UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

FILE NO. 3-15141

In the Matter of MOHAMMED RIAD AND KEVIN TIMOTHY SWANSON Respondents.	)))))))	MOTION TO DISMISS

Dated: February 5, 2016

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Attorneys for Mohammed Riad and Kevin Timothy Swanson

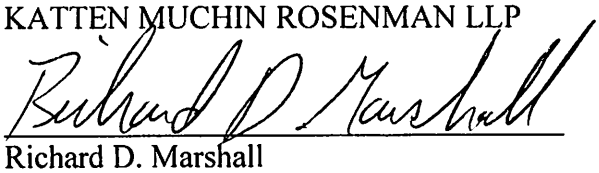
Pursuant to Rules 154(a) and 411(d) of the Securities and Exchange Commission's ("SEC" or the "Commission") Rules of Practice, Respondents Mohammed Riad and Kevin Timothy Swanson (collectively, the "Respondents") hereby petition the Commission to dismiss this matter on the basis that the impartiality of the Commissioners might reasonably be questioned because of statements approved by the Commission in a release proposing a new Rule 18f-4 under the Investment Company Act of 1940, as amended ("Investment Company Act"). See Investment Company Act Rel. 31933 (Dec. 11, 2015)(the "Release").

For the reasons set forth in the accompanying brief in support of this motion, Respondents respectfully urge the Commission to dismiss this action.

February 5, 2016

Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP



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Dated: February 5, 2016

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Pursuant to Rules 154(a) and 411(d) of the Securities and Exchange Commission's ("SEC" or the "Commission") Rules of Practice, Respondents Mohammed Riad and Kevin Timothy Swanson (collectively, the "Respondents") hereby petition the Commission to dismiss this matter on the basis that the impartiality of the Commissioners might reasonably be questioned because of statements approved by the Commission in a release proposing a new Rule 18f-4 under the Investment Company Act of 1940, as amended ("Investment Company Act"). See Investment Company Act Rel. 31933 (Dec. 11, 2015)(the "Release").

I. Facts

On December 11, 2015, by a vote of three to one, the Commission proposed a new Rule 18f-4 governing investments by investment companies in derivatives and other senior securities, as those terms are defined in the proposed rule. One of the Commissioners who voted to approve the proposal of the rule, Commissioner Aguilar, resigned on December 31, 2015. However, the other three Commissioners who voted on proposal of the rule are still members of the Commission.

In the Release, near its beginning (at page 32), there is a section captioned "Need for a New Approach." The Release states that "[w]e [referring to the Commissioners] have determined to propose a new approach to funds' use of derivatives in order to address the investor protection purposes and concerns underlying section 18 of the Act . . . . We are concerned . . . that funds' current practices . . . in some cases may not adequately address these considerations." Later in this same section, the Release notes that "[t]hree relatively recent settled enforcement actions provide examples of situations in which funds' use of derivatives caused significant losses and are relevant to our consideration of whether funds' current practices, based on their application of Commission and staff guidance, are consistent with the

investor protection purposes and concerns underlying section 18 of the Investment Company Act."

Three cases are then discussed in the Release. The first and third cases discussed are settled administrative proceedings in which no individuals were charged. The second cases discussed, however, are the settled cases directly related to the pending case against the Respondents. The Release states the following about these settled cases:

> The second action[124] involved a registered closed-end fund that pursued an investment strategy involving written out-of-the money put options and short variance swaps.[125] These derivatives transactions led to substantial losses for the fund in September and October 2008, when the fund realized a loss of approximately $45.4 million, or 45% of the fund's net assets as of the end of August 2008, on five written put options and variance swaps, contributing to a 72.4% two-month decline in the Fund's net asset value. The fund was liquidated in May 2009.
>
> 124 See In the matter of Claymore Advisors, LLC, Investment Company Act Release No. 30308 (Dec. 19, 2012); In the matter of Fiduciary Asset Management, LLC, Investment Company Act Release No. 30309 (Dec. 19, 2012) (settled actions).
>
> 125 Variance swaps are essentially a bet on whether the actual or realized market volatility will be higher or lower than the market's expectation for volatility (or "implied volatility"). A party with a "long variance" position profits when realized volatility for the contract period is greater than the implied volatility. A party with a "short variance" position profits whenever realized volatility is less than the implied volatility.

In fact, the case against the Respondents arises directly from the cases against Fiduciary Asset Management and Claymore Advisors. Respondents are accused of improperly investing in derivatives while employed by Fiduciary Asset Management, while that firm was the sub-adviser to a closed-end registered investment company advised by Claymore Advisors. The facts alleged against the Respondents are identical to the facts alleged against Fiduciary Asset Management and Claymore Advisors in the settled cases.

In the total context of the Release, it is clear that these cases are discussed to provide support for the adoption of the proposed rule. Since the current pending case against the Respondents is based on the exact same facts and conduct that was alleged in the cases against Fiduciary Asset Management and Claymore Advisors, a decision by the Commission to reverse the decision of the administrative law judge against the Respondents would severely undermine the rationale for the proposed rule 18f-4, the adoption of which was publicly supported by the Commissioners who would sit in judgment of the pending appeal from the administrative law judge's decision against the Respondents.

II. Legal Analysis

"Due process requires a neutral, or unbiased, adjudicatory decision-maker." II Pierce, Administrative Law Treatise 846 (2010). Arnett v. Kennedy, 416 U.S. 134, 171 (1974). In certain cases, this Constitutional requirement has also been codified in statute. For example, 28 U.S.C. Section 455(a) requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[1] Interpreting this statutory requirement, Justice Kennedy wrote in concurrence in Liteky v. United States, 510 U.S. 540 (1994) that:

> The standard that ought to be adopted for all allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the statute itself: Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case.

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[1] See also, Section 556(b) of the Administrative Procedures Act, 5 U.S.C. Section 556(b)(3): "The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner."

These principals have been applied to Commission actions. For example, in Antoniu v. SEC, 877 F.2d 721 (8th Cir. 1989), the Court vacated and remanded for further proceedings an SEC administrative proceeding in which an SEC Commissioner had given a speech about the case while the appeal was pending before the Commission. In so holding, the Court reasoned that:

> We begin with the fundamental premise that principles of due process apply to administrative adjudications. See Amos Treat & Co. v. SEC, 306 F.2d 260, 264 (D.C.Cir.1962). The Supreme Court has described the requirements of due process: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). The Court has demanded not only a fair proceeding, but also that" 'justice must satisfy the appearance of justice.'" Id., citing Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954). The relevant inquiry is thus whether Commissioner Cox's post-speech participation in the Antoniu II proceedings comported with the appearance of justice.

Applying similar standards, in Amos Treat Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962), the Court ordered the district court to vacate a Commission decision in an enforcement action in which one of the Commissioners had participated as the supervisor of the investigation: "an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process."

In this case, the appearance of fairness has been compromised by the statements in the Release. The Commissioners advocate in the Release the adoption of proposed Rule 18f-4 based in part upon the conduct which is the subject of this appeal. Although the Respondents are not mentioned in the Release, the intimately related settled cases against their former employer and supervising adviser are highlighted to demonstrate the "Need for a New Approach." Only three

examples are cited in the Release to show the "Need for a New Approach." Reversal of the decision by the administrative law judge against the Respondents would severely undermine the evidence of the "Need of a New Approach" by taking away one of three cited examples to prove this "Need."

There was no reason for this issue to have arisen in the first place. The Release could have cited other examples or rested its argument solely on the two other cases cited, which did not involve allegations against individuals and have been completely resolved. The Commission voluntarily chose to rest its argument for adoption of the proposed Rule 18f-4 on conduct that is currently before the Commission for review. The Commission itself has voluntarily created this appearance of partiality by building its argument for the adoption of Rule 18f-4 on the successful prosecution of the Respondents, a prosecution which should be decided on its merits, not based upon how the outcome of this appeal may help advance the policy objectives of the Commissioners. This result is mandated by the Constitutional requirement of due process, which dictates that this case now be dismissed.

Conclusion

For the foregoing reasons, Respondents respectfully urge the Commission to dismiss this action.

February 5, 2016

Respectfully submitted,

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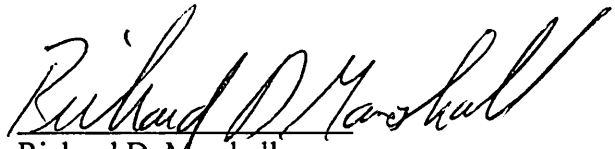
CERTIFICATE OF COMPLIANCE WITH RULE 450(d)

I, Richard Marshall, certify that this brief complies with the word limitation set forth in Commission Rule of Practice 450(c), as it contains 1,603 words, excluding the parts of the brief exempted by the Rule.[1]



Richard D. Marshall

[1] 17 C.F.R. §201.450 (c).

UNITED STATES OF AMERICA
Before the
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File No. 3-15141

In the Matter of

MOHAMMED RIAD AND KEVIN TIMOTHY SWANSON

Respondents.

CERTIFICATE OF SERVICE

Richard D. Marshall, an attorney, certifies that on February 5, 2016, he caused true and correct copies of Respondents' Motion to Dismiss and Brief in Support of Motion to Dismiss to be served by facsimile and by mail on the following:

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Dated: February 5, 2016

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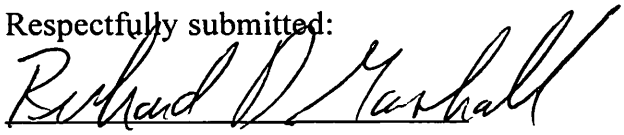

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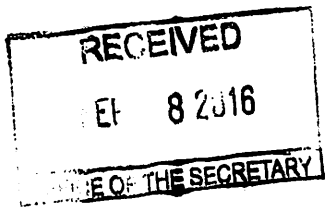

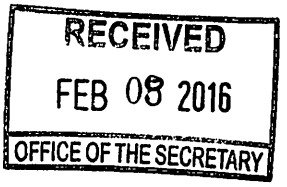

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February 5, 2016

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Re: In the Matter of Mohammed Riad and Kevin Timothy Swanson, File No. 3-15141

Dear Mr. Fields

Enclosed please find the original and three copies of the Motion to Dismiss, Brief in Support of Motion to Dismiss and Certificate of Service for filing with the Securities and Exchange Commission in the above-captioned matter.

Very truly yours,

Richard D. Marshall

Richard D. Marshall

RDM: