UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

HARD COPY

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

REPLY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement ("Division") responds to Jesse C. Litvak's ("Litvak") opposition to the Division's motion for summary disposition.

Litvak argues that the Presiding Judge should wait for the anticipated Second Circuit decision on Litvak's pending appeal before rendering a decision in this matter. Memorandum in Opposition to the Division of Enforcement's Motion for Summary Disposition ("Def. Opp."), *passim*. In support of his argument that this proceeding should wait, he cites two main things: (1) judicial and legal economy and (2) the public interest. Except as an aside, Litvak does not take on the ample precedent, cited by the Division in its opening memorandum, that it is appropriate to proceed with a follow-on administrative decision while an appeal remains pending.

1. There is little economy to be gained by waiting.

In arguing that this proceeding should wait until the Second Circuit makes a decision, Litvak cites repeatedly to the parties' status conference before the District Court, called by Judge Hall to address the question of whether the SEC's civil injunctive action should remain stayed

following the jury's adjudication of Litvak's guilt. The citations seem designed to convince the Presiding Judge that counsel's agreement, in the district court action, that some of Litvak's arguments for continuing that stay had merit, should force the Division into the same posture in this administrative proceeding. [*See* Def. Opp. at 3-4.]

Litvak's partial quotations of the record in that hearing are misleading, as a review of that full transcript makes clear. [*See* Smith Decl., Ex. A.] In addition to the language quoted by Litvak, counsel stated both that the SEC's position in such cases is "that the stay is no longer necessary and that the case should continue forward," and that, "I'm not particularly persuaded by the notion that it is a pending appeal that throws a procedural wrench into the summary judgment work. It would be our intention to move forward with the motion for summary judgment on the basis of the criminal conviction."[1] [Smith Decl., Ex. A, at 5, 6.]

And, in considering the continued applicability of a stay in the civil injunctive action, the parties assumed that this administrative matter was proceeding. [Smith Decl., Ex. A, at 3-4]. Indeed, in support of his motion to continue the stay, Litvak's counsel argued that, "[G]iven the publicity Mr. Litvak's case received during his trial and the SEC's pending administrative action which, if successful, will bar him from ever working in the securities industry again, the criminal prosecution has already served to advance the public interests at stake here." [Declaration of Rachel Hershfang, filed in support of this Reply, Ex. B at 4.]. Furthermore, the amount of briefing contemplated in that matter was quite different. There, the parties were considering a motion for summary judgment, including factual appendices. Here, the briefing is – with this

[1] Litvak chose not to quote the SEC's response to his motion to continue the stay in the District Court case, which was filed a week before his opposition brief here. That response read, in full, "Plaintiff Securities and Exchange Commission ("SEC" or "Commission") hereby responds to the motion filed by defendant Jesse C. Litvak ("Litvak") seeking to continue the stay in the above-captioned case. The SEC's position on the stay was set out at the telephonic hearing held on October 15, 2014: it is the Commission's practice to oppose the continued imposition of stays in situations like this one." [Declaration of Rachel Hershfang, filed in support of this Reply, Ex. A.].

filing – done. The economy to be gained at this stage in this proceeding is all judicial, in that the Presiding Judge might be spared considering and ruling on this matter if Litvak's arguments were to find traction in the Court of Appeals. Any such economy would, however, come at a price, as Litvak frankly admits, since it would be necessary to seek a motion by the Chief Administrative Law Judge to the Commission by March 3, 2015, seeking an extension. (Litvak phrases this as a possibility, "in the event the Second Circuit does not rule within the requisite timeframe." But, crediting the dates cited in Litvak's opposition, it is a certainty: appellate briefing is not complete until March, [Def. Opp. at 5], after which there will be oral argument, and only after that, a decision from the Court of Appeals.) The Commission's Rules discourage such delay, and Litvak has not established good cause for different treatment. [*See* In the Matter of Anthony Chiasson, Rel. No. 589, 2014 WL 1512024 at *3 (Initial Decision, April 18, 2014).]

2. The public interest favors moving ahead.

In support of his argument that it is not in the public interest that he be barred now, Litvak argues that (1) he is not currently working in the securities industry and has no plans to do so (Def. Opp. at 5); (2) if he changed his mind about working in the securities industry, and the Second Circuit reversed his conviction, it could take a long time for the Commission to vacate the bar (Def. Opp. at 6); (3) the Division's *Steadman* argument isn't persuasive (Def. Opp. at 6-8). In support of these arguments, Litvak cites no decisions.

This first argument has been rejected many times, and should be rejected here. *See, e.g.,* In the Matter of Donald L. Koch and Koch Asset Management, LLC, Securities Exchange Act Rel. No. 72179, Investment Advisers Act Rel. 3836, Investment Company Act Rel. 31047, 2014 WL 1998524 at * 21 (May 16, 2014) (imposing a collateral industry bar despite respondent's argument that he had retired since, absent a bar, "there is nothing to prevent [Respondent] from

coming out of retirement and participating in the industry," *id.* at *20); In the Matter of Gregory Bartko, Exchange Act Rel. No. 71666, 2014 WL 896758 at *16-17 (March 7, 2014) (respondent's incarceration is insufficient to protect the public and a collateral industry bar is therefore warranted) Chiasson, 2104 WL at *7 (rejecting incarcerated respondent's argument that he was "effectively barred already" from the industry); In the Matter of Christopher A. Seeley, Rel. No. 508, 2013 WL 5561106, *15 (Initial Decision, October 9, 2013) (barring respondent notwithstanding fact that he was not involved, and had stated that he had no intention to be involved, in the securities industry, because any future potential connection with the securities industry presented the possibility of future violations). As to the second, while speed of reinstatement may understandably be a concern of Litvak's, it does not factor in determining the public interest in barring him now, based on his criminal conviction.

As to his third argument, Litvak stands convicted of serious, repeated, intentional violations of the securities laws. [*See* Facts, Ex. 1 (Indictment), Ex. 2 (Verdict Form)]. To say that these violations were "egregious" is to acknowledge their nature which, as the jury concluded, was to lie to customers, intentionally and repeatedly, in connection with the purchase and sale of securities. [*See, e.g.,* Facts, Ex.s 1, 2, 3 (District Court ruling on Defendant's Motions for Judgment of Acquittal and for a New Trial) at 9 and 4 (sentencing transcript) at 140]. "The Commission has 'repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws.'" [Chiasson, 2014 WL at *5, *quoting* In the Matter of Peter Siris, Exchange Act Rel. No. 71068, 2013 SEC LEXIS 3924 at *23 (Dec. 12, 2013)]. Long-established precedent supports barring Litvak from the securities industry now, and he has put forward no "extraordinary" mitigating circumstances to counter that precedent. [*See* Alberto W. Vilar and

Gary Alan Tanaka, 2009 WL 1284733, 95 S.E.C. Docket 2072, *2 (Initial Decision, April 17, 2009); John S. Brownson, c/o Payless Furniture, 2002 WL 1438186, 77 S.E.C. Docket 3097 (July 3, 2002).]

Litvak closes by questioning the SEC's authority to impose a collateral industry bar because the term "conviction" is not defined in Section 15(b) of the Exchange Act. [Def. Opp. at 8.] While this is technically true, it is not relevant. The term "convicted" is used in the same context in Sections 203(e) and (f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 202 of that act defines "convicted" to include "a jury verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed." The Commission has expressly rejected the argument Litvak makes here, ruling that the definition of "convicted" is the same under the Exchange Act as under the Advisers Act. *See* Bartko, 2014 WL at * 8 ("we agree with the Division that 'there i[s] no reason for ascribing a different meaning to the word "convicted" in the Exchange Act to the meaning given to that term in the Advisers Act'"). Litvak, like Bartko, stands "convicted" for purposes of Section 15(b) of the Exchange Act. *Id.* ("we have long held that a person has been convicted for purposes of an Exchange Act follow-on proceeding when a jury reaches a guilty verdict that is entered by the court").

For the reasons set out above and in the Division's memorandum in support of its motion for summary disposition, it is both appropriate and warranted for the Presiding Judge to render a decision now, on the basis of Litvak's criminal conviction. The pending appeal does nothing to

alter that conclusion. The Division respectfully requests that the Presiding Judge impose a full collateral industry bar on Litvak.

Respectfully submitted,

DIVISION OF ENFORCEMENT,
by its attorneys,

Rachel E. Hershfang, Senior Trial Counsel
Kerry Dakin, Senior Counsel
U.S. Securities & Exchange Commission
33 Arch Street, 23rd Floor
Boston, MA 02110
(617) 573-8987 (Hershfang)
(617) 573-5940 (Fax)

Dated: December 5, 2014

CERTIFICATE OF SERVICE

I, Rachel E. Hershfang, hereby certify that a copy of the foregoing document will be sent today, December 5, 2014, to Patrick J. Smith, counsel for Respondent, by overnight and electronic mail.

/s/ Rachel E. Hershfang