INITIAL DECISION RELEASE NO. 450
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14457

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

In the Matter of	:	INITIAL DECISION
	:	February 6, 2012
LOCKE CAPITAL MANAGEMENT, INC.	:	

APPEARANCES: Frank C. Huntington and Naomi J. Sevilla for the Division of Enforcement, Securities and Exchange Commission

Leila C. Jenkins for Respondent Locke Capital Management, Inc.

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision grants the Motion for Summary Disposition filed by the Division of Enforcement (Division), denies the Motion for Summary Disposition filed by Respondent Locke Capital Management, Inc. (Locke), and permanently bars Locke from acting as an investment adviser.[1]

PROCEDURAL HISTORY

On July 8, 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 District of Rhode Island (Court) entered a final default judgment (Final Judgment) against Locke in SEC v. Locke Capital Management, Inc., Civil Action Number 1:09-cv-00100-S-DLM (Civil Case). OIP, pp. 1-2. The OIP also alleges that the Final Judgment permanently enjoined Locke from violating Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder, and Sections

[1] The parties have filed the following papers: the Division's Motion for Summary Disposition (Div. Motion) (and an Appendix in Support with a Declaration of Naomi J. Sevilla and Exhibits A through E attached); Locke's Motion for Default Judgment Against the Division's Motion for Summary Disposition, which, to the extent that it addresses the Division's Motion, has been construed as an Opposition thereto (Resp. Oppo.); Locke's Motion for Summary Disposition (Resp. Motion) (with Exhibits 1 through 13 attached); and the Division's Opposition thereto (Div. Oppo.) (with Exhibit A attached).

204, 204A, 206(1), 206(2), 206(4), and 207 of the Investment Advisers Act of 1940 (Advisers Act) and Rules 204-2(a)(6), 204-2(a)(8), 204-2(a)(10), 204-2(a)(15), 204-2(a)(16), 204A-1, and 206(4)-1(a)(5) thereunder. Id.

Locke filed its response to the OIP on August 9, 2011. On August 29, 2011, Locke moved to stay this proceeding, pending appeal of the Final Judgment. In an Order dated September 16, 2011, Locke's motion to stay was denied, the parties were granted leave to file motions for summary disposition, and specific filing deadlines were established. The Division filed its Motion on December 8, 2011, Locke filed its Motion on December 9, 2011, the Division filed its Opposition on December 16, 2011, and Locke filed its Opposition on January 3, 2012.

Locke's representative, Leila C. Jenkins (Jenkins), requested several extensions of the prehearing schedule because she was incarcerated on a charge of passport fraud. Division of Enforcement's Report Concerning Service of Pleadings (Report), Ex. 5. Orders extending the filing deadlines were issued on November 10, 2011, December 19, 2011, and January 3, 2012. The January 3 Order set January 10, 2012 as the deadline for Respondent to file its opposition brief, and January 19, 2012 as the deadline for both parties to file reply briefs. Locke filed no opposition brief, and briefing is therefore complete.

The Division provided sufficient documentation that it served all relevant papers upon Locke in accordance with Rule 150 of the Commission's Rules of Practice. In particular, the Division served its Motion on December 7, 2011 by UPS delivery to Locke's record address (where the delivery was signed for), as well as by email to Jenkins' sister, and served its Opposition on December 16, 2011 by UPS delivery to Locke's record address (where the delivery was signed for), as well as by email to Jenkins' sister and by mail to Jenkins at the Metropolitan Correctional Center, New York, NY. Report, pp. 1-2. The Division also served its Motion on December 16, 2011 by mail to Jenkins at the Metropolitan Correctional Center. Report, pp. 2-3. In Locke's Opposition, filed January 3, 2012, Jenkins acknowledged that no later than December 29, 2012, she received both the Division's Motion and the Division's Opposition. Resp. Oppo., pp. 1-2. As noted in my Order issued January 20, 2012, I conclude that service of the Division's Motion and Opposition was proper, that Locke received these papers both actually and constructively, and that Locke had sufficient time under Rule 154(b) to respond to them.[2]

[2] Oddly, in a series of e-mails sent to this Office on January 18 and 20, 2012, Jenkins claimed that she had not received copies of either the Division's Motion or its Opposition. In one of these emails, she provided no address of record between January 20, 2012 and some unspecified date in early February, 2012. Immediately following the issuance of the January 20, 2012, Order, Jenkins sent an e-mail to this Office, acknowledging that she had in fact received the Division's Opposition, but had to leave it behind when released from prison. She also apparently asserted that she did not receive the Division's Motion until January 20. Notably, this string of emails started on January 18, two weeks after Jenkins' release from federal custody. Jenkins has provided no explanation for why it took her two weeks to take action on the Division's allegedly unserved briefs.

SUMMARY DISPOSITION STANDARD

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 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.

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 (collecting cases), petition for review denied, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare." See John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 55 S.E.C. 1023, 1028 n.12.

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to Rule 323 of the Commission's Rules of Practice. See 17 C.F.R. § 201.323. The findings and conclusions made in the underlying action are immune from attack in a follow-on administrative proceeding. See Phillip J. Milligan, Exchange Act Release No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26796-97; Ted Harold Westerfield, Exchange Act Release No. 41126 (Mar. 1, 1999), 54 S.E.C. 25, 32 n.22 (collecting cases). The Commission does not permit a respondent to relitigate issues that were addressed in previous proceedings against the respondent. See William F. Lincoln, Exchange Act Release No. 39629 (Feb. 9, 1998), 53 S.E.C. 452, 455-56. Thus, the Court's findings of fact, discussed and relied upon throughout this Initial Decision, are binding.[3]

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, 101-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

FINDINGS OF FACT

As of March 9, 2009, Locke was a Rhode Island corporation with offices in Newport, Rhode Island, and New York, New York. Complaint, p. 4. Locke was registered with the

[3] The Court's Opinion and Order (Opinion) (Div. Motion, Ex. B) granting the Commission's motion for a default judgment against Locke takes the well-pleaded factual allegations of the Complaint in the Civil Case (Complaint) (Div. Motion, Ex. A) as true, but otherwise generally contains no separate findings of fact. Opinion, pp. 1-2. Accordingly, the Findings of Fact, infra, are taken largely from the Complaint.

Commission as an investment adviser since March 1997.[4] Id. Locke marketed itself as a global equity management boutique, and its clients included institutions, high net worth individuals, two separately-managed accounts for other clients, and a hedge fund with approximately $10 million in assets. Id. Jenkins was the founder and sole owner of Locke and served as its president, chief executive officer, and chief investment officer. Id.

Beginning in at least 2000, Jenkins told some of Locke's employees, clients, and prospective clients that Locke's clients included an entity in Switzerland, which she described as a Swiss money manager or Swiss private bank. Id. at 8. However, the Swiss client did not exist. Id. at 11. From approximately 2003 until 2006, Locke had no clients except for the purported Swiss client. Id. at 9. Beginning in 2006, Locke started to attract new clients, including two foreign banks that, in 2007, invested in a hedge fund formed by Locke. Id. With the new clients came a ten-fold increase in Locke's assets under management as reported in its Forms ADV, from less than $100 million to more than $1.2 billion. Id.

As an investment adviser registered with the Commission, Locke was required by Section 203 of the Advisers Act to execute and keep current an application for investment adviser registration on Form ADV, which is filed with the Commission and made available to the public. See 17 C.F.R. § 279.1; Complaint, p. 5. Part I of Form ADV requires the disclosure of certain material information about the adviser, including the amount of assets under management. Complaint, p. 5. Between February 2003 and September 2008, Locke filed Forms ADV, representing that it had between $62 million and $1.33 billion in assets under management. Id.

Locke maintained and periodically updated a "due diligence questionnaire" that was distributed to clients and prospective clients. Id. at 6. Two questionnaires, dated December 1, 2006, and November 30, 2008, represented that Locke had $1.2 billion in assets under management. Id. Locke also maintained and periodically updated a firm brochure that was distributed to clients and prospective clients. Id. Various versions of the firm brochure represented that between 2003 and 2008, Locke had between $400 million and $1.39 billion in assets under management. Id.

Locke supplied data to several commercial services that compiled information for clients and consultants to review when evaluating investment advisers. Id. at 6-7. Many of Locke's clients and potential clients reviewed this information regarding assets under management when deciding whether to select or retain Locke as an investment adviser. Id. at 4-5, 7. In late 2006, Locke told one service that it had more than $1.1 billion in assets under management as of September 30, 2006. Id. at 7. In 2008, Locke represented to another service that, between 2003 and 2008, it had between $400 million and $1.38 billion in assets under management. Id. Jenkins also sent e-mails to clients and prospective clients containing information about Locke. Id. Several of the e-mails, dated between November 2007 and May 2008, represented that Locke had between $1.23 billion and $1.5 billion in assets under management. Id.

[4] The Commission's records reflect that Locke has withdrawn its registration as an investment adviser. Div. Motion, p. 9.

Jenkins made representations about Locke's assets under management during meetings with prospective clients. Id. at 8. For example: (1) on or about December 13, 2004, Jenkins told a prospective client that Locke had $581 million in assets under management for three clients, including a purported Swiss bank; (2) on or about July 31, 2006, Jenkins told a prospective client that Locke had more than $1 billion in assets under management as of June 30, 2006; (3) on or about November 16, 2007, Jenkins told a prospective client that Locke had $1.4 billion or $1.6 billion in assets under management; (4) on or about January 28, 2008, Jenkins told a prospective client that Locke had more than $1.5 billion in assets under management as of September 30, 2007; (5) on or about August 19, 2008, Jenkins told a prospective client that Locke had $1.4 billion in assets under management; and (6) on or about January 29, 2009, Jenkins told a client that Locke had $1.2 billion in assets under management. Id.

Locke's representations about its assets under management were materially false and misleading. Id. at 11. The stated amounts for 2004 and 2005 were false because Locke had no clients in those years. The amounts for 2006, 2007, and 2008 were materially overstated because the assets of Locke's clients never exceeded $165 million in those years, whereas Locke consistently reported amounts in excess of $1 billion and, on at least one occasion, as high as $1.6 billion. Id.

Locke also made misrepresentations to clients and potential clients about the investment returns on its various investment strategies from 2005 until at least 2008. Id. at 12. Throughout this period, Locke prepared and distributed to clients and prospective clients certain marketing brochures that presented Locke's purported investment returns dating back to 1990, when in fact, Locke did not exist in 1990. Id. Also throughout this period, Locke told clients and potential clients that Locke's investment performance figures complied with Global Investment Performance Standards (GIPS)[5] while, in fact, Locke's investment performance figures were not GIPS-compliant. Id. at 12-13. Locke's due diligence questionnaire, dated December 1, 2006, included figures purporting to show that the firm had an eleven-year track record (from 1995 through 2006) for investment performance while, in fact, Locke had no clients in 2004 and 2005 and thus could not have had any investment performance in those years. Id. at 12. Also, on or about November 9, 2005, and January 24, 2006, Locke sent a brochure to prospective investors in its hedge fund that listed the hedge fund's investment performance results dating back to January 2004 while, in fact, the hedge fund only came into existence in January 2006 and was not funded by any investors until 2007. Id. Many of Locke's clients reviewed this investment return information in connection with choosing an investment adviser. Id. at 4-5.

On March 9, 2009, the Commission filed the Civil Case, asserting violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 204, 204A, 206(1), 206(2), 206(4), and 207 of the Advisers Act and Rules 204-2(a)(6), 204-2(a)(8), 204-2(a)(10), 204-2(a)(15), 204-2(a)(16), 204A-1, and 206(4)-1(a)(5) thereunder. Complaint, pp. 15-22. Locke defaulted in the Civil Case on March 15, 2010. Opinion, p. 1. The

[5] GIPS is a set of standardized principles that provides investment firms with guidance on how to calculate and report their investment returns in a manner that enables the investing public to compare such results. Complaint, pp. 12-13.

Commission then moved for entry of a default judgment against Locke, which the Court granted on July 21, 2010. Opinion, pp. 1, 10. The Final Judgment was issued against Locke on June 30, 2011. Final Judgment.

The Final Judgment ordered disgorgement in the amount of $1,892,476,[6] imposed a civil penalty in the amount of $1,781,520, and enjoined Locke from violating Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 204, 204A, 206(1), 206(2), 206(4), and 207 of the Advisers Act and Rules 204-2(a)(6), 204-2(a)(8), 204-2(a)(10), 204-2(a)(15), 204-2(a)(16), 204A-1, and 206(4)-1(a)(5) thereunder. Final Judgment, pp. 1-8.

CONCLUSIONS OF LAW

Locke is permanently enjoined from "engaging in or continuing any conduct or practice in connection with [activities as an investment adviser]" and "in connection with the purchase or sale of any security" within the meaning of Section 203(e)(4) of the Advisers Act. 15 U.S.C. § 80b-3(e)(4).

Locke's principal argument is that the Final Judgment is flawed, asserting that this proceeding "lacks any [b]asis or [f]oundation" because the Division "found no wrongdoing" in the Civil Case. Resp. Motion, pp. 1-21; Resp. Oppo., pp. 1-3. Locke disputes many of the facts found against it and alleges numerous procedural defects in the Civil Case.[7] Resp. Motion, pp. 1-21; Resp. Oppo., pp. 1-3. However, Locke may not collaterally attack the Final Judgment in this proceeding, and the Findings of Fact, supra, are based on the well-pleaded factual allegations of the Complaint, which the Court took as true, and which Locke may not now contest. See 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); Demitrios Julius Shiva, Exchange Act Release No. 38389 (March 12, 1997), 52 S.E.C. 1247, 1250 ("[A]ny substantive or procedural objections that [Respondent] has with respect to the civil proceeding should have been directed to the federal appeals court."). Because the Final Judgment is 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

[6] Locke and Jenkins were held jointly and severally liable for this amount, which represents the total disgorgement, including prejudgment interest. Final Judgment, pp. 7-8.

[7] Locke also asserts that the Civil Case has not yet been litigated, and challenges several procedural aspects of the Civil Case. Resp. Oppo., p. 2; Resp. Motion, passim. To the extent that this claim is construed as an argument that the Final Judgment cannot operate as the basis for this proceeding, either because it is a default judgment or because of the alleged procedural defects, this argument fails. The statutory basis for this proceeding is satisfied in that Locke was enjoined from violating the antifraud and other provisions of the federal securities laws while registered as an investment adviser. See 15 U.S.C. § 80b-3(e).

we believe that those cases will be rare.").[8] Thus, the Division's Motion is granted, and Locke's Motion is denied.

SANCTION

This proceeding was instituted pursuant to Section 203(e) of the Advisers Act. In relevant part, Section 203(e) authorizes the Commission to censure or place limitations on the activities, functions, or operations of Locke, if it is in the public interest. See 15 U.S.C. §80(b)-3(e). The Division requests that Locke be barred from acting as an investment adviser. Div. Motion, p. 9. Locke requests that no action be taken against it. Resp. Oppo., p. 3. The sanction requested by the Division will be granted.

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). Conrad P. Seghers, Advisers Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2303-04 petition for review denied, 548 F.3d 129 (D.C. Cir. 2008). 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) 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; Chris G. Gunderson, Exchange Act Release No. 61234 (Dec. 23, 2009), 97 SEC Docket 24040, 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. Seghers, 91 SEC Docket at 2298.

Locke's misconduct was egregious, recurrent, and involved a high degree of scienter. Over the course of several years, Locke lied to investors and regulators by maintaining a fabricated client, inflating its reported assets under management in marketing materials, and falsifying records and filings made with the Commission, resulting in a fraud that generated approximately $1.78 million in fees. Opinion, pp. 6-8. Locke has failed to recognize the wrongful nature of its conduct, and indeed, it denies that the Division "found any evidence of wrongdoing" and implies that it is "innocent" and "has done nothing but benefit many clients over the years." Resp. Motion, p. 1; Resp. Oppo., p. 3. Locke has offered no assurances against future violations, and the Court found that there was "a reasonable likelihood Locke could attempt to evade securities laws and regulations in the future if it sought to continue doing business." Opinion, p. 9.

In sum, there is no genuine issue of material fact, and the Steadman factors weigh in favor of a permanent bar. Additionally, a permanent bar will further the Commission's interests in deterrence, particularly general deterrence. See Altman, 99 SEC Docket at 34438 ("Other

[8] If the underlying injunction is vacated, Locke 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).

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 ("even if further violations of the law are unlikely, the nature of the conduct mandates permanent debarment as a deterrent to others in the industry"). Finally, a permanent bar is remedial rather than punitive because it will protect the integrity of regulatory processes and will thereby protect the investing public from future harm.

ORDER

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

It is FURTHER ORDERED that, pursuant to Section 203(e) of the Investment Advisers Act of 1940, Locke Capital Management, Inc., is BARRED from acting as an 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. See 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. See 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 occurs, the Initial Decision shall not become final as to that party.

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Cameron Elliot
Administrative Law Judge