UNITED STATES OF AMERICA

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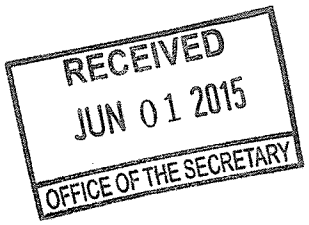
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16182

In the Matter of

PAUL EDWARD "ED" LLOYD, JR., CPA,

Respondent.



DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES AND RELEASES

FEDERAL STATUTES AND REGULATIONS

Pursuant to Rule of Practice 340, the Division of Enforcement of the United States Securities and Exchange Commission ("Division") respectfully submits this Post-Hearing Reply Brief in connection with the hearing in this matter held on March 19-20 and March 23-25, 2015.

I. INTRODUCTION

Respondent Paul Edward "Ed" Lloyd, Jr., CPA ("Lloyd"), filed his Post-Hearing Brief ("Respondent's Brief") on May 1, 2015. Although he has taken a scatter-shot approach, and has gratuitously impugned the integrity and professionalism of Division counsel and the presiding Administrative Law Judge ("ALJ") in the process, the Division will focus its Reply on the issues raised by the ALJ in his "Order Directing Briefing on Certain Issues" filed on May 6, 2015, which implicates Lloyd's contentions that he was acting as an accountant in connection with the Forest Conservation transactions and that the Commission lacks enforcement jurisdiction over him (Respondent's Brief, pp. 16-17), and Lloyd's claim that he "has been denied due process of law from the inception of these proceedings" (Respondent's Brief, p. 18).

II. FACTS

The Division relies upon the Facts previously referenced in its Post-Hearing Brief. In response to the Facts addressed in Lloyd's Post-Hearing Brief, the Division objects to them to the extent they differ from those offered by the Division. In particular, the Division notes that Lloyd's claim that his clients "[Chris] Brown, [James "Rusty"] Carson [III] and [Mike] Malloy provided affidavits [to him] ..." (Respondent's Brief, p. 25) is false. Brown and Malloy, who each provided $50,000 checks to Lloyd, declined to provide signed affidavits for him (Ex. 47, 59 and R. 39). Lloyd's claim that he erroneously failed to include Brown, Malloy and Carson as members of Forest Conservation 2012 due to a "scrivener's error" (Respondent's Brief, p. 13) is also false. Lloyd's own hearing testimony shows that he intentionally removed Carson from that investment:

Q So did you say to Ms. Zak, James Rusty Carson is a member of Forest Conservation 2012, but I don't want to share the paperwork with him because I think it would be too difficult to get?

A No. I made the decision that I was going to take him out. And again that's a decision that I made.

Q So you made a decision to take him out even though you're saying he was still actually in because he gave you a check. Right?

A. I think he was in because he gave me a check and I think he was out because I was going to take him out.

Q Okay. So he's out in your mind, but you're still – you think he's an investor and he's in. Correct?

A I don't agree with that.

Q Well, you just said he was out, you took him out, you withdrew him from something. What did you take him out from?

A I was going to take him out of his position and write him a check and pay him out.

* * * *

Q When you said the word "out" to Ms. Zak, what did you mean by the word "out" to Ms. Zak? You meant that he wasn't going to participate in the offering. Correct?

A Yes. That was my intention, that he was not going to participate.

Q So you never shared with Mr. Carson your determination that he was going to be out of the offering. Right?

A Correct.

Q And you kept his money. Right?

A Correct.

Q And even so much so that you ultimately, when all is said and done and when you received a K-1 for the membership units that were held by Forest Conservation 2012, you issued him a K-1 indicating that he was in fact an investor in the Forest Conservation 2012 offering?

A Correct, because his money was in there.

JUDGE ELLIOT: I have – I have got to say I am completely baffled. I have no idea what's going on here. What do you mean? I thought you said he wasn't in. He gave you the money. You didn't give it back.

THE WITNESS: I didn't give it back. My intention was to give it back to him, sir. I did not do that. He gave me the money and therefore he was entitled to the K-1 for the charitable contribution and I gave that to him.

JUDGE ELLIOT: No, he wasn't. Why didn't you just give him his money back instead of the K-1?

THE WITNESS: Because I had gone through and I explained to him what the tax benefits were. I promised these things to him and I didn't feel it was right.

(T. 814-816).

It is also notable that, although Lloyd claims he intended to remove Carson as an investor in Forest Conservation 2012, he admits using the money Carson gave for that investment to fund Lloyd's personal investment in that project:

Q Okay. [Division Ex. 88] That is an e-mail and attachment that you sent to Nancy Zak on December 10th, in which you said, among other things, quote, mine was increased to $41,052, closed quote. Do you see that?

A Yes, sir, I do.

Q And what you're referring to, your personal investment had increased from $16,802 to $41,052. Is that right?

A Yes.

Q Okay. And that difference, that spread is $24,500. Correct?

A I believe that's correct, yes.

Q And I believe what you have testified to is that that money came from the money that you received from Mr. Carson, correct?

A Yes. As far as the amount that I was going to be able to claim, that would be correct.

Q And Mr. Carson gave $30,000. Is that right?

A Yes.

* * *

Q My question was: When you took Mr. Carson's money and used it to increase your personal investment in the Piney Cumberland Holdings offering, did you tell Mr. Carson that you were going to do so?

MR. SHARPLESS: Objection. That's not a question. It's a speech. Let's have a question.

JUDGE ELLIOT: Overruled.

THE WITNESS: I did not make any communications to Mr. Carson.

BY MR. SCHROEDER

Q So the answer is no, I didn't tell him?

A That would be correct.

Q So obviously you didn't receive his permission or approval in order to do so?

A In my understanding, I didn't have a choice but --

Q Did you receive --

A -- the answer --

Q -- his permission or approval --

A The answer to your question, no, I did not.

(T. 911-913).[1]

[1] Lloyd previously feigned ignorance when asked, during his sworn investigative testimony in February 2014, why his personal investment in Forest Conservation 2012 (concerning the Piney Cumberland Holdings offering) had increased from $16,802 to $41,052: (Ex. 144 (pp. 113-115)).

III. THE DIVISION'S RESPONSE TO ORDER DIRECTING BRIEFING ON CERTAIN ISSUES AND LLOYD'S ARGUMENTS

A. Liability Under Sections 206(1), (2) and (4) of the Advisers Act Extends to Activities Outside the Advisory Relationship

This Court directed the parties to brief whether Sections 206(1), (2) and (4) of the Investment Advisers Act of 1940 ("Advisers Act") extend to activities outside the advisory relationship. The broad wording of these statutes, as well as Commission precedent, show that the answer is yes. Sections 206(1) and (2) are drafted broadly to proscribe "**any** device, scheme or artifice to defraud a client or prospective client" and "**any** transaction [or] practice which operates as a fraud or deceit upon a client or prospective client," respectively. (Emphasis added). Section 206(4) is similarly worded broadly to prevent an adviser from engaging in "**any** act, practice or course of business which is fraudulent or deceptive." (Emphasis added).[2] By the use of "any," it is clear that Congress intended broad proscriptions of fraudulent practices, not just those dealing with the adviser's investment advice.

Indeed, the Commission has found violations of Sections 206(1) and (2) even where the misconduct had nothing to do with the adviser's financial advice. In Mysore S. Sundara, et al., Exchange Act Rel. No. 28419, 1990 WL 312172 at *3 (Sept 10, 1990), the Commission found that Respondent violated Sections 206(1) and (2) of the Advisers Act by misrepresenting facts when soliciting loans from her advisory clients. Specifically, respondent guaranteed the repayment of the loans by a pledge of the equity in her home, assuring at least one advisory client that the

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[2] This Court has concluded that a "[v]iolation of one of its associated rules is not a precondition to finding a violation of Section 206(4)." Raymond J. Lucia Companies, Inc., et al., I.D. No. 540, 2013 WL 6384274 at n.37 (Dec. 6, 2013), citing Warwick Capital Mgmt., Inc., et al., Advisers Act Release No. 2694, 2008 WL 149127 n.3 (Jan. 16, 2008). Accordingly, the Court correctly noted at the hearing in this matter that "[t]here is no requirement under 206(4) that the -- that there be an investor or prospective investor at all. Any deceitful conduct or manipulative or fraudulent conduct by in this case it would be an associated person of an investment adviser assuming the other requirements are met the materiality and interstate commerce, is a violation of 206(4)." (T. 821).

property had no outstanding liens and that the equity had not been previously pledged. In fact, the adviser's home had a significant outstanding first mortgage, and the adviser had previously pledged any remaining equity in it to numerous other parties. Obviously, borrowing money from a client has nothing to do with the advisory relationship, but the Commission found that the adviser had violated the antifraud provisions of the Advisers Act. See also, In re Ronald B. Donati, Inc., et al., Advisers Act Rel. No. 683, 1979 WL 174199 (July 2, 1979). There, in a settled proceeding, the Commission found that an adviser violated Sections 206(1) and (2), in part, by borrowing money from a client without disclosing facts showing the adviser's poor financial condition.

The fact that Advisers Act Sections 206(1), (2) and (4) lack any limiting language, such as the "in connection with the purchase or sale of securities" found in Section 10(b) of the Securities Exchange Act of 1934 or the "in the offer or sale of securities" found in Section 17(a) of the Securities Act of 1933, reinforces the conclusion that these statutes extend to activities outside the advisory relationship. For example, in SEC v. Dibella, 2005 WL 3215899 (D. Conn. Nov. 29, 2005), the court concluded that, because Section 206(2) "contains no requirement that a violation of that section occur in connection with the provision of investment advice," the Commission need not make this showing to prove a violation of that statute. Id. at * 8. Sections 206(1) and 206(4) also lack such limiting language and, thus, no such showing is required for those statutes either. Indeed, this court and the Commission have recognized that investment advisers may be held liable "even without misrepresentations specific to a client investment decision." Raymond J. Lucia, 2013 WL 6384274 at * 49 (citation omitted); Marc N. Geman, Exchange Act Rel. No. 43963, 2001 WL 124847 at * 8 (Feb 14, 2001) ("[T]he fact that [the adviser] did not provide advice regarding individual investment decisions did not ... relieve [the adviser] of its fiduciary obligations.").

Even if this Court accepts Lloyd's claim that the investments were solely for tax advice, the sale of these investments should still be viewed as part of his advisory relationship with his clients. The recommendations were clearly part of his overall financial plan for his advisory clients, prospective advisory clients and the Forest Conservation funds that he advised. See Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Advisers Act Rel. No. 1092 ("Release No. 1092"), 1987 WL 112702 at *3 ("A person who, in the course of developing a financial program for a client, advises a client as to the desirability of investing in, purchasing or selling securities, as opposed to, or in relation to, any non-securities investment or financial vehicle would also be 'advising' others within the meaning of [Advisers Act] Section 202(a)(11)").

In this matter, John Adams, one of the members of the Exam staff who met with Lloyd in March 2013, testified that prior to his meeting with Lloyd, Adams discovered that Lloyd's tax website was linked to the website of another entity that Lloyd owned and controlled called "Lloyd Wealth Management." When Adams clicked on the Lloyd Wealth Management link, it revealed that Lloyd was a registered representative and associated person with LPL Financial (T. 550-551). Lloyd testified that Lloyd Wealth Management was a separate entity that he established for financial planning services to assist his clients to retain their wealth. Indeed, in the signature block of his Ed Lloyd & Associates e-mails, it specifically listed that Lloyd provided wealth management services for his clients (T. 770-771, 827). Thus, Lloyd was still acting as an adviser when recommending the Forest Conservation investments to his clients, and the transactions would be covered by the Adviser's Act prohibited transaction statutes.

B. Lloyd May Be Charged with Primary Violations of the Advisers Act

This Court also requested the parties to address the impact of Russell W. Stein, et al., Exchange Act Rel. No. 47504, 2003 WL 1125746, at *3-4 and n.5 (Mar. 14, 2003) on the alleged primary violations of the Advisers Act Sections 206(1), (2) and (4). In that case, the Commission dismissed allegations that a person associated with an investment adviser committed primary violations of the Advisers Act, concluding that "'persons associated with investment advisers' must be charged as aiders and abettors." But in other cases, the Commission has found that an associated person may be charged with primary violations if they meet the "broad definition" of investment adviser within Section 202(a)(11) of the Advisers Act. See, e.g., John J. Kenny, et al., Exchange Act Rel. No. 47847, 2003 WL 21078085 n. 54 (May 14, 2003) ("An associated person may be charged as a primary violator under Section 206 where the activities of the associated person cause him or her to meet the broad definition of 'investment adviser'."), citing, inter alia, SEC v. Gotchy, 981 F.2d 1251 (4th Cir. 1992) (unpublished table decision); see also Warwick Capital Mgmt., 2008 WL 149127 at n.37 (2008).

In Stein, the Commission dismissed the primary charges largely because "[t]here is no evidence . . . that Stein acted in any capacity other than as a Merrill Lynch employee in his dealings with Merrill Lynch clients" with respect to the transactions at issue. 2003 WL 1125746 at *3. In contrast, Lloyd was selling away and advising away from LPL Financial (the adviser) in the transactions at issue in this case and, thus, was not acting as an associated person of LPL. It makes sense to view Lloyd as an *adviser*, rather than a person associated with an adviser, with respect to these transactions. Indeed, the Commission has noted that antifraud provisions apply "to all advisers, whether registered or not." Teicher v. SEC, 177 F.3d 1016, 1017-19 (D.C. Cir. 1999). If the antifraud provisions apply to unregistered advisers, they should also apply to associated

persons acting outside the scope of their employment with the adviser. Otherwise, associated persons could escape the antifraud provisions and defraud their clients simply by selling investments away from the firm.[3]

C. Lloyd's Challenges to the AP Process Are Without Merit

Lloyd asserts two challenges to the administrative proceeding process. First, he claims that the hearing did not comply with Section 212 of the Advisers Act, which provides that hearings "may be held before the Commission, . . . or any officer of the Commission designated by it . . . ." Lloyd apparently reasons that because, in other contexts, the Commission has argued that ALJs are not "inferior officers" under Article II of the Constitution, the ALJs cannot be "officers" for purposes of Section 212. Such an argument is nonsense. The Advisers Act entitles the Commission, for purposes of an investigation or administrative proceeding, to designate certain employees as "officers" to, among other things, administer oaths, take evidence and compel the attendance of witnesses. Advisers Act Section 209(b). For purposes of this statute, officers can include rank and file staff. See, e.g., Delegation of Authority to the Director of Its Division of Enforcement, Exchange Act Rel. No. 62690, 2010 WL 3177932 (Apr. 11, 2010) ("The Commission issues formal orders of investigation that authorize specifically-designated enforcement staff to exercise the Commission's statutory power to subpoena witnesses and take the other actions authorized by [Section 209(b) of the Advisers Act].") Such an "officer" is a far cry

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[3] Lloyd cannot escape his status as an adviser by reliance on Section 202(a)(11)(B). That statute excludes from the definition of investment adviser "any lawyer, accountant, engineer or teacher whose performance of such [advisory] services is solely incidental to the practice of his profession." But the exemption is not available to an accountant "who holds himself out to the public as providing financial planning . . . or other financial advisory services" because "the performance of investment advisory services by the person would not be incidental to his practice as a lawyer or accountant." Release No. 1092, 1987 WL 112702 at *6. Here, as set forth above, Lloyd held himself out as providing financial planning and other financial advisory services.

from an "inferior officer" under the Constitution. See, e.g., Buckley v. Valeo, 424 U.S. 1, 126 & n.162 (1976) (the vast majority of government personnel are "employees," that is, "lesser functionaries subordinate to officers of the United States."); Samuels, Kramer & Co. v. Comm'r, 930 F.2d 975, 985-86 (2d Cir. 1991) (officers and inferior officers under the Constitution exercise "significant authority" pursuant to the laws of the United States).

In this matter, the Commission, pursuant to the Order Instituting Proceedings ("OIP"), designated "an Administrative Law Judge to be designated by further order" as an Officer for purposes of this matter. (OIP at Section IV). Pursuant to Rule of Practice 110, the Commission has delegated the power to designate a hearing officer to the Chief Administrative Law Judge. By Order dated October 2, 2014, Judge Murray designated Judge Foelak as the hearing officer. By Order dated March 16, 2015, Judge Murray redesignated this Court to be the hearing officer. Thus, the Commission complied with Section 212 of the Advisers Act.

Lloyd next claims that this administrative proceeding violated his due process rights. (Respondent's Brief, pp. 18-22). While his rationale is not completely clear, he appears to claim that the ALJ and the Commission are not impartial, as evidenced by the Division's supposedly high success rate in administrative proceedings, and this Court's adverse evidentiary rulings. (Respondent's Brief, pp. 19-20). But courts have found that prior rulings rarely, if ever, support a bias claim. Liteky v. U.S., 510 U.S. 540, 555 (1994); In re Russell G. Davy, Release No. AD – 53, 1985 WL 660828 at *5 (Apr. 15 1985) ("the law judge's findings with respect to Davy's credibility are not evidence of any bias on the part of the law judge."). Instead, to overcome the presumption that the ALJ acted impartially, Respondent must show "that a judge's mind was 'irrevocably closed' on the issue before the court." SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1222 (D.C. Cir. 1989).

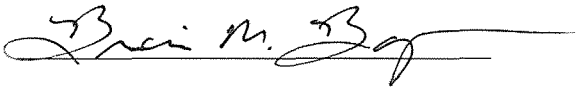
Lloyd does not meet this standard. To the contrary, ALJ Foelak's partial summary disposition ruling and ALJ Elliot's "Order Directing Briefing on Certain Issues" demonstrate their fairness towards Lloyd. Lloyd's arguments are completely baseless and should be denied.

IV. CONCLUSION

For the foregoing reasons, and based upon the evidence presented at the hearing, the Court should find that Lloyd violated Sections 206(1), (2) and (4) of the Advisers Act and grant relief as requested in the Division's Post-Hearing Brief.

This 29th day of May 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned counsel for the Division of Enforcement hereby certifies that he has served the **DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF** by UPS overnight mail and electronic mail, to the individuals identified below:

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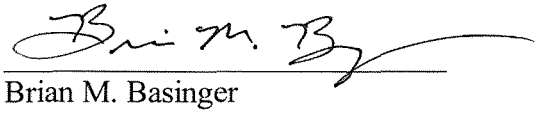

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