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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15925

In the Matter of

MICHAEL S. STEINBERG,

Respondent.

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT MICHAEL S. STEINBERG

DIVISION OF ENFORCEMENT
Justin P. Smith
Daniel R. Marcus
U.S. Securities and Exchange Commission
New York Regional Office
200 Vesey Street, Suite 400
New York, NY 10281
(212) 336-0043 (Smith)
(212) 336-0021 (Marcus)

Dated: August 27, 2014

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The Division of Enforcement ("Division") of the Securities and Exchange Commission ("Commission") respectfully submits this reply memorandum of points and authorities in further support of its motion for summary disposition of the claims in the Order Instituting Proceedings ("OIP") against Respondent Michael S. Steinberg ("Steinberg").

PRELIMINARY STATEMENT

Steinberg, in his opposition papers, does not ask this Court to deny the Division's motion; rather, he requests that the Court defer any decision on the motion—including, if necessary, requesting additional time from the Commission—until the Court of Appeals for the Second Circuit issues a decision in Todd Newman's and Anthony Chiasson's appeals of their criminal convictions. *See Memorandum of Points and Authorities in Opposition to the Division of Enforcement's Motion for Summary Disposition Against Respondent Michael S. Steinberg* ("Opp.") at 2, 15. In essence, Steinberg is asking this Court to discard decades of precedent and to apply a new—and utterly unworkable—legal standard in this proceeding simply because he believes that the appeals of Todd Newman and Anthony Chiasson, and by extension his own, have merit. Nominally, Steinberg makes three arguments: (1) that this Court's decision on the Division's motion should be deferred until the Second Circuit issues a decision on the appeals of Newman and Chiasson, Opp. at 10-12; (2) that imposition of a collateral industry bar on Steinberg is not in the public interest, Opp. at 12-14; and (3) that imposition of a collateral industry bar would unfairly prejudice Steinberg, Opp. at 14. In fact, although Steinberg presents these arguments as distinct from one another, they really are variants of a single unsupported assertion: that this Court should delay this proceeding indefinitely based on Steinberg's hope that the Second Circuit will reverse his conviction.

This Court should adhere to well-established precedent and promptly grant the Division's motion for summary disposition under Rule 250(b) of the Commission's Rules of Practice because there is no genuine issue with regard to any material fact, and the Division is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). Under Section 203(f) of the Investment Advisers Act of 1934 ("Advisers Act"), the Commission *shall* impose a bar that prevents a person, like Steinberg, from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (hereinafter a "collateral industry bar") if, *inter alia*, (1) the person has been convicted of a crime within the preceding ten years involving the purchase or sale of securities; (2) the person was associated with an investment adviser at the time of the misconduct underlying the conviction; and (3) the collateral industry bar is in the public interest. 15 U.S.C. § 80b-3(f). Steinberg does not dispute that the first two factors apply to him, Opp. at 6, 12, and, as discussed below, implicitly acknowledges the applicability of the third factor.

ARGUMENT

I. THIS COURT SHOULD NOT DEFER A DECISION ON THE DIVISION'S MOTION

As this Court previously stated in a prehearing conference on June 26, 2014, the only issue in this administrative proceeding is the "very, very limited issue" of whether imposition of a collateral industry bar against Steinberg is in the public interest. Transcript of Prehearing Conference of June 26, 2014 ("Hearing Tr."), attached as Exhibit 1 to the Declaration of Justin P. Smith dated August 27, 2014 ("Decl."), at 15:7-21. In the conference, Steinberg requested that the Court adjourn this administrative proceeding based on the pendency of the appeal of his criminal conviction. The Court, in denying Steinberg's request, noted: "The Commission's case law on that subject is that the administrative proceeding should proceed, and if the underlying judgment is

overturned then the respondent can petition the Commission to remove any sanction that's been imposed." Hearing Tr. at 4:3-11.

A. No Good Cause Exists For A Deferral Of This Court's Decision

As the Court noted during the prehearing conference, the only open question in this proceeding is whether imposition of a collateral industry bar against Steinberg is in the public interest. In his opposition, Steinberg disregards the law of the case, as stated by the Court during the conference, and again asks the Court to defer making a decision on the imposition of a collateral industry bar. This time, Steinberg asks the Court to exercise its purported discretion under Rule 250(b) of the Commission's Rules of Practice to defer decision on the Division's motion for summary disposition until the Second Circuit issues its decision on the appeals of Newman and Chiasson. Steinberg also requests that, if the Second Circuit does not issue its decision before expiration of the 210-day period within which this Court must make its initial decision, the Court ask the Commission, under Rule 360 of the Commission's Rules of Practice, for authority to postpone its initial decision for an indefinite amount of additional time until the Second Circuit issues its decision.

Without providing any citations or other support, Steinberg incorrectly asserts that Rule 250(b) empowers hearing officers with the discretion to defer all motions for summary disposition as to which deferral is not mandatory. Opp. at 10. In fact, Rule 250(b) specifies that the hearing officer shall "promptly" grant or deny the motion or defer decision. 17 C.F.R. § 201.250(b). Deferral is only proper if a party, "for good cause shown," cannot present by affidavit prior to the hearing facts essential to justify opposition to the motion. *Id.* Steinberg has not attempted to show "good cause" or even suggested, let alone established, the existence of any facts that he could not present through affidavit prior to a hearing to support his opposition to the Division's motion. *See, e.g., In the Matter of Anthony Chiasson*, 2014 SEC LEXIS 1366, at *9-*10 (Apr. 18, 2014) ("Rule

250 requires me to 'promptly grant or deny' a motion for summary disposition, and Chiasson has not shown good cause within the meaning of the rule to defer decision on the Motion . . . ."); *In the Matter of China-Biotics, Inc.*, 2013 SEC LEXIS 3451, at *63 n.107 (Nov. 4, 2013) (noting that deferral under Rule 250(b) is an "exception"); *In the Matter of Robert L. Burns*, 2011 SEC LEXIS 2722, at *18 (Aug. 5, 2011) (holding summary disposition to be proper when respondent failed to cite any evidence that could only be presented in a hearing, as opposed to by affidavit). Lacking the legal basis for a deferral, this Court does not have the discretion to grant one.

B. No Basis Exists For This Court To Request An Extension Of Time From The Commission

Steinberg is also under the mistaken impression that Rule 360(a)(3) of the Commission's Rules of Practice provides the Chief Administrative Law Judge with the discretion to simply request from the Commission an extension of the deadline for filing an initial decision. Opp. at 11. In fact, Rule 360(a)(3) specifies that before the Chief Administrative Law Judge may make any such discretionary request of the Commission, the hearing officer must make a determination that "it will not be possible" to issue the initial decision within the specified period of time. 17 C.F.R. § 201.360(a)(3). Steinberg has failed to present any basis for such a determination, and no such basis exists.

C. Steinberg's Criminal Appeal Is No Obstacle To This Court's Granting the Division's Motion

Moreover, even if this Court had unfettered discretion to defer decision on motions for summary disposition or to request unlimited extensions of time from the Commission, it would not be proper to defer a decision on the Division's motion in this proceeding. The sole basis for Steinberg's request to defer a decision on the Division's motion is the fact that he is appealing his criminal conviction and believes that the Second Circuit may overturn it. Indeed, much of Steinberg's opposition brief consists of his reading tea leaves in an attempt to justify his belief that

Newman and Chiasson, and therefore he himself, will win their appeals. None of this is relevant to the Division's motion or to the legal basis under which this Court is required to promptly decide it. The fact of Steinberg's appeal, and even the likelihood of its success, are simply not factors that allow deferral of a decision on the Division's motion.

The law is clear that a pending appeal of a criminal conviction is not grounds to defer entry of an associational bar based on that conviction. *See, e.g.*, *Chiasson*, 2014 SEC LEXIS 1366, at *10 (citing cases); *In the Matter of James E. Franklin*, 2007 SEC LEXIS 2420, at *12 n.15 (Oct. 12, 2007) (holding that pendency of appeal of civil injunction does not affect injunction's status as basis for follow-on administrative proceeding seeking imposition of penny stock bar); *In the Matter of Jose P. Zollino*, 2007 WL 98919, at *7 n.4 (Jan. 16, 2007); *In the Matter of Michael Batterman*, 2004 SEC LEXIS 2855, at *9 n.10 (Dec. 3, 2004) (holding that pending appeal does not affect injunction's status as basis for administrative proceeding); *In the Matter of Joseph P. Galluzzi*, 2002 SEC LEXIS 3423, at *11 n.21 (Aug. 23, 2002) (holding that pendency of appeal does not preclude Commission from acting to protect public interest); *In the Matter of Ira William Scott*, 1998 SEC LEXIS 1957, at *7 n.8 (Sept. 15, 1998) ("We need not await the outcome of any post-conviction proceeding in order to proceed."); *In the Matter of Jon Edelman*, 1996 SEC LEXIS 3560, at *2 (May 6, 1996); *In the Matter of Charles Phillip Elliott*, 1992 SEC LEXIS 2334, at *11 and n.15, n.17 (Sept. 17, 1992), aff'd, 36 F.3d 86 (11th Cir. 1994) ("At one point, Elliott argued that the Commission should withhold judgment pending the appeal of his conviction. However, we see no need to delay this proceeding until the outcome of his appeal.").

In *Edelman*, the respondent petitioned the Commission for review of the decision of an administrative law judge denying his request for a stay pending the final disposition of his motion

to vacate his conviction in federal district court. Although the Division did not oppose the motion for a stay, the Commission nevertheless declined to grant it. Its determination was unequivocal:

> The pendency of an appeal of a criminal conviction generally is an insufficient basis upon which to grant a motion to stay proceedings. This remains the case where the respondent, as here, represents that he will not be involved in the securities industry. The public interest demands prompt enforcement of the securities laws, even while other government proceedings are under way. Accordingly, indefinite stays for the purposes of pursuing other relief are inappropriate.

1996 SEC LEXIS 3560, at *2-3. Similarly, in *Elliott*, the respondent, like Steinberg, was free on bond pending the appeal of his criminal conviction. 1992 SEC LEXIS 2334, at *3. The respondent argued that the Commission should withhold judgment pending his appeal, but the Commission declined to do so, noting that that the administrative proceeding was concerned with the factual existence of Elliott's conviction and its public interest implications. The Commission stated: "Elliott's conviction has been established, and Elliott may not challenge its validity." *Id.* at *11. It recognized that "a court of competent jurisdiction has acted, and the fact that an appeal is taken does not bear on our consideration." *Id.* at *11 n.17.

The guidance of *Edelman* and *Elliott*, among the litany of other Commission precedent addressing this issue, is applicable here. Neither Steinberg's belief in the strength of his appeal nor his prediction of the Second Circuit's decision—whether based on his interpretation of judicial questioning in the oral argument in the appeals of Newman and Chiasson, Opp. at 6-7, or of the media's purported reaction to that oral argument, Opp. at 7-9, 7 n.3—is relevant to the imposition of a collateral industry bar in this proceeding. Nor do they provide any basis for the Court to defer decision on the Division's motion or otherwise to delay imposition of a collateral industry bar against Steinberg.

D. Steinberg's Proposed Standard For Deferring A Collateral Industry Bar Is Contrary To Precedent And Unworkable

Steinberg attempts to distinguish the extensive precedent that undermines his request for a deferral on the basis of the "unprecedented response" to the oral argument from the U.S. Attorney's Office, the Commission, and the courts. Opp. at 11. But permitting a respondent like Steinberg to challenge the imposition of a collateral industry bar based on a prediction of the likelihood that the conviction will be reversed (or on the reaction of the legal community to judicial questioning during oral argument) would create an entirely new and completely unworkable standard for future cases. The approach Steinberg advocates would require the Commission's administrative law judges—and the Commission itself—to evaluate the likelihood of success of a respondent's appeal of a criminal conviction in a separate legal action, assessing not only the briefs filed in that separate action but the legal community's "reaction," Opp. at 8, to the oral argument.

This approach would erode the Commission's clear precedent in cases like *Edelman* and would undermine the purpose of Advisers Act Section 203(f), which seeks to protect the public from investment advisers who have been convicted of or enjoined from violating the federal securities laws. It also would eviscerate the doctrine of collateral estoppel in this context by requiring hearing officers, and the Commission, to oversee the relitigation of earlier criminal and civil cases. Such collateral challenges are highly disfavored. *See, e.g.*, *Franklin*, 2007 SEC LEXIS 2420, at *11 (citing cases).[1]

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[1] In fact, such collateral challenges are so highly disfavored that Commission hearing officers need not even engage in the particularized collateral estoppel analysis that might be required in other contexts, *i.e.*, imposing collateral estoppel only as to factual issues that were both actually litigated and legally necessary to the decision in the preceding litigation. Rather, in a follow-on administrative proceeding after a criminal conviction, hearing officers "may take into account all of the indictment's factual allegations in determining the appropriate sanction, without reference to whether such allegations were necessarily put in issue and determined in the criminal case." *Chiasson*, 2014 SEC LEXIS 1366, at *13 n.6 (citing *In the Matter of Ross Mandell*, 2014 SEC LEXIS 849, at *10 n.13 (Mar. 7, 2014)).

E. The Decisions Of Other Courts And Agencies On Different Issues Are Irrelevant To The Timing Of This Court's Decision On The Division's Motion

The possibility that the convictions of Newman and Chiasson, and of Steinberg, will be overturned by the Second Circuit is not relevant to this proceeding in general or to the Division's motion in particular. But even if the possibility of reversal were somehow relevant, the events to which Steinberg points in unrelated cases that occurred after the oral argument in Newman's and Chiasson's criminal appeals, Opp. at 9-10, do not lend support to Steinberg's request that the Court defer decision on the Division's motion. For example, the most recent event is the Second Circuit's decision to hold Steinberg's criminal appeal in abeyance until the appeals of Newman and Chiasson are decided. But that decision does not indicate one way or the other whether Steinberg's appeal is likely to be successful. It only indicates that because the appeals address the same issue, it would be inefficient to proceed with both of them concurrently.

Similarly, Steinberg again suggests, as he did in his unsuccessful request for an adjournment of this administrative proceeding, that the Division's motion for summary disposition is somehow inconsistent with its decision to join Steinberg's request for a stay in the Commission's civil action against Steinberg, *SEC v. Steinberg*, 13 Civ. 2082 (S.D.N.Y.) (SAS). Opp. at 1, 10. As the Division pointed out in opposing Steinberg's request for an adjournment, the Division's administrative proceeding against Steinberg and the Commission's civil action against him are different lawsuits, in different forums, with different legal provisions at issue, different applicable legal standards, and, most relevantly, different relief sought, all of which result in different considerations in determining whether to support or oppose a stay or deferral. In particular, in this administrative proceeding, there is a significant public interest in the Division's promptly obtaining a collateral industry bar against Steinberg to prevent investors from future harm. The fact that the Commission decided in its civil action against Steinberg that it was proper

to defer seeking an injunction and monetary relief that it could potentially obtain has no bearing on the Division's decision that it is in the public interest to ensure that an individual who has been convicted of securities fraud be legally barred from the securities industry as promptly as possible.

No other reason exists for this Court to defer decision on the Division's motion. Despite Steinberg's repeated invocation of a prediction by the U.S. Attorney's Office that the Second Circuit would decide the appeals of Newman and Chiasson within the next several months, Opp. at 6, 9, 17, neither the parties, nor the Court, nor the Commission, nor even the U.S. Attorney's Office knows when the decision in Newman's and Chiasson's appeals will be rendered, what the ruling will be, or whether further appellate litigation will result (*e.g.*, whether Newman or Chiasson or the Government will seek a rehearing *en banc* or a writ of *certiorari* from the U.S. Supreme Court). Steinberg, like the respondent in *Elliott*, is in essence requesting an indefinite deferral, during which time there would be no legal restraint on his returning to work in the securities industry.

II. IMPOSITION OF A COLLATERAL INDUSTRY BAR AGAINST STEINBERG IS IN THE PUBLIC INTEREST

Steinberg's second argument is that imposing a collateral industry bar on Steinberg before his criminal appeal is decided is not in the public interest. Opp. at 12-14. But Steinberg does not consider or apply the relevant public interest factors to existing reality, in which he has gone to trial, been convicted by a jury of one count of conspiracy to commit securities fraud and four counts of securities fraud, and been sentenced by a federal judge to a prison term of 42 months, followed by three years of supervised release, and ordered to pay a fine of $2 million and over $365,000 in criminal forfeiture. Instead, Steinberg hypothesizes that his conviction has not occurred and that the facts underlying it have not been established because his appeal has not yet been decided by the Second Circuit. *See, e.g.*, Opp. at 12-13 ("The Division's assessment of the

Steadman factors improperly presumes that Mr. Steinberg's conviction will survive"; "the soon-to-be tested assumption that Mr. Steinberg's conduct was, in fact, unlawful"; "Mr. Steinberg's conviction has been called into question"). Indeed, Steinberg goes so far as to say that it would be "premature to presume that he committed any infractions or violations, let alone multiple infractions, or is likely to do so in the future." Opp. at 14. Steinberg is asking the Court to disregard the fact of his conviction and to disregard the underlying facts that were established in his criminal case, and therefore to ignore their preclusive effect in this proceeding. Aside from the fact that there is no legal basis to completely disregard the final judgment of the federal district court, Steinberg's argument is nothing more than a reiteration of his first argument that no collateral industry bar should be imposed on him because he thinks he may win his appeal. As the Division explained in its opening brief, application of the factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), indicates that imposition of a collateral industry bar against Steinberg is in the public interest. Division Memorandum of Points and Authorities at 6-8.

Steinberg also argues, as he did in the prehearing conference, that a collateral industry bar is unnecessary because he is and has been on leave from his employer, and he would agree to remain on leave until final resolution of this matter. Opp. at 12. But there is at present no legal impediment preventing him from reentering the industry, which is the entire purpose of this proceeding. A significant reason for obtaining a collateral industry bar against Steinberg, rather than a simple agreement to remain on leave from his employer, is that if Steinberg were to violate the bar there would be statutory consequences. The Division could pursue an action under Section 203(f) of the Advisers Act against Steinberg, and against any firm with which he became associated, seeking injunctive relief, disgorgement, and penalties. 15 U.S.C. § 80b-3(f); *see, e.g.*, *SEC v. Markovitz*, SEC Lit. Rel. No. 19862, 06 Civ. 8291 (S.D.N.Y.) (Oct. 11, 2006) (imposing

injunction, disgorgement, and civil penalty for violation of order barring individual from association with investment adviser). No such relief would be available if Steinberg were to violate a simple agreement to remain on leave. Moreover, allowing agreements to remain on leave to substitute for associational bars would vitiate the statutory framework that contemplates imposition of such *de jure* bars following criminal convictions.

III. IMPOSITION OF COLLATERAL INDUSTRY BAR WOULD NOT UNFAIRLY PREJUDICE STEINBERG

Steinberg's assertion that imposition of a collateral industry bar would unfairly prejudice him, Opp. at 14, is incorrect. The Commission has held repeatedly that in the event of a successful appeal of a criminal conviction the proper remedy is for the respondent to move to have the bar set aside. *See, e.g., Chiasson*, 2014 SEC LEXIS 1366, at *10 ("If the underlying criminal and civil judgments are vacated and a statutory basis for the bar is no longer present, the remedy is to petition the Commission for reconsideration of this action."); *Edelman*, 1996 SEC LEXIS 3560, at *3; *Elliott*, 1992 SEC LEXIS 2334, at *11 n.17. Such an application would require the expenditure of only minimal resources by Steinberg and the Division.

Steinberg's concerns about the length of time that it may take to lift the bar if his appeal succeeds are similarly misplaced. In past cases, the Commission has acted to lift bars following successful appeals promptly after the respondent has moved to vacate the bar. *See, e.g., In the Matter of Evelyn Litwok*, 2012 SEC LEXIS 2328 (July 25, 2012), and Decl. Ex. 2 (vacating bar on July 25, 2012, seven weeks after respondent's motion was received on June 12, 2012); *In the Matter of Jimmy Dale Swink, Jr.*, 1995 SEC LEXIS 2033 (August 1, 1995), and Decl. Ex. 3 (vacating bar on August 1, 1995, twelve days after respondent's motion was received on July 20, 1995). In *In the Matter of Linus N. Nwaigwe*, 2013 SEC LEXIS 1997 (July 11, 2013) one of the two cases cited by Steinberg, the respondent moved to have the associational bar set aside on May

15, 2013, and his bar was lifted less than two months later. *Id.* and Decl. Ex. 4. In the other case Steinberg cites, *In the Matter of Kenneth E. Mahaffy, Jr.*, 2012 SEC LEXIS 4020 (Dec. 18, 2012), the respondent's successful appeal was made final on September 14, 2012, and his bar was lifted three months later.[2]

Finally, Steinberg asserts, incorrectly, that neither the Division nor the public would be prejudiced by a deferral of the Court's decision on the Division's motion. Opp. at 1-2. The Division and the public both have an interest in obtaining the appropriate legal remedy as expeditiously as possible, and an indefinite delay of a remedy to which the Division is entitled surely prejudices both the Division and the investing public. That prejudice outweighs any inconvenience to Steinberg that will result if he wins his appeal and then seeks to lift the collateral industry bar imposed in this proceeding.

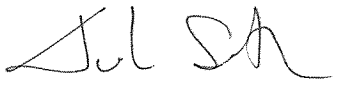
[2] Steinberg also argues that imposition of a collateral industry bar would unfairly prejudice him by preventing him and his family from receiving certain compensation, in the form of medical benefits, from his employer during the pendency of his appeal. Aside from the fact that Steinberg made millions of dollars during the period of his illegal conduct and clearly has the ability to obtain medical care outside the auspices of his employer, preventing someone who has been convicted of securities fraud from receiving compensation from the securities industry is one of the purposes behind imposition of a collateral industry bar. Preventing Steinberg from receiving employer-provided medical benefits is no more prejudicial than preventing him from receiving a salary from an employer in the securities industry.

CONCLUSION

For the foregoing reasons, and the reasons set forth in its opening memorandum, the Division respectfully requests that its motion for summary disposition be granted promptly and that this Court issue an order permanently barring Steinberg from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Dated: August 27, 2014.

Respectfully submitted,
DIVISION OF ENFORCEMENT



Justin P. Smith
Daniel R. Marcus
U.S. Securities and Exchange Commission
New York Regional Office
200 Vesey Street, Suite 400
New York, NY 10281
(212) 336-0043 (Smith)
(212) 336-0021 (Marcus)

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UNITED STATES OF AMERICA
Before the
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ADMINISTRATIVE PROCEEDING
File No. 3-15925

In the Matter of

MICHAEL S. STEINBERG,

Respondent.

DECLARATION OF JUSTIN P. SMITH

I, Justin P. Smith, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am over 18 years old and a member of the bar of the State of New York.

2. I am employed as a Senior Counsel in the Division of Enforcement ("Division") at the New York Regional Office of the Securities and Exchange Commission ("Commission"). I make this declaration in support the Division's Motion for Summary Disposition against Respondent Michael S. Steinberg.

3. Attached as exhibits to this Declaration are true and correct copies of the following documents:

Exhibit 1: Transcript of Prehearing Conference of June 26, 2014, in *In the Matter of Michael S. Steinberg*, AP File No. 3-15925.

Exhibit 2: The initial page of the respondent's motion to dismiss in *In the Matter of Evelyn Litwok*, AP File No. 3-14190, which indicates that the motion was received by the Office of the Secretary on June 12, 2012.

Exhibit 3: The respondent's "Application to Vacate Order Making Findings and Imposing Remedial Sanctions" (without exhibits) in *In the Matter of Jimmy Dale Swink, Jr.*, AP File No. 3-8129, which indicates that the application was received by the Office of the Secretary on July 20, 1995.

Exhibit 4: The respondent's "Motion to Vacate the Commission's Order of Debarment," in *In the Matter of Linus N. Nwaigwe*, AP File No. 3-13481, which indicates that the motion was received by the Office of the Secretary on May 15, 2013.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 27, 2014
New York, New York

Justin P. Smith

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
Administrative Proceeding

In the Matter of:	)	
	)	File No. 3-15925
Michael S. Steinberg,	)	
	)	
Respondent		

SEC
200 Vesey Street
New York, New York 10281
Thursday, June 26, 2014
10:30 a.m.

B E F O R E:

BRENDA MURRAY,
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
Administrative Proceeding
In the Matter of:)
) File No. 3-15925
Michael S. Steinberg,)
)
Respondent

SEC
200 Vesey Street
New York, New York 10281
Thursday, June 26, 2014
10:30 a.m.

BEFORE:

BRENDA MURRAY,
Administrative Law Judge

APPEARANCES:
ON BEHALF OF THE SECURITIES AND EXCHANGE COMMISSION:
JUSTIN SMITH
DANIEL MARCUS
United States Securities and Exchange Commission
3 World Financial Center
New York, New York

For Mr. Steinberg, via telephone:

BARRY BERKE
ROBIN WILCOX
THEODORE HERTZBERG
Kramer, Levin, Naftalis & Frankel

PROCEEDINGS

THE COURT: My name is Brenda Murray. I'm an administrative law judge with the United States Securities and Exchange Commission. This is the first prehearing conference in the matter of Michael S. Steinberg; in administrative proceeding file number 3-15925, and the order instituting proceedings issued on June 11, 2014.

Appearances for the Division, state your name for the record.

MR. SMITH: Justin Smith for the Division, as well as Daniel Marcus for the Division.

THE COURT: Okay. Who do we have for Mr. Steinberg?

MR. BERKE: Good morning, Judge. This is Barry Berke of Kramer Levin, and I'm here with Robin Wilcox and Theodore Hertzberg.

THE COURT: Okay. This is what we call at the SEC office a follow-up proceeding. And so, the question usually is, Does the respondent dispute the allegations in the OIP? If there's a need for a hearing to establish facts, usually in this type of proceeding there is no need for a hearing because the Division can just put in evidence, a certified copy of the underlying

co-judgment; and the issue then becomes, Is it in the public interest to sanction the respondent?

Usually, I assume in this case the respondent argues the proceeding should not go forward because they have an appeal pending in which they are hopeful to reverse the underlying judgment.

The Commission's case law on that subject is that the administrative proceeding should proceed, and if the underlying judgment is overturned then the respondent can petition the Commission to remove any sanction that's been imposed. So that's what we're dealing with.

What do we have in this particular case? The Division has brought the charges. So what does the Division want to do?

MR. SMITH: Your Honor, we would like to move for a leave to file a motion for summary disposition. We're prepared to discuss a briefing schedule. As your Honor indicated, we don't think a factual hearing with witnesses would be necessary. We believe it can be resolved on a motion for summary disposition.

MR. BERKE: Judge, this is Barry Berke. I appreciate your Honor's summary at the outset. We would like to take a few moments. This case is somewhat

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unusual, given some of the things that have happened thus far. Following the conviction, there have been many developments as your Honor may be familiar with, at least in part, related to the critical legal issue that's always present in our case, as well as the related case involving Neuman and Chiasson.

And what happened, the SEC has taken a position based on what happened, to make sure your Honor is aware of, because it does bear on our application we have today. In the civil proceeding that the SEC filed against Mr. Steinberg that was before Judge Baer before he unfortunately passed, that case was scheduled to go forward.

In that case the SEC agreed in a joint application submitted by the defendant that that entire matter should be adjourned, not based on the pendency of the appeal, but rather based on what happened in the oral argument of Neuman and Chiasson, it would appear very likely, almost certain, because those who were present at the hearing, that the Court will find that the instructions on which the convictions for Mr. Steinberg as well Neuman and Chiasson, was improper.

And in fact, the SEC submitted a letter with us, it was a joint letter on our letterhead, both parties, that asked Judge Baer to put off the civil

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proceeding filed by the SEC because of the statements made by the judges hearing the appeal, indicating that there was a substantial likelihood of a reversal. In our letter that judges, quote, "appear to express skepticism as to the sufficiency of Judge Sullivan's jury instructions, because of downstream 'to be's'."

And the letter we both said to Judge Baer, accordingly it would be, quote, "inefficient and unnecessarily burdensome to the Court and parties that the SEC seek summary judgment and parties proceed to trial in accordance with the current schedule." And we both asked that the matter be put off until October. And Judge Baer did put the matter off to the fall.

We would submit, your Honor, that under these very unique circumstances, I have known -- for quite some time, and also researching it in connection, I'm not aware of a similar situation that appeared before the Commission where a panel has been so explicit on an issue that would clearly be favorable to any conviction.

And based on all of this, our request, which is a relatively modest request given the 210 day schedule, would simply be to adjourn this matter for three months, to approximately the fall.

Our argument that we're quoting from

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occurred approximately two months ago, three months, there's no guarantee there will be a decision, but there's certainly a good chance there could be a decision.

As your Honor I believe knows, that based on the position the SEC has taken in our case, in the civil matter, Anthony Chiasson has moved to have the administrative injunction lifted that had been imposed on him based on his conviction.

Prior to the oral argument raised by these issues, we understand that briefing has been allowed on that matter and that issue will probably be resolved as well, we presume, sometime in the fall.

We will also say that, given the unique situation we're in, our own criminal appeal that obviously addresses this very issue that the Court has spoken to, but also other issues that would be relevant in a retrial, our briefs are now due September 22.

So we would also like to avoid being in a position of having to brief the SEC matter, and whether the conviction is actually a conviction given appeal, based on legally being recognized as an erroneous jury charge.

So for all these reasons, Judge, we would ask that your Honor consider the modest request of a

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three month adjournment, approximately 90 days, at which time we would have another conference. Hopefully by then there may be guidance given in the form of an opinion by the Second Circuit. But we would proceed otherwise, that the SEC agreed in a civil proceeding before Judge Baer, it's unnecessarily burdensome to the Court and the parties.

Just as the SEC recognizes how inefficient and unneccessarily burdensome on Judge Baer, we submit it similarly has the same effect on you as well as us.

And if I can add, thank you for listening. I have one last factor. Our client is not in any way engaged in anything in the industry. He is on leave from the SEC, which allows him to get certain health benefits to his family. And he's not in any way involved in trading or the like, and agrees he would not in any way be involved with markets, et cetera, during the pendency of these issues.

But obviously, given the order issued, based on the conviction -- it would preclude him, because he would be on leave from the SEC potentially, which would at least cause him to lose the benefit he now receives.

MR. SMITH: Your Honor, if I may be heard on a couple of the points opposing counsel just raised?

THE COURT: Yes.

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MR. SMITH: First of all, we disagree very strongly with some of the supposed facts that opposing counsel just indicated. We certainly disagree that it is very likely that the Neuman-Chiasson appeal in the Second Circuit will result in an overturning of the conviction.

In a letter that was submitted, the Division did agree that the questioning by the judges appeared to express some skepticism of the insufficiency of Judge Sullivan's instructions. That is as far as we're willing to go –

THE COURT: I don't want to speculate on that. You can't go there. The point that Mr. Berke raised does concern me.

Did you all, does the Division of Enforcement agree before Judge Baer in a joint application that civil action should be held off?

MR. SMITH: We did agree to a stay of the summary judgment briefing schedule in the civil action. And I can explain that the Division views the civil action as very different from the current administrative proceeding, in a number of important respects.

First of all, we're talking about completely different statutory provisions. Here we're talking about Advisors Act 203F, in which we are looking for an

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industry bar against Mr. Steinberg following a District Court conviction.

This is a different legal action, it's an administrative proceeding, not a civil court action. It's brought under a different statutory provision, in the civil action obviously being collateral estoppel.

In addition to different legal provisions, there is different relief sought in the two proceedings, one action and one proceeding. In the civil court action the relief being sought is a penalty and injunction; whereas in the administrative proceeding, what's being sought is an industry bar.

And the Division believes that there's a particular public interest in an industry bar to protect investors from future harm that isn't present in the kind of relief sought in the civil action.

Moreover, going back to the statutory provisions at issue, in the administrative proceeding, according to the SEC rules of practice, in particular Practice 161, any kind of postponement is strongly disfavored, any request for extension of time or postponement or adjournment, unless there is some strong showing that would substantially prejudice the respondent's case.

We don't believe that's present here.

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Moreover, there is no such similar language in any kind of summary judgment proceeding in the civil court action.

THE COURT: I think there's no question that you will have precedent on your side. The case law, as I stated, is that these administrative proceedings should continue even if there's an appeal of the underlying judgment.

I just wondered if the Division is cognizant of what Mr. Berke stated, that this gentleman's benefits will end if a sanction is imposed on him? And if we know, at least I think all available information is that some court action is going to be taken on the appeal in the not too distant future. Is the Division solid in its position? It wants to go with precedent, knowing what it knows on the factors of this case?

MR. SMITH: Yes, your Honor. A couple points, if I can make in response.

First of all, we have no idea when the Second Circuit appellate decision would be handed down. In point of fact, recent Second Circuit decisions have taken as long as a year and a half, if not longer.

THE COURT: Let's zero in. Baer certainly wants a 90 day postponement, a 90 day stay of this thing. You would not go along with 90 days? I'm not

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saying you should or shouldn't. I don't know that much about this case and I don't know what you all know. But just on what was presented to me today, the Division would oppose a 90 day postponement?

MR. SMITH: We absolutely oppose a 90 day postponement in this case.

On the issue of health insurance, there is no statutory provision that would allow some sort of interim de facto bar, that is not a de jure bar that would preclude any relief sought by us under 203F if there's any kind of violation of that bar.

It is, as your Honor points out, precendental, any time when following a conviction there's an industry bar and the effects fall where they may. So we would oppose a 90 day adjournment, your Honor.

THE COURT: Okay. If you've got the law on your side there's nothing I can do about it. If that's your position on it, that's your position on it. You win, because you've got the law on your side.

Having decided that, Mr. Berke, I'm sorry, you made a very eloquent plea but it's denied.

When does the Division want to file a motion for summary disposition?

MR. SMITH: Your Honor, the briefing

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schedule contemplated would involve the Division filing our initial motion papers on July 24.
THE COURT: July 24.
MR. SMITH: Yes, with opposition by Mr. Steinberg on August 7, and a reply by the Division --
THE COURT: Hold on. You want to file by the 24th and you want to give him two weeks?
MR. SMITH: Two weeks until August 7 for the opposition; and then our reply two weeks after that on August 21.
THE COURT: Okay.
Mr. Berke, do you go along with that?
MR. BERKE: No. I'm opposed to that, your Honor. This is the first we've heard of that schedule.
And your Honor, I would say one thing, if I may. I understand there's a ruling about the request and law of the case.
I agree with Mr. Smith when he describes what was in our joint letter. But the only thing he said about this that could affect the briefing schedule letter too, the letter also said if the Second Circuit reverses or vacates Neuman and Chiasson it likely grants the same relief to Steinberg.
And while your Honor is right that the law is on the Commission's side, in this case we have a law,

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a case, I would submit, that is on our side. Because while Mr. Smith talks about how the rules and procedures are different, what is identical and what led us to say what is inefficient and unnecessarily burdensome in the civil action proceeding with summary judgment, is that summary judgement was granted based on the conviction, if the conviction was reversed based on the skepticism expressed by the judges, then the summary judgment would be undone.
In the same way, if they have a bar here, and then an appeals court reverses it based on skepticism expressed, then again, the bar would be undone.
So I would submit, your Honor, that while the general law is certainly on the Commission's side and has been established without question, in this case the law of the case with the SEC has already taken a position on the very issue that is identical, and that is because whatever happens here will be unknown if it's reversed, the same inefficiencies and unneccsary burdens would apply.
And if your Honor is not inclined to grant just a straight adjournment, 210 days, we ask that we be permitted to respond to whatever papers the Commission is going to file after we file our appeal papers, which

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are now consuming all our attention, and which is due September 22. Given that we have 210 days, and the issues are relatively straightforward, we would ask to be able to file our response sometime in mid October.
THE COURT: Sorry, I have to deny that request. I don't know that much about what's going on in the civil action. But I do know this is an administrative action. The criteria is in the public interest that what exists now on the record is a conviction, whether that's the basis for sanction.
The issue in this case is very simple. Very few people in this person's situation escape a collateral bar. Now, maybe the public interest in this case is going to be different. But if you look at all the case law on this, people who are in this gentleman's position usually, almost always, are subject to a collateral bar under Dodd-Frank.
So whether you can demonstrate this is different, I don't know. But this is a single issue, very, very limited issue in this administrative proceeding. And so that's where I'm coming from.
I do think the Division's schedule, as far as your filing goes, if you can make a filing on the 24th of July, fine, that's going to be good. But you've got to give the other side more than two weeks. So I

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will give the other side until the 20th of August, which is an extended period. But then I would require the Division file its reply on August 27.
So we've got the motion for summary disposition on July 24, respondent's opposition on August 20, and the Division's reply on August 2.
Okay. I'm sorry gentlemen, that's going to be it.
Is there anything else that we have to decide before we recess this prehearing conference?
MR. SMITH: One question, your Honor. We weren't sure, based on when the receipt of the order of proceedings was delivered to the respondent, when their answer is due?
THE COURT: Their answer would be due 20 plus 3 days after they got it. Steinberg's counsel served the OIP on June 16. That's an order that I issued on June 20.
MR. SMITH: My apologies, I missed it, your Honor. Thank you.
THE COURT: Okay. We calculated that from the United States Postal Service tracking. Then we have 20 days under the OIP, and then he got it by mail, he gets another three days according to another provision in the Commission's rules of practice.

If there's nothing else, I have to put out an order of what transpired in today's prehearing conference, and I will do that as soon as I can, it will have the dates in it.

MR. BERKE: One other question. We talked about this briefly. Would you be prepared to waive our need to file an answer in light of the summary disposition schedule?

MR. SMITH: Yes, we would, Mr. Berke.

MR. BERKE: Okay. Your Honor, do you accept that and not file an answer?

THE COURT: That's fine. I will note that in the order I put out. Okay.

If there's nothing else, this prehearing is adjourned. Thank you, gentlemen.

MR. SMITH: Thank you.

(Time noted: 10:53 a.m.)

SCOPIST CERTIFICATE

I, JEFFREY SHAPIRO, hereby certify that the foregoing transcript consisting of 17 pages is a complete, true and accurate transcript of the investigative hearing, held on Thursday, June 26, 2014, at 200 Vesey Street, New York, New York, in the matter of Michael Steinberg.

I further certify that this proceeding was reported by me and that the foregoing transcript has been scoped by me.

JEFFREY SHAPIRO DATE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
REPORTER'S CERTIFICATE

I, Jeffrey Shapiro, reporter, hereby certify that the foregoing transcript of 17 pages is a complete, true, and accurate transcript of the testimony indicated, held on January 1, 2011, at the Securities and Exchange Commission, 3 World Financial Center, New York, New York, in the matter of: Michael Steinberg.

I further certify that this proceeding was recorded by me and that the foregoing transcript was prepared under my direction.

JEFFREY SHAPIRO DATE

PROOFREADER'S CERTIFICATE

In the Matter of: Michael Steinberg

File Number: 3-15925
Date: June 26, 2024
Location: 200 Vesey Street
New York, New York

This is to certify that I, JEFFREY SHAPIRO, the undersigned, do hereby swear and affirm that the attached proceedings before the United States Securities and Exchange Commission were held according to the record, and that this is the original, complete, true and accurate transcript that has been compared to the reporting or recording accomplished at the hearing.

JEFFREY SHAPIRO DATE

HARD COPY

Received

JUN 12 2012

Office of Administrative Law Judges

RECEIVED
JUN 12 2012
OFFICE OF THE SECRETARY

May 29,2012

Judge Carol Fox Foelak
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. St. N.E.
Washington, DC 20549

Re: File NO. 3-14190

The attached papers are copies of the Second Circuit Court decision dated April 30, 2012 (Ex. 1). A true copy was instantly sent to Cynthia Matthews of the SEC who has not filed for a dismissal. **I ask Your Honor to dismiss this administrative proceeding.**

As you will note, of the 4 criminal charges, 2 counts were reversed and 2 were vacated. The SEC instituted this proceeding because "Litwok was convicted of mail fraud and tax evasion arising from misconduct while associated with an investment advisor." This last statement is no longer accurate.

For the record, I declared myself to be not guilty at the beginning of the SEC investigation in 1998. Prior to the filing of the SEC claim, my attorney and I provided documents to SEC staff to make them aware of the "true" facts in this case. In spite of evidence verifying my version of the facts, the SEC filed a knowingly false claim on December 27, 2000. No less than 30 SEC staff were involved with this case over the last 12 years at a cost of roughly $10 million dollars.

It is my contention each of SEC staff had thorough knowledge of the documents and had either met or reviewed forensic accounting provided to them. Both sets of documents directly contradicted SEC witnesses, Dalia Eilat and Peter Testaverde, deposition testimony. The SEC knew prior to filing their claim, their evidence was false.

Throughout the 12 years, I repeatedly attempted to get the SEC to withdraw their complaint on the basis of perjured testimony by Dalia Eilat and Peter Testaverde. I pointed out the perjured testimony to Cynthia Matthews during the course of his depositions. And I told SEC staff Cynthia Matthews, David Markowitz and David Rosenberg they were suborning the perjury of Dalia Eilat and Peter Testaverde.

Being self -regulating and accountable to no one, the SEC continued this malicious case and continued to make false accusation about me in court papers for 12 years. Had they been accountable to anyone, they would have been obligated to follow the evidence which was the "money." By following the money it would have lead to an indictment and claims against both Eilat and Testaverde.

I sent in several formal complaints against SEC staff to their Office of the Inspector General and received no response.

The primary SEC allegation of "embezzlement" was a lie; the dollar amount was a lie; that Evelyn Litwok gave Dalia Eilat 1.3 million dollars was a SEC lie and putting in writing that Evelyn Litwok and Dalia Eilat were lovers was a lie. Creating a scenario of lesbian lovers was "discrimination" in 2000. Public sentiment on the Lesbian issue was far more negative 12 years ago. This "made up Lesbian lover relationship" showed only the length SEC staff would go to win at all costs.

(3)

THE PERRONI LAW FIRM

A PROFESSIONAL ASSOCIATION

STEWART BUILDING

801 WEST THIRD STREET

LITTLE ROCK, ARKANSAS 72201-2103

SAMUEL A. PERRONI
RITA S. LOONEY
J. NICOLE GRAHAM
SHERRY JOYCE, CLA

OF COUNSEL
PATRICK R. JAMES, P.A.

TELEPHONE
501/372-6555
FAX
501/372-6333

July 17, 1995

Jonathan G. Katz
United States Securities
and Exchange Commission
Washington, D.C. 20549

RE: In The Matter of Jimmy Dale Swink, Jr.

Dear Jonathan:

Please find enclosed for filing the original and seven (7) copies of an Application to Vacate Order Making Findings and Imposing Remedial Sanctions regarding the above matter.

Very truly yours,

Patrick R. James

PRJ/vs

cc: Certificate of Service

1katz.795

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934
Release No. 33399 / December 29, 1993

Administrative Proceeding
File No. 3-8129

IN THE MATTER OF JIMMY DALE SWINK JR.	)

APPLICATION TO VACATE ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS

Comes the Respondent, Jim D. Swink, Jr., by and through his attorneys, The Perroni Law Firm, P.A., and for his Application states:

1. On December 29, 1993, the Commission entered an order against Respondent Jim D. Swink, Jr., barring him from association (the "Bar Order") based solely upon a conviction. A copy of the Bar Order is attached as Exhibit "A" and incorporated by reference.

2. The Bar Order specifically provided that the bar would be vacated upon Swink, Jr.'s application if the conviction was reversed or vacated on appeal.

3. On April 15, 1994, the Eighth Circuit Court of Appeals vacated the conviction of Jim Swink, Jr. Attached hereto as Exhibit "B" and incorporated by reference is the decision of the Eighth Circuit.

4. The prior conviction was for counts 1 and 16 of the

indictment. The Eighth Circuit dismissed count 16 with prejudice and remanded the district court for a new trial on Count 1.

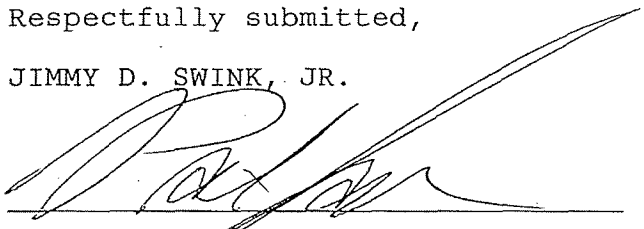
5. Thereafter, the United States District Court for the Eastern District of Arkansas, on July 15, 1994, Western Division, entered an Order dismissing Count 1. A copy of the Order is attached hereto as Exhibit "C" and incorporated by reference.

Therefore, pursuant to the terms of Bar Order, Swink moves this Commission to vacate the Bar Order in light of the reversal of his conviction, and dismissal of the remaining Count.

WHEREFORE, Jim D. Swink, Jr. prays that his Application to Vacate Order Making Findings and Imposing Remedial Sanctions and for all other just and proper relief.

Respectfully submitted,

JIMMY D. SWINK, JR.

By: 

PATRICK R. JAMES, Bar No. 82084
The Perroni Law Firm, P.A.
801 West Third Street
Little Rock, Arkansas 72201
Tel. (501) 372-6555
Fax. (501) 372-6333

CERTIFICATE OF SERVICE

I, Patrick R. James, hereby certify that a true and correct copy of the above and foregoing has been served on the Plaintiff by mailing a copy of same by first class United States mail, postage prepaid, to:

Phillip W. Offill, Jr.
United States Securities and Exchange Commission
Fort Worth District Office
19th Floor
801 Cherry Street
Fort Worth, Texas 76102

Jeffrey Hiller, Esq.
Securities and Exchange Commission
Divison of Enforcement, Stop: 4-8
450 5th Street, N.W.
Washington, D.C. 20549

Honorable Warren E. Blair
Chief Administrative Law Judge
Securities and Exchange Commission
450 5th Street, N.W., Stop: 7-7
Washington, D.C. 20549

T. Christopher Browne
District Administrator
Securities and Exchange Commission
Forth Worth District Office
801 Cherry, Ste. 1900
Fort Worth, TX 76102

Patrick R. James, P.A.

1vacate.795

4

Linus N. Nwaigwe
82 Lotus Oval south
Valley Stream, NY 11581
(516)-851-7013
nwaigwe1@verizon.net

May 7, 2013

By US PRIORITY MAIL

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F. Street, N. E.
Washington, D. C. 20549

Re: In the Matter of Linus N. Nwaigwe
Administrative Proceeding File No. 3-13481

Dear Ms. Murphy:

Enclosed is the original and three copies of a motion of Linus N. Nwaigwe to vacate the Commission's order of debarment dated September 20, 2010.

Very truly yours,

Linus N. Nwaigwe

Cc:
Jack Kaufman, Esq.
Senior Trial Counsel
Securities and Exchange Commission
3 World Financial Center
New York, New York 10281

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-13481

In the Matter of

DECLARATION IN SUPPORT OF MOTION TO VACATE ORDER OF DEBARMENT

LINUS N. NWAIGWE

Respondent.

I, Linus Nwaigwe, appearing pro se, declares under penalty of perjury:

1. I am the Respondent in the above –referenced matter. I make this declaration in support of my motion to vacate the Commission's order, dated September 20, 2010, that I be debarred from association with any broker, dealer or investment advisor.

2. The Commission's order of debarment was based solely on a criminal conviction, which the United States Court of Appeals for the Second Circuit vacated on August 2, 2012. The Second Circuits opinion is already in your possession.

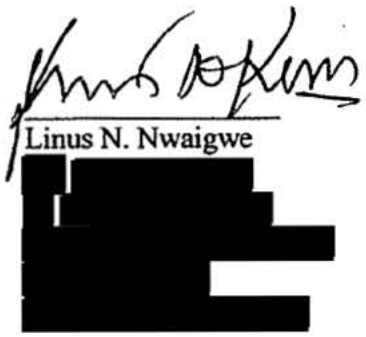
3. The procedural history of the matter is as follows: Upon a jury verdict in United States District Court for the Eastern District of New York finding me guilty of conspiracy to commit securities fraud, administrative proceedings against me were authorized on May 21, 2009, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisors Act of 1940.

4. On December 11, 2009, an administrative law judge issued an initial decision by summary disposition based on the conviction. Upon review, the Commission ordered me disbarred on September 20, 2010.

5. I no longer stand convicted, because on August 2, 2012, the Second Circuit vacated my conviction. Thus, the basis for my debarment no longer exists.

WHEREFORE, for these reasons, the order of debarment should be vacated.

Dated: May 7, 2013



Linus N. Nwaigwe

[redacted]