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

SECURITIES EXCHANGE ACT OF 1934
Release No. 65593/October 19, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14361

In the Matter of	:	
	:	ORDER MAKING FINDINGS AND
ROY D. HIGGS	:	IMPOSING SANCTION BY DEFAULT

SUMMARY

This Order grants the Motion for Default (Motion) filed by the Division of Enforcement (Division) and bars Roy D. Higgs (Higgs) from association with a broker, dealer, investment adviser, municipal securities dealer, and transfer agent, and from participating in an offering of penny stock. Higgs was previously enjoined from violating the antifraud provisions and registration provisions of the securities laws in connection with wrongdoing while acting as an unregistered broker-dealer.

I. BACKGROUND

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) against Higgs on May 2, 2011, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that judgment was entered against Higgs in 2011, permanently enjoining him from violating the antifraud and registration provisions of the securities laws in connection with wrongdoing while acting as an unregistered broker-dealer. Higgs was served with the OIP on May 9, 2011, in accordance with 17 C.F.R. § 201.141(a)(2)(i). Higgs is currently incarcerated in federal prison, and has not filed an answer. On June 3, 2011, an Order to Show Cause issued, directing Higgs to show cause why he should not be found in default. Higgs has not responded to the Order to Show Cause. Higgs is in default within the meaning of 17 C.F.R. § 201.155(a) in that he did not file an answer or respond to the Order to Show Cause. Accordingly, the following allegations in the OIP are found to be true.

II. FINDINGS OF FACT

Higgs served as treasurer of Earthly Mineral Solutions, Inc. (EMS), between 2003 and 2006. OIP, p. 1. During this time, Higgs solicited investors on behalf of EMS. Id. Higgs was permanently enjoined from violating Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933,

and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in SEC v. Earthly Mineral Solutions, Inc., et al., Civil Action No. 2:07-CV-01057-JCM-(LRL) (D.Nev. Mar. 23, 2011).[1] Id., p. 2; Motion, Exhibit C. Higgs' injunction was based on his participation in a scheme to defraud investors through the sale of interests in mining claims in the desert near Las Vegas, Nevada. OIP, p. 2. Higgs offered investors a guaranteed annual return of 7% to 9% on their investment, and told investors that the return on their investments would be paid out of the revenue generated by the sale of fertilizer produced by the mining claims. Id. In reality, EMS never operated a fertilizer business, but rather paid new investors with prior investors' funds. Id. Higgs defrauded more than 100 investors of approximately $20 million. Motion, Exhibit C, pp. 1, 4.

Higgs pled guilty to criminal charges relating to the offering and sale of EMS securities. Motion, Exhibit B, p. 3. Higgs, through EMS, was involved in the sale of mining claims from 2004 until at least January 1, 2006. Plea Agreement, p. 8. In soliciting investors on behalf of EMS, Higgs was presented as a successful business executive with a favorable track record as an investor. Id. In fact, Higgs had undergone two previous bankruptcies, a fact no investor was told. Id. Higgs pled guilty to one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 371 and 1341. Id. at 8-9.

III. CONCLUSIONS OF LAW

Higgs is permanently enjoined "from engaging in or continuing any conduct or practice in connection with [activities as a broker or dealer]" and "in connection with the purchase or sale of any security" within the meaning of Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) of the Exchange Act.

IV. SANCTION

A. A Permanent Bar is Appropriate

Higgs' conduct was egregious and involved a high degree of scienter, because he executed a Ponzi scheme resulting in an investor loss of approximately $20 million and a criminal conviction for himself, and it was recurrent, because it involved repeated misrepresentations to over 100 investors over the course of three years. Motion, Exhibit B, pp. 1, 4, 5. By his default, he has failed to offer assurances against future violations or to recognize the wrongful nature of his conduct. Although he is currently serving a five year sentence for mail fraud, there is a likelihood of future violations because Higgs has committed similar violations before. Motion, Exhibit B, p. 3, and Exhibit D.

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[1] Official notice has been taken, pursuant to 17 C.F.R. § 201.323, of the judicial documents filed in Higgs' civil case and attached as exhibits to the Motion, as well as to Higgs' plea agreement (Plea Agreement) in his criminal case. SEC v. Earthly Mineral Solutions, Inc., et al., document 79-5 (filed July 19, 2010); U.S. v. Roy Higgs, No. S1-4:07CR470 SNLJ (E.D.Mo. June 28, 2009).

A permanent associational bar is therefore appropriate. This sanction will serve the public interest and the protection of investors, pursuant to Section 15(b) of the Exchange Act. It accords with Commission precedent and the sanction considerations set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

B. Legal Standard for Collateral Bars

The Division requests a bar from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, nationally recognized statistical rating organization (NRSRO), and from participating in an offering of penny stock. Motion, pp. 5-6. The requested sanction will be granted except as to municipal advisors and NRSRO's.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), enacted July 21, 2010, added collateral bar sanctions to Sections 15(b)(6)(A), 15B(c)(4), and 17A(c)(4)(C) of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940. The new sanctions authorize the Commission to simultaneously suspend or bar an individual who has engaged in certain unlawful conduct from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO. Prior to Dodd-Frank, collateral sanctions were generally authorized only on a piecemeal basis, i.e., only when an individual sought association with that particular branch of the securities industry at issue. Teicher v. SEC, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999) (the Commission could not impose sanctions as to any specific branch until it could "show the nexus matching that branch"). The issue is whether Dodd-Frank's broader collateral bar can be applied to Higgs, whose misconduct ended before the enactment of Dodd-Frank.

"The presumption against statutory retroactivity is founded on elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." Landgraf v. USI Film Products, 511 U.S. 244, 245 (1994). See also Sacks v. SEC, 648 F.3d 945 (9th Cir. 2011); Koch v. SEC, 177 F.3d 784 (9th Cir. 1999). Under Landgraf, a statute has impermissibly retroactive effect when it "attaches new legal consequences to events completed before [the statute's] enactment." See Landgraf, 511 U.S. at 269-70.

The presumption against retroactivity, however, stands in tension with the principle that a court is to "'apply the law in effect at the time it renders its decision.'" Landgraf, 511 U.S. at 273 (quoting Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974)). The Supreme Court announced the following test for resolving this tension:

> 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, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate

retroactively, our traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result.

511 U.S. at 280.

The Court then examined certain categories of cases, one of which – involving purely prospective relief – is implicated here: "When 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. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." Id. at 269. This is because relief by injunction operates *in futuro* and the affected party has no vested right in the judge's decree. Id. at 274 (quoting American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 201 (1921)).

American Steel Foundries dealt with an injunction imposed against labor picketers, which included a provision prohibiting peaceful "persuasion" while picketing. During the pendency of the appeal, the Clayton Act went into effect, which prohibited injunctions against peaceful persuasion. The Supreme Court held that the Clayton Act's prohibition "introduce[d] no new principle into the equity jurisprudence" because it was "merely declaratory of what was the best practice always." 257 U.S. at 203. The Court therefore applied the Clayton Act retroactively and upheld a modification to the injunction removing the prohibition against persuasion. Id. at 207-08.

This proceeding falls within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, which has considered the retroactivity of Commission sanctions at least three times since Landgraf. In SEC v. First Pacific Bancorp, 142 F.3d 1186 (9th Cir. 1998), the court considered the newly-created officer and director bar of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Penny Stock Act). The court applied the bar retroactively, noting that the Act "merely codified the equitable authority to impose [an] officer and director bar which the courts already possessed and exercised." Id. at 1193 n.8 That is, the court essentially adopted the reasoning of American Steel Foundries. However, it did not take up Landgraf's prospective relief exception, or even cite to Landgraf at all.

The following year, in Koch, the court considered whether the newly-created penny stock bar provision of the Penny Stock Act applied to conduct committed by an individual prior to passage of the act. The court held that the Commission could not retroactively apply the bar because it would increase the consequences of the individual's pre-act conduct. 177 F.3d at 789. Again, the court did not take up Landgraf's prospective relief exception, because it had not been argued by the Commission. Id. at 789 n.7.

Finally, in Sacks, the court considered a 2007 Commission rule prohibiting non-attorneys previously banned from the securities industry from representing parties in securities-related litigation. 648 F.3d at 948-49. The court treated the case as closely analogous to Koch and rejected retroactive application of the bar:

For all intents and purposes, Koch is indistinguishable from the facts here. Like

Koch, Sacks was barred by the [Commission] from engaging in certain securities-related activities. And, like Koch, Sacks was confronted with the consequences of a new statute or regulation as a result of prior misconduct – the new rule here bars Sacks, like Koch, from participating in a securities-related activity in which he had previously been allowed to participate. Based on the reasoning in Koch, as well as the "deeply rooted" "presumption against retroactivity," Koch, 177 F.3d at 785, we hold that the rule here cannot be applied retroactively.

Id. at 952. As with First Pacific Bancorp and Koch, the court did not take up Landgraf's prospective relief exception, and it is not clear whether the Commission raised the issue.

Thus, notwithstanding Landgraf, the Ninth Circuit has never recognized the prospective relief exception to retroactive application of a Commission sanction. Consequently, in those Ninth Circuit cases where the question of retroactivity cannot be resolved by statutory construction, and the new law authorizes injunctive relief, the question of retroactive application is limited to the question of whether such application would have retroactive effect. Sacks, 648 F.3d at 951 (describing two-step analysis under Landgraf). That question, in turn, is answered by examining whether the new law codifies or declares an existing practice, as in First Pacific Bancorp, or retroactively bars an individual from "securities-related activity in which he had previously been allowed to participate," as in Koch and Sacks. Id. at 952; 142 F.3d at 1193 n.8.

C. Application to Higgs

Dodd-Frank lacks an express retroactivity provision, and "'normal rules of [statutory] construction'" do not reveal Congress' intent regarding retroactivity. Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225, 228 (quoting Lindh v. Murphy, 521 U.S. 320, 326 (1997)); see also SEC v. Daifotis, Fed. Sec. L. Rep. P 96,325, 2011 WL 2183314 at *14 (N.D.Cal. June 6, 2011). The requested relief is injunctive, and the question, then, is whether retroactive application of Dodd-Frank's collateral bar would have retroactive effect.

Before Dodd-Frank's enactment (and before Higgs began his misconduct), any person who was permanently enjoined "from engaging in or continuing any conduct or practice in connection with [activities as a broker or dealer]" or "in connection with the purchase or sale of any security" was subject, without further action on that person's part, to a broker and dealer associational bar and could not participate in an offering of penny stock under Section 15(b)(6)(A)(iii) of the Exchange Act. 15 U.S.C. § 78o(b)(6)(A) (2002). That is, these two bars were and are direct, not collateral. Under both Koch and Sacks, Dodd-Frank has no retroactive effect on Higgs as to the broker, dealer, and penny stock bars, and these bars may lawfully be applied to Higgs.

Also, before Dodd-Frank's enactment there existed a statutory provision for revoking the registration of an NRSRO based on a permanent injunction imposed against a person associated with it. 15 U.S.C. § 78o-7(d)(1) (2006). This provision would make it unlikely that any NRSRO would hire or otherwise associate with a person subject to such a permanent injunction. However, this provision was not effective until September 29, 2006, after Higgs' misconduct ended. Plea Agreement, p. 8. There was also no associational bar or similar provision predating

Dodd-Frank with respect to municipal advisors. See, e.g., Commissioner Kathleen L. Casey, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011) (noting that the municipal advisor bar did not exist before Dodd-Frank). Higgs was "allowed to participate" in these two industry segments prior to Dodd-Frank, and imposing NRSRO and municipal advisor bars would therefore have an impermissible retroactive effect. Sacks, 645 F.3d at 952.

The remaining bars present a different situation. Had Higgs sought association with an investment adviser, municipal securities dealer, or transfer agent prior to Dodd-Frank, bars could have been imposed against him because of the permanent injunction. 15 U.S.C. § 78o-4(c)(4) (2002); 15 U.S.C. § 78q-1(c)(4)(C) (2002); 15 U.S.C. § 80b-3(f) (2002). That Higgs had to seek such association before being sanctioned demonstrates that Dodd-Frank's new collateral bar is not merely a codification or declaration of "what was the best practice always" – otherwise, the bars for these three industry segments could have been imposed without any affirmative action on Higgs' part. American Steel Foundries, 257 U.S. at 203. However, this factor is outweighed by the fact that, as a practical matter, Higgs was not "allowed to participate" in these three industry segments because of the injunction against him. Sacks, 648 F.3d at 952. Higgs had no reasonable expectation of being able to associate with an investment adviser, municipal securities dealer, or transfer agent, even before Dodd-Frank. Dodd-Frank simply eliminates one step in the process of barring him: that of seeking association.

Thus, under Landgraf and its progeny First Pacific Bancorp, Koch, and Sacks, application of the Dodd-Frank collateral bar to Higgs is proper as to association with a broker, dealer, investment advisor, municipal securities dealer, and transfer agent, and to participation in a penny stock offering, but not as to association with municipal advisers and NRSRO's. A permanent bar is therefore warranted, but only with respect to brokers, dealers, investment advisers, municipal securities dealers, transfer agents, and penny stock offerings.

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Roy D. Higgs is BARRED from association with a broker, dealer, investment adviser, municipal securities dealer, and transfer agent, and from participating in an offering of penny stock.

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Cameron Elliot
Administrative Law Judge