INITIAL DECISION RELEASE NO. 436
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14474

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

In the Matter of	:	INITIAL DECISION
	:	October 13, 2011
GLENN M. BARIKMO	:	

APPEARANCES: Edward D. McCutcheon for the Division of Enforcement, Securities and Exchange Commission

Glenn M. Barikmo, pro se

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision grants the Division of Enforcement's (Division) Motion for Summary Disposition (Division's Motion), denies Respondent Glenn M. Barikmo's (Barikmo) Motion for Summary Disposition (Barikmo's Motion), and permanently bars Barikmo from associating with a broker, dealer, investment adviser, municipal securities dealer, transfer agent, and nationally recognized statistical rating organization (NRSRO).[1]

PROCEDURAL HISTORY

On July 20, 2011, the Securities and Exchange Commission (Commission) issued an Order Instituting Proceedings (OIP), alleging that on June 30, 2011, the United States District Court for the Middle District of Florida (Court) entered a final judgment (Final Judgment) against Barikmo in SEC v. Mittasch, 8:10-cv-02859-JDW-MAP (Civil Case). OIP at 2. The

[1] The parties have filed the following papers in connection with their cross-motions for summary disposition: the Division's Motion, which includes copies of the Order and Judgment in the underlying civil case attached as Exhibit A, and a copy of the Complaint in the underlying civil case attached as Exhibit B; Barikmo's Motion, which includes copies of e-mails from Don Sowers and a VEF, LLC balance sheet as of November 30, 2009, attached as Exhibit I; and the Division's Opposition to Barikmo's Motion, which includes a copy of the BrokerCheck report for Maximum Financial Investment Group, Inc., current as of September 22, 2011, generated by FINRA, attached as Exhibit A.

Final Judgment permanently enjoined Barikmo, by default, from violating Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder, and from aiding and abetting any violation of Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 (Advisers Act) and Rule 206(4)-8 thereunder. Div. Mot. Ex. A.

On August 9, 2011, Barikmo filed his Answer. On August 15, 2011, the Division filed its Notice that Documents are Available for Inspection and Copying. At a telephonic prehearing conference on August 23, 2011, the parties were granted leave to file cross-motions for summary disposition. The Division's Motion was filed on September 9, 2011, and Barikmo's Motion was filed on September 13, 2011. The Division filed its Opposition to Barikmo's Motion (Opposition) on September 26, 2011.[2]

SUMMARY DISPOSITION STANDARD

After the respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP. See 17 C.F.R. § 201.250(a). 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 noticed pursuant to 17 C.F.R. § 201.323. Id. A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. See 17 C.F.R. § 201.250(b).

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to 17 C.F.R. § 201.323. In particular, Barikmo is precluded from contesting any findings made against him in the Civil Case. James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713, aff'd, 285 F.App'x 761 (D.C. Cir. 2008) (the Commission may not reconsider any factual or procedural issues actually litigated and necessary to the court's decision to issue the injunction); see also Chris G. Gunderson, Exchange Act Release No. 61234 (Dec. 23, 2009), 97 SEC Docket 24040, 24047. Thus, the Court's findings of fact, discussed and relied upon throughout this Initial Decision, are binding.

The parties' motion papers, and indeed, all documents and exhibits of record, have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-104 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

[2] A Scheduling Order was issued on August 23, 2011, which established specific deadlines for filing motions for summary disposition, oppositions, and replies. See Glenn M. Barikmo, Admin. Proc. No. 3-14474 (A.L.J. Aug. 23, 2011) (unpublished). Barikmo did not file an opposition to the Division's Motion, and, as a result, the Division did not file a reply. Barikmo did not file a reply to the Division's Opposition. Accordingly, briefing is complete.

FINDINGS OF FACT

Between January 2006 and September 2008, Barikmo was affiliated with Maximum Financial Investment Group, Inc. (Maximum), a broker-dealer formerly registered with the Commission. Complaint at 3-4. Maximum served as trustee for Vestium Equity Fund LLC (Vestium) and provided various broker-dealer services for Arcanum Equity Fund, LLC (Arcanum) until the Financial Industry Regulatory Authority (FINRA) expelled it for anti-money laundering and net capital rule violations. Id. Barikmo held Series 4, 6, 7, 8, 53, and 63 licenses and was a managing member of Imperium Investment Advisors LLC (Imperium), a New York limited liability company created in August 2008. Id. at 4. Imperium was registered as an investment adviser with the Commission and replaced Maximum as Vestium's trustee in October 2008. Id.

Vestium's offering materials, dated June 9, 2008, included a trust indenture agreement between Vestium and Maximum, which Barikmo signed. Complaint at 7. The trust indenture, and the private placement memorandum that was part of the offering materials, both stated that Maximum would be Vestium's trustee. Id. Barikmo was a principal of Maximum. Id. The trust indenture and private placement memorandum provided that Vestium would deposit all offering proceeds in a corporate custody account with U.S. Bank, N.A., which Maximum controlled, and which the trust indenture governed. Id.

After FINRA expelled Maximum in August 2008, Barikmo and two other individuals formed and became principals of Imperium, which then replaced Maximum as Vestium's trustee. Complaint at 8. Barikmo, along with the other defendants in the Civil Case, disregarded the investment parameters in the Arcanum and Vestium offering materials by investing a portion of the funds' money in investments that fell outside the scope of their offering documents. Complaint at 9.

In May 2009, Terry Rawstern, a managing member of Arcanum and Vestium, transferred $7,500 as a personal loan to Barikmo. Complaint at 20. The Arcanum and Vestium offering materials did not allow the managing members to make loans using investor funds, and Barikmo did not disclose this loan to investors. Id.

Barikmo helped deceive investors with respect to Arcanum's and Vestium's ability to pay redemptions and meet other obligations to investors, and he attempted to dissuade investors from redeeming their investments. Complaint at 15. Barikmo signed a September 2009 opinion letter from Imperium to Vestium, falsely certifying that the value of Arcanum's and Vestium's assets "exceeds all outstanding liabilities of the Funds," and certifying that the funds' investments were consistent with the investment authority in the funds' offering materials. Id.

In October 2009, Barikmo expected a $239,000 wire transfer from Transcap Corporation (Transcap), a Canadian investment company that received millions of dollars from Arcanum and Vestium, as a partial loan repayment, and secretly opened a new account in Vestium's name. Complaint at 19. When Transcap sent the money to the Vestium account, Barikmo misappropriated the funds. Id.

On November 17, 2009, Barikmo, on behalf of Imperium, sent an e-mail to Vestium investors stating that "Imperium works solely on behalf of the Fund," and that Imperium had determined that the assets of the fund exceeded the obligations of the fund. Complaint at 16. Barikmo's e-mail also stated that Imperium was working with the managing members and the "counter parties" to Arcanum's and Vestium's investments to generate enough cash to meet investors' redemption requests. Id. However, these statements were false because of the conflicts of interest between Imperium and Vestium arising from Vestium's investments in companies in which principals of Imperium had a financial stake. Id. They were also false because in November 2009, Vestium had no independent accountant or any other legitimate process to value its assets, so there was no reasonable basis for Barikmo's statement that Vestium's assets exceeded its liabilities. Id. Finally, based on millions of dollars in overdue payments from the "counter parties" to Vestium's conflicted, improper investments, there were no realistic prospects for payments to Vestium in November 2009. Id.

CONCLUSIONS OF LAW

Barikmo is permanently enjoined "from engaging in or continuing any conduct or practice in connection with [activities as a broker, dealer, or investment adviser]" 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 and Sections 203(e)(4) and 203(f) of the Advisers Act. Barikmo does not dispute this.

The only arguments presented in Barikmo's Motion are factual disputes. See generally Barikmo's Motion. However, all of the Findings of Fact, supra, are based on the Court's findings, which Barikmo may not now contest. Franklin, 91 SEC Docket at 2713. Because the Court's findings are incontestable, there are no genuine issues of material fact, even as to the appropriate sanction. See John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 77 SEC Docket 3636, 3640 n.12 ("[A] respondent may present genuine issues with respect to facts that could mitigate his or her misconduct, although we believe that those cases will be rare.").[3] Accordingly, the Division is entitled to summary disposition in its favor, and Barikmo is not entitled to summary disposition in his favor.

SANCTION

A. A Permanent Associational Bar is Warranted

The appropriate remedial sanction is guided by the well-established public interest factors listed in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Gunderson, 97 SEC Docket at 24048. They 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)

[3] If the underlying injunction is vacated, Barikmo may request the Commission to reconsider any sanctions imposed in this administrative proceeding. See Charles Phillip Elliott, Exchange Act Release No. 31202 (Sept. 17, 1992), 52 SEC Docket 2011, 2017 n.17, aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994).

the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. Steadman, 603 F.2d at 1140. Deterrence should also be considered, and the sanction may not be punitive. Steven Altman, Exchange Act Release No. 63306 (Nov. 10, 2010), 99 SEC Docket 34405, 34435; Gunderson, 97 SEC Docket at 24048; Johnson v. SEC, 87 F.3d 484, 490 (D.C. Cir. 1996). The inquiry into the appropriate remedial sanction is flexible, and no one factor is controlling. Conrad P. Seghers, Investment Advisers Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2298, aff'd, 548 F.3d 129 (D.C. Cir. 2008).

The Court found that from at least April 2008 through April 2010, Barikmo, in connection with the purchase or sale of securities, knowingly, willfully, or recklessly, employed devices, schemes, or artifices to defraud; made material untrue statements and omissions; or engaged in acts, practices, and courses of business which operated as a fraud upon the purchasers of such securities. Complaint at 20. Such conduct demonstrates the egregiousness of Barikmo's actions, the recurrent nature of his infraction, and the degree of scienter involved.

Barikmo has offered no assurances against future violations. Also, Barikmo has not recognized the wrongful nature of his conduct, as evidenced by his denial that he misappropriated funds, an alleged violation that the Court found he committed. See generally Barikmo's Motion. Barikmo held several securities licenses, all of which he claims have expired. Id. However, Barikmo could retake the examinations to reestablish the licenses, and he has offered no evidence (such as a declaration) that he has no intention of working in the securities industry in the future. Id. Therefore, Barikmo may commit future violations.

In sum, there is no genuine issue of material fact, and the Steadman factors weigh in favor of a permanent associational bar. Additionally, a permanent bar will further the Commission's interests in deterrence, particularly general deterrence. See Altman, 99 SEC Docket at 34438 ("Other attorneys, who might be encouraged by a more lenient sanction to act in a similar fashion, must also be deterred."); Steadman, 603 F.2d at 1140 ("[e]ven if further violations of the law are unlikely, the nature of the conduct mandates permanent debarment as a deterrent to others in the industry."). A permanent bar is remedial rather than punitive because it will protect the investing public from future harm.

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, and NRSRO. Division's Motion at 9-10. The requested sanction will be granted except as to the municipal advisor bar.

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 Advisers Act. 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 Barikmo, 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). 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 it 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.

Landgraf's Supreme Court progeny suggest that retroactive application of a statute involving purely prospective relief is appropriate only when the "no vested right" element described in American Steel Foundries is present. INS v. St. Cyr, 533 U.S. 289, 321 (2001), found that a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) eliminating discretionary relief from deportation for certain felons did not apply retroactively to felons who pled guilty before AEDPA's effective date, because doing so would attach a new disability to a completed transaction. Martin v. Hadix, 527 U.S. 343, 358 (1999), found that a reduction in attorney fees imposed by the Prison Litigation Reform Act (PLRA) applied to legal work performed after the PLRA's effective date, but not to work performed before its effective date, because imposing the new fees limitations "would attach new legal consequences to completed conduct" (internal quotation omitted). Hughes Aircraft v. U.S. ex rel. Schumer, 520 U.S. 939, 948-49 (1997), found that certain amendments to the False Claims Act (namely, eliminating one particular defense to a qui tam action and permitting a relator's qui tam action without participation by the government as a party) had retroactive effect because pre-enactment legal rights were altered, and the Court accordingly declined to apply the Act retroactively. Fernandez-Vargas v. Gonzales, 548 U.S. 30, 42-43 (2006), by contrast, found that a particular provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) had no retroactive effect, and was therefore retroactively applicable. However, this was, in part, because the predicate act to which IIRIRA applied was remaining in the U.S. (i.e., a continuing violation) after IIRIRA became effective. That is, the Supreme Court examined whether retroactive application of IIRIRA would impair "vested rights," and found that it would not. 548 U.S. at 44 n.10.

Thus, notwithstanding Landgraf's suggestion to the contrary, retroactive application of a new law authorizing or affecting the propriety of prospective relief may be appropriate in certain cases, but requires more than simply identifying the relief as injunctive. It also requires inquiry into whether the new law would impair vested rights – that is, "rights a party possessed when he acted." Landgraf, 511 U.S. at 280; Fernandez-Vargas, 548 U.S. at 44 n.10 (noting that vested rights are "something more substantial than inchoate expectations and unrealized opportunities," and include "an immediate fixed right of present or future enjoyment"). Consequently, in those cases where the question of retroactivity cannot be resolved by statutory construction, and the new law authorizes injunctive relief, the question of retroactive application essentially reduces to the question of whether such application would impair vested rights. Ferguson v. U.S. Attorney General, 563 F.3d 1254, 1261 (11th Cir. 2009) (describing two-step analysis under Landgraf); see also Wayde M. McKelvy, Exchange Act Release No. 65423 (Sept. 28, 2011); Richard L. Goble, Initial Decision Release No. 435 (Oct. 5, 2011).

C. Application to Barikmo

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 impair vested rights.

Barikmo plainly had no such vested right to associate with brokers, dealers, and investment advisers. Before Dodd-Frank's enactment, any person who was permanently enjoined "from engaging in or continuing any conduct or practice in connection with [activities as a broker, dealer, or investment adviser]" or "in connection with the purchase or sale of any security" was subject to a broker and dealer associational bar under Section 15(b)(6)(A)(iii) of the Exchange Act, and an investment adviser associational bar under Section 203(f) of the Advisers Act. 15 U.S.C. § 78o(b)(6)(A) (2006); 15 U.S.C. § 80b-3(e)(4), (f) (2006).

But these associational bars are direct, not collateral, because Barikmo was associated with a broker/dealer and an investment adivser while he committed the underlying misconduct. The more important question is whether he had vested rights in associating with other securities industry segments, which rights became impaired once Dodd-Frank became effective. Put another way, the question is whether he had a reasonable expectation that his misconduct would not affect his ability to associate with industry segments other than brokers, dealers, and investment advisers.

Before Dodd-Frank, a permanent injunction like the one against Barikmo subjected a person to a bar on associating with municipal securities dealers and transfer agents, even though the bar could not be imposed until the person actually sought such association. 15 U.S.C. § 78o-4(c)(4) (2002); 15 U.S.C. § 78q-1(c)(4)(C) (2002); Teicher, 177 F.3d at 1020-21. Barikmo thus had no vested right to associate with municipal securities dealers or transfer agents.

The situation is more complicated with respect to NRSRO's and municipal advisors. There is no associational bar or similar provision predating Dodd-Frank with respect to municipal advisors, nor was there a formal associational bar with respect to NRSRO's. See, e.g., Commissioner Kathleen L. Casey, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011) (noting the absence of these two bars before Dodd-Frank). As to association with municipal advisors, therefore, Barikmo possessed a right approximating an "immediate fixed right of present or future enjoyment." Fernandez-Vargas, 548 U.S. at 44 n.10. However, in 2006, before Dodd-Frank's enactment and before Barikmo violated the law, there existed a statutory provision for revoking the registration of an NRSRO if any person associated with it was found to have been enjoined as Barikmo has. 15 U.S.C. § 78o-7(d)(1)(A) (2006). Barikmo had no reasonable expectation of, and no vested right in, association with an NRSRO, if such an association would subject the NRSRO to revocation of registration. Although this provision is not formally an associational bar, for practical purposes it amounts to one, because it is unlikely any NRSRO would ever hire him or otherwise associate with him.

Thus, Barikmo had no vested rights in association with a broker, dealer, investment adviser, municipal securities dealer, transfer agent, or NRSRO, but did have such rights with respect to municipal advisors. A permanent bar is therefore warranted, but only with respect to brokers, dealers, investment advisers, municipal securities dealers, transfer agents, and NRSRO's.

ORDER

It is ORDERED, pursuant to Rule 250 of the Commission's Rules of Practice, that the Division's Motion for Summary Disposition is GRANTED and Barikmo's Motion for Summary Disposition is DENIED; and

It is further ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Glenn M. Barikmo is BARRED from association with a broker, dealer, investment adviser, municipal securities dealer, transfer agent, and NRSRO.

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 occur, the Initial Decision shall not become final as to that party.

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Cameron Elliot
Administrative Law Judge