INITIAL DECISION RELEASE NO. 246
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11259

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
MICHAEL BATTERMAN and	:	INITIAL DECISION
RANDALL B. BATTERMAN III	:	February 12, 2004
	:	
	:	

APPEARANCES: Jayne K. Blumberg, Stephen E. Donahue, and William J. Estes for the Division of Enforcement, Securities and Exchange Commission.

Michael Batterman, pro se, and Randall B. Batterman III, pro se.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) instituted this proceeding on September 15, 2003, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act).

The Order Instituting Proceedings (OIP) alleges that the Commission filed a civil injunctive action against Michael Batterman (M. Batterman) and Randall B. Batterman III (R. Batterman) (collectively, the Battermans), charging that they violated the antifraud provisions of the federal securities laws. The OIP further claims that the United States District Court for the Southern District of New York entered a final judgment against the Battermans, permanently enjoining them from committing future violations of Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), Exchange Act Rule 10b-5, and Sections 206(1) and 206(2) of the Advisers Act. The OIP also asserts that the district court ordered the Battermans to disgorge ill-gotten gains plus prejudgment interest, and to pay civil monetary penalties.

The Commission instituted this proceeding to determine whether these allegations are true and, if so, to decide whether disciplinary action is appropriate in the public interest. The

Commission's Division of Enforcement (Division) seeks to bar the Battermans from association with any investment adviser.

Procedural History of the Case

The Battermans received the OIP on September 29, 2003, and filed a joint Answer on October 21, 2003. The Division notified the Battermans of the size and location of its investigative files and informed them when those files would be available for inspection and copying (Prehearing Conference of Oct. 29, 2003, at 23-24). The Division also identified certain materials it proposed to withhold from inspection and copying on the grounds of privilege (Privilege Log, dated Nov. 24, 2003).

The Battermans then submitted a letter, challenging the Division's claim of privilege with respect to specific documents. I treated their letter as a motion to compel the production of documents. After affording the parties an opportunity to brief the issues of privilege and relevance, I denied the motion to compel production (Orders of Jan. 12, 2004, and Jan. 28, 2004).

I also granted the Division leave to file a motion for summary disposition (Prehearing Conference of Nov. 20, 2003, at 5, 17-19; Order of Nov. 21, 2003). The Division filed its motion for summary disposition, a memorandum of law, and accompanying exhibits on December 19, 2003. The Battermans submitted their opposition, an affidavit, and accompanying exhibits on January 28, 2004. The Division filed its reply on February 9, 2004.

The Standards for
Summary Disposition

Rule 250(a) of the Commission's Rules of Practice provides that, after a 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 with respect to that respondent. 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 noted pursuant to Rule 323 of the Commission's Rules of Practice.

Rule 250(b) of the Commission's Rules of Practice requires the hearing officer promptly to grant or deny the motion, or to defer decision on the motion. The hearing officer may grant the motion for summary disposition 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.

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine

issue for a hearing and may not rest upon the mere allegations or denials of its pleadings. At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. See Anderson, 477 U.S. at 249.

FINDINGS OF FACT

The Division's Motion

Certain exhibits accompanying the Division's motion for summary disposition involve matters that may be officially noticed under Rule 323 of the Commission's Rules of Practice. Based on these documents and on the joint Answer to the OIP, the Division has established, and the Battermans have not contested, the following material facts.

M. Batterman is seventy-two years old and resides in Hackensack, New Jersey (Answer). In 1976, the Commission barred M. Batterman from association with any registered broker, dealer, investment company, or investment adviser (Declaration of William J. Estes, dated Dec. 18, 2003, Exhibit O and Exhibit P) (Estes Decl., Ex. __). Michael Batterman, 9 SEC Docket 307 (Mar. 29, 1976), as amended, 10 SEC Docket 843 (Nov. 2, 1976). Under the terms of the Commission's settlement order, M. Batterman retained the right to apply for reinstatement in a non-supervisory capacity after two years. Also in 1976, the New York Stock Exchange (NYSE) barred M. Batterman for ten years from employment in any capacity with any member or member firm (Estes Decl., Ex. N). The NYSE's order also permanently barred M. Batterman from employment in any supervisory capacity with any member or member organization. In 1993, M. Batterman pled guilty to two felony counts of income tax evasion (Estes Decl., Ex. J, Ex. L, and Ex. M). United States v. Batterman, 91 Cr. 395 (S.D.N.Y.) (KC). During that criminal proceeding, the district court revoked M. Batterman's bail after finding that he had converted for personal use funds entrusted to him by investment advisory clients (Estes Decl., Ex. K).

R. Batterman is forty-one years old and resides in Hackensack, New Jersey (Answer). He is the son of M. Batterman (Answer).

On June 29, 2000, the Commission filed a civil injunctive action in the United States District Court for the Southern District of New York against M. Batterman, R. Batterman, and Dynasty Fund, Ltd. (Dynasty Fund), an open-end investment management company (Estes Decl., Ex. A). SEC v. Batterman, 00 Civ. 4835 (S.D.N.Y.) (LAP). The Commission's complaint charged the defendants with violations of the antifraud provisions of the Securities Act and the Exchange Act in connection with the offer and sale of Dynasty Fund's securities. The complaint also alleged that M. Batterman violated the antifraud provisions of the Advisers Act, and that R. Batterman aided and abetted M. Batterman's violations of the antifraud provisions of the Advisers Act. As relief, the Commission sought permanent injunctions, disgorgement plus prejudgment interest, and civil monetary penalties (Estes Decl., Ex. A).

On November 27, 2001, the district court granted a final default judgment against Dynasty Fund (Estes Decl., Ex. E at 1 n.1). On September 30, 2002, the district court granted

the Commission's motion for summary judgment against the Battermans (Estes Decl., Ex. E). SEC v. Batterman, 00 Civ. 4835 (S.D.N.Y. Sept. 30, 2002) (LAP).

The Commission's complaint alleged, and the district court found, that between approximately November 1993 and August 1995, the Battermans misrepresented and omitted material facts in defrauding United States investors, who were M. Batterman's advisory clients, in connection with the offer and sale of the securities of Dynasty Fund, a foreign investment company that M. Batterman controlled and that was not registered with the Commission (Estes Decl., Ex. A at 4-12 and Ex. E at 19).

The district court deemed the following facts to be admitted by the Battermans:

- M. Batterman is a felon who had been sanctioned by the Commission and the NYSE, and R. Batterman knew about his father's criminal and regulatory history as early as January 1994.

- Between November 1993 and January 1996, M. Batterman, under the name Windsor Group, Ltd. (Windsor), and with R. Batterman's assistance, acted as Dynasty Fund's investment adviser, controlled transactions in Dynasty Fund's bank and brokerage accounts, and purchased and sold securities in Dynasty Fund's portfolio.

- In connection with their offer and sale of Dynasty Fund's shares, M. Batterman and R. Batterman knowingly (1) misrepresented to Dynasty Fund's investors that M. Batterman was Dynasty Fund's successful money manager and had an unblemished record, and (2) failed to disclose that M. Batterman was a felon who had been sanctioned.

- M. Batterman and R. Batterman, with assistance from Barclays Private Bank and Trust, LLC (Barclays Bank), drafted and distributed to Dynasty Fund's investors a prospectus, which affirmatively misrepresented that Dynasty Fund's investment adviser had never been involved in any criminal, civil, administrative, or investigative proceedings.

- M. Batterman and R. Batterman misappropriated funds that they received from investors for Dynasty Fund and thereafter knowingly made additional misrepresentations to Dynasty Fund's investors concerning Dynasty Fund's financial performance in order to conceal their fraud and induce additional investments in Dynasty Fund's shares.

(Estes Decl., Ex. E at 19).[1] In addition, the district court determined that the Battermans exhibited "a high degree of scienter" (Estes Decl., Ex. E at 21). The district court concluded that M. Batterman and R. Batterman had violated Section 17(a) of the Securities Act, Section 10(b)

[1] The Battermans do not dispute that the district court made these factual findings; rather, they assert that the district court committed reversible error in so finding. They also request an opportunity to show in this proceeding that the district court was wrong. These arguments are addressed below.

of the Exchange Act, Exchange Act Rule 10b-5, and Sections 206(1) and 206(2) of the Advisers Act.

Following further proceedings, the district court entered a final judgment against M. Batterman and R. Batterman on July 23, 2003 (Estes Decl., Ex. H). The district court permanently enjoined the Battermans from future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Sections 206(1) and 206(2) of the Advisers Act. The district court also ordered each of the Battermans to disgorge $837,182, consisting of $475,000 in ill-gotten gains plus $362,182 in prejudgment interest. Finally, the district court imposed on each of the Battermans a civil penalty of $250,000.

The Battermans appealed the district court's order to the United States Court of Appeals for the Second Circuit, where it is still pending (No. 03-6213).[2]

The Battermans' Opposition

In their joint Answer to the OIP and their opposition to the Division's motion for summary disposition, the Battermans attempt to challenge each of the district court's key findings. Among other things, they assert: (1) M. Batterman never conducted business under the name Windsor Group; (2) Barclays Bank, not M. Batterman, actually controlled Dynasty Fund; (3) R. Batterman was never an investment adviser and never engaged in the business of advising clients for compensation about investments in securities; (4) neither M. Batterman nor R. Batterman made fraudulent misrepresentations or omitted to disclose material facts; (5) Dynasty Fund's investors knew of M. Batterman's "tax problem"; and (6) at the relevant times, R. Batterman never knew about M. Batterman's criminal conviction or regulatory sanctions.

The Commission has consistently applied the doctrine of collateral estoppel to prevent respondents from relitigating the factual findings or the legal conclusions of an underlying injunctive action in a follow-on administrative proceeding. See, e.g., Martin R. Kaiden, 70 SEC Docket 439, 453 & n.39 (July 20, 1999) (applying the doctrine of collateral estoppel on the basis of a consent injunction); Robert Sayegh, 69 SEC Docket 1307, 1312 (Mar. 30, 1999) (applying the doctrine on the basis of an injunction entered after litigation on the merits), reconsideration granted in part on other grounds, 70 SEC Docket 1126 (Aug. 19, 1999); John Francis D'Acquisto, 53 S.E.C. 440, 444 (1998) (applying the doctrine on the basis of an injunction entered on summary judgment). If the Battermans cannot distinguish this line of Commission precedent, they cannot defeat the Division's motion for summary disposition.

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[2] The pending appeal is not a valid reason for delaying the resolution of this matter. See Joseph G. Galluzzi, 78 SEC Docket 1125, 1130 n.21 (Aug. 23, 2002); Jon Edelman, 52 S.E.C. 789, 790 (1996); Charles Phillip Elliott, 50 S.E.C. 1273, 1276 n.15 (1992), aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994); C.R. Richmond & Co., 46 S.E.C. 412, 414 n.11 (1976); Samuel H. Sloan, 45 S.E.C. 734, 740 n.27 (1975), aff'd on other grounds, 547 F.2d 152 (2d Cir. 1976). If the Battermans succeed in having the underlying injunction vacated, they may ask the Commission to reconsider the sanctions imposed in this initial decision. See Gary L. Jackson, 48 S.E.C. 435, 438 n.3 (1986); cf. Jimmy Dale Swink, Jr., 59 SEC Docket 2877 (Aug. 1, 1995).

DISCUSSION AND CONCLUSIONS

The Doctrine of Collateral Estoppel

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent proceeding an issue of fact or law that was decided in a prior proceeding. Under federal law, a party is collaterally estopped from relitigating an issue if a four-part test is met: (1) the issue in both proceedings must be identical; (2) the issue must have been actually litigated and decided in the previous proceeding; (3) the party must have had a full and fair opportunity to litigate the issue in the previous proceeding; and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits. See Boguslavsky v. Kaplan, 159 F.3d 715, 719-20 (2d Cir. 1998) (collecting cases); Levy v. Kosher Overseers Ass'n of Am., 104 F.3d 38, 41 (2d Cir. 1997).

In their opposition, the Battermans argue that the doctrine is inapplicable here because the underlying injunctive action was not "actually litigated." At times, the Battermans emphasize that the Commission won the injunctive action on a motion for summary judgment and not after a full trial on the merits. On other occasions, the Battermans mischaracterize the district court's order as a default judgment. Both arguments attempt to undercut the legitimacy of the district court proceeding.

The circumstances were as follows. For well over a year, the Battermans actively contested the allegations in the Commission's complaint. The Battermans filed an answer and provided deposition testimony (Estes Decl., Ex. B and Ex. C; Batterman Opposition, Ex. A). A review of the district court's docket sheet shows that they also participated in pretrial conferences and filed motions to extend deadlines (official notice). Eventually, however, the Battermans failed to respond in a timely manner to the Commission's requests for admission (RFA) (Answer at 5; Estes Decl., Ex. E at 10-16, Ex. Q and Ex. R).[3] At that juncture, the district court deemed the Commission's RFA to be admitted by operation of Federal Rule of Civil Procedure 36(a). The court declined to excuse the Battermans from their admissions. It also found that the Battermans' failure to respond to the Commission's RFA in a timely manner was not the result of excusable neglect (Estes Decl., Ex. E at 15). On that basis, the district court determined that there were no material facts in dispute, and it granted summary judgment to the Commission.

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[3] At one point in this proceeding, M. Batterman represented that he and his son had been "several days late" in responding to the Commission's RFA (Prehearing Conference of Nov. 20, 2003, at 15). In fact, the district court found that the Battermans were almost four months late in responding to the Commission's RFA and that "throughout the course of this litigation, [the Battermans] repeatedly have procrastinated and attempted to draw out the proceedings" (Estes Decl., Ex. E at 14, 16 n.2).

The Battermans argue that the Commission's victory in the district court is the result of a "procedural mishap" on their part and should not be given preclusive effect here.[4] They claim that, even if the district court was correct in deeming admitted the Commission's RFA in the underlying injunctive action, Federal Rule of Civil Procedure 36(b) prohibits the Division from using those deemed admissions, or the district court's factual findings and legal conclusions based on those admissions, in this administrative proceeding (Batterman Opposition at 3-4). This is an interesting argument, which the Division's reply inexplicably fails to address.

Federal Rule of Civil Procedure 36(b) provides in relevant part:

> Any admission made by a party under this rule is for the purposes of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

There is some judicial support for the Battermans' argument. See In re Cassidy, 892 F.2d 637, 640 n.1 (7th Cir. 1990) ("The case law on the question of whether a judgment based on an admission, as opposed to the admission itself, can be used in a later proceeding is relatively sparse. On consideration of the question, we hold that a judgment based solely on admissions made under. . . . [Fed. R. Civ. Pro. 36]. . . . cannot be used to estop relitigation of a factual question in a later proceeding."); cf. Hernandez v. Pizante (In re Pizante), 186 B.R. 484, 487-89 (B.A.P. 9th Cir. 1995) (applying Bankruptcy Rule 36 to reach the same result), aff'd, 107 F.3d 878 (9th Cir. 1997) (table case); Hildebrand v. Kugler (In re Kugler), 170 B.R. 291, 296-301 (Bankr. E.D. Va. 1994) (same, applying Virginia rules).

However, there is also case law to the contrary. Almost five decades ago, in Kaye, Real & Co., 36 S.E.C. 373, 374-75 (1955), the Commission found that it was in the public interest to revoke the registration of a broker and dealer that had been enjoined from violating the antifraud provisions of the federal securities laws, even though the underlying injunction had been based in part on the registrant's failure to deny the factual allegations in the Commission's RFA. The Commission acknowledged the limiting language in Fed. R. Civ. Pro. 36(b), but nonetheless rejected the registrant's effort to use the follow-on administrative proceeding to disprove the facts upon which the underlying injunction was based.

At least one judicial opinion has also rejected arguments similar to those offered by the Battermans. In Kairys v. INS, 981 F.2d 937, 940-41 (7th Cir. 1992), the Seventh Circuit held that findings in a district court denaturalization proceeding could be given preclusive effect in a subsequent administrative deportation proceeding, even though the findings rested in part on admissions made in the denaturalization case. The Seventh Circuit reasoned:

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[4] In their appeal to the Second Circuit, the Battermans anticipate arguing that the district court erred when it deemed admitted all the Commission's RFA and then resolved the case on the grounds that there were no remaining material factual disputes. In this proceeding, the Battermans take a different approach.

> A contrary rule might discourage the use of admissions and stipulations, lest that use deprive the winning party of a judgment that he could use in a subsequent proceeding to foreclose relitigation of the facts that had been determined in his favor—or, conversely, might, we acknowledge, encourage admissions and stipulations, by making them less costly in future consequences for the concessionary party.

Courts have also given collateral estoppel effect to default judgments when the defaults are entered after participation, as is the case with a discovery sanction. See Bush v. Balfour Beatty Bahamas, Ltd., (In re Bush), 62 F.3d 1319, 1322-25 (11th Cir. 1995); FDIC v. Daily (In re Daily), 47 F.3d 365, 368-69 (9th Cir. 1995). As stated in 18 James Wm. Moore et al., Moore's Federal Practice, ¶ 132.03[2][k] (3d ed. 2003) (footnotes omitted):

> [I]f a party defaults, not out of a failure to appear, but by actively participating in the litigation for a time (for example, by initially participating and contesting the litigation then subsequently abandoning the attempt and succumbing to a default), that party may be prevented from relitigating the issues that had been in contention during the period of participation. In cases of initial participation and later default, a court may conclude that a party deliberately precluding resolution of factual issues through normal adjudicative procedures may be bound by issue preclusion in a subsequent proceeding. If so, the "actual litigation" requirement [of the collateral estoppel doctrine] is satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity for defense on the merits but chooses not to do so. The "actual litigation" requirement may also be satisfied if a default judgment is rendered as a discovery sanction.

The Division takes issue with the Battermans' effort to characterize the district court's order of September 30, 2002, as a default judgment. While the Division is clearly correct, the foregoing passage demonstrates that the doctrine of collateral estoppel also may be applied to preclude relitigation of issues resolved by a default judgment entered after participation on the merits. The Battermans answered the Commission's complaint, provided deposition testimony, participated in pretrial conferences, and filed motions to extend deadlines. I therefore conclude that the underlying district court action was "actually litigated." The doctrine of collateral estoppel applies with full force.

In reliance on the reasoning of Kaye, Real and Kairys, and by analogy to the discussion of default judgments after initial participation in Bush, Daily, and Moore's Federal Practice, I conclude that the Battermans may not challenge the factual findings or legal conclusions of the civil injunctive action in this administrative proceeding, even though the underlying district court order of September 30, 2002, is based on deemed admissions.[5] I further conclude that there is no

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[5] The Division argues that the Commission's case in the underlying injunctive action was not based entirely on the deemed admissions, because the Commission also submitted other evidence, including transcripts of the Battermans' depositions and the sworn statements of Dynasty Fund's investors, in support of its motion for summary judgment (Estes Decl., Ex. D at

genuine issue with regard to any material fact and that the Division is entitled to summary disposition as a matter of law.

Jurisdictional Requirements

In relevant part, Section 203(f) of the Advisers Act empowers the Commission to impose a sanction against a person associated with an investment adviser if such a person is enjoined from any action, conduct, or practice specified in Section 203(e)(4) of the Advisers Act. Specifically, the Commission may censure, place limitations on the activities of such a person, suspend that person for a period not exceeding twelve months, or bar that person from being associated with an investment adviser if the Commission finds, on the record and after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest.

The district court's order of September 30, 2002, specifically found that M. Batterman engaged, for compensation, in the business of advising clients on investments in securities (Estes Decl., Ex. E at 19). Clearly, M. Batterman was an "investment adviser," as that term is defined in Section 202(a)(11) of the Advisers Act.

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1 n.1; Memorandum of Law at 5-6). However, the district court's order of September 30, 2002, cites only the deemed admissions on the relevant matters (Estes Decl., Ex. E at 19).

It is recognized that application of the doctrine of collateral estoppel produces an arguably harsh result in one respect. The district court held that disciplinary actions against M. Batterman, taken by the Commission and the NYSE during 1976, were material and should have been disclosed to Dynasty Fund's investors and prospective investors between 1993 and 1996 (Estes Decl., Ex. E at 19). This holding was based on deemed admissions and on SEC v. Scott, 565 F. Supp. 1513, 1527 (S.D.N.Y. 1983). In this proceeding, the Battermans attempt to argue that references to the 1976 disciplinary actions are irrelevant and prejudicial (Answer at 5; Opposition at 2-3, Ex. B at ## 10, 17).

It is fraud for an investment adviser to fail to disclose to any client or prospective client all material facts with respect to legal or disciplinary events that are material to an evaluation of the adviser's integrity. See 17 C.F.R. § 275.206(4)-4(a)(2) (1993). There is a rebuttable presumption that a legal or disciplinary event involving the adviser or a management person of the adviser is material within the meaning of subsection (a)(2) for ten years after the event. See 17 C.F.R. § 275.206(4)-4(b). The Rule was promulgated in 1987, well after Scott.

Because the presumption of materiality lasts only ten years, and the disciplinary events in question were seventeen years old in 1993, the Battermans might have put the Commission to its proof on the issue of materiality before the district court. The Battermans failed to make this argument before the district court and they may not raise it in this proceeding. In any event, M. Batterman's 1993 criminal conviction for tax evasion clearly fell within the ten-year window.

The district court's order of September 30, 2002, also held that M. Batterman acted as Dynasty Fund's investment adviser "with R. Batterman's assistance" (Estes Decl., Ex. E at 19). However, the district court never explicitly determined whether R. Batterman was a "person associated with an investment adviser," as that term is defined in Section 202(a)(17) of the Advisers Act. That issue arises for the first time in this proceeding, but its resolution is straightforward. R. Batterman's sworn deposition testimony establishes that he did whatever his father asked him to do in connection with Dynasty Fund, including helping to create Dynasty Fund's Hong Kong office, reviewing Dynasty Fund's prospectus, and writing letters to clients and prospective clients to promote Dynasty Fund (Estes Decl., Ex. B at 55-57 and Ex. G. at 92, 112). On the basis of this testimony, I conclude that R. Batterman was a "person . . . controlled by [an] investment adviser," namely, by his father, and that R. Batterman's functions were not clerical or ministerial. R. Batterman was therefore a "person associated with an investment adviser" within the meaning of Section 202(a)(17) of the Advisers Act.

Although M. Batterman and Windsor were not registered with the Commission as investment advisers, that fact does not deprive the Commission of jurisdiction to impose an associational bar. See Alexander V. Stein, 52 S.E.C. 296, 298-300 (1995) (holding that the Commission's authority to proceed under Section 203(f) does not rest on whether or not an entity or individual is registered). A bar prohibiting an individual from associating with an investment adviser applies to associations with all investment advisers, registered and unregistered. See Victor Teicher, 53 S.E.C. 581, 584-86, 588 (1998), aff'd in relevant part, 177 F.3d 1016, 1018-19 (D.C. Cir. 1999). It also prevents the individual from acting as an unregistered investment adviser, as opposed to associating with an unregistered investment adviser. See Anthony J. Benincasa, 74 SEC Docket 924, 925-27 (Feb. 7, 2001).

Section 203(e)(4) of the Advisers Act applies to a person associated with an investment adviser who is permanently enjoined by the order of a court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with activity in such capacity or in connection with the purchase or sale of any security. Based on the findings and conclusions of the district court, these requirements have been satisfied (Estes Decl., Ex. E and Ex. H).

The Public Interest

The public interest analysis requires that several factors be considered, including: (1) the egregiousness of the respondents' actions; (2) the isolated or recurrent nature of the infractions; (3) the degree of scienter involved; (4) the sincerity of the respondents' assurances against future violations; (5) the respondents' recognition of the wrongful nature of their conduct; and (6) the likelihood that the respondents' occupation will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1980). The severity of sanctions depends on the facts of each case and the value of the sanctions in preventing a recurrence of the violative conduct. See Berko v. SEC, 316 F.2d 137, 141-43 (2d Cir. 1963). Sanctions should demonstrate to the particular respondent, the industry, and the public generally that egregious conduct elicits a harsh response. See Arthur Lipper Corp. v. SEC, 547 F.2d 171, 184 (2d Cir. 1976). Registration sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

The Battermans' conduct was egregious. Over a period of nearly three years, the Battermans solicited several investors for Dynasty Fund, failed to disclose M. Batterman's past misconduct, and misrepresented Dynasty Fund's financial status (Estes Decl., Ex. E at 21). Their misconduct with respect to Dynasty Fund was ongoing, not isolated. When the Dynasty Fund fraud is considered in conjunction with M. Batterman's criminal conviction for tax evasion, the pattern of misbehavior over several years is impossible to ignore. Both Battermans exhibited a high degree of scienter (Estes Decl., Ex. E at 21). Neither of the Battermans has acknowledged any misconduct in connection with Dynasty Fund or has provided assurances against future violations. Finally, there is a strong likelihood that the Battermans will be presented with opportunities to commit future violations. The nature of the violations at issue here, coupled with the Battermans' refusal to recognize the magnitude of their misconduct, supports an inference that such violations may well be repeated. I am aware of no mitigating evidence and no rehabilitation evidence in this case. Considering the Steadman factors in their entirety, it is in the public interest to bar the Battermans from association with any investment adviser.

ORDER

IT IS ORDERED THAT:

1. The Division of Enforcement's motion for summary disposition is granted;
2. The telephonic status conference scheduled for February 17, 2004, is cancelled; and
3. Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Michael Batterman and Randall B. Batterman III are each barred from association with any investment adviser.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a petition for review of this initial decision may be filed within twenty-one days after service of the decision. It shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 360(d)(1) within twenty-one days after service of the initial decision upon him, unless the Commission, pursuant to Rule 360(b)(1), determines on its own initiative to review this initial decision as to any party. If a party timely files a petition for review, or the Commission acts to review as to a party, the initial decision shall not become final as to that party.

James T. Kelly
Administrative Law Judge