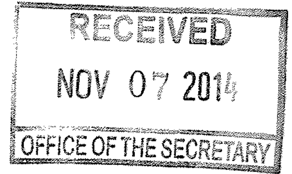

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
JESSE C. LITVAK	:	Administrative Proceeding File No. 3-16050

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

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Dated: November 6, 2014

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JESSE C. LITVAK	:	Administrative Proceeding File No. 3-16050

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement ("Division") now moves for summary disposition under Commission Rule of Practice 250. The Division submits that, as Jesse C. Litvak ("Litvak") has been convicted in federal court of criminal securities law violations, there is no genuine issue as to any material fact and Litvak should be barred from the industry as a matter of law. The Division respectfully requests that the Court issue an Order barring Litvak from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (a "collateral industry bar"), based on his conviction for securities fraud, TARP fraud, and making false statements to the United States government in United States v. Litvak, 3:13-cr-00019-JCH (D. Conn.) (Judgment entered July 25, 2014).

As more fully explained below, Litvak was indicted by a Grand Jury sitting in the District of Connecticut. The charges stemmed from Litvak's practice, while a trader at Jefferies & Co., Inc. ("Jefferies"), of misrepresenting to counter-parties the prices at which he could purchase or

sell certain bonds. In so doing, Litvak increased the "spread" between the purchase price and sales price, and thus Jefferies' profit on the deal. Litvak did this over the course of three years. The Indictment, which was unsealed on or about January 25, 2013, alleged violations of 15 U.S.C. §§ 78j(b), 78ff (securities fraud), 18 U.S.C. § 1031 (TARP fraud) and 18 U.S.C. § 1001 (false statements to the government). Following a jury trial, Litvak was found guilty on all remaining counts in the Indictment.[1] The case is now on appeal before the Court of Appeals for the Second Circuit .

I. As a registered representative and trader at Jefferies, Litvak deceived his customers for the benefit of his firm and himself.

A. Background on Litvak and the bonds he traded.

From April 2008 to December 2011, Litvak was a registered representative associated with Jefferies. [Order Instituting Proceedings ("OIP") ¶ A.1.][2] Jefferies has been registered with the Commission as a broker-dealer since 1969. [Id.] During the time period relevant to the Indictment, Litvak was a registered representative associated with Jefferies. [Id.]

As alleged in the Indictment, Litvak worked at Jefferies as a trader of residential mortgage-backed securities ("RMBS"). [Id. ¶ A.3, Stipulated Facts, filed herewith ("Facts"), Ex. 1 (Indictment) ¶ 3.] These RMBS are securities within the meaning of the securities laws. [Facts, Ex. 1 ¶ 3.] RMBS are bonds made up of large pools of residential mortgages and home equity loans. [Id.¶ 14.] Unlike stocks, RMBS bonds are not publicly traded on an exchange, and pricing information about these bonds is not publicly available. [Id.¶ 14; Facts, Ex. 3 (District Court ruling on Defendant's Motions for Judgment of Acquittal and for a New Trial) at 7 & n.1.]

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[1] Count Seven had been dismissed, on motion of the government, before trial. [Stipulated Facts, filed herewith, ¶ 2.]
[2] Under Commission Rule of Practice 220(c), "any allegation [in the OIP] not denied shall be deemed admitted." In his Answer, dated September 29, 2014, Litvak did not deny any factual allegations in the OIP.

Buyers and sellers of RMBS bonds use broker-dealers, like Jefferies, to execute individually negotiated transactions. [Facts, Ex.1 ¶ 14.]

The Indictment alleged that, generally, RMBS bonds are sold in three ways. First, they may be sold from a broker-dealer's inventory, in which case the firm (like Jefferies) sells a bond it has owned for a period of time. [Id. ¶ 16.] Second, they may be sold as an order, in which the seller asks the broker-dealer to seek a buyer, or the buyer asks the broker-dealer to find a seller, for a particular bond. [Id. ¶ 16.] Finally, RMBS are sold as part of a "bid list" or "BWIC" ("bids wanted in competition"), in which the seller circulates a list of specific bonds it is interested in selling so that the broker-dealer may seek a potential buyer willing to negotiate terms for the trade. [Id. ¶ 16.]

For both orders and bid-list trades, the buyer and seller do not know each other's identity, but communicate exclusively through the broker-dealer. [Id.¶ 18.] The broker-dealer's profit on a set of trades in which it serves as the middleman is the difference (or "spread") between the price it pays the seller and the price it charges the buyer. [Id. ¶ 20.] In the bond industry, prices are measured in 1/32s of a dollar, commonly referred to as "ticks." [Id. ¶ 20; Facts, Ex. 3 at 7.] For instance, if a broker-dealer buys a bond for $65.25 (meaning $65.25 per $100 of current face value), the price would be expressed as "65 dollars and 8 ticks," "65 and 8," or "65-8." [Facts, Ex.1. ¶ 20.]

B. The offenses for which Litvak was convicted.

The Indictment alleged that, on ten occasions, Litvak lied to his customers about the prices paid for various RMBS bonds that Litvak bought and sold.[3] The Indictment alleged, and the jury found, that, in connection with these sales, Litvak committed securities fraud. [Facts, Ex. 2 (Verdict Form) at 1-2; Ex. 3 at 4.] The Indictment also alleged, and the jury found, that in connection with five of those transactions (Counts One through Five), Litvak also committed TARP fraud, [Facts, Ex. 2 at 2; Ex. 3 at 12], and that he made false statements to a government official in connection with three of those trades, and one other, in violation of Title 18, United States Code, Section 1001. [Facts, Ex. 2 at 2-3.][4]

The fraud, as alleged by the Indictment and found by the jury, was that, while acting as a middleman between buyers and sellers, Litvak misrepresented to his customers the prices at which Jefferies bought and sold bonds. [Facts, Ex.1 ¶36; Ex. 3 at 9.] Some of those customers were involved in a form of federal assistance (the TARP program). [Facts, Ex. 3 at 13-17.] Litvak "told the buyer that they could get the bond they wanted and that the seller would sell it at X when, in fact, the price the seller had told [him] they would take was less than X. There were situations where [he] told a seller that a buyer would pay X when, in fact, the buyer would pay X plus, but [he] induced the seller to sell based upon that lower price represented. And there were times [. . .] where [he] said to the buyer that there was a third-party seller with whom [he was]

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[3] Litvak has also been charged by the Commission with violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act, and Rule 10b-5 in a civil injunctive action. SEC v. Litvak, 3:13-cv-00132 (D. Conn.) (Hon. Janet C. Hall). That matter, which alleges violations based on the same conduct for which Litvak was indicted and convicted – as well as some additional examples of the same type of conduct – is pending before the same District Judge who presided over the criminal case. It is currently stayed, and no determination has been made by the District Court, in that context, about the likelihood that Litvak will engage in future violations.

[4] Specifically, the statement charged in Count 13 was made in the trade charged in Count One. [Facts, Ex. 1 ¶¶ 37(j), 55, 60.] The statement charged in Count 14 was made in the trade charged in Count Two. [Facts, Ex. 1 at ¶¶ 37(j), 55, 60.] The statement charged in Count 15 was made in the trade charged in Count Five. [Facts ¶¶ 49(f), 55, 60.] The statement charged in Count 16 was made in connection with an uncharged trade.

vigorously negotiating and had finally worked out a price when, in fact, it was a bond that was in the inventory of Jefferies, there was no other seller." [Facts, Ex. 4 at 140.]

By lying to customers about how much the firm was paying for the bonds, Litvak increased Jefferies' compensation on those trades. [Facts, Ex. 1, ¶ 36; Ex. 3 at 9.] After hearing testimony from Litvak's customers on those trades, and reviewing documentary evidence (including Bloomberg chats and trade tickets) about the trades, the jury found that these misrepresentations were material, and that Litvak made them with an intent to defraud. [Facts, Ex. 3 at 2, 6-10.]

Specifically, the Indictment identified nine different dates during 2009-2011, and ten bond transactions on those dates, and alleged that Litvak lied in connection with those bond transactions. [Facts, Ex. 1 ¶ 55.] The jury found that, in connection with those transactions, "Litvak knowingly lied and benefitted as a result." [Facts, Ex. 3 at 9.] "For example," for the transaction charged in Count 1, "there was evidence that Litvak knew the actual price at which the seller was selling the HVMLT bond to Jeffries [sic] and yet misrepresented the price when selling the bond to Michael Canter of AllianceBernstein." [Id.]

In finding Litvak guilty of the Section 1001 counts, the jury necessarily concluded that he made the false statements alleged in paragraph 60 of the Indictment. [Facts, Ex. 1 ¶ 60; Ex. 2 (Jury Verdict Form) at 2-3.] Specifically, in finding Litvak guilty on Count 13, the jury found that, on March 31, 2010, Litvak lied to a trader at AllianceBernstein (identified at trial, and through his own testimony, as Michael Canter ("Canter"[5])) in connection with the sale of the HarborView bond (HVMLT 2006-10 2A1A). Litvak represented to Canter that Jefferies was being offered the HarborView bond at 58-00, when in fact Jefferies had already negotiated with the seller to purchase the bond at 57-16. [Facts, Ex. 1 ¶¶ 60, 37-46.]

[5] Facts, Ex. 3 at 2 (identifying victim-witnesses).

In finding Litvak guilty on Count 14, the jury found that, on the same date (March 31, 2010), Litvak lied to Canter in connection with the sale of a second bond, the Lehman Bond (LXS 2007-15N 2A1). The jury found that Litvak had told Canter that a seller was offering Litvak the Lehman Bond at 58-8, when in fact Jefferies had already negotiated with the seller to buy the Lehman Bond at 56-16. [Facts, Ex. 1 ¶¶ 60, 37-46.]

And, in finding Litvak guilty on Count 15, the jury found that, on December 23, 2009, Litvak lied to a trader at Wellington Management (identified through trial as Alan Vlajinec[6]) in connection with a transaction in the Wells Fargo Bond [WFMBS 2006-AR12 1A1]. Litvak told Vlajinec that Jefferies was going to buy the Wells Fargo Bond at 75-28. In truth, Jefferies had bought the bond on December 14 at 70. [Facts, Ex. 1 ¶¶ 60, 49-53.]

These lies, as well as Litvak's lies alleged in the other counts of the Indictment, were material. [Facts, Ex. 2 at 1-2 (verdict form); Facts, Ex. 3 at 4 (outlining elements of securities fraud claim), 5-8 (evaluating facts supporting jury's finding of materiality).]

In sentencing Litvak, the District Court made a number of findings about the nature of the offense. The District Court found that the loss from Litvak's offense was between $2.5 million and $7 million. [Facts, Ex. 4 (transcript of sentencing hearing) at 56.] The District Court further found that there were more than 10 victims of the offense, [id. at 56], and that Litvak had not accepted responsibility for his behavior. [Id. at 60-61.][7] That behavior, according to the District Court, was repeatedly lying about material matters in his work as a securities industry professional. [See Facts, Ex. 4 at 137-38, 140.] The District Court found that Litvak took

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[6] Facts, Ex. 3 at 2 (identifying victim-witnesses).

[7] At sentencing, Litvak's counsel agreed that Litvak's position was that he had not committed a crime. [Facts, Ex. 4 at 59.]

advantage of a market "that existed because of taxpayer money," and that he did so by committing fraud. [Facts, Ex. 4 at 140.]

Tellingly for this proceeding, it was clear from the sentencing hearing that the District Court believed that Litvak had *already* been permanently stripped of his ability to engage in the purchase and sale of securities. As the District Court put it, "[t]he government has taken away your license and they will not give it back to you." [Facts, Ex. 4 at 147.] This incorrect assumption played a role in the District Court's analysis of an appropriate sentence: in explaining its reasons for the length of the sentence, the District Court said, "[I]f [the Court] thought there was any chance you would go out and commit another fraud, the sentence today would be significantly different than what I think it's going to be. But I don't see that as present in this case, as far as a need for your sentence." [Facts, Ex. 4 at 147.] Thus, it is clear from the context that the District Court did not see any chance that Litvak would commit another fraud because the District Court believed (incorrectly) that the government had already taken away his security license. Litvak received a 24-month sentence. [Facts, Ex. 5 (Judgment) at 1.]

Because of the criminal conviction described above, the Division respectfully seeks summary disposition against Litvak and requests that the Presiding Judge issue a collateral industry bar.

II. Summary disposition is appropriate in this case.

A. Legal standard: summary disposition.

Rule 250(a) of the Commission's Rules of Practice permits a party, with leave of the hearing officer, to move for summary disposition of any or all of the OIP's allegations. By order issued October 6, 2014, the Presiding Judge granted the Division leave to file a motion for summary disposition against Litvak.

A motion for summary disposition should be granted if there is "no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." [Rule 250(b).] In cases like this, where the pertinent facts already have been litigated and determined in a prior judicial proceeding, the Commission has repeatedly upheld the use of summary disposition to determine the sanction. [See, e.g., In the Matter of Joseph P. Galluzzi, Exchange Act Rel. No. 34-46405, 2002 WL 1941502 (Aug. 23, 2002) (Commission upheld ALJ's grant of Division's motion for summary disposition where facts were determined in earlier injunctive action and criminal conviction); In the Matter of Jeffrey L. Gibson, 92 S.E.C. Docket 1591, Exchange Act Release No. 34-57266, 2008 WL 294717 (2008) at *5 & n.21 (citing cases).] Because in cases like this – and in this one—there is no genuine issue of material fact, the Division is entitled to a permanent collateral industry bar. The Division respectfully requests that the Presiding Judge grant this motion and impose one on Litvak.

B. Litvak's conviction is the basis for imposition of a collateral industry bar.

There is no dispute that Litvak was convicted, just this year, of a "felony or misdemeanor" that "involves the purchase or sale of any security" and that "arises out of the conduct of the business of a broker [or] dealer" within the meaning of Sections 15(b)(4)(B) and 15(b)(6)(A)(ii) of the Exchange Act. Litvak's answer to the OIP appropriately admits the existence of his conviction. [Answer, dated September 29, 2014 ("Answer").] Each count on which Litvak stands convicted of securities fraud or TARP fraud is a basis for the imposition of remedial sanctions, because each of those counts "involves the purchase or sale of any security" and/or "arises out of the conduct of the business of a broker [or] dealer." 15 U.S.C. §78o(b)(6)(A)(ii). Litvak's convictions under 18 U.S.C. § 1001 are also appropriate bases for

the imposition of a collateral industry bar. [See Kornman v. SEC, 592 F.3d 173 (D.C. Cir. 2010).]

The only defense Litvak has raised is that he has appealed his conviction. [See Answer.] But that is not germane to the analysis of whether a collateral industry bar is applicable, or to the appropriateness of such a bar. [See Elliott v. SEC, 36 F.3d 86, 87 (11th Cir. 1994) ("Nothing in the statute's language prevents a bar [from being] entered if a criminal conviction is on appeal."); Hunt v. Liberty Lobby, Inc., 707 F.2d 1493, 1497 (D.C. Cir. 1983) ("Under well-settled federal law, the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court.").] As the Presiding Judge noted recently, "the Commission has repeatedly held that the pendency of an appeal is not grounds to dismiss or postpone judgment in a proceeding." [In the Matter of Ross Mandell, Rel. No. 478, 2013 WL 30144 at *5 (Initial Decision, January 3, 2013), aff'd, Exchange Act Rel. No. 71668, 2014 WL 907416 (March 7, 2014)]. Accordingly, the Presiding Judge may impose the collateral industry bar sought by the Division. [See 15 U.S.C. §78o(b).][8]

C. It is in the public interest for Litvak to be subject to a collateral industry bar.

The Steadman factors are the touchstone in analyzing whether it is in the public interest to impose a collateral industry bar. Those factors are:

> (a) the egregiousness of the defendant's actions; (b) the isolated or recurrent nature of the infraction; (c) the degree of scienter involved; (d) the sincerity of the defendant's assurances against future violations; (e) the defendant's recognition of the wrongful nature of his conduct; and, (f) the likelihood that the defendant's occupation will present opportunities for future violations.

[8] Collateral estoppel bars Litvak from attacking, in this proceeding, the legal or factual bases for his conviction. [See Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326-334 (1979); In the Matter of Jose P. Zollino, Exchange Act Rel. 34-55107, 2007 WL 98919, at *4 & n. 20 (Jan. 16, 2007) ("[A] party cannot challenge his . . . criminal conviction in a subsequent administrative proceeding"); William F. Lincoln, Exchange Act Rel. No. 39629, 1998 WL 80228, at *2, (Feb. 9. 1998) (In proceedings based on a criminal conviction, a respondent "is collaterally estopped from attacking here the merits of the criminal proceeding against him.").]

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981), quoting SEC v. Blatt, 583 F.2d 1325, 1223 n.29 (5th Cir. 1978) (internal quotations omitted). Where, as here, the basis for the requested sanction is the Respondent's prior criminal conviction for securities fraud, long-established precedent provides that the Respondent should be barred from the securities industry absent "extraordinary" mitigating circumstances. [See Alberto W. Vilar and Gary Alan Tanaka, 2009 WL 1284733, 95 S.E.C. Docket 2072, *2 (Initial Decision, April 17, 2009) ("'[A]bsent extraordinary mitigating circumstances,' an individual who has been criminally convicted in connection with activities related to the purchase or sale of securities cannot be permitted to remain in the securities industry.") (citations omitted); see also John S. Brownson, c/o Payless Furniture, 2002 WL 1438186, 77 S.E.C. Docket 3097 (July 3, 2002).]

The Steadman factors all counsel in favor of imposing a collateral industry bar on Litvak. His behavior was both egregious and recurrent, spanning at least three years and multiple, separate transactions. And Litvak's violations involved a high degree of scienter. The lies at issue in this case were deliberate and repeated. The nature of Litvak's lies – made to his customers, about the pricing of bond trades, in the course of negotiating those trades – violated what the Commission recently had reason to reiterate are the "bedrock antifraud principles that apply throughout the securities industry": "the 'philosophy of full disclosure' of accurate and non-misleading information to investors; [and] the obligation to deal fairly with investors." [Mandell, Rel. No. 71668 at *4 (citing Santa Fe Indus. V. Green, 430 U.S. 462, 477 (1977); SEC v. Capital Gains, 375 U.S. 180, 186 (1963), Randall v. Loftsgaarden, 478 U.S. 647, 664 (1986)).]

The jury found that "Litvak knowingly lied and benefitted as a result." [Facts, Ex. 3 at 9.] Litvak lied repeatedly and brazenly, including making up conversations with imaginary

counterparties, in his pursuit of an extra profit on the transactions. He "told the buyer that they could get the bond they wanted and that the seller would sell it at X when, in fact, the price the seller had told [him] they would take was less than X. There were situations where [he] told a seller that a buyer would pay X when, in fact, the buyer would pay X plus, but [he] induced the seller to sell based upon that lower price represented. And there were times, as I recall, where [he] said to the buyer that there was a third-party seller with whom [he was] vigorously negotiating and had finally worked out a price when, in fact, it was a bond that was in the inventory of Jefferies, there was no other seller." [Facts, Ex. 4 at 140.]

Litvak has not recognized the wrongful nature of his conduct. As his counsel confirmed at his sentencing hearing, Litvak continues to maintain that he did not violate the law. [Facts, Ex. 4 at 59.]

Finally, were Litvak to remain in the securities industry, there would be a high likelihood of future violations. As described above, the market in which he traded (RMBS bonds) is an opaque market. Buyers and sellers transact business through intermediaries and have little or no access to underlying price information. The intermediaries, like Jefferies, are ordinarily the only parties who know both purchase and sale price. This opacity, combined with Litvak's belief that he did not commit a crime, further counsel in favor of barring Litvak from the industry.

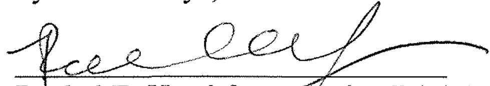
III. Conclusion.

The Division submits that a collateral industry bar is appropriate and warranted. Litvak stands convicted of multiple counts of securities fraud and TARP fraud. A collateral industry bar "will serve the public interest as a prospective remedy to 'protect investors against fraud and . . . promote ethical standards of honesty and fair dealing' in the securities markets." [Mandell,

Exchange Act Rel. No. 71668, at 9, quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976).]

Respectfully submitted,

DIVISION OF ENFORCEMENT,
by its attorneys,



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