UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15211

In the Matter of	
Francis V. Lorenzo,	
Respondent.	

RESPONDENT FRANCIS V. LORENZO'S BRIEF REGARDING SANCTIONS

Pursuant to the Commission's Order dated December 12, 2017 Respondent Francis V. Lorenzo ("Lorenzo") respectfully submits this Brief Regarding Sanctions.[1]

I. Summary

This matter is currently before the Commission on remand from the DC Circuit Court of Appeals. In a decision dated September 15, 2017, the DC Circuit vacated all the sanctions that the Commission previously imposed on Lorenzo. The DC Circuit's decision is reported at *Lorenzo v. SEC*, 872 F.3d 578 (DC Cir. 2017). Judge Kavanaugh of the DC Circuit stated:

> I hope that the SEC on remand pays attention, comes to its senses, and (at a minimum) dramatically scales back the sanctions in this case. Indeed, notwithstanding the majority opinion, I hope that the SEC, on its own motion, goes further than that: **The SEC should vacate the order against Lorenzo in its entirety and either end this case altogether.** (J. Kavanaugh dissenting at 12)(emphasis added)

[1] This Brief Regarding Sanctions is submitted without waiving or withdrawing any of the arguments in Lorenzo's pending motion to the Commission seeking to stay consideration of sanctions until the U.S. Supreme Court rules on his petition for a writ of certiorari. (*Lorenzo v. Securities and Exchange Commission*, Supreme Court Application No. 17A657)

For the reasons set forth below we respectfully request that the Commission adopt Judge Kavanaugh's conclusions, not impose any sanctions on Lorenzo and dismiss the case in its entirety.

II. Background and Procedural History

A. Administrative Proceedings and Initial Decision

The Commission issued an Order Instituting Proceedings ("OIP") against Lorenzo on February 15, 2013. The OIP was issued pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Sections 15(b), 21B, and 21C of the Securities Exchange Act of 1934 (Exchange Act). The OIP concerned two emails that Lorenzo sent to two customers of Charles Vista, LLC ("Charles Vista"), a registered broker-dealer owned by Gregg Lorenzo (no relation to Respondent Francis Lorenzo) during the fall of 2009. The OIP alleged that the emails containing false and misleading statements concerning the assets and business of Waste2Energy Holdings, Inc., (W2E) a start-up waste management company for which Charles Vista was attempting to sell convertible debentures.

On September 18 and 19, 2013 an administrative hearing was held before SEC Administrative Law Judge Carol Fox Foelak and on December 31, 2013 an Initial Decision was rendered. The Initial Decision found that the emails in question were drafted by Gregg Lorenzo (ID at 5), the owner and principal control person of Charles Vista and not Francis Lorenzo. The Initial Decision also found that Francis Lorenzo sent the emails that Gregg Lorenzo drafted from Francis' email account at the direction of Gregg Lorenzo. (ID at 5) In fact, the emails themselves indicate that they were being sent to the two customers at the request of Gregg Lorenzo. (ID 5-6) There is no allegation that the two recipients of the email were customers of Lorenzo or that he ever communicated with either of them in any other ways.

However, despite finding that the email in question was drafted by Gregg Lorenzo and not Francis Lorenzo (ID at 5), the Initial Decision imposed sanctions on Francis Lorenzo including a lifetime bar from the securities industry and a civil monetary penalty of $15,000.

B. Commission Review

Lorenzo petitioned the Commission for review of the Initial Decision. In his Petition for Review Lorenzo argued, among other things, that he could not be held to have violated Section 10(b) of the Exchange Act and Rule 10b-5 because he was not the "maker" of the statements that appeared in the two emails, Gregg Lorenzo was. The Petition for Review also argued the Initial Decision improperly found that the statements in question in the two emails were materially false and misleading.

On April 29, 2015 the Commission issued the Opinion sustaining the initial decision's conclusion that the two emails in question violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and imposed on Lorenzo a cease-and-desist order, a lifetime bar from the securities industry and a civil monetary penalty of $15,000. Respondent's motion to the Commission for reconsideration was denied on June 3, 2015.

C. DC Circuit Court Appeal

Lorenzo appealed the Commission's Order to the Court of Appeals for the DC Circuit. On September 29, 2017 the DC Circuit (with Judge Kavanaugh dissenting) held that Lorenzo was not liable under Rule 10b-5(b) for the misstatements at issue because he was not the "maker" of the statements under the standards set by this Court's holding in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). (*See Lorenzo v. SEC*, 872 F.3d 578 (DC Cir. 2017)). However, the DC Circuit held that these same misstatements, which it found Lorenzo did not make, could still be the basis of liability under Section 10(b) of the Exchange

Act, Rule10b-5(a), (c) and Section 17(a)(1) of the Securities Act because the misstatements constituted deceptive conduct. The DC Circuit remanded the matter back to the Commission.

D. Supreme Court Petition for a Writ of Certiorari

On December 15, 2017 Lorenzo filed an application with the U.S. Supreme Court seeking an extension of time within which to file a petition for a writ of certiorari. (*Lorenzo v. Securities and Exchange Commission,* Supreme Court Application No. 17A657). Lorenzo's application to the Supreme Court was granted and the new deadline to file the certiorari petition is January 26, 2018.

E. Respondent's Motion to Stay the Commission's Order Scheduling Briefs

On December 12, 2017 the Commission entered an Order Scheduling Briefs regarding sanctions and ordered that Lorenzo's brief be filed by January 11, 2018. On January 3, 2018 Lorenzo filed a motion with the Commission seeking it stay its Order Scheduling Briefs pending a decision by the U.S. Supreme Court on Lorenzo's certiorari petition. That motion to stay is currently pending before the Commission and Lorenzo continues to believe a stay of the Commission proceedings in appropriate pending a decision by the U.S. Supreme Court.

ARGUMENT

The Commission's Findings that Lorenzo Violated the Antifraud Provisions of the Securities Laws are Seriously Flawed and the Commission Should Dismiss this Case and Not Impose Any Sanctions on Lorenzo

As Judge Kavanaugh's dissent makes clear the findings by the Commission and the Administrative Law Judge that Lorenzo violated the antifraud provisions of the federal securities laws are seriously flawed. Judge Kavanaugh stated that the administrative law judge

> concluded that Lorenzo's boss had "drafted" the emails in question and that Lorenzo's boss had "asked" Lorenzo to send the emails to two clients. ALJ Op. at 5 (Dec. 31, 2013), 906. The judge also concluded that Lorenzo did not read the text of the emails and that Lorenzo "sent the emails without even thinking about the contents." *Id.* at 7; *see id.* at 9, ("Had he taken a minute to read the text . . ."). Furthermore, the judge noted that the emails themselves

> expressly stated that they were being sent at "the request" of Lorenzo's boss. *Id.* at 5, Those factual findings were very favorable to Lorenzo and should have cleared Lorenzo of any serious wrongdoing under the securities laws. At most, the judge's factual findings may have shown some mild negligence on Lorenzo's part. . .
>
> The judge somehow concluded that those findings of fact demonstrated that Lorenzo willfully violated the securities laws – meaning that Lorenzo acted with an intent to deceive, manipulate, or defraud. (A finding of willfulness, as opposed to a finding of negligence, matters because it subjects a defendant to much higher penalties.) As a sanction, the judge not only fined Lorenzo, but also imposed a lifetime suspension that prevents Lorenzo from ever again working in the securities industry. **The administrative law judge's factual findings and legal conclusions do not square up.** (J. Kavanaugh dissenting at 3, emphasis added, and internal citations omitted)

Judge Kavanaugh also stated that "[t]he administrative law judge's decision in this case contravenes basic due process." (J. Kavanaugh dissenting at 3)

The Commission's April 29, 2015 decision upholding the sanctions imposed by the Initial Decision was also severely criticized by Judge Kavanaugh. Judge Kavanaugh stated

> Fast forward to the Securities and Exchange Commission, which heard the appeal of the administrative law judge's decision. Surely the Commission would realize that the administrative law judge's factual findings did not support the judge's legal conclusions and sanctions?
>
> And indeed, the Commission did come to that realization. But instead of vacating the order against Lorenzo, the Commission did something quite different and quite remarkable. In a Houdini-like move, the Commission rewrote the administrative law judge's factual findings to make those factual findings correspond to the legal conclusion that Lorenzo was guilty and deserving of a lifetime suspension.
>
> Recall what the administrative law judge found: that Lorenzo's boss "drafted" the emails, that Lorenzo did not think about the contents of the emails, and that Lorenzo sent the emails only after being asked to do so by his boss. ALJ Op. at 5. The judge reached those conclusions only after hearing Lorenzo testify and assessing his credibility in person.
>
> Without hearing from Lorenzo or any other witnesses, the Commission simply swept the judge's factual and credibility findings under the rug. The Commission concluded that Lorenzo himself was "responsible" for the emails' contents. In the Matter of Francis V. Lorenzo, Securities Act Release No. 9762, Exchange Act Release No. 74836 at 16 (Apr. 29, 2015). How did the Commission magically explain its decision to discard the administrative law judge's findings of fact? Easy. In a footnote, the Commission said that it did not need to "blindly" accept the administrative law judge's factual findings and credibility judgments. Id. at 16 n.32. Voila. (J. Kavanaugh dissenting at 5)

Lorenzo respectfully requests that the Commission adopt Judge Kavanaugh's dissenting opinion, recognize the flaws that occurred in the administrative and Commission proceedings which underpin the finding that Lorenzo acted with scienter[2] and violated the securities laws and dismiss this case without imposing any sanctions on Lorenzo, who has been out of the securities industry since March 2014.

In its entirety this case involves two emails that were drafted by Lorenzo's boss that were sent to two individuals. There is no evidence that either individual was harmed in any way from receiving the emails and there is no evidence either individual relied on the statements in the emails in deciding to purchase W2E securities. While reliance is not a formal element that the Commission must prove to establish a violation of the federal securities laws, it is an element the Commission considers when determining whether anyone was harmed by the conduct at issue. The total financial gain to Lorenzo was a negligible $150.

Lorenzo's sending of two emails to two customers was a unique occurrence that was outside the scope of his investment banking responsibilities at Charles Vista. At Charles Vista Lorenzo did not have any customer accounts and did not communicate with customers outside of the two customers that received the two emails. Accordingly, there is no opportunity for the same conduct to occur in the future.

[2] Judge Kavanaugh stated "the majority opinion does not heed the administrative law judge's factual conclusions, which were based on the judge's in-person assessment of Lorenzo's testimony at trial. Those factual conclusions demonstrate that Lorenzo lacked the necessary mens rea of willfulness. (J. Kavanaugh dissenting at 6).

Conclusion

Based upon the foregoing, Respondent Francis V. Lorenzo respectfully requests that the Commission dismiss this matter and impose no sanctions upon him.

Dated: New York, New York
January 11, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert G. Heim, certify that on the 11th day of January 2018, I caused true and correct copies of Respondent Francis V. Lorenzo's Brief Regarding Sanctions to be filed and served on the following by the methods indicated below:

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