response at 2.

Section 15(b)(6)(A) of the Exchange Act provides that where a person was enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security and where the conduct occurred while the person was associated with a broker or dealer, the Commission shall order certain sanctions if it is in the public interest. In making public interest considerations, the Commission considers the following Steadman factors:

> [T]he egregiousness of the [respondent's] actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the [respondent's] assurances against future violations, the [respondent's] recognition of the wrongful nature of his conduct, and the likelihood that the [respondent's] occupation will present opportunities to commit future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

Respondents' conduct was egregious, continuous, and involved a high degree of scienter. Respondents, all well educated persons, two CPAs, a PhD in education, and a pharmacist, controlled Radical Bunny, LLC (Radical Bunny), an Arizona limited liability company, formed to invest in Mortgages Ltd. (Mortgages), a mortgage lender. Order at 1-2, 8. In 2005, Radical Bunny's business was loaning money to Mortgages, which Mortgages would loan to real estate developers. Order at 2. Between at least January 2006 and June 2008, Radical Bunny issued notes and raised a total of $189.5 million in 900 separate accounts from investors in 20 different states. Order at 2, 4. At the time, Respondents held no security licenses, and Radical Bunny was not a registered broker-dealer and had not registered securities for sale to the public. Order at 2. Both Radical Bunny and Mortgages were the subject of Chapter 11 bankruptcy cases in Arizona. Order 1-2.

Respondents found investors for Radical Bunny through the clients of Hirsch and Shah's accounting firm and word of mouth. Respondents kept the 2% percent difference between the 11% interest for a one-year term they paid to most investors and the 13% interest Mortgages paid them annually for most loans. Order at 3. The court in the underlying action agreed that Respondents violated the antifraud provisions by making numerous material misrepresentations and omissions to investors, both in writing and verbally, from at least January 2006 to June 2008. Order at 8. Respondents did not provide investors with any disclosure documents or audited financial statements. Order at 3.

In May 2007, Respondents' attorneys informed Respondents that Radical Bunny was acting as an unregistered broker-dealer and violating the antifraud provisions of the securities laws. Order at 9-10. Radical Bunny, acting through Respondents, continued to sell securities and make material misrepresentations and omissions to investors. Order at 10. Attorneys informed Respondents, orally and in writing, in June or July 2007, that their loan documents might be defective and that investors might not hold beneficial interests in Mortgages. Order at 8-9. Even so, after July 2007, all new investors were given a document that the investor "will have a security interest in the Loan in that the Note is secured by a lien on the assets of the Barrower as described in the Security Agreement." Order at 9.

Respondents have not provided assurances against future violations or recognized the wrongful nature of their conduct. For assorted reasons, each Respondent denies that he/she participated in the offering of securities by Radical Bunny. Answer at 1-2.

Collateral Bar

Prior to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) signed into law on July 21, 2010, Section 15(b)(6)(A) of the Exchange Act empowered the Commission to censure, place limitations on the activities or functions, suspend for a period not exceeding 12 months, bar a person from association with a broker or dealer, or from participating in an offering of penny stock. Dodd-Frank amended Section 15(b)(6)(A) 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 (collateral bar), or from participating in an offering of penny stock. The issue is application of the collateral bar sanctions based on Respondents' conduct that occurred before Dodd-Frank. The Commission has not yet ruled on this issue. [2]

The Division argues that collateral bars are appropriate here because they constitute prospective relief and, therefore, do not raise retroactivity concerns. Motion at 8-10. Respondents did not address the issue.

The leading case on retroactivity is Landgraf v. USI Film Products, 511 U.S. 244 (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.

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

Landgraf, 511 U.S. at 245. "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.

Under Section 15(b)(6)(A) of the Exchange Act before amendment by Dodd-Frank, Respondents' illegal conduct subjected them to an associational bar from the broker-dealer industry. In addition, their pre-Dodd-Frank conduct subjects them to bars from association with an investment adviser, municipal securities dealer, and transfer agent.[3] See Exchange Act Sections 15(b)(6) (persons associated with brokers and dealers), 15B(c)(4) (persons associated with municipal securities dealers), and 17A(c)(4)(C) (transfer agents), and Advisers Act Section 203(f) (investment advisers). Thus, the portions of the collateral bar authorized by the Dodd-Frank amendments to Section 15(b)(6)(A) adding these sanctions do not attach new legal consequences to Respondents' pre-Dodd-Frank conduct.

Amended Section 15(b)(6)(A) of the Exchange Act also includes two newly-created associational bars: municipal advisors and NRSROs. Because such bars did not exist at the time of Respondents' conduct, I find that they attach new legal consequences to Respondents' conduct and are impermissibly retroactive.[4]

[3] In Teicher v. SEC, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999), the court rejected the SEC's argument that disallowing a collateral bar "forces [the Commission] to do in two proceedings what it would be more convenient to do in one." The court reasoned that Congress established three separate systems for denying benefits of association with licensed entities; therefore, the Commission could not "impose sanctions in any specific branch until it [could] "show the nexus matching that branch." Id. However, Dodd-Frank has now established the nexus requirement the court in Teicher found missing.

[4] 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.

Order

I ORDER, pursuant to Section 15(b)(6)(A) of the Securities Exchange Act of 1934, that Tom Hirsch, Berta Walder, Howard Walder, and Harish P. Shah be barred from association with an investment adviser, broker, dealer, municipal securities dealer, or transfer agent, and from participating in any penny stock offering.

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 of the Commission's Rules of Practice, 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 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 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.

Brenda P. Murray
Chief Administrative Law Judge