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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.	)	REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Dated: February 15, 2016

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Neither the facts nor the law are in dispute on this motion.

The facts are simple and clear. On December 19, 2012, the Commission issued a single press release simultaneously announcing the FAMCO and Claymore Cases[1] as well as the litigated case against the Respondents.[2] The first three paragraphs of that press release stated the following:

> The Securities and Exchange Commission today charged two investment advisory firms and two portfolio managers responsible for managing a Midwest-based closed-end fund for their roles in the failure to adequately inform investors about the fund's risky derivative strategies that contributed to its collapse during the financial crisis.
>
> An SEC investigation found that the Fiduciary/Claymore Dynamic Equity Fund (HCE) attempted two strategies to enhance returns — writing out-of-the money put options and shorting variance swaps. This exposed HCE to additional undisclosed risks and caused the fund to lose more than $45 million in September and October 2008, which was approximately 45 percent of its net assets. The fund liquidated in 2009.
>
> Fund adviser and administrator Claymore Advisors LLC, which is located in Lisle, Ill., and the sub-adviser responsible for managing HCE's portfolio, St. Louis-based Fiduciary Asset Management LLC (FAMCO), agreed to settle the SEC's charges. Claymore has established a plan to distribute up to $45 million to fully compensate investors for losses related to the problematic trading. FAMCO agreed to pay an additional $2 million in disgorgement and penalties. The SEC's case continues against former FAMCO employees Mohammed K. Riad of Clayton, Mo., and Kevin Timothy Swanson of St. Louis, the co-portfolio managers who allegedly made misleading statements in HCE's periodic reports about the two strategies' contribution to HCE's performance and about HCE's exposure to downside risk.[3]

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[1] 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).

[2] The Respondents are Mohammed Riad and Kevin Timothy Swanson.

[3] Press Release 2012-272 (Dec. 19, 2012), available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487082.

It is undisputed that the FAMCO Case and the Claymore Case involve identical factual allegations and legal theories to the allegations against the Respondents, which are now before the Securities and Exchange Commission ("SEC" or the "Commission") for review on this appeal.

It is also undisputed that on December 11, 2015, the Commission approved a release recommending a new Rule 18f-4 governing the use of derivatives by registered investment companies.[4] On page 32 of the Proposing Release, a key section begins with the bold faced caption: "**Need for a New Approach.**" Within this section, at page 44 of the Proposing Release, the Commission states that "[t]hree relatively recent settled enforcement actions . . . 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." Then, again in this same section, at pages 45 through 46 of the Proposing Release, the Commission discusses the FAMCO and Claymore Cases but does not mention the case against the Respondents.

The law is also undisputed. Both the Constitution and statutes require a judge to adhere to the following standard: "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

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[4] See Investment Company Act Rel. 31933 (Dec. 11, 2015)(the "Proposing Release").

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."[5]

It is also undisputed that, as set forth in Canon 3(a)(6) of the Code of Conduct for United States Judges, "[a] judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control."[6] The Official Commentary to this Canon provides that "[t]he admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A."[7]

It is also undisputed that these obligations apply to the Commissioners on this appeal.[8]

The only issue on this motion is whether the relevant statements in the Proposing Release might "lead[] a detached observer to conclude that a fair and impartial hearing is unlikely."[9]

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[5] Liteky v. United States, 510 U.S. 540 (1994). The oath that all federal judges must take is set forth in 28 U.S.C. §453: "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.'"

[6] Available at http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[7] Canon 2(a) provides that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

[8] Antoniu v. SEC, 877 F.2d 721 (8th Cir. 1989); Amos Treat Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962).

The Division of Enforcement (the "Division") makes four arguments that a detached observer would not conclude that the appearance of impartiality has been compromised in this case. First, the Division claims that the Proposing Release cites the FAMCO and Claymore cases "solely for the factual proposition that investments in derivatives can result in substantial investor losses" and that "Respondents do not contest this proposition." (Brief at p. 4) This argument is inconsistent with the language of the Proposing Release, which states that the FAMCO and Claymore cases are cited to show the "Need for a New Approach" 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."

Second, the Division argues that because "the Division of Enforcement did not allege any Section 18 violations against the Respondents," "the proposal, or even the adoption, of the proposed Rule under Section 18 adds nothing to the Commission's consideration of Respondents' actions in this appeal." (Brief at p. 5) This argument does nothing more than suggest that the Proposing Release should never have cited the FAMCO and Claymore Cases at all as "relevant" to the "need for a new approach" because neither of those cases involved alleged violations of Section 18. In fact, the Commissioners saw a connection between the FAMCO and Claymore Cases and the proposed Rule 18f-4, which is precisely why those Cases were prominently discussed in the Proposing Release.

Third, the Division argues that "Respondents' contention that reversing the Initial Decision would undermine the 'Need for a New Approach' described in the Release is simply not true." (Brief at p. 5) In fact, reversal of the decision by the administrative law judge against

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9 Liteky v. United States, 510 U.S. 540 (1994).

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."

Fourth, the Division argues that "Respondents [cannot] demonstrate that the Release somehow renders the Commissioners incapable of fairly judging the merits of their appeal." (Brief at p. 6) This formulation misstates the law entirely. The standard is whether an impartial observer would conclude that the appearance of impartiality has been compromised, not whether the Commissioners are "incapable of fairly judging the merits of their appeal." It is also incorrect to place the burden on the Respondents to prove that the Commissioners are "incapable" of judging this case fairly. Indeed, it is unclear how any litigant could meet such a burden under any circumstances, short of being permitted to depose the judges.

* * *

In considering this motion, we urge the Commissioners to consider the following hypothetical. Suppose this case had been filed in federal court and was now on appeal to the United States Court of Appeals. Suppose that, prior to the completion of briefing or the scheduling of oral argument, the three Judge panel assigned to decide the appeal were unanimously to file a petition for rulemaking with the Commission urging the adoption of a new rule governing the use of derivatives by investment companies and were to cite in the petition as "relevant" to the "need for a new approach" the FAMCO and Claymore Cases. Such conduct by Court of Appeals Judges would obviously be extraordinary, unconstitutional, illegal, and unethical. We ask the Commissioners to consider why this case is different from this hypothetical.

We also note that this issue, to our knowledge, has never arisen before and need never arise again. This issue does not arise from a necessary tension between the Commission's

different roles. 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.

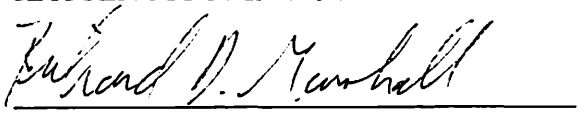
Conclusion

For the foregoing reasons and those set forth in their opening brief, Respondents respectfully urge the Commission to dismiss this action.

February 15, 2016

Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP



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Respondents.

CERTIFICATE OF SERVICE

Richard D. Marshall, an attorney, certifies that on February 15, 2016, he caused true and correct copies of Respondents' Reply Brief in Support of Motion to Dismiss to be served by facsimile and by Federal Express on the following:

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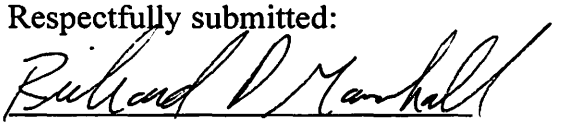
Dated: February 15, 2016

Respectfully submitted:



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February 15, 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 Reply 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: