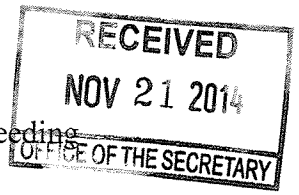
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of	Administrative Proceeding File No. 3-16050
JESSE C. LITVAK	November 20, 2014

MEMORANDUM IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT JESSE C. LITVAK

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Respondent Jesse C. Litvak submits the following response in opposition to the motion of the Securities and Exchange Commission Division of Enforcement (the "Division") for summary disposition of the claims set forth in the September 2, 2014 Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act").

PRELIMINARY STATEMENT

The Division's pursuit of an industry bar in this matter is premature. The Division's sole basis for the relief it seeks is Mr. Litvak's conviction. But Mr. Litvak's conviction is subject to review. The U.S. Court of Appeals for the Second Circuit, in granting Mr. Litvak's motion for bail pending appeal, clearly signaled that Mr. Litvak's conviction is infirm. The Court found, after reviewing the written submissions and hearing oral argument, that Mr. Litvak's appeal raises "a substantial question of law or fact likely to result in . . . reversal." (*See* Div. Mem., Ex. 6.) Any bar order entered in this proceeding would be invalid and subject to attack if the Second Circuit rules in Mr. Litvak's favor, a circumstance that the Second Circuit has indicated is "likely." (*See* Div. Mem., Ex. 6).

The Division's attempt to justify why administrative relief is warranted at this uncertain time is unpersuasive and its reliance on purported facts that are not part of the record in this proceeding is impermissible. The Division fails to establish that it or the public would be prejudiced should an initial decision in this matter be deferred pending the outcome of Mr. Litvak's appeal. Mr. Litvak, on the other hand, would be prejudiced were he to be barred from the securities industry based on a conviction that ultimately may be reversed or vacated by the Second Circuit. This is especially true in light of the Second Circuit's ruling on his motion for bail pending appeal and the current state of the law in the Second Circuit regarding the issues Mr. Litvak raised in his appeal. Therefore, we respectfully submit that the most practical

approach at this time is to defer ruling on the Division's motion until Mr. Litvak's appeal is decided in just a matter of months.

PROCEDURAL HISTORY AND RELEVANT FACTS

In a case of first impression, the government prosecuted Mr. Litvak, a former bond trader at Jefferies & Co., for statements he made in the course of negotiations with sophisticated investment fund managers. The Indictment alleges that while working at Jefferies, Mr. Litvak made fraudulent misrepresentations to buyers of residential-mortgage backed securities about Jefferies's acquisition costs in order to obtain extra undisclosed profit for Jefferies, at the expense of the alleged victims. (*See* Div. Mem., Ex. 1 ¶ 33). The Indictment further alleges that on certain occasions, Mr. Litvak made misrepresentations to buyers of securities regarding the true identity of the seller in order to earn additional profit, at the expense of the alleged victims. (*See* Div. Mem., Ex. 1 ¶¶ 47-48). Nowhere is it alleged that Mr. Litvak made misrepresentations concerning the nature or quality of the securities being purchased or sold, and thus, the counterparties paid a price they were willing to pay for precisely the securities they expected to, and did, receive. Nevertheless, in pursuing a flawed theory that these counterparties were victims of a fraud, the government charged Mr. Litvak in the District of Connecticut with 11 counts of securities fraud under 15 U.S.C. § 78j(b), one count of fraud against the Troubled Asset Relief Program (TARP) under 18 U.S.C. § 1031, and four counts of making false statements on a matter within the government's jurisdiction under 18 U.S.C. § 1001.[1] Trial commenced on February 18, 2014, and a jury convicted Mr. Litvak of each of these charges on March 7, 2014.[2]

[1] The basis for the TARP fraud and false statement counts was that the counterparties for some of the charged trades managed funds in which the Treasury had invested pursuant to the Public-Private Investment Program (PPIP).
[2] One of the securities fraud charges—Count Seven—was dismissed pursuant to the government's motion on the eve of trial.

Following his conviction, Mr. Litvak moved for acquittal under Federal Rule of Criminal Procedure 29, which motion the district court denied. On July 23, 2014, the district court sentenced Mr. Litvak to 24 months of imprisonment and ordered him to pay a fine of $1.75 million, which he promptly satisfied. Mr. Litvak filed a timely notice of appeal to the U.S. Court of Appeals for the Second Circuit on August 5, 2014. On August 22, 2014, Mr. Litvak filed a motion for bail pending appeal in the Second Circuit and that motion was granted on October 3, 2014. The Second Circuit ordered Mr. Litvak released pending resolution of his appeal. On November 18, 2014, Mr. Litvak filed the opening brief in his appeal and briefing by both sides will be complete no later than March 2015.

On January 28, 2013, the SEC initiated a civil action against Mr. Litvak in the Federal District Court for the District of Connecticut seeking injunctive relief, disgorgement, civil monetary penalties, and interest. The civil complaint alleges that Mr. Litvak violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder by misleading customers about the price at which Jefferies had purchased RMBS and in some cases, the identity of the seller. That case has remained dormant since the District Court granted Mr. Litvak's unopposed motion to stay the case on March 6, 2013. Mr. Litvak recently filed a motion to continue the stay until his appeal is resolved. That motion is currently pending.

ARGUMENT

1. Decision on the Division's Motion for Summary Disposition Should be Deferred Until Mr. Litvak's Appeal is Resolved

Rule 250(b) of the Commission's Rules of Practice directs hearing officers to grant, deny, *or defer* decision on motions for summary disposition. Where a party cannot present facts essential to justify opposition to the motion, denial or deferral is mandatory; in all other

circumstances, deferral is discretionary. 17 C.F.R. § 201.250(b). An exercise of that discretion to grant a deferral is warranted here because Mr. Litvak's conviction is still under review. Even the Division appreciates this prospective. In the related civil enforcement proceeding still pending in the District of Connecticut, the Division stated in a recent status conference that while it is the SEC's "official position" to oppose a continued stay in cases with this procedural posture, it agreed with the arguments raised by Mr. Litvak's counsel that a continued stay made sense in the context of the pending appeal, and would promote the conservation of judicial resources and avoid potentially wasteful litigation. (*See* Declaration of Patrick J. Smith ("Smith Decl."), Ex. A at 6). Similar concerns are present here. The Division agreed with Mr. Litvak that if the civil case proceeds to summary judgment and Mr. Litvak's conviction is vacated or reversed, the parties will have needlessly litigated, and the District Court will have needlessly considered, various issues implicated by the appeal, such as whether the relief sought by the Division is appropriate at this juncture. (*See* Smith Decl., Ex. A at 6).

Here, if the Division's motion for summary disposition is granted and Mr. Litvak's conviction is reversed or vacated, the basis for this collateral proceeding and the industry bar will be invalidated and Mr. Litvak and the Commission will be forced to expend additional resources to lift the bar. This can be avoided if decision on the Division's motion is deferred until Mr. Litvak's appeal is resolved in a matter of several months.[3] In fact, authority that the Division cites as support for its argument includes cases where the Division commenced administrative proceedings only after the defendant's conviction was affirmed by the U.S. Court of Appeals. *See, e.g.*, *In the Matter of Joseph P. Galluzzi*, Exchange Act Rel. No. 34-46405, 2002 WL 1941502 at *3 (Aug. 23, 2002).

Courts recognize that there are circumstances in which a short deferral is warranted. In a

[3] Mr. Litvak's opening brief was filed on November 18, 2014.

decision authored by then-judge Ruth Bader Ginsburg, the D.C. Circuit cautioned that "care should be taken in dealing with judgments that are final, but still subject to direct review" because "[a]ccording preclusive effect to a judgment from which an appeal has been taken . . . risks denying relief on the basis of a judgment that is subsequently overturned." *Martin v. Malhoyt*, 830 F.2d 237, 264 (D.C. Cir. 1987). The D.C. Circuit suggested that "[o]ne potential solution to this dilemma is to defer consideration of the preclusion question until the appellate proceedings addressed to the prior judgment are concluded, provided they are moving forward with reasonable dispatch and will not be long delayed." *Id.* at 265. This prudent approach is precisely the one Mr. Litvak requests here. His appellate proceedings are actively progressing; the opening brief has been filed and the briefing will be complete no later than March 2015. In the event the Second Circuit does not rule within the requisite timeframe, we would respectfully request that, pursuant to Rule 360, Your Honor ask the Commission to extend the time for filing of the initial decision. *See* 17 C.F.R. § 201.360(a)(3) ("[T]he Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension of the time period for filing the initial decision."). Such a motion would need to be made by March 3, 2015. *Id.* ("This motion must be filed no later than 30 days prior to the expiration of the time specified in the order for issuance of an initial decision.").

2. Barring Mr. Litvak from the Securities Industry Before His Appeal is Resolved is Not in the Public Interest and May Serve to Prejudice Mr. Litvak

Imposing a collateral industry bar at this uncertain time does not serve the public interest and would unfairly prejudice Mr. Litvak if his conviction were to be reversed or vacated. Mr. Litvak has not worked in the securities industry since his termination from Jefferies in December 2011 nor does he have any plans to seek such employment. In fact, Mr. Litvak is pursuing work in an entirely unrelated field. Nevertheless, if Mr. Litvak's conviction is reversed and he chooses

to seek employment in the securities industry, he would be forced to petition the Commission to reverse the bar. Even after a conviction has been reversed, and even after the Division consents to lifting a previously imposed bar, it appears that months can pass before the Commission restores a respondent's right to associate. *See, e.g.*, *In the Matter of Linus N. Nwaigwe*, 2013 WL 3477085 (July 11, 2013); *In the Matter of Kenneth E. Mahaffy, Jr.*, 2012 WL 6608201 (Dec. 18, 2012). If Mr. Litvak's conviction is affirmed, a bar would be an appropriate sanction. If, on the other hand, Mr. Litvak's conviction is reversed because the Second Circuit justly deems his conduct to be non-criminal, then Mr. Litvak should be free to earn a living in whatever industry he chooses, without the delay of petitioning the Commission to lift a bar that was based on a wrongful conviction.

The Division claims that if Mr. Litvak were to remain in the securities industry, there would be a high likelihood of future violations and thus, it is in the public's interest for Mr. Litvak to be subject to a collateral industry bar. (Div. Mem. 11). This argument is not grounded in fact. Indeed, the Division's arguments seeking to have the *Steadman* factors resolved in its favor rely on "facts" that have not been determined for purposes of this proceeding. The only "facts" for purposes of this proceeding are contained in the stipulation between the parties, which did not sweep in the various statements of the District Court in ruling on motions and in sentencing Mr. Litvak. It is therefore inappropriate for the Division to argue in this motion for summary disposition facts concerning the nature of Mr. Litvak's conduct when such "facts" have not been developed for purposes of this proceeding.

Were this tribunal to consider the District Court's statements on the likelihood that Mr. Litvak would be a repeat offender, these statements actually cut in Mr. Litvak's favor, not the Division's. At Mr. Litvak's sentencing, the district court deemed it unnecessary even to mention

"danger to the community," which has never been an issue with regard to Mr. Litvak. To the contrary, the district court expressed its view, based on the "record . . . number of sentencing letters . . . of support" it received, that Mr. Litvak is "very thoughtful, caring, kind, I guess good-natured," and, "in a nutshell, . . . a person worth knowing." (*See* Div. Mem., Ex. 4 at 154:1-2; 154:18-19; 156:2-3). The court also noted that it saw no chance that Mr. Litvak would commit other crimes. (*See* Div. Mem., Ex. 4 at 147). The Division claims that the District Court's belief was based on an incorrect assumption that the government already had taken away Mr. Litvak's license, (Div. Mem. at 7), but a careful reading of the sentencing transcript reveals that Judge Hall was speaking more generally about Mr. Litvak's character when she stated, "I don't see you as committing any other crimes. And I think the government kind of agreed with me on that." (*See* Div. Mem., Ex. 4 at 147:16-18).[4]

The Division's assessment of the *Steadman* factors is an irrelevant exercise that should be disregarded by Your Honor. The Division attempts to portray Mr. Litvak's conduct as being more serious than the facts of conviction convey by using inflammatory adjectives such as "egregious" and "repeated" and by claiming that "Litvak knowingly lied and benefitted as a result," which simply regurgitates the District Court's Order denying Mr. Litvak's post-trial

[4] The complete discussion by the District Court regarding the possibility of Mr. Litvak committing other crimes is copied below:

> The second need for the sentence is to provide adequate deterrence to future criminal conduct. I think I got the government to agree with me – well, certainly they agreed with me that you won't commit this crime again because you won't be able to commit it. The government has taken away your license and they will not give it back to you. So your ability to commit this crime again is, in my opinion, zero. *But* I also – it's my pretty confidentially held view, I am never going to say I am always going to be right, but even with the view that it bothers me a little that you feel like you were singled out or a victim, *I don't see you as committing any other crimes.* And I think the government kind of agreed with me on that. And I actually happen to think that in crimes like this, that need for the sentence is a very important one. I think I referenced it earlier talking to Attorney Francis. *But if I thought that 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.* (Div. Mem., Ex. 4 at 147:6-25) (emphasis added)).

motions. (Div. Mem. at 10). These adjectives and phrases are nothing more than hyperbole. At most, for purposes of this proceeding, the SEC could argue that the elements of each of the crimes for which Mr. Litvak was charged—in instructions that Mr. Litvak argues on appeal were erroneous in several respects—have been found by a jury.

Finally, to our knowledge, neither the Second Circuit nor the D.C. Circuit has authorized the remedy being sought here where the integrity of the conviction has yet to be tested by the Court of Appeals. Section 15(b) of the Exchange Act discusses "conviction" yet it does not define the term. Therefore, the Commission's authority to impose an industry bar is unclear in this circumstance, where Mr. Litvak's conviction is subject to direct review.

CONCLUSION

For the reasons set forth above, we respectfully request that, pursuant to Rule 250(b) of the Commission's Rules of Practice, decision on the Division of Enforcement's motion for summary disposition should be deferred until after the Second Circuit decides Mr. Litvak's appeal. In the event that the appeal remains pending on March 3, 2015, we respectfully request that Your Honor move the Commission pursuant to Rule 360(a)(3) for an extension of time to file an initial decision.

Respectfully submitted,

THE RESPONDENT,
JESSE C. LITVAK

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2014, I caused copies of the foregoing to be served on the following by electronic mail:

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November 20, 2014

VIA FEDERAL EXPRESS

Jill M. Peterson
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Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549

Re: In the Matter of Jesse C. Litvak, Respondent
Administrative Proceeding File No. 3-16050

Dear Ms. Peterson:

Enclosed please find an original and three copies of the following:

- Memorandum in Opposition to the Division of Enforcement's Motion for Summary Disposition Against Respondent Jesse C. Litvak;
- Declaration of Patrick J. Smith (with Exhibit A).

Thank you for your assistance and please do not hesitate to contact me if you have any questions.

Very truly yours,

Sarah Zimmer

Sarah Zimmer

cc: Honorable Cameron Elliot
Rachel Hershfang, Esq.