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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2979/July 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16374

In the Matter of DAVID R. WULF	ORDER DENYING MOTION TO CORRECT A MANIFEST ERROR OF FACT

The Securities and Exchange Commission initiated this proceeding in February 2015, by issuing an Order Instituting Proceedings (OIP) under Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940. OIP at 1; *see* 15 U.S.C. §§ 78*o*(b), 80b-3(f). After I granted it leave to do so, the Division of Enforcement moved for summary disposition. I granted the Division's motion and issued an Initial Decision on June 25, 2015. *David R. Wulf*, Initial Decision Release No. 824, 2015 SEC LEXIS 2603.

On July 13, 2015, my Office received Wulf's "motion to correct manifest error of fact." The Division has not responded to Wulf's motion. Because Wulf has not shown the existence of any manifest error of fact, I DENY his motion.

Rule of Practice 111(h) permits a party to file a "motion to correct a manifest error of fact in the initial decision." 17 C.F.R. § 201.111(h). "A motion to correct is properly filed under this Rule only if the basis for the motion is a patent misstatement of fact in the initial decision."[1] *Id.* A manifest error is "[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." Black's Law Dictionary (2009).

Wulf presents what he claims are thirty-one manifest errors. The first four alleged errors pertain to the recitation in the Initial Decision of the Division's allegations in the OIP. *See* Mot. at 1-2. Wulf does not complain that my recitation of the Division's allegations was erroneous.

[1] Unlike Federal Rule of Civil Procedure 59(e), Rule 111(h) only contemplates a motion to correct a manifest error of fact. *See Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 17 (D.C. Cir. 2015) ("A district court need not grant a Rule 59(e) motion unless there is an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'"); *Sparkman Learning Ctr. v. Ark. Dept. of Human Servs.*, 775 F.3d 993, 1000-01 (8th Cir. 2014) ("Rule 59(e) . . . provides a means for 'correcting manifest errors of law or fact or to present newly discovered evidence.'").

Instead, he challenges the allegations themselves. The first four alleged manifest errors thus do not concern errors, manifest or otherwise, in the Initial Decision.

In his fifth alleged error, Wulf quarrels with the quotation in the Initial Decision that "[t]ypically, 'states expressly require the creation of a trust account in connection with the sale of a preneed funeral contract.'" Mot. at 2; *see David R. Wulf*, 2015 SEC LEXIS 2603, at *6 (quoting Judith A. Frank, *Preneed Funeral Plans: The Case For Uniformity*, 4 Elder L.J. 1, 7 (1996)). The fact Wulf disagrees with the quoted statement does not show that the Initial Decision contains a manifest error. The language from the cited article was accurately quoted in the Initial Decision and Wulf does not claim otherwise. Additionally, the quote was provided merely to give the reader context to understand the findings that followed. The fifth alleged error does not constitute a manifest error for purposes of Rule 111(h).

Wulf's sixth alleged error, that he was not involved in the sale of contracts that led to his conviction, amounts to a collateral attack on his conviction. As I explained to Wulf, Prehearing Conference Transcript 7-8, his "'criminal conviction cannot be collaterally attacked in an administrative proceeding,'" *Ira William Scott*, Advisers Act Release No. 1752, 1998 SEC LEXIS 1957, at *8 (Sept. 15, 1998) (citation omitted). Moreover, he has not shown a manifest error. The record evidence, including Wulf's second superseding indictment, Wulf's criminal judgment, the transcript of Wulf's sentencing hearing, the transcript of Wulf's direct examination during his trial, and the transcript of Wulf's cross-examination during his trial, shows that he was involved in the sale of contracts that led to his conviction.

Wulf's alleged errors eight through fifteen, seventeen, twenty-one, twenty-two, and twenty-five contest factual findings in the Initial Decision. *See* Mot. at 2-4. Each challenged finding, however, is supported by Wulf's own trial testimony, found at the exhibit pages indicated in the Initial Decision.[2] Because the challenged findings are supported by testimony from Wulf's criminal trial, Wulf has failed to establish the existence of a "patent misstatement of fact." He has thus failed to show a manifest error of fact.

Alleged errors seven, sixteen, eighteen, twenty, twenty-three, twenty-eight, twenty-nine, and thirty-one, present either minor quibbles about inconsequential matters (seven and twenty-three) or do not actually present disputes about the facts at issue (sixteen, eighteen, twenty, twenty-eight, twenty-nine, and thirty-one). These alleged errors, therefore do not constitute manifest errors for purposes of Rule 111(h).

In alleged error nineteen, Wulf disputes whether he and his firm maintained their independence from National Prearranged Services. Mot. at 4; *see David R. Wulf*, 2015 SEC LEXIS 2603, at *13. Again, the fact that Wulf disagrees with a finding does not demonstrate the existence of a manifest error of fact. Indeed, Wulf does not dispute, as he must, that the record reasonably supports the conclusion that he and his firm were not independent. He also does not

[2] Alleged errors fourteen and twenty-five relate back to the eleventh alleged error. Those alleged errors are thus refuted by the citation that supports the language quoted in the eleventh alleged error.

claim that this factual determination "amounts to a complete disregard of . . . the credible evidence in the record." Black's Law Dictionary (2009). Alleged error nineteen, therefore, does not amount to a manifest error. For similar reasons, I reject the allegations of manifest error found in alleged errors twenty-six, twenty-seven, and thirty. *See* Mot. at 4-5.

In alleged error twenty-four, Wulf says that it is circular logic to say that "[t]he fact that the district court imposed a $435 million restitution award necessarily means that Wulf caused $435 million in losses." Mot. at 4; *see David R. Wulf*, 2015 SEC LEXIS 2603, at *16. This is not an allegation of manifest error. Furthermore, as the supporting citations in the Initial Decision reflect, "courts may award restitution '*only* for the loss caused by the specific conduct that is the basis of the offense of conviction.'" *United States v. Howard*, 759 F.3d 886, 891 (8th Cir. 2014) (quoting *Hughey v. United States*, 495 U.S. 411, 413 (1990)) (emphasis added). In other words, absent a determination that Wulf caused $435 million in losses, the district court could not have ordered restitution in that amount. It is therefore the case that "[t]he fact that the district court imposed a $435 million restitution award necessarily means that Wulf caused $435 million in losses." *David R. Wulf*, 2015 SEC LEXIS 2603, at *16.

Wulf shall have twenty-one days to file a petition for review of the Initial Decision from today's date.

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James E. Grimes
Administrative Law Judge