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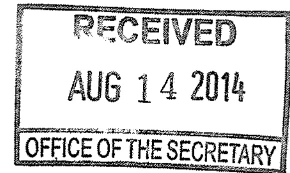

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15580

In the matter of:
ANTHONY CHIASSON,
Respondent-Petitioner.

Oral Argument Requested

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF ANTHONY CHIASSON'S PETITION TO REVIEW THE INITIAL DECISION

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Dated: August 13, 2014

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ADMINISTRATIVE DECISIONS

In the Matter of Jon Edelman, 52 S.E.C. 789 (1996), 1996 SEC LEXIS 2560 3-4

Petitioner Anthony Chiasson submits the following Reply Memorandum in response to the Memorandum of Points and Authorities in Opposition to his Petition to Review the Initial Decision (the "Opposition") submitted by the Division of Enforcement of the Securities and Exchange Commission ("the Division"), relating to the Initial Decision issued by the assigned Administrative Law Judge ("ALJ") on April 18, 2014, in the above-captioned proceeding ("Initial Decision").

PRELIMINARY STATEMENT

The Division stands alone. By taking the position that Mr. Chiasson's appeal should have no impact on his Administrative Proceeding, the Division separates itself from the Second Circuit Court of Appeals, three Federal District Court judges, and the United States Attorney's Office for the Southern District of New York ("USAO"). Each case of which Mr. Chiasson is aware that has any connection to the issue he raised on appeal has been impacted in a way that favors Mr. Chiasson's appellate argument. The Second Circuit Court of Appeals granted Mr. Chiasson bail pending appeal. In addition, it held Michael Steinberg's appeal (on the identical issue) in abeyance pending resolution of Mr. Chiasson's appeal. District Court Judge Richard J. Sullivan postponed one defendant's sentencing and granted another bail pending appeal on the issue (where he had previously denied it to Mr. Chiasson). Based on her interpretation of the law Mr. Chiasson's appeal put at issue, District Court Judge Naomi Reice Buchwald dismissed certain substantive counts in a recent high-profile criminal insider trading case. In the same case, the USAO agreed that the court should charge the jury using language that Mr. Chiasson's appeal argues is the law. The USAO also moved for a continued stay in a civil proceeding against Steven A. Cohen based on Mr. Chiasson's appeal. And the Division itself—the very same Division that seeks the imposition of this bar—petitioned District Court Judge Harold Baer,

Jr. to stay the SEC's action against Mr. Steinberg pending the outcome of Mr. Chiasson's appeal. All of the aforementioned cases have been impacted in significant ways, suggesting that all of the parties involved recognize that Mr. Chiasson's appeal has merit and that the Second Circuit may soon reverse his conviction. No other recent criminal appeal has garnered such a response. And still, the Division opposes the minimal relief sought by Anthony Chiasson here.

In seeking the imposition of a bar, the Division seemingly disregards recent events and prefers instead to focus only on the portions of Mr. Chiasson's case that support its preferred result. It is telling that the Division never bothered to address the merits of Mr. Chiasson's criminal appeal; indeed, it suggests that the Division believes he will prevail. And if the Division believes Mr. Chiasson will prevail—or even that there is a substantial chance he will prevail—why would it seek the imposition of a bar at this time? The overarching question the instant petition raises is: What is the rush to bar Mr. Chiasson in light of recent events?

The Commission should require the Division to put its cards on the table. If the Division believes that Mr. Chiasson will lose his criminal appeal, it should explain on the record its reasoning and why Mr. Chiasson should be barred before the Circuit has a chance to rule. If the Division believes otherwise, but still seeks a bar, it should explain why it is proper to punish a person it believes may soon be declared innocent. In any event, Mr. Chiasson respectfully suggests that the Commission should not be moved by the conclusory statements the Division makes when arguing that the Commission should bar Mr. Chiasson regardless of present circumstances.

ARGUMENT

The Division sets forth seven basic positions in its Opposition. It argues that the Commission should summarily deny Mr. Chiasson's request because: (1) the appeal does not address an "important exercise of discretion or a decision of . . . policy;" (2) certain cherry-picked facts from the criminal case warrant an immediate bar; (3) the public's interest is in Mr. Chiasson being barred immediately; (4) the timing of the Second Circuit's decision in Mr. Chiasson's appeal is uncertain; (5) Mr. Chiasson's request that the Commission consider the reaction of judges and prosecutors to his appeal proposes an unworkable process; and (6) the prejudice Mr. Chiasson would suffer by being barred is only minimal. The Division's seventh and final position inexplicably asks that the Commission deny Mr. Chiasson's request for oral argument. None of the Division's arguments are persuasive.

1. Mr. Chiasson's Appeal Raises an Important Issue of Discretion or Policy that Precludes Summary Affirmance

The Division states that Mr. Chiasson's "Petition did not assert . . . [an] important exercise of discretion or . . . policy that the Commission should review." Opp. at 7-8. To the contrary, Mr. Chiasson's Petition raises important issues of discretion and policy concerning whether the Commission should bar Mr. Chiasson in light of the overwhelming reaction to his Second Circuit appeal.

The Commission has the discretion to decline to impose the bar at issue because all objective signs point to a reversal of the criminal conviction that is the sole basis for the ALJ's recommendation. Oddly, while denying that an exercise of discretion is implicated here, the Division relies on a case that demonstrates that the Commission has the discretion to hold this matter in abeyance. The Division cites *In the Matter of Jon Edleman*, 52 S.E.C. 789 (1996), 1996 SEC LEXIS 3560, for the principle that it is irrelevant to the ALJ's recommendation that

Mr. Chiasson is effectively barred at present. The Division, however, misses the point of the *Edleman* passage as it relates to this Petition. *Edleman* states: "The pendency of an appeal of a criminal conviction *generally* is an insufficient basis on which to grant a motion to stay proceedings." 52 S.E.C. 789 at *2-3 (emphasis added). The key term is *generally*—meaning, in the average, run-of-the-mill case. However, if a criminal appeal is *generally* not a reason to stay, that means it *sometimes* can be—otherwise, *Edleman* would have used the phrase "is *always* insufficient" or words to that effect. As both parties cite the same passage from *Edleman* with approval, there is no dispute that the Commission has discretion to stay a bar in light of a criminal appeal. Thus Mr. Chiasson, by seeking a stay based on the merits of his criminal appeal, has invoked "an important issue of discretion" that precludes summary affirmance.

The Division cannot deny that all of the lawyers and judges whose cases will be impacted by the *Chiasson* appellate decision have either sought to stay their cases pending the outcome of the appeal, or have adopted Mr. Chiasson's arguments. That said, it does make an attempt to downplay this reaction. The Opposition contends that the USAO's request to extend the stay in the *Steven A. Cohen* Administrative Proceeding was unrelated to the Chiasson appeal and "was based on the fact that two of the three criminal actions, including the Steinberg case, were still ongoing." Opp. at 13. But the USAO called it an "ongoing" matter in its request for a continued stay at least in part because of Judge Sullivan's acknowledgement that the Second Circuit may vacate Messrs. Chiasson's and Steinberg's convictions. *See* Letter from AUSA John T. Zach to the Honorable Brenda P. Murray, dated May 28, 2014 at 2, attached as Exhibit G to the June 30, 2014 Declaration of Savannah Stevenson in Support of Anthony Chiasson's Petition to Review the Initial Decision (the "June Stevenson Decl."). While the USAO could have attempted to

press forward with the *Cohen* matter, it opted to seek a continued stay pending the outcome of the *Chiasson* appeal.

Next, the Division trumpets the fact that although it sought and received from Judge Baer a stay in its district court case against Mr. Steinberg based on the *Chiasson* appeal,[1] it subsequently instituted a follow-on Administrative Proceeding against Mr. Steinberg. This development highlights that the Division is now wasting resources in not one, but two separate Administrative Proceedings.[2] Moreover, the Division's agreed-upon stay in Mr. Steinberg's district court case juxtaposed with its pursuit of an industry bar in the related Administrative Proceeding exhibits a slightly schizophrenic strategy that the Commission should address as a matter of policy.

Additionally, since the time Mr. Chiasson filed his Petition, his appeal continues to impact other pending cases. Mr. Chiasson's Petition noted that during *United States v. Rengan Rajaratnam*, 13-cr-211 (NRB) (S.D.N.Y.), a criminal insider trading trial in the Southern District of New York, Judge Buchwald described the knowledge-of-personal-benefit jury charge as "the law." Petition at 11. After Mr. Chiasson filed his moving brief, Judge Buchwald, pursuant to Federal Rule of Criminal Procedure 29, dismissed the only two substantive insider trading counts in that case, noting that there was no proof that the defendant knew that the corporate insiders

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[1] *See* Letter from Barry Berke to Hon. Harold Baer, Jr., dated May 8, 2014, joined by the Division at 2 ("the panel's questions appeared to express skepticism as to the sufficiency of Judge Sullivan's jury instructions regarding downstream tippees"), attached as Exhibit F to the June Stevenson Decl.

[2] The Division submitted 313 pages of a brief with exhibits that cites undisputed facts and analyzes case law *that is not being challenged.* The Division's choice to spend its time and resources pursuing a bar is a monument to government waste. Indeed, when recently voicing concern about the lack of Congressional funding to the SEC, the current Chair of the Commission publicly stated that "I owe a duty to Congress, the staff, and to the American people to use the funds we are appropriated prudently and effectively." Transcript of Chairman's Address at SEC Speaks, Feb. 21, 2014, *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370540822127#.U96Gd4zD85s. Expending attorney and staff hours in this proceeding to oppose a relatively straightforward and benign proposal to maintain the *status quo* for what in all likelihood amounts to a few months is hardly using resources "prudently and effectively."

tipped *in exchange for a personal benefit*. *See* July 1, 2014 Rule 29 Argument Tr. at 1382, *United States v. Rengan Rajaratnam*, 13-cr-211 (NRB) (S.D.N.Y.), attached as Exhibit A to the August 13, 2014 Declaration of Savannah Stevenson in Further Support of Anthony Chiasson's Petition to Review the Initial Decision (the "August Stevenson Decl."). Judge Buchwald stated:

> After considering the above in the light most favorable to the prosecution, can a reasonable jury find that Rengan traded in Clearwire on the basis of inside information obtained in violation of a duty of confidentiality and with a *knowledge that the tipper receive a personal benefit* from a tip he provided to Raj, I find that a reasonable jury could not so find, so the [substantive insider trading] counts are dismissed.

Id. at 1382 (emphasis added).

In the same case, the USAO chose not to contest the knowledge-of-personal-benefit jury charge.[3] *See* Government's Requests to Charge, *United States v. Rengan Rajaratnam*, 13-cr-211 (NRB) (S.D.N.Y.), Request No. 18, at 33, attached as Exhibit B to the August Stevenson Decl. Thereafter, Judge Buchwald charged the jury consistent with Mr. Chiasson's position on appeal: the government must prove that the defendant knew that the material nonpublic information had been disclosed by an insider in breach of a duty of trust and confidence, in return for some actual or anticipated benefit. *See* Jury Charge Tr. at 2124-25, *United States v. Rengan Rajaratnam*, 13-cr-211 (NRB) (S.D.N.Y.), attached as Exhibit C to the August Stevenson Decl. The jury acquitted the defendant on the remaining conspiracy count.

In addition, Judge Sullivan (the trial judge in Mr. Chiasson's criminal case) exercised discretion based on Mr. Chiasson's appeal in two instances. First, he granted Mr. Steinberg bail pending appeal—which he had previously denied to Mr. Chiasson based on the same issue; and

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[3] In its Requests to Charge, the government noted that although it agreed that the court should instruct the jury on this element, it did not mean that the government agreed that Judge Sullivan wrongly decided the issue in the *Chiasson* criminal case. No matter the caveat, the fact is that after the *Chiasson* oral argument, the government agreed that the jury must find knowledge of a personal benefit to convict.

second, he postponed sentencing cooperating witness Danny Kuo. *See* July 1, 2014 Tr. at 35, *United States v. Kuo*, 12-cr-121 (RJS) (S.D.N.Y.), attached as Exhibit D to the August Stevenson Decl. Judge Sullivan deferred Kuo's sentencing because Kuo's knowledge of the tipper's personal benefit was "on par" with that of the defendants on appeal, and the outcome of the appeal might substantially affect Kuo's sentence. *Id.* at 36. The government did not object to an adjournment pending the *Chiasson* appeal. *Id.* at 46. Judge Sullivan opted to be patient, even though he had the authority to sentence Kuo and leave him with the option to file a *habeas corpus* petition to vacate or reduce the sentence based on the outcome of Mr. Chiasson's appeal. *See id.* at 36 (defense counsel stating that Kuo would "be in a position to put in a petition for habeas corpus . . . if he was in jail and serving his sentence and the appeal came out in his favor.").

Most recently, the Second Circuit decided to hold Mr. Steinberg's appeal in abeyance pending the outcome of the *Chiasson* appeal. *See* Order, *United States v. Steinberg*, No. 14-2141, Doc. 22 (2d Cir., Aug. 6, 2014) and Motion for Order Holding Appeal in Abeyance and Declaration of Barry H. Berke dated August 5, 2014 (without exhibits), attached as Exhibit E to the August Stevenson Decl. In support of his motion—which the USAO did not oppose—Mr. Steinberg cited the Second Circuit's conclusion that Mr. Chiasson's appeal presented a substantial question of law likely to result in reversal or a new trial. *Id.* at 3-4. Mr. Steinberg noted, as Mr. Chiasson does above, that following oral argument judges in the *Steinberg* and *Cohen* civils cases and the *Kuo* criminal case stayed their respective proceedings in recognition of the potential impact of the decision in the *Chiasson* appeal. *Id.* at 7 (citing Order, *SEC v. Steinberg*, No, 13-cv-2082 (HB) (S.D.N.Y. May 12, 2014); *In the Matter of Steven A. Cohen*, Administrative Proceeding No. 3-15382, Rel. No. 1472 (May 29, 2014); *United States v. Kuo*,

12-cr-121 (RJS) (S.D.N.Y. July 1, 2014). Each party could have attempted to press forward, but each took a wait-and-see approach in an effort to avoid needless litigation and expenditure of resources.

Virtually every matter that has any connection to the *Chiasson* appeal has been stayed or impacted in a significant manner, yet the Division staunchly maintains its position that the Commission should impose the ALJ's recommended bar regardless of these developments. What the above-referenced lawyers and judges did not do is what the Division is proposing here: act as if the Second Circuit argument never took place and ignore the reality that Mr. Chiasson's conviction may well be vacated. Mr. Chiasson urges the Commission to exercise its discretion and find that, as a matter of policy, it is appropriate to maintain the *status quo* until the outcome of his appeal.

2. The Division Highlights Only Certain Facts from Mr. Chiasson's Criminal Case

The Division cherry-picks snippets of evidence from an approximately six-week trial to gloss over Mr. Chiasson's challenge that his conviction is invalid as a matter of law. Mr. Chiasson addresses these excerpts below because the Division put them at issue; however, by highlighting these facts the Division demonstrates that it has missed the point of Mr. Chiasson's Second Circuit appeal and the instant Petition. Both the appeal and the Petition deal with one discrete legal issue: whether a remote tippee must know of the personal benefit provided to the original tipper to be convicted of insider trading. *See Dirks v. SEC*, 463 U.S. 646, 662 (1983) ("Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure. . . . Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach."). None of the facts the Division

addresses go to that issue; they are cited merely to improperly color the Commission's impression of Mr. Chiasson.

In one instance, the Division discusses an email and instant message exchange between Mr. Chiasson and a portfolio manager at different hedge fund. The statements the Division puts at issue demonstrate that Mr. Chiasson had "checks on [gross margin] this [quarter];" replied "not your concern" when asked by his competitor where he received his information; and said "my view on [gross margin] more convicted than [yours]." Opp. at 3.

These statements do not suggest wrongdoing as the Division would have the Commission believe. When analyzed fairly, the statements demonstrate that Mr. Chiasson discussed with a competitor certain information about which he was confident, yet was unwilling to share the source. No statement addresses whether Mr. Chiasson had knowledge of a personal benefit to the tipper. Indeed, logic and common sense dictate that these statements are run-of-the-mill in the hedge fund industry because most portfolio managers likely express conviction in their investment strategies and presumably do not share with their competitors their sources of information (whether internal or external to their fund). These statements are as consistent—if not more consistent—with an innocent explanation as they are with a guilty one, but either way they do not touch upon the issue at bar. Thus, the Commission should see these statements for what they are and disregard them.

Similarly, the Division submits an additional trial snippet about the members of the Nvidia tipping chain that is equally irrelevant to the actual issue contemplated by the *Chiasson* appeal and this Petition. The Division stated: "With respect to Nvidia, Adondakis told Chiasson that he [Adondakis] got the information from a friend of Adondakis's who, in turn, got the information from a friend from church." Opp. at 3. Presumably, the Division makes this

statement to convince the Commission that friendship is the personal benefit provided to the initial tipper. However, like the USAO at the Second Circuit argument, the Division misstates the facts about the Nvidia tipping chain because the "friend from church" is not the initial tipper/corporate insider.

The trial record demonstrates that Adondakis received Nvidia information from a friend—the friend was coconspirator and cooperating witness Danny Kuo, an analyst at Whittier Trust. Kuo, as the Division correctly points out, received his information from his church friend—cooperating witness Hyung Lim. The Division's version of the tipping chain ends there; however, Hyung Lim is *not* the Nvidia insider. The Nvidia insider, Chris Choi—who was never indicted, never cooperated, and never testified at trial—is one additional step removed.[4]

Also missing from the Opposition is the fact that Adondakis testified that he did not know who the original Nvidia tipper was and that he did not tell Mr. Chiasson that the tipper worked at Nvidia. *See* Adondakis Testimony, Trial Tr. at 1878:16-1879:5, *United States v. Newman, et al.*, 12-cr-121 (RJS) (S.D.N.Y.), excerpt attached as Exhibit F to the August Stevenson Decl. Moreover, the prosecution failed to bring out any evidence whatsoever that suggested that Adondakis knew whether the original tipper, Choi, received a personal benefit from his direct tippee, Lim.[5] While the Division arguably attempts to address the issue of personal gain in relation to the Nvidia tipping chain, it does so inaccurately by excluding the

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[4] Presumably, the Division knows this is the full extent of the tipping chain because it charged Adondakis, Kuo, Lim, and eventually Choi (settling with Choi, the Nvidai tipper, for approximately $30,000 the day after the *Chiasson* oral argument). *See* April 23, 2014 SEC Press Release No. 2014-82, *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541624596#.U-tykWd0yM9. Thus, it knows that the Nvidia tipping chain started with Choi, not the church friend. From there the information went to the actual church friend (Lim), then to Kuo, and finally to Adondakis.

[5] This applies equally to the Dell tipper. At trial, the government adduced no evidence that demonstrated that Mr. Chiasson knew of any benefit to either of the corporate insiders. Moreover, the USAO did not even attempt to prove Mr. Chiasson knew of any such personal benefit, despite the fact that Judge Sullivan did not decide the knowledge of personal benefit jury charge issue until *after* the government had concluded its case in chief.

initial tipper—the individual who must receive the personal benefit for the action of tipping to be fraudulent.

3. The Division Argues that the Public Interest Cuts in Favor of Immediately Barring Mr. Chiasson

The Division states in conclusory fashion that the public has an interest in "obtaining an appropriate legal remedy as expeditiously as possible." Opp. at 15. It further states that "an indefinite delay of a remedy to which the Division is legally entitled surely prejudices both the Division and the investing public." Opp. at 15. Yet the Division provides no explanation for why it or the public would be prejudiced if the Commission exercised caution and waited for the Second Circuit decision before determining whether a bar is warranted. Accordingly, the Division has failed to meet its burden of articulating any prejudice that will result from the Commission granting the Petitioner's requested relief.

Mr. Chiasson submits, in stark contrast to the Division's position, that the public has an interest in the proper administration of justice. This means that the public's interest is best served by not wasting resources and by not imposing a bar on someone whom the Second Circuit may soon deem to be innocent of a crime. It means exercising appropriate judgment because prosecutors and regulators enjoy vast discretion and "[t]he public has an interest in its *responsible exercise*." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1036 (1991) (emphasis added) (Supreme Court reversing imprudent disciplinary action against an attorney in violation of his First Amendment rights). The public surely has an interest in dispensing sanctions to those who deserve them, but likewise has an equal—if not greater—interest in not punishing those whose conduct does not merit punishment.

Mr. Chiasson may very well be restored to his pre-indictment stage of presumed innocence. If that is the case, it cannot be in the public interest for Mr. Chiasson to be subjected

to contradictory results: Considered innocent by the justice system because he was deprived of a fair trial, but barred from the securities industry despite the fact that he was deprived of a fair trial.

4. The Division Argues that the Timing of Mr. Chiasson's Appeal is Uncertain

The Division argues that the Commission should not maintain the *status quo* because no one knows when the Second Circuit will decide Mr. Chiasson's appeal. The Division is right about the uncertainty of the Second Circuit's timing; however, it does not follow that the Commission should impose a bar. Uncertain timing should not be a factor here, let alone the deciding factor. Importantly, the courts discussed above that issued stays in their cases likewise do not know when the Second Circuit will issue its decision, but that did not deter them from holding their cases in abeyance. Those courts obviously concluded that it is more important to make the right decision than to make a quick decision. Mr. Chiasson simply seeks the relief so many others have been granted based on the merits of his appeal—to put the Administrative Proceeding on the same footing and time-table as Mr. Chiasson's criminal appeal. Contrary to the Division's predictions of mass chaos, this would in fact bring logic and coordination to the parallel proceedings.

While the Division protests that Mr. Chiasson's requested relief has never before been granted, relief of this nature is not at all unprecedented. In other settings, stays in cases that involve competing litigations are routine. For example, appellate courts routinely grant requests to hold appeals in abeyance. *See, e.g.*, Order, *Pedersen v. Office of Prof'l Mgmt.*, No. 12-3273 & 12-3872 (2d Cir. May 16, 2013) (granting motion to hold appeal in abeyance pending Supreme Court's decision where movants argued that a stay would allow the parties to provide the court of appeals with "briefing that takes into account the Supreme Court's opinion"); Order Holding

Appeal in Abeyance, *United States v. Michael Steinberg*, No. 14-2141 (2d Cir., Aug. 6, 2014), Ex. E to the August Stevenson Decl. Courts will also stay removal orders pending the outcome of a litigation that may affect deportation proceedings. *See, e.g., Michael v. INS*, 48 F.3d 657 (2d Cir. 1994) (granting a stay of a deportation order pending appeal of petitioner's *habeas* petition). And of course, federal courts routinely grant bail pending appeal when there is clear and convincing evidence that the appeal presents substantial issues. *See, e.g., United States v. Gupta*, No. 12-4448, Order Granting Bail Pending Appeal, Doc. 47 (2d. Cir., Dec. 6, 2012). All of the above stays were granted even in the face of uncertain timing.

Indeed, this Petition is essentially the equivalent of a bail pending appeal motion. On a motion for bail pending appeal, the convicted defendant seeks leave to stay the imposition of the criminal sanction until his appeal has been decided. *See United States v. Randell*, 761 F.2d 122, 124 (2d Cir. 1985). Here, Mr. Chiasson is doing the same. He is asking the Commission to refrain from imposing a sanction based on the merits of his appellate argument. Where the appellate court believes that the appeal is so meritorious that it warrants a stay of the criminal sanctions, it hardly seems inappropriate that the civil sanctions—which present a different form of punishment—likewise be held in abeyance.

Specifically, the Division's claim that a bar is necessary now because there may be further rounds of appellate litigation is unavailing. As an initial matter, it cannot be that the Division is suggesting that Mr. Chiasson's proposed timing is unworkable in the event the Second Circuit *affirms* the conviction. The Petition clearly and specifically requests that the Commission wait for the resolution of the *Second Circuit appeal*. Mr. Chiasson did not and does not now ask the Commission to stay the bar unless and until all of his appeals are exhausted. He

asks only that the Commission wait until the present appeal is decided.[6] Thus, the Commission must be seeking a continued bar for Mr. Chiasson in the event that the Second Circuit reverses his conviction and the government appeals. That hardly seems fair.

Were Mr. Chiasson to prevail upon appeal—returning him to a state of innocence—and the USAO to seek further appellate litigation, Mr. Chiasson would continue to be presumed innocent during the pendency of any follow-on appeals. However, the Division argues that even if Mr. Chiasson wins his appeal but the USAO "seek[s] rehearing *en banc* or a writ of *certiorari* from the U.S. Supreme Court," Mr. Chiasson should be barred throughout the process because it could take "years." Opp. at 11. This is the worst kind of backward logic. Mr. Chiasson should not be barred for one minute if he is restored to an innocent state because the district court deprived him of a fair trial. Moreover, he should not have to bear the stigma of being barred while the USAO pursues whatever remedies it may. If the Second Circuit reverses the conviction, Mr. Chiasson should not suffer the consequences of a bar, no matter what the USAO does thereafter.

5. The Division Argues that Mr. Chiasson's Petition Presents an Unworkable Proposal

The Division argues that granting the relief requested would create an unworkable standard that would require the Commission's ALJs to "scour the public record for news articles and public comments assessing the legal community's reaction to appellate arguments" in order to assess the merits of appeals. Opp. Mem. at 11. This prediction is preposterous and ignores

[6] Indeed, Mr. Chiasson only filed this Petition after the oral argument in his appeal. This is not a situation where Mr. Chiasson approaches the Commission fresh off his conviction seeking a stay that affords him the opportunity to draft and submit his appeal, receive the government's opposition papers, draft and submit his reply, wait for oral argument and then the opinion. The instant Petition comes at the last stage of the Second Circuit appeal. It has been nearly two years since Mr. Chiasson was convicted: he has gone all this time without a bar, and in all this time no prejudice has befallen the Division or the public. A few additional months should not cause any hardship.

the burdens of proof that exist in every SEC proceeding. The burden is clearly on the petitioner to establish not only that his appeal has merit, but that there are objective facts in the record indicating a likelihood of success. If the Division disagreed with the merits of the appeal and its likelihood of success, the Division would be free to make those arguments—arguments that the Division has apparently forgone here.[7] The ALJ or the Commission could then decide whether a stay is appropriate, as it does in every case. Accordingly, the Division's concern is unfounded.

6. The Division Argues that Mr. Chiasson Will Suffer No Prejudice

The Division further contends that Mr. Chiasson will suffer no prejudice by the imposition of an industry bar even if his appeal succeeds. This argument defies all logic and common sense. If Mr. Chiasson's appeal succeeds, he will be an individual who was wrongly convicted; at the very least, he will no longer have a criminal conviction, and may even be acquitted altogether. If he has been barred for even one day while he was the subject of a legally invalid conviction, he will have unfairly suffered severe reputational and economic damage because of the premature imposition of an industry bar. Once the bar is imposed, there is no realistic way for Mr. Chiasson to restore his reputation or to return to his pre-bar posture.

The Division's proffered solution—that if his appeal is successful, Mr. Chiasson can petition to have the bar overturned in only 60-90 days—misses the point entirely. *See* Opp. at 14. So too does the Division's point that he can fix his BrokerCheck report by contesting it with FINRA. *Id.* at 15, n. 6. Because the objective signals appear to indicate that the Second Circuit may reverse the conviction, subjecting Mr. Chiasson to 30, 40, 60 or more days of being barred

[7] Glaringly absent from the Opposition is any analysis of the merits of Mr. Chiasson's appeal. The Division encourages the Commission to deny Mr. Chiasson's request to maintain the *status quo*, but nowhere does the Division address the main issue head-on, namely the merits of the criminal appeal. Nowhere does it comment on the legal issue before the Second Circuit, or the Court's reaction to the oral argument. Nowhere does it express the opinion that Mr. Chiasson's appeal will be successful or unsuccessful. Surely, all of these facts are relevant to the instant Petition, yet none of them appear in the Opposition.

and making him fight with FINRA to correct an inaccurate record should never come to pass. The Division's cavalier approach to barring a potentially innocent man is—to put it mildly—unfortunate. Maintaining the *status quo* is the most reasonable course of action.

7. Oral Argument is Necessary and Should be Granted as Usual

Oral argument is necessary because Mr. Chiasson raises issues of discretion and policy with the Commission. The Division concedes that Rule 451(a) says that oral argument "will usually be granted." Opp. at 15. In cases where oral argument is requested by one party and opposed by the other, surely the opposing party must make a persuasive argument as to why it is not necessary in order to prevail. The Division's arguments are not persuasive in the least.

The Division argues that oral argument is unnecessary because Mr. Chiasson is not arguing that the applicable case law is wrong. The Division neglects to discuss why an "important exercise of discretion or . . . policy that the Commission should review" is unworthy of oral argument. *See* Opp. at 8.

The Division argues that this Reply is sufficient to provide Mr. Chiasson with the opportunity to argue his case. Opp. at 15. This is not a reason to deny oral argument when it is "usually granted." *See id.* Every appeal has an opening brief, an opposition, and a reply. This case is no different; the fact that Mr. Chiasson has a reply brief does not mean that the Division has established a reason to forego oral argument.

The Division posits that oral argument is unnecessary because the relief Mr. Chiasson seeks is unprecedented. Opp. at 15. But in light of the reactions to Mr. Chiasson's appeal from all corners of the legal community, it would seem that oral argument is more necessary here than in the normal case. The impact of the appeal and oral argument has been sweeping; accordingly,

it is all the more important for the Commission, the Division, and Mr. Chiasson to assure that all arguments are fully developed in the event the Commission denies Mr. Chiasson's Petition.

Finally, the Division facetiously expresses concern that oral argument would cause Mr. Chiasson to expend additional resources further litigating this issue. Opp. at 15-16. But the Division cannot have it both ways. On one hand, the Division takes the position that it is appropriate for Mr. Chiasson to have to expend the resources to file a petition with the Commission to reverse a bar and perhaps wrangle with FINRA to correct his BrokerCheck report. And on the other hand, it purports to sympathize with his plight by not wanting him to expend any resources on oral argument. *See id.* These inapposite positions undermine the notion that the Division is actually concerned about conserving Mr. Chiasson's resources, or its own.

The harsh reality is that the Division does not wish to have oral argument because there are difficult questions left unanswered in the Opposition. Mr. Chiasson deserves to have oral argument to understand the rationale behind all of the Divisions unsupported positions. For example, the Division should be made to answer the following:

a) Does the Division believe that the Second Circuit will reverse or affirm the conviction?

b) What is the Division's position on the merits of the criminal appeal?

c) If it is to be reversed, why does the Division think Mr. Chiasson should be barred in the interim?

d) What is the prejudice the public and/or the Division will suffer by maintaining the *status quo*?

These are just a few of the questions the Division must be made to answer based on its assertion that a bar is in the public interest. The Division should not be able to make conclusory statements and then avoid the rigor of oral argument during which the Commission will have the

opportunity to fully explore the basis (other than "it's never been done before") for the Division's position.

Where oral argument is favored, and the opposition has left so many issues unaddressed, it is only fit and proper that the Commission grant oral argument so that Mr. Chiasson may have a full and fair assessment of his Petition.

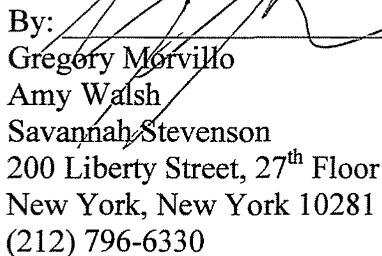
CONCLUSION

For the reasons set forth above, Mr. Chiasson respectfully requests that the Commission not summarily affirm the ALJ's Initial Decision in this Administrative Proceeding. Instead, Mr. Chiasson requests that the Commission reverse the Initial Decision and remand with instructions to stay the Administrative Proceeding through the pendency of Mr. Chiasson's Second Circuit appeal, or in the alternative, modify the Initial Decision such that any proposed bar is not entered until after the Second Circuit's decision in Mr. Chiasson's appeal.

Dated: August 13, 2014
New York, New York

Respectfully submitted,

MORVILLO LLP



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