UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16104

In the Matter of

MICHAEL LEE MENDENHALL

Respondent.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST MICHAEL LEE MENDENHALL

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The Division of Enforcement ("Division") respectfully submits this Memorandum of Law in support of its Motion for Summary Disposition against Michael Lee Mendenhall ("Respondent"), pursuant to Rule 250 of the Commission's Rules of Practice.

I. Preliminary Statement

The Division moves for summary disposition because the pleadings in Respondent's criminal case establish both (a) the predicate facts necessary for an industry-wide collateral bar under Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 and (b) the appropriateness of that bar under the *Steadman* public interest factors. Respondent was convicted of 17 counts of securities fraud in violation of Colorado law, was sentenced to 30 years in prison, and ordered to pay $1,408,667.77 in restitution following a jury trial. Accordingly, the undisputed facts necessary to granting the Division's request for summary disposition are readily established without a hearing.

In short, at the time of his misconduct, Respondent was associated with broker-dealers and an investment adviser registered with the Commission. The securities fraud counts on which Respondent was convicted establish that, between April 2006 and November 2010, while Respondent was associated with broker-dealers and an investment advisor, in connection with the offer, sale, or purchase of a security, he directly, unlawfully, feloniously, and willfully engaged in an act, practice, or course of business which operated as a fraud or deceit upon numerous persons in connection with purported residential real estate acquisition investments.

The indictment, Respondent's conviction, and his 30 year sentence establish his high level of scienter, egregious and repetitive conduct, and the potential for future violations. As a result, it is in the public interest to permanently bar Respondent from associating with any registered entity and the Division's motion should be granted.

II. Facts

On September 12, 2014, the Commission issued an Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") ("OIP"). The OIP alleges that Respondent was an associated person from June 2005 to November 2009, and during that time he operated a fraud or deceit upon persons in connection with purported residential real estate acquisition investments and made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in connection with the purported residential real estate investments.

On April 14, 2011, Respondent was indicted on 18 counts of securities fraud and nine counts of theft. See Exh. 3, Indictment, pp.1-30.[1] On March 2, 2012, Respondent was convicted of 17 counts of securities fraud in violation of Colo. Rev. Stat. § 11-51-501, and eight counts of theft in violation of Colo. Rev. Stat. § 18-4-401, both class three felonies. *See People v. Michael Lee Mendenhall,* Case No. 2011CR10094, Exh. 1, Verdict and Sentencing Docket, p. 1.[2] On April 20, 2012, Respondent was sentenced to 30 years in prison, and ordered to pay $1,408,667.77 in restitution. Exh. 1, pp. 2, 3.

Respondent was associated with Bankers Life and Casualty starting in 1983. Exh. 2, IARD, p. 4. Thereafter, he became associated with U-VEST Financial Services Group, Inc.,

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[1] Pursuant to Commission's Rule of Practice 323, the Division has submitted a request to take notice of the following exhibits, all of which come from Respondent's criminal matter or the FINRA website: Exh. 1, Verdict and Sentencing Docket; Exh. 2, Investment Advisers Registration Depository ("IARD"); Exh. 3, Indictment; Exh. 4, Transcript of Sentencing; Exh. 5, Transcript of Jury Verdict; Exh. 6, Respondent's Opening Brief in *People v. Michael Mendenhall,* Case No. 12CA1171, Court of Appeals, State of Colorado.

[2] The prosecution dismissed one count of securities fraud and one count of theft. Exh. 5, Respondent Opening Brief, p. 2. This document is Respondent's brief to the Colorado Court of Appeals appealing his conviction. Statements made in briefs are binding as judicial admissions. *Ruiz v. Allstate Ins. Co.,* 295 Fed. Appx. 668, 672 (5th Cir. 2008).

which was a broker-dealer and investment adviser registered with the Commission, from June 2005 to November 2009. *Id.* He was associated with Colorado Financial Service Corporation, a broker-dealer registered with the Commission, from January 2010, until October 2010. *Id.* The dates of Respondent's offenses spanned from April 13, 2006 to November 2010, while he was an associated person. Exh. 6, p. 2. Respondent contacted investors he had met while at Bankers Life and Casualty and explained that he could take funds previously invested in annuities or other safe investments at Bankers Life and Casualty and invest them in his real estate and make a better return for them. Exh. 3, p. 10, ¶¶ 2-4, p. 15, ¶¶ 4, 5, p. 16 ¶¶ 12-14. Respondent issued promissory notes or investment contracts to approximately 16 private investors. Ex. 3, p. 11 ¶ 6, p. 12 ¶ 16, p. 13 ¶ 30, p. 19 ¶ 5, p. 22 ¶ 5, p. 23 ¶¶ 6, 12, 13, p. 24 ¶ 22, p. 25 ¶ 30, p. 29 ¶¶ 6, 7, p. 30 ¶ 21, p. 32 ¶ 5. Most of the investors were senior citizens born between 1924 and 1941. Exh. 3, Count Seven, ¶¶ 3, 13, 24, Count Eleven, ¶¶ 3, 13, 21, Count Thirteen, ¶ 3, Count Eighteen, ¶¶ 3, 11, 19, Count Twenty-Four, ¶¶ 3, 4 12, 18, 19. Respondent falsely represented to the investors that the investments were without risk, were safe, and a sure thing. Exh. 3, ¶ 14. Respondent also told the investors they had an equity interest in the property. Exh. 3, ¶ 15. Instead, Respondent used the investors' funds to pay back other investors, cover outstanding checks for payment of personal expenses, and transfers to his own controlled bank accounts. Exh. 3, p. 7 ¶ 17.

Respondent omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, including: that he used new investor money to pay off prior investors; that the funds were being co-mingled with other investors funds; that even though he represented that funds were secured by the equity in the property, no liens were filed against the property to secure the investors' promissory notes;

that the property had preexisting liens on it; that some of the property was used by Respondent as his personal residence; that Respondent had allowed some of the property to go into foreclosure; and that the Respondent was using the investors' funds to pay personal expenses. Exh. 3, p. 7.

III. Argument

A. Legal Standards for Summary Disposition.

The Division brings this Motion for Summary Disposition under Rule 250(a) of the Commission's Rules of Practice, which provides in pertinent part:

> [T]he respondent, or the interested division may make a motion for summary disposition of any or all allegations of the order instituting proceedings with respect to that respondent....The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323.

Commission's Rules of Practice, Rule 250(a) (March 2006), published at 17 C.F.R. § 201.250(a) (2008).

The hearing officer may "grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law." *In the Matter of Joseph C. Lavin,* Admin. Proc. File No. 3-13222, 95 SEC Docket 1148, 2009 WL 613543, *5 (March 10, 2009) (granting summary disposition based upon criminal conviction). In considering a motion for summary disposition, the hearing officer may analogize to cases under Fed. R. Civ. P. 56. *Id.* As such, once a party provides specific facts supporting its motion for summary disposition, the opposing party must offer specific facts showing that there is a genuine issue for a hearing. *Id.* (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986)).

Summary disposition is appropriate in cases where respondent has been convicted of securities fraud and the sole determination concerns the appropriate sanction. *Gary M. Kornman,*

Admin Proc. File No. 3-12716, 95 SEC Docket 590, 2009 WL 367635, *6 (Feb. 13, 2009), *pet. denied,* 592 F.3d 173 (D.C. Cir. 2010); *Jeffrey L. Gibson,* Admin. Proc. File No. 3-12323, 92 SEC Docket 1591, 2008 WL 294717, *5 nn. 21-24, (Feb. 4, 2008), *pet. denied,* 561 F.3d 548 (6th Cir. 2009); *John S. Brownson,* Admin. Proc. File No. 3-10295, 77 SEC Docket 3097, 2002 WL 1438186, *2 n.12, (July 3, 2002), *pet. denied,* 66 Fed. App'x 687 (9th Cir. 2003) (circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare.").

The hearing officer can take official notice, pursuant to Rule 323, of the Verdict and Sentencing Docket (Exh. 1); IARD (Exh. 2); the Indictment (Exh. 3); Transcript of Sentencing (Exh. 4); Transcript of Jury Verdict (Exh. 5); and Opening Brief in *People v. Michael Mendenhall,* Case No. 12CA1171, Court of Appeals, State of Colorado (Exh. 6), all attached to the Division's Request for Official Notice in Support of Motion for Summary Disposition Against Respondent. Commission's Rule of Practice 323 authorizes official notice of any matter which might be judicially noticed by a district court of the United States. Rule 323; *see also* Fed. R. Evid. 201(b)(2) (permitting judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."). *See, e.g., In the Matter of David A. Souza,* Admin Proc. File No. 3-14548, 2011 WL 6046243, at *1-2 n. 1 (Dec. 6, 2011) (taking official notice of provisions of district court judgment against respondent).

B. The Undisputed Facts Establish the Statutory Bases for a Bar Under Exchange Act Section 15(b)(6), Advisers Act Section 203(f).

Exchange Act Section 15(b)(6) authorizes the Commission to bar a person from being associated with a broker or dealer if the person has been convicted of an offense specified in Exchange Act Section 15(4)(B)(i), the criminal offense occurred while the person was associated with a broker or dealer, and such sanctions are in the public interest. 15 U.S.C. § 78o(b)(6).

Similarly, the Advisers Act Section 203(f) authorizes the Commission to bar a person from being associated with an investment adviser if the person has been convicted of any offense specified in Section 203(e)(2)(A), if the criminal offense occurred while the person was associated or seeking to become associated with an investment adviser, and such sanctions are in the public interest. 15 U.S.C. § 80b-3 (all as amended under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act")),[3]

The Dodd-Frank Act further broadened the bars, enabling the Commission to authorize bars from associating with any investment adviser, broker, dealer, municipal securities dealer, municipal adviser, transfer agent, or Nationally Recognized Statistical Rating Organization (NRSRO) for a violation enumerated in Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, (hereinafter "industry-wide collateral bar"). This industry-wide collateral bar is available prospectively under the securities laws and is not impermissibly retroactive. *Ross Mandell,* Admin. Proc. File No. 3-14981, 2013 WL 30144 (Jan. 3, 2013), *aff'd, Ross Mandell,* 2014 WL 907416 (March 7, 2014); *John W. Lawton,* Admin. Proc. File No. 3-14162, 105 SEC Docket 61722, 61737, 2012 WL 6208750 (Dec. 13, 2012).

The predicate facts for each of these bars are established by Respondent's criminal conviction. As to the broker dealer bar: Respondent was convicted of 17 counts of securities fraud for conduct during the period April 2006 to November 2010, while Respondent was associated with a broker or dealer. Exh. 1. p. 1; Exh. 5, pp. 8-14. As to the investment adviser bar: Respondent was convicted of securities violations for conduct occurring between April 2006 and November 2010, while Respondent was associated with U-Vest. *Id.;* Exh. 2, p. 4.

[3] The Dodd-Frank Act is Pub. L. No. 111-203, 124 Stat. 1376 (2010).

C. The Public Interest Factors and Deterrence Support a Strong Sanction Against Respondent.

In considering the appropriateness of sanctions, the hearing officer is guided by the public interest factors set forth in *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981). Those factors include: 1) the egregiousness of the respondent's actions; 2) the isolated or recurrent nature of the infraction; 3) the degree of scienter involved; 4) the sincerity of the respondent's assurances against future violations; 5) the respondent's recognition of the wrongful nature of his conduct; and 6) the likelihood of future violations. These *Steadman* factors are flexible and no one factor is dispositive. *See Gary M. Kornman*, 2009 WL 367635, *6-7. In addition, the Commission must consider whether the sanction will have a deterrent effect. *See Schield Mgmnt Co.,* Admin. Proc. File No. 3-11762, 87 SEC Docket 695, 2006 WL 231642, *8 n. 46 (Jan. 31, 2006); *Ahmed Mohamed Soliman,* Admin. Proc. File No. 3-7954, 58 SEC 249, 1995 WL 237220, *3 (April 17, 1995) (stating that the selection of an appropriate sanction involves consideration of several elements, including deterrence).

In this case, the *Steadman* factors demonstrate that Respondent's conduct was egregious, repeated, and conducted with a high degree of scienter, showing a risk of future harm to the public. As such, an industry-wide collateral bar is necessary and appropriate to protect investors and markets. *John W. Lawton*, 2012 WL 6208750, *13. Therefore, it is in the public interest to bar Respondent.

1. Respondent's conduct was egregious.

An investment adviser is a fiduciary in whom clients must be able to put their trust. *Ahmed Mohamed Soliman,* 1995 WL 237220, *3. As an associated person of an investment

adviser, Respondent owed a fiduciary duty to investors, including an "affirmative duty of utmost good faith and full and fair disclosure of all material facts, as well as [an] affirmative obligation to employ reasonable care to avoid misleading clients." *John W. Lawton,* 2012 WL 6208750, *10.

Respondent contacted senior citizens and represented that they should cash out existing, secure investments and invest in his real estate. He misrepresented that the investments were without risk, safe, and a sure thing. Exh. 3, p 6 ¶ 14. He explained that the investor would be secured on the real property yet he omitted to state that he never filed any liens to secure the investment, that the property had preexisting liens on it, that he used new investor money to pay off prior investors, that the funds were being co-mingled with other investors funds, that some of the property was used by Respondent as his personal residence, that Respondent had allowed some of the property to go into foreclosure, and that the Respondent was using the investors' funds to pay personal expenses. Exh. 3, p.7 ¶18. Such misrepresentations and omissions violate "bedrock antifraud principles that apply throughout the securities industry" including the philosophy of full disclosure of accurate and non-misleading information to investors and the prohibition on self-dealing. *Ross Mandell,* 2014 WL 907416, *4.

This type of egregious conduct warrants a permanent bar. *See Jason George Rivera, Jr.,* Admin. Proc. File No. 3-14897, 104 SEC Docket 2418, 2012 WL 3986212, *2 (Sept. 11, 2012) (imposing permanent collateral bar on investment adviser who, after Dodd-Frank enactment, continued to raise investor funds through fraudulent statements while using a portion of the funds for his personal expenses); *Joseph C. Lavin*, 2009 WL 613543, at *5 (imposing bar upon investment adviser whose criminal conduct would violate the antifraud provisions of the federal securities laws); *In the Matter of David A. Souza,* 2011 WL 6046243, *1-2 (imposing adviser bar

under Section 203(f) based upon adviser's fraudulent scheme to use investor money for his own benefit).

2. Respondent's conduct was recurrent, not isolated.

Respondent's conduct lasted over five years and he defrauded over 16 investors. Exh. 4, pp. 8-14. This repetitive behavior represents a long-standing pattern of violative conduct that demonstrates unfitness for the securities industry. Respondent's violations were recurrent not isolated.

3. Respondent acted with a high degree of scienter.

Respondent's conviction and sentence demonstrate that he acted with a high degree of scienter. See Exhs. 1, pp. 1-3, 4, pp. 8-14. His conviction rests on findings that he acted intentionally and knowingly. Exhs. 3, Count Two and Four p. 9, Count Six p. 10, Count Eight, Nine, and Ten, p. 14, Count Twelve, p. 19, Count Fourteen, Fifteen, and Sixteen, p. 21,Count Seventeen, p. 22, Counts Nineteen, Twenty, and Twenty-One, p. 27, Counts Twenty-Two and Twenty-Three, p. 28, Count Twenty-Five, p. 32. Respondent misled investors about the nature of their investment and omitted to tell them that he used new investor money to pay off prior investors, that the funds were being co-mingled with other investors funds, that even though he represented that each and every investor's funds were secured by the equity in the property, no liens were filed against the property to secure the investors' promissory notes, that the property had preexisting liens on it, that some of the property was used by Respondent as his personal residence, that Respondent had allowed some of the property to go into foreclosure, and that the Respondent was using the investors' funds to pay personal expenses. *Id.*

4. Respondent has not offered assurances against future violations.

Respondent has not offered assurances against future violations and has not recognized the wrongful nature of his conduct. To the contrary, Respondent denies that he has done anything wrong.[4] See Exh. 5, Opening Brief, p. 2-4. Respondent's conduct in the instant case shows a "fundamental misunderstanding of his responsibilities" as a securities professional and he has offered no assurance against future violations. *Ross Mandell*, 2014 WL 907416, *5; *Joseph C. Lavin*, 2009 WL 613543, *5 (imposing bar upon investment adviser whose criminal conduct would violate the antifraud provisions of the federal securities laws); *In the Matter of David A. Souza,* 2011 WL 6046243, *1-2 (imposing adviser bar under Section 203(f) based upon adviser's fraudulent scheme to use investor money for his own benefit).

5. Respondent will have opportunities for future violations.

Respondent is educated in the securities industry and has passed Series 7 and 63 exams. Exh. 2, p. 5. Respondent was a licensed professional yet his conduct demonstrates a "fundamental misunderstanding of his responsibilities" as a securities professional and demonstrates that he "hold[s] these obligations in contempt." *Ross Mandell,* 2014 WL 907416, *5.

Respondent could reenter the industry and present future risks to the investing public. *See Charles Phillip Elliot,* Admin. Proc. File No. 3-7280, 52 SEC Docket 1462, 1992 WL 258850, *3 (Sept. 17, 1992) (industry "presents many opportunities for abuse and overreaching"), *aff'd,*

[4] Respondent is appealing his conviction. If Respondent successfully overturns the criminal verdict on appeal, he may seek modification of any sanctions imposed by this proceeding. *In the Matter of Ross Mandell,* Admin. Proc. File No. 3-14981, 2014 WL 907416, *5, n. 28 (March 7, 2014), *citing Jimmy Dale Swink, Jr.*, Admin. Proc. File No. 3-8129, 59 SEC Docket 2386, 1995 WL 467600, *2 (Aug. 1, 1995) (vacating findings and administrative bar order when an appellate court reversed the criminal conviction that was the basis for the proceeding); *In the Matter of Kenneth E. Mahaffy, Jr.* Admin. Proc. File No. 3-13481, 105 SEC Docket 893, 2012 WL 6608201, *1 (Dec. 18, 2012) (order vacated once criminal conviction was vacated).

36 F.3d 86 (11th Cir. 1994). Respondent lied and defrauded the investors over a period of years, making the likelihood of future violations high.

An industry wide collateral bar in this case 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. *McCurdy v. SEC,* 396 F. 3d 1258, 1265 (D.C. Cir. 2005) (finding that the purpose of a securities industry suspension in that case was "not to punish [the respondent], but rather to protect the public from his demonstrated capacity" for violative conduct).

6. Deterrence Supports the Imposition of a Collateral Bar

Considerations of both specific and general deterrence support the imposition of a collateral bar against Respondent. *See, e.g., Monetta Fin. Servs., Inc.,* 2005 WL 2453949, *3*; Lester Kuznetz,* 1986 WL 625417, *3 (noting that the sanction of a bar "serves the purpose of general deterrence"). Industry bars have long been considered effective deterrence. *See, e.g. Monetta Fin. Servs., Inc.,* 2005 WL 2453949, *3*; Lester Kuznetz,* 1986 WL 625417, *3 (noting that the sanction of a bar "serves the purpose of general deterrence"). A collateral bar is necessary to prevent Respondent from prospectively harming investors in the securities industry and to deter others from similar misconduct.

IV. Conclusion

For the foregoing reasons, the Division requests that an industry wide collateral bar be entered against Respondent under Exchange Act Section 15(b)(6) and Advisers Act Section 203(f), barring him from association with any investment adviser, broker, dealer, municipal securities dealer, municipal adviser, transfer agent, or NRSRO.

Respectfully submitted this 12th day of December, 2014.

Nancy K. Ferguson
Securities and Exchange Commission
Byron G. Rogers Federal Building
1961 Stout Street, Suite 1700
Denver, CO 80294-1961
Email: fergusonn@sec.gov
Phone: 303.844.1050

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Division of Enforcement's Memorandum of Law in Support of Its Motion for Summary Disposition was served on the following on this 12th day of December, 2014, in the manner indicated below:

Securities and Exchange Commission
Brent Fields, Secretary
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
(By Facsimile and original and three copies by UPS)

Honorable Carol Fox Foelak
100 F Street, N.E.
Mail Stop 2582
Washington, D.C. 20549
(Courtesy copy by Email and UPS)

Michael Lee Mendenhall
[redacted]

Nicole L. Nesvig