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

SECURITIES EXCHANGE ACT OF 1934
Release No. 65423 / September 28, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14345

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| In the Matter of | : | |
| | : | ORDER MAKING FINDINGS AND |
| WAYDE M. MCKELVY | : | IMPOSING SANCTION BY DEFAULT |

## SUMMARY

This Order bars Wayde M. McKelvy (McKelvy) from association with a broker, dealer, investment adviser, municipal securities dealer, nationally recognized statistical rating organization (NRSRO), and transfer agent, and from participating in a penny stock offering. McKelvy was previously enjoined from violating the antifraud 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 McKelvy on April 20, 2011, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that judgment was entered against McKelvy on April 5, 2011, permanently enjoining him from violating various provisions of the securities laws in connection with wrongdoing while acting as an unregistered broker-dealer. McKelvy was served with the OIP multiple times during May 2011, in accordance with 17 C.F.R. § 201.141(a)(2)(i), and acknowledged receipt of the OIP in an electronic mail message sent to counsel for the Division of Enforcement (Division) on May 21, 2011.

On May 26, 2011, a prehearing conference was held, in which McKelvy failed to participate. An Order Following Prehearing Conference was issued granting the Division permission to file a motion for default on or after June 6, 2011. McKelvy has not responded to this Order. On July 15, 2011, the Division filed a Motion for Default (Motion), a Brief in support, including five exhibits, and a Declaration of Douglas Bliss in support of the Division's Motion. McKelvy did not file an Opposition to the Division's Motion.

McKelvy is in default within the meaning of 17 C.F.R. § 201.155(a) in that he did not file an answer or participate in the prehearing conference, and has not otherwise defended the proceeding. Accordingly, the following allegations in the OIP are found to be true.

## II. FINDINGS OF FACT

Between September 2007 and November 2009, McKelvy sold the securities of Mantria Corporation (Mantria) and its affiliates. OIP at 2. In connection with his sales, McKelvy made materially false representations to investors regarding, among other things, the intended use of the proceeds from the sale of the securities, the past rates of return that had been paid to other investors, and the operational success and business prospects of the companies issuing the securities. Id. McKelvy also omitted the material fact that the proceeds of the sales were used, in Ponzi-like fashion, to pay off earlier investors. Id. McKelvy actively solicited investors to purchase the securities through seminars, Internet webinars, telephone conference calls, and/or conversations with investors. Id. McKelvy received transaction-based compensation for his sales. OIP at 2. McKelvy does not hold any securities licenses and has never been associated with a registered broker or dealer, and acted as an unregistered broker or dealer in selling the securities of Mantria and its affiliates. OIP at 1.

Official notice is taken that McKelvy was, by consent, 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. Mantria Corp., et al., Civil Action No. 1:09-CV-02676-CMA-MJW (D. Colo. April 5, 2011).

## III. CONCLUSIONS OF LAW

McKelvy 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 permanent associational bar is appropriate. McKelvy's conduct was egregious and involved a high degree of scienter, because he executed a Ponzi scheme apparently targeting numerous potential investors. It was recurrent, because it involved repeated misrepresentations over the course of two years. By failing to participate in this proceeding, McKelvy has failed to offer assurances against future violations or recognize the wrongful nature of his conduct, or explain why there is no likelihood of future violations. A permanent associational bar 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).

1. 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, and from participating in a penny stock offering. Motion at 3-4. 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 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 cannot 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 McKelvy, 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 principal 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 207-208.

Landgraf's Supreme Court progeny suggest that retroactive application of a statute involving purely prospective relief is appropriate only when no vested rights are infringed. 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. Fernandez-Vargas, 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).

2. Application to McKelvy

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 McKelvy possessed before Dodd-Frank's enactment.

McKelvy plainly had no such vested right to associate with brokers and dealers. Before Dodd-Frank's enactment, and before McKelvy 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 to a broker and dealer associational bar under Section 15(b)(6)(A)(iii) of the Exchange Act. 15 U.S.C. § 78o(b)(6)(A) (2006).

But the broker and dealer associational bar is direct, not collateral, because McKelvy was acting as an unregistered broker/dealer 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 impair his ability to associate with industry segments other than brokers and dealers.

Before Dodd-Frank, the permanent injunction like the one against McKelvy subjected a person to a bar from associating with investment advisers, municipal securities dealers, and transfer agents, even though the bar could not be imposed until the person actually sought such association (that is, it was collateral). 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(e)(5), (f) (2006); Teicher, 177 F.3d at 1020-21. A similar bar existed as to penny stock offerings, but it was direct, not collateral. 15 U.S.C. §§ 78o(b)(4)(D), 78o(b)(6)(A)(iii) (2006); see also 15 U.S.C. § 78o(b)(6)(C) (defining the term "participating in an offer of penny stock"). McKelvy, thus, had no vested right to associate with investment advisers, municipal securities dealers, or transfer agents, or to participate in a penny stock offering.

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, McKelvy could have reasonably expected no interference from the Commission; that is, something 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 McKelvy began committing his violations, 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 McKelvy has, and if it was necessary for the protection of investors and in the public interest. 15 U.S.C. § 78o-7(d) (2006). McKelvy 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 have hired him or otherwise associate with him.

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

## V. ORDER

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

Cameron Elliot
Administrative Law Judge