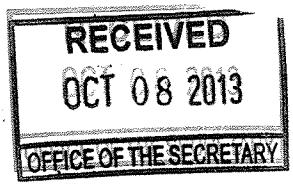
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15045

In the Matter of

DAVID MURA,

Respondent.



DIVISION OF ENFORCEMENT'S BRIEF OPPOSING RESPONDENT DAVID MURA'S PETITION FOR REVIEW

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I. INTRODUCTION

Respondent and former registered representative David Mura, the Division alleges, violated Section 15(a) of the Exchange Act by acting as an unregistered broker-dealer while soliciting individuals to invest in promissory notes issued by a number of small New York limited liability companies. Mura defaulted in these proceedings because he skipped a January 29, 2013 status conference (the "January 29 Conference") that was called to address his own adjournment request, and has repeatedly refused to provide a valid explanation for his absence. Mura claims in his petition for review that he did not receive the January 23, 2013 order scheduling the conference (the "Scheduling Order"), but this claim is absolutely false. As Judge Elliot concluded, "[t]here can be no doubt that Mura had actual notice of the January 29 conference." (Initial Decision ("ID") at 4.) In fact, six days before the conference was to take place, Mura received and repeatedly responded to an email attaching the Scheduling Order (he agreed to accept service by email in these proceedings). Mura even confirmed beforehand that he was "fine" with the conference as scheduled. Mura attempts to ignore this elephant in the room – he does not so much as mention the email in his previous motions to set aside the default or in his present petition for review. And to the extent Mura complains of delayed delivery of the Scheduling Order by U.S. mail, he has only himself to blame because he never put an accurate address of record on file pursuant to Rule of Practice 102(d)(1).

Mura's various attempts to set aside the default order against him failed for equally straightforward reasons, *i.e.*, he completely ignored the requirements set forth in Rule of Practice 155(b). Mura did not state a remotely valid reason for his failure to appear (as referenced above), and did not even attempt to specify the nature of his proposed defense. Instead, he baldly claimed that he would discredit the evidence against him. This is

insufficient as a matter of law – merely asserting that "I didn't do it" is not a meritorious defense for purposes of setting aside a default. Further, as a practical matter, Mura would have a hard time persuading a fact-finder of anything given that Judge Elliot will preclude him from introducing his own documents or calling his own witnesses because he failed to identify exhibits or witnesses in pretrial submissions.

Mura's petition also requests that the sanctions against him be reduced or overturned. Specifically, he claims that he is financially strapped, his victim-investors got their money back through a FINRA arbitration, he did not engage in the securities offering at issue, and he has accepted a permanent bar from FINRA. These points are altogether unavailing. Mura: fails to support his claim about strained personal finances through a sworn financial disclosure statement, as required by Rule of Practice 410(c); conflates claimants' proceeds from settling (primarily with Mura's employer and it's insurance carrier) in a separate arbitration (including for conduct not alleged in the Commission's OIP) with civil money penalties that Mura is required to pay personally; does not address *any* of the specific allegations concerning his role in the subject securities offering; imagines that the Commission's and FINRA's bars are mutually exclusive; and fails to mention that the FINRA bar was imposed based on a separate and unrelated violation, *i.e.*, he refused to provide documents in response to the SRO's requests for information.

Mura's purported status as a disadvantaged *pro se* litigant also bears mention at the outset. While he is emphatic in seeking every allowance due an individual litigating without legal representation, he is, in reality, only nominally *pro se*. Mura is highly litigious, brags that he is very familiar with the law, and is surrounded by attorneys. The fact that he chose not to engage counsel to make a formal appearance in these particular proceedings should not alter the parties' relative burdens surrounding his current petition. An example

demonstrates this point particularly well: at the very same time Judge Elliot was waiting in vain for Mura to join the January 29 Conference, Mura was sitting in the office of Steven Cole, Esq., the attorney who represented Mura for purposes of the staff's investigation, and who continued to represent Mura throughout the referenced FINRA arbitration (which involved some allegations that overlap with those here). Neither Mura nor Cole joined the conference.

In the end, Judge Elliot's initial decision rests on rock solid facts and law and should be upheld, and Mura's petition for review should be denied.

II. PROCEDURAL BACKGROUND AND THE INITIAL DECISION

The Commission instituted these proceedings on September 24, 2012 by an Order Instituting Public Administrative and Cease-and-Desist Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934. The OIP generally alleged that "Mura violated Section 15(a) of the Exchange Act by acting as an unregistered broker-dealer in connection with his solicitation of investors in promissory notes (the 'LLC Promissory Notes') issued by several small, related New York Limited Liability Companies (the 'LLCs') located in Pittsford, New York. While Mura engaged in these solicitation efforts, he was a registered representative and branch office manager of J.P. Turner & Company, LLC ('J.P. Turner'), a broker-dealer registered with the Commission. Despite his association with J.P. Turner, Mura conducted the offering of the LLC Promissory Notes outside the scope of his employment with J.P. Turner, in violation of Section 15(a) of the Exchange Act." (OIP at 1.) Mura also aided and abetted violations of Section 15(a) by directing two other individuals, Edward Tackaberry[1] and James Scalise, to identify and

[1] Tackaberry, now deceased, was a resident of Fairport, New York. From 1981 (continued . . .)

solicit additional potential investors and to otherwise participate in the LLC Promisorry Notes offering. (*Id.* at 2. Scalise is referenced in the OIP as "Investor 1.")

Shortly after receiving the OIP, Mura's counsel Steven Cole informed the Division that he would no longer be representing Mura for purposes of these proceedings. (Arnzen Decl. in Support of Opposition to Amended Motion to Set Aside Default, ¶ 2.) Mura filed an answer on October 14, 2012 and immediately requested an adjournment of the pretrial conference. (*Id.*, Ex. 1.) Mura filed an amended answer on October 24, 2012. (*Id.*, ¶ 4 and Ex. 2.) Mura and the Division attended a telephonic scheduling conference with Judge Elliot on November 6, 2012, during which a prehearing schedule was established. (*Id.*, Ex. 3.) During the hearing, Mura did not object to the proposed March 4, 2013 hearing date, or pretrial schedule generally, in response to direct questions put to him by Judge Elliot (*Id.*, Ex. 4, 11:19-12:19, 17:9-14;), and stated that "I'm fairly capable of acting in *pro se* litigation if necessary, [sic] could go through the process completely." (*Id.*, Ex. 4, 6:16-7:4.) Also during the hearing, Judge Elliot stated: "I encourage the parties to communicate with each other electronically" and "send each other the various filings electronically." (*Id.*, Ex. 4, 20:16-20.)

On December 12, 2012, the Division emailed Mura and inquired whether he would agree to accept service by email in this case. "Mr. Mura – Will you agree to accept service

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(. . . continued)
through 2006, Tackaberry was a registered representative of various broker-dealers. In September 2007, Tackaberry was barred from association with any broker or dealer based on permanent injunctions imposed by a federal district court upon finding, in a case brought by the Commission, that he committed securities fraud in a scheme that did not involve the LLCs. (*In the Matter of Mark Palazzo and Edward Tackaberry*, Admin. Proc. File No. 3-12844, Exchange Act Release No. 56550A (September 27, 2007); *SEC v. Pittsford Capital Income Partners, L.L.C.*, 06 Civ. 6353 T(P) (W.D.N.Y. Aug. 30, 2007)). Tackaberry passed away on July 5, 2013.

of papers and other materials in the referenced matter via email delivery alone? In other words, if you agree, we will serve papers by delivering them to this email address, and not send them to a physical address. Is that agreeable to you?" (*Id.*, Ex. 5.) On December 13, 2012, Mura replied by email: "dear Aaron, yes I will be more than glad to accept any documents by e- mail." (*Id.*)

On January 21, 2013, Mura emailed the Division stating that he was "in need of an adjournment" for a number of purported reasons. (*Id.*, Ex. 6.) After confirming with Mura that he intended to direct this message to Judge Elliot, the Division promptly forwarded Mura's email and requested a telephonic status conference to address Mura's request for an adjournment. (*Id.*) On January 23, 2013, Judge Elliot issued the Scheduling Order calendaring the January 29 Conference, and sent the order to Mura by U.S. mail and by email. (*Id.*) That same day, in an effort to ensure that Mura did not have a scheduling conflict or otherwise object to the January 29 Conference, the Division forwarded the Scheduling Order to Mura by email and asked if he was available. (*Id.*, Ex. 7.) Mura responded by email: "Dear Aaron tues. the 29 of jan at 12;30 is fine." (*Id.*) On January 28, 2013, in order to tee up issues for purposes of the conference, the Division replied to the email by which the ALJ notified the parties of the Status Conference, and attached a letter challenging several of Mura's purported bases for his adjournment request. (*Id.*, Ex. 6.) Later that day, Mura responded to the Division's letter by replying to the same email chain, *i.e.*, the email chain by which the Status Conference was noticed, and stated "I … have nothing to offer financialy and wasting mor valuabl sec time on this matter is a waste of taxpayer time and money ." (*Id.*)

Pursuant to Judge Elliot's November 6, 2012 scheduling order, the Division timely provided Mura with its witness and exhibit lists. (*Id.*, ¶ 10.) Mura did not comply with the order and provided no such lists to the Division. (*Id.*)

On January 29, 2013, at 12:30 p.m., the Division opened the telephone line for the January 29 Conference. (*Id.*, ¶ 6 & Ex. 4.) Mura was not on the line, so the Division immediately emailed him and phoned him no less than four times to remind him of the conference, and reached his voicemail each time. (*Id.*, Ex. 4, 3:9-18.) Meanwhile, by his own admission, Mura was "in steve coles [Mura's attorney] office all morning" on January 29, 2013. (*See* January 30, 2013 Email from Mura to ALJ and the undersigned). After waiting on the line for almost 20 minutes, Judge Elliot opened the record at 12:47 pm, noted Mura's absence, and stated his intention, consistent with his practice, to issue an order to show cause why Mura should not be found to be in default. (*Id.*, Ex. 4, 4:16-5:7.) Judge Elliot issued such an order to show cause on the same day, and on February 11, 2013, found that Mura had not responded to the order to show cause and deemed Mura in default, and postponed the evidentiary hearing *sine die*. (*Id.*, Ex. 8, 9.) Soon after the default order issued, the Division contacted Mura by phone and informed him of the order and of the Division's intention to file a motion seeking findings and sanctions. (*Id.*, ¶ 12.) Thereafter, Mura emailed objections to Judge Elliot; one email claimed that Mura was not aware of the conference and asserted that the Division's "lack of effort to reach out to me I believe was an effort to make me look bad to the judge AS you were Instructed by the judge." (*Id.*, Ex. 10.) On March 1, 2013, Judge Elliot issued an order that (a) construed the emails liberally as a motion to set aside the default, (b) denied the motion(s) without prejudice, and (c) stated that any motion by Mura to set aside the default "shall be made in

writing, and filed with the Secretary of the Commission, and should be supported by evidence and points and authorities." (*Id.*, Ex. 11.)

On April 10, 2013, Mura submitted a more formal motion to set aside the default, which was denied without prejudice because Mura did not comply with SEC Rule 155(b) or Judge Elliot's prior order insofar as the motion did not specify the nature of Mura's defenses or present evidence or points and authorities. (*Id.*, Ex. 12, 13.) Mura sent an amended motion consisting of just over two double-spaced pages to the Division by U.S. mail on April 22, 2013. (*Id.*, Ex. 14.) The Division forwarded this motion to the ALJ by email and copied Mura, who responded by email within 15 minutes thanking the Division for forwarding the motion: "Dear mr. arnzen thank you for your courtesy.this acromony is not personal but I cant belive you could possibly believe what you are presenting that makes me very upset and doubt the integretity of this case." (*Id.*, Ex. 18.)

On April 18, 2013, the Division filed a Motion For Initial Decision Making Findings And Determining Sanctions Based On Entry Of Default. Mura submitted twelve purported evidentiary documents, without explanation, in opposition. On June 14, 2013, Judge Elliot issued an Initial Decision that (1) denied Mura's motion to set aside the default, (2) made findings of fact based on the OIP's allegations and evidence submitted by the Division and Mura, (3) concluded that Mura had violated, and aided, abetted and caused violations of, Section 15(a) of the Exchange Act, and (4) because Mura's violations were willful and "[p]articularly egregious" (ID at 11), imposed against Mura a cease and desist order, associational bars, a censure, and maximum Second Tier civil penalties totaling $840,000.

Several of Judge Elliot's findings are particularly relevant here:

> Mura's actions were plainly willful: he personally solicited investments, directed others to solicit investments for him, oversaw the transactions, and collected

and deposited the funds. Mura also deceived his employer, J.P. Turner, so that he could devote substantial time and resources toward soliciting investors for the LLCs without scrutiny. (ID at 10.)

* * *

Mura's conduct was egregious. Mura solicited numerous individuals to invest in what are now worthless securities, causing them to lose large portions of, in some cases, their savings and retirement funds. The total investment induced by Mura was at least $761,000, of which Mura received $50,000. Particularly egregious was Mura's use of violence and threats of violence on multiple occasions. (ID. at 11.)

* * *

Although not necessary to prove a Section 15(a) violation, the evidence amply demonstrates that Mura acted with scienter. As a registered representative for nearly two decades, Mura was well aware of the requirements imposed upon brokers, and even bragged about his knowledge of the rules during his deposition. He acknowledged in his investigative testimony that he was not allowed to solicit investors in the LLCs: "because of my job . . . [t]hat is selling in a way and that's not something that I can do." He misled J.P. Turner about his outside activities on his "Outside Employment Disclosure" forms, stating on the forms that he worked ten hours per week after normal trading hours on two businesses, but testifying that he spent "thousands if not tens of thousands" of hours on all of the LLCs. He instructed Weaver to falsely tell two potential investors that the LLCs had signed "multi-million dollar contracts." He instructed Scalise to mislead the Commission's examiners regarding Tackaberry's role in the LLCs. He instructed his wife to write a letter to investors discouraging them from cooperating with the Commission's investigation; the letter falsely stated that the investors were represented by the same attorney representing Mura. He attempted to stymie the Commission's investigation by telling Division counsel that investigative subpoenas to be served on the LLCs should be sent to Weaver, even though Weaver was no longer affiliated with the LLCs at that time. He falsely told a business associate that Commission attorneys had told him that the associate's conduct was unethical and fraudulent. He was contumacious and obstructive on multiple occasions during his deposition and investigative testimony, stating "this is a witch hunt," "I'm not answering any more of your questions," "[d]id you look for the moon this morning when you got up?" and "[l]ady, if you think you can badger me, you're out of your mind . . . are you having problems hearing me still?" (ID at 12-13 (citations to record omitted).)

On July 10, 2013, Mura submitted to Judge Elliot a "notice of my appeal to reverse the [ID]" and, on July 11, 2013, Mura emailed Judge Elliot a request for "reconsideration of your recent [ID]." The next day, July 12, 2013, Judge Elliot issued an order in which he

construed the first email as a petition for review and ruled that he lacked authority to act on it, and construed the second email as a motion for reconsideration and denied it because it was not properly served and because the Rules of Practice do not provide for such a motion.

On July 26, 2013, Mura submitted his petition for review. The Commission granted the petition on August 7, 2013, and on August 31, 2013, Mura submitted a two-page memo in support of his petition.

III. ARGUMENT

A. Mura's Motion To Set Aside The Default Was Properly Denied.

Judge Elliot's denial of Mura's motion to set aside the default was appropriate and should be upheld. Rule of Practice 155(b) provides that "[a] motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding." A default may be set aside "in order to prevent injustice" and for "good cause shown." *Id.*; *see Robert E. Ainbinder*, Exchange Act Release No. 39177 (Oct. 1, 1997), 65 SEC Docket 1966 (good cause must be shown as to the reasons for failing to defend); *James M. Russen, Jr.*, Exchange Act Release No. 32895 (Sept. 14, 1993), 51 S.E.C. 675, 677 (same).

1. Mura Has Failed To State The Reasons For Failing To Appear.

In a single paragraph in his petition for review (which he styles as a Request for Review and Dismissal of Fine), Mura briefly argues that he failed to appear for the January 29 Conference because he did not receive the Scheduling Order until after the conference took place. "I was deemed to be in default because I missed 1 telephonic conference call and that was due to the fact that I received notice for the sec in a letter which is Exhibit 1 showing that that the letter arrived on the same day that the conference call was scheduled

at 11 AM. I received notice at 4 in the afternoon from the mailbox where I was staying." (Peition for Review, at 1.)

This argument is defeated by three indisputable facts. First, the ALJ's office properly served the Scheduling Order on Mura by U.S. mail pursuant to Rule of Practice 141(b). And while Mura argues that he had changed residences and therefore his receipt of the Scheduling Order was delayed, this is exclusively Mura's fault because he did not put his current address on file with the Office of the Secretary, as required by Rule of Practice 102(d)(1). (ID at 4 ("[A]ny delay in receipt of U.S. mail notification was invited by Mura.").)

Second, well in advance of the January 29 Conference, the Division properly served Mura with the Scheduling Order by email, with Mura's consent. As described above, the Division sent to Mura a crystal clear, stand-alone email asking Mura if he would accept service in these proceedings by email. (Arnzen Decl. in support of Opposition to Amended Motion to Set Aside Default, Ex. 5.) Mura's reply: "dear Aaron, yes I will be more than glad to accept any documents by e- mail." (*Id.*) Under this agreement, the Division served the Scheduling Order on Mura by email on January 23, and Mura confirmed receipt of the order by repeatedly replying to that same email. (*Id.*, Ex. 7.)

Finally, the ALJ's Office delivered the Scheduling Order to Mura by email, further ensuring that Mura had actual notice of the January 29 Conference. As Judge Elliot found, Mura's excuse that the United States Postal Service did not find him in time "misses the point, because he had actual notice of the conference." (ID, at 4.) Indeed, in addition to receiving the email attaching the Scheduling Order directly from the ALJ's Office, the Division also did Mura the courtesy of confirming that the calendared date and time were acceptable to him. His response - "Dear Aaron tues. the 29 of jan at 12;30 is fine." Mura

later replied to this same email string, *i.e.*, the very email string attaching the Scheduling Order.

In short, there is no room for debate that Mura was properly served with the Scheduling Order and had actual notice of the January 29 Conference, and he does not present any valid reasons for his failure to appear or defend.

2. Mura Has Failed To Specify The Nature Of His Proposed Defense.

Mura also fails to adequately set forth the nature of his proposed defense. His only argument in this respect is that "I was deprived of my right to confront [the Division's] witnesses and discredit their testimony." (Petition for Review, at 2.) This does not meet Mura's legal burden. To demonstrate a meritorious defense to vacate a default, a party is not required to establish the defense conclusively, but "must present evidence of facts that, if proven at trial, would constitute a complete defense." *S.E.C. v. McNulty*, 137 F.3d 732, 740 (2d Cir. 1998) (quotation omitted). The evidence presented must consist of more than conclusory denials and/or unsupported affidavits. *See SEC v. Breed*, No. 01 Civ. 7798, 2004 U.S. Dist. LEXIS 16106, at *38-39 (S.D.N.Y. Aug. 13, 2004) (denying motion to vacate default judgment; noting that a simple "I didn't do it" is not a meritorious defense). Mura similarly asserted to Judge Elliot that he would discredit the Division's witnesses based on their status as claimants in a FINRA arbitration against him. However, these, too, are conclusory statements and, as Judge Elliot pointed out, "of the thirty-four witnesses the Division has identified, by my count no more than fourteen of them, or less than half, are identified as limited liability company (LLC) investors; the remaining twenty witnesses are surely not FINRA claimants." (ID at 4.) Further, Mura did not file a witness or exhibit list, and therefore "will not be permitted (absent extraordinary circumstances) to present any witnesses or evidence." (*Id.*) More fundamentally, Mura does not explain how he could or

would discredit witnesses by virtue of their being investors who have settled with Mura and given him a full release in the arbitration against him. (Petition for Review, Ex. 3.)

Lastly, Mura argues that default is a heavy sanction. While that may be true, the Commission's Rules of Practice clearly and unambiguously put parties on notice that skipping a conference could lead directly to default. "A party to a proceeding may be deemed to be in default ... if that party fails ... to appear, in person or through a representative, at a hearing or conference of which that party has been notified." Rule of Practice 155.[2]

Finally, as a matter of fairness, Judge Elliot gave Mura at least four opportunities to explain his failure to appear and three chances to specify the nature of his defense. Mura failed to respond, in any way whatsoever, to the January 29, 2013 order to show cause by explaining his absence from the status conference held that day. And Mura's first two motions to set aside the default were denied (on March 1 and April 10, 2013) *without prejudice*, and Judge Elliot advised Mura on both occasions that he should comply with Rule 155(b) in future attempts to set aside the default. In total, Mura had four bites at the

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[2] It is worth noting that Mura's citations to default judgment cases for the proposition that default judgment is overly harsh are all inapt. *Lewis v. Lawson*, 564 F.3d 569 (2nd Cir. 2009) does not address default judgments at all, but instead concerns a dismissal for failure to prosecute under a standard that is not applicable here because (to state the obvious) Mura is not a plaintiff or respondent. Further, the appellate court upheld dismissal of the case; and (3) the quotation is from the dissenting opinion. *Id.* at 586-87. Similarly, Mura quotes a portion of *Bobal v. Rensselaer Polytechnic Institute*, 916 F.2d 759 (2nd Cir. 1990) that addresses sanctions under FRCP 37(d), which specifically concerns violations of court orders regarding civil discovery. Finally, *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 386 (2d Cir. 2001) involves a default order issued because plaintiff failed to appropriately complete a form required by the district court's standing order concerning RICO cases; the Second Circuit overturned the default order, in part, because such a standing order "may not make the prosecution of the action dependent upon the plaintiff's ability to furnish more information that is required, as a matter of law, to prove the essential elements of the claim." *Id.* at 386. These facts, and this opinion, have no bearing here.

apple, and failed each and every time to explain his absence or specify his proposed defense.

B. The Sanctions Imposed Against Mura Should Be Upheld.

Judge Elliot's order regarding sanctions should not be overturned. Mura's petition does not address the great majority of Judge Elliot's reasons for imposing sanctions, and Mura has therefore waived his right to challenge these. Instead, Mura makes a small number of unfounded arguments to reduce or eliminate the sanctions against him. These arguments are discussed individually below.

1. Mura Has Failed To Establish His Inability To Pay A Civil Money Penalty.

In an apparent argument that he is unable to pay the civil money penalty imposed by Judge Elliot, Mura asserts that he is effectively penniless. "I now have an income of $1440 from Social Security and all of my assets have been depleted." (Petition for Review, at 2.) "I lost my job and now have to live under the poverty line." (*Id.*) "[M]y life has been ruined financially and emotionally and ... any further pursuit is cruel and unjust." (*Id.*)

However, Mura has failed to support these assertions through the submission of a sworn financial disclosure statement as required by Rule of Practice 410(c) or, for that matter, through any other reliable means. Nor did Mura submit such evidence to Judge Elliot below. Mura's unsubstantiated assertion surrounding his financial status should not allow him to reduce his civil money penalty or other sanctions in these proceedings. *See, e.g., David Henry Disraeli*, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 883 (finding that the "vague and unsubstantiated nature of [the respondent's] disclosures render them neither adequate nor credible as a basis for reducing the disgorgement or penalty amounts"), *aff'd*, 2009 WL 1791547 (D.C. Cir. June 19, 2009) (*per*

curiam) (unpublished); *Philip A. Lehman*, Exchange Act Rel. No. 54660 (Oct. 27, 2006), 89 SEC Docket 536, 549 (finding that respondent's claim of inability to pay "neither adequate nor credible because his assertions variously are vague, unsubstantiated, inconsistent, or contradicted by reliable evidence").

2. Mura's Reference To Settlement In A Separate FINRA Arbitration Is Irrelevant.

Mura argues that the sanctions against him are unjust because claimants in a FINRA arbitration obtained funds by settling their claims against Mura's former employer, J.P. Turner. However, Mura does not explain how settlement payments by J.P. Turner, in substantial part for conduct that was *not* alleged in the OIP, has anything to do with civil penalties imposed on Mura, personally. The purpose of a civil money penalty is to penalize, and this purpose would be entirely thwarted here if Mura avoided a civil penalty because his employer paid money to settle a separate arbitration proceeding.

Mura also attaches to his Petition for Review as Exhibit 3 a purported settlement agreement between himself and the FINRA claimants. He apparently seeks to supplement the record with additional evidence but has not sought leave to do so, as required by Rule of Practice 452. Significantly, the settlement agreement has a confidentiality provision stating that the Claimants are not permitted to discuss the "existence or terms of this Agreement or the parties' settlement." (Petition for Review, Ex. 3 at ¶ 14.) Claimants' counsel is therefore legally constrained from disclosing, and politely refused to disclose to the Division, whether Mura paid the settlement amount personally or, more likely, an insurance carrier made such a payment.

3. Mura's Reference To FINRA's Bar Against Him Is Irrelevant.

Mura's Petition for Review mentions that FINRA has imposed a "permanent bar from the industry" against him, presumably as a reason to reduce or nullify the sanctions

imposed by Judge Elliot. (Petition for Review, at 2.) Mura points to no law, logic, or argument for the proposition that sanctions imposed by the Commission, including associational bars, and bars imposed by FINRA are mutually exclusive. What's more, according to FINRA's CRD system, the bar against Mura was imposed because he refused to provide documents in response to requests for information concerning his broker-dealer activities. Judge Elliot's sanctions, on the other hand, were imposed because (1) Mura violated Section 15(a) of the Exchange Act, and (2) Mura acted egregiously in committing such violations and contumaciously in his interactions with the staff during its subsequent investigation.

4. Mura Should Not Be Heard To Argue The Merits Of His Defense At This Stage Of The Proceedings

In his Petition for Review, Mura takes issue with the merits of the allegations against him. Mura asserts that he "was not responsible for" and even "unaware" of the LLC Promissory Note offering, and he "did not sign any notes nor sent any emails nor did I solicit anyone." (Petition for Review, at 2.) He also advances a rather preposterous proposition – that the overwhelming number of witnesses that the Division could call and the mountain of documents that the Division could introduce at an evidentiary hearing demonstrates that the case is "full of factual issues," and presumably must therefore go to hearing. The Division has a decidedly different view – it is unusually confident in its ability to prove its allegations against Mura. But that's not the point. This is – if Mura wanted to argue the merits, he certainly could have. All he had to do was (1) attend the January 29 Conference, or (2) respond to the order to show cause, or (3) present some reason for his failure to appear and specify the nature of his defense. But he chose not to do so. The OIP's allegations against him were therefore deemed to be true, and Mura should not be heard to argue the merits at this late stage of the proceedings. *See* Rule of Practice 155(a)

(upon default, the "allegations of [the OIP] may be deemed to be true"); ID at 5 ("The Set Aside Motion is accordingly denied, the allegations in the OIP are deemed true, and this proceeding is determined against Mura by default.").

C. Mura's Nominal Pro Se Status Should Not Change The Relative Burdens In His Petition for Review

Mura has repeatedly sought all of the allowances typically afforded to a *pro se* litigant. In most cases where a party in unrepresented, such allowances are not unusual or unfair. But here, Mura is trying to game the system. By his own account, he has "been subject to the vagrancies of the legal system and its bullying tactics before. I am very familiar with the law." (Arnzen Decl. in Support of Motion for Initial Decision, Ex. 3, at 25:8-20.) By way of example, Mura purports to be very familiar with:

- The results of invoking the Fifth Amendment in civil proceedings. "I refuse to answer any of those questions on the grounds of it may tend to incriminate me. ... I'm very aware of the possible ramifications of that." (*Id.* at 25:2-13.)

- The litigation process generally. "I'm fairly capable of acting in *pro se* litigation if necessary, [and] could go through the process completely." (Arnzen Decl. in Support of Opposition to Amended Motion to Set Aside Default, Ex. 4, 6:16-7:4.)

When there are litigation issues with which he needs legal assistance, Mura personally knows – and has engaged at various times – a cadre of litigators he can and does contact. To name a few: Steven Cole, Esq., represented Mura in the investigation leading to the Division's allegations (including for purposes of Mura's investigative testimony and Wells submission), and continued to represent Mura in a FINRA arbitration well after the Commission initiated these proceedings. (*See* Petition for Review, Exhibit 3 (arbitration settlement agreement approved as to form by Mr. Cole on July 22, 2013).) James Philippone, Esq., represented Mura when his deposition was taken during the

Commission's effort to enforce a federal district court judgment against Edward Tackaberry (which deposition focused primarily on Mura's knowledge of the LLCs – Mura lied repeatedly and was contumacious throughout the deposition). (Arnzen Decl. in Support of Motion for Initial Decision, Ex. 3.) Robert Brenna, Jr., Esq., appears to represent Mura behind the scenes in these proceedings (*see* Mura's Opposition to Motion for Initial Decision, attaching May 17, 2013 email from Mura to Brenna, copying "ALJ" and the undersigned (requesting documents, information and an affidavit to use in opposition)), and previously represented Mura in litigation that focused (for reasons surrounding Mura's proclivity toward violence) on whether Mura threatened to heave opposing counsel from the 7th story window of a Rochester, New York building during a deposition (*see id.*, June 3, 2010 Letter from Brenna to court ("We make no excuse for Mr. Mura's intolerance when being asked questions by [attorney] Mr. Capell ....."). In brief, Mura regularly engages counsel, and it was his choice not to do so here. He should gain no advantage from this strategic decision.

IV. CONCLUSION

For all the foregoing reasons, Mura's Petition for Review should be denied and Judge Elliot's Initial Decision upheld.

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Respectfully submitted,

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