UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16374

In the Matter of

DAVID R. WULF

Respondent

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT DAVID R. WULF'S PETITION FOR REVIEW

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I. INTRODUCTION

The Division of Enforcement ("Division") submits this memorandum of law in opposition to the Petition for Review ("Petition") of the Initial Decision filed by Respondent David R. Wulf ("Wulf"). The Initial Decision granted the Division's Renewed Motion for Summary Disposition ("Motion") based on Wulf's criminal conviction and imposed a permanent bar against Wulf. The only issue to determine in this proceeding is "what sanctions, if any, are appropriate in this matter." *David R. Wulf*, Exchange Act Rel. No. 34-75956 (Sept. 21, 2015).[1] The permanent bar imposed against Wulf was fully warranted based on Wulf's recurrent and harmful criminal behavior.

Wulf's criminal conviction arises from his multiple fraud-based crimes, his egregious misconduct as an investment adviser over a decade, and his infliction of more than $400 million in losses to investors. Specifically, a federal jury found Wulf guilty on ***eighteen*** counts of mail fraud, wire fraud, bank fraud, wire fraud affecting a financial institution, conspiracy to commit mail fraud affecting a financial institution, conspiracy to commit wire fraud affecting a financial institution and conspiracy to commit wire fraud, mail fraud and bank fraud in violation of 18 U.S.C. §§ 1343, 1344, and 1349. *See U.S. v. Sutton et al.*, Case No. 4:09-cr-00509-JCH-6 (E.D. Mo.) ("District Court").

During the 16-year period of his criminal activity, Wulf was associated both with a registered investment adviser and a firm dually registered as a broker-dealer and an investment adviser. The District Court sentenced Wulf to 120 months in prison, to be followed by five years

[1] The Commission limited the review of Wulf's Petition to this issue pursuant to the Commission's Rule of Practice 411(d). Following the June 25, 2015 Initial Decision, the U.S. Circuit Court of Appeals for the District of Columbia held that the Commission cannot apply the 2010 Dodd-Frank Act to bar an individual from associating with municipal advisors and rating organizations for conduct that occurred before the implementation of the Dodd-Frank Act. *Koch v. SEC*, 793 F.3d 147, 157-58 (D.C. Cir. 2015). The D.C. Circuit further stated that "[t]his holding does not apply to the other securities industries with which [Respondent] may not associate.") *Id.* at 158. In light of this ruling and the time period that Wulf committed his crimes, the Division only seeks to bar Wulf from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, and from participating in any offering of a penny stock.

of supervised release, and ordered him to pay ***$435,515,234*** in restitution. The District Court also barred Wulf from self-employment, owning a business and managing a business.

Administrative Law Judge Grimes ("ALJ") properly concluded that barring Wulf from the securities industry was critical to protect the public. Wulf's behavior was egregious, recurrent and harmful. Wulf must be deterred from inflicting any more harm on the investing public. As the ALJ found, it would be difficult for any trier-of-fact reviewing Wulf's criminal record to conclude that Wulf is suited to continue serving the public. And for his part, even Wulf has failed to raise any legitimate reason why a bar is not necessary here. He refuses to accept any responsibility for his fraud. He offers no assurances that he would stop this behavior. Instead, he advances a collateral attack on his underlying criminal conviction, points fingers at the prosecutors, his former defense counsel, and his prior colleagues, and complains that this follow-on proceeding is unfair. Wulf had an opportunity to defend himself against the criminal charges in the District Court. He cannot take a second bite at the apple and relitigate his criminal case in this forum.

Put simply, Wulf's pleas of innocence are belied by the District Court's judgment that Wulf knowingly committed eighteen fraud-based crimes over a period of sixteen years and caused ***over $400 million in losses***. Wulf's misconduct calls for severe sanctions.

II. PROCEDURAL HISTORY

A. Background Regarding Wulf's Criminal Conviction.

On November 18, 2010, the United States Attorney for the Eastern District of Missouri filed a Second Superseding Indictment ("Indictment") naming Wulf as a defendant in *U.S. v. Sutton et al.*, Case No. 4:09-cr-00509-JCH-6 (E.D. Mo.). (Div. Ex. A.)[2] On August 5, 2013, the

[2] The Division's exhibits labeled alphabetically refer to the exhibits filed in support of the Division's Renewed Motion for Summary Disposition.

trial against Wulf commenced before a jury and continued for approximately three weeks. (Div. Ex. R at Dkt. Nos. 488-509.) The government presented evidence in support of the charges alleged in the Indictment. (Div. Ex. R at Dkt. Nos. 488, 492, 495, 497-504, 508.) Wulf, through his legal counsel, raised his defenses to these charges. (Div. Ex. R at Dkt. No. 508.) Wulf testified before the jury. (Div. Exs. N and O.)

On August 22, 2013, the jury reached a unanimous verdict finding Wulf guilty "as charged in [each and every count] of the Indictment." (Div. Ex. M; Div. Ex. Q.)[3] On November 14, 2013, the District Court held a sentencing hearing. (Div. Ex. J.) On November 18, 2013, the District Court entered a criminal judgment against Wulf. (Div. Ex. B). The jury found that Wulf committed eighteen fraud-based crimes "prior to 1992 and continuing until on or about May 14, 2008." (Div. Ex. B at SEC-Wulf-000224-226) (listing each guilty offense).

The District Court Judge sentenced Wulf to a prison term of 120 months followed by five years of supervised release, and further ordered him to pay $435,515,234 in restitution. (Div. Ex. B at SEC-Wulf-000227-228.) The District Court also placed Wulf under special supervision upon his release, and explained: "As the offense involved the defendant's lack of oversight of a business, it is ordered that he be barred from owning or managing a business and barred from self-employment." (Div. Ex. J at 16:12-15.)

B. Background Regarding the Administrative Proceeding.

On February 4, 2015, the Commission filed an Order Instituting Proceedings and Notice of Hearing pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") ("OIP"). (Div. Ex. C.) Wulf filed an Answer. (Div. Ex. D.) On March 10, 2015, the parties participated in a telephonic prehearing

[3] The counts in the Indictment were renumbered to only reflect the charges against Wulf as Wulf was the only named defendant in his criminal case that proceeded to trial. Accordingly, the verdict form follows the renumbered Indictment, which can be located at Division Exhibit P.

conference. (Div. Ex. E.) The ALJ thereafter issued an order setting a briefing schedule for summary disposition. (Div. Ex. F.)

On April 7, 2015, the Division filed a Motion for Summary Disposition against Wulf based on his criminal conviction. On April 27, 2015, The ALJ issued an Order Denying without Prejudice the Division's Motion for Summary Disposition, and granted the Division the opportunity to file a renewed motion for summary disposition. (Div. Ex. K.) In denying the Motion for Summary Disposition, the ALJ explained that the Division relied too heavily on the allegations in the Indictment, and stated that the Division may provide additional evidence in support of a renewed motion. (Div. Ex. K) (*citing Gary L. McDuff*, Exchange Act Rel. No. 74803, 2015 WL 1873119, at *3 (Apr. 23, 2015)). On May 5, 2015, the Division filed a motion seeking an extension to file a renewed motion for summary disposition. The ALJ granted the Division's motion for an extension. (Div. Ex. L.)

On May 26, 2015, the Division filed the Renewed Motion for Summary Disposition ("Motion"). Wulf did not file an opposition to this Motion. However, he tendered a copy of his 28 U.S.C. § 2255 motion on May 28, 2015. *See Wulf v. U.S.A.*, Case No. 4:14-cv-1903-JCH, (E.D. Mo.).[4] On June 25, 2015, the ALJ granted the Division's Motion ("Initial Decision"). On July 22, 2015, Wulf filed a Motion to Correct a Manifest Error of Fact, which The ALJ denied on July 28, 2015. On August 31, 2015, Wulf filed his Petition. The Commission granted review of Wulf's Petition to determine what sanctions, if any, are appropriate.

[4] Wulf referred to this docket for all relevant filings. The District Court has not yet ruled on Wulf's motion.

III. ARGUMENT

Severe sanctions are critical here.[5] Wulf's gross misconduct involved multiple fraud-based crimes over a lengthy period, and inflicted massive harm to investors. Wulf's criminal history is appalling and telling on its face – he is patently unsuited to serve the investing public. Unsurprisingly, Wulf has failed to raise a *single* mitigating factor that weighs in his favor. Given the absence of mitigating circumstances, Wulf should be permanently barred from the securities industry. In the following sections, the Division first responds to Wulf's arguments that do not pertain to sanctions, and then addresses why sanctions are appropriate and necessary.

A. The Commission has Authority to Sanction Wulf.

Wulf's Petition questions the Commission's authority to preside over these proceedings. For instance, Wulf's Petition points out that some products involved in his underlying criminal proceedings did not involve securities and "are not the purview of the SEC..." (Petition at 6.) He adds, "Each and every 'allegation' or purported 'fact' in this review should be discarded or referred to the proper agency which regulates these products." (*Id.* at 6.)

Wulf's argument misconstrues the relevant issue. The Commission is not deciding his criminal case, but rather his sanctions. The District Court already entered a judgment on Wulf's guilt. (Div. Ex. B.) The purpose of follow-on proceedings is to determine what sanctions, if any, are appropriate based on his criminal conviction. *Nicholas D. Skaltsounis*, Initial Decision Rel. No. 729, 2014 WL 7407487 at *3 (Dec. 31, 2014) (reiterating that the only "real issue" in follow-on proceedings is determining the appropriate sanction). More importantly, Wulf

[5] The sole issue for review here is the question of what sanctions, if any, are appropriate. *David R. Wulf*, Exchange Act Rel. No. 34-75956 (Sept. 21, 2015). Most of the arguments Wulf raises in his Petition, however, go beyond the stated scope of review. Specifically, Wulf contends that (i) the Commission lacks jurisdiction over this matter; (ii) the underlying proceedings were unfair procedurally; (iii) the ALJ disregarded evidence that he tendered for review; (iv) the jury verdict was erroneous; and (v) the criminal trial involved prosecutorial misconduct and ineffective assistance of counsel. These arguments are misplaced and irrelevant in this forum. Nonetheless, in light of Wulf's *pro se* status, the Division has addressed these arguments.

concedes that he served as a registered investment adviser. (Petition at 6.) Indeed, Wulf was associated with both an investment adviser and a broker-dealer. (Div. Exs. G, H.) Accordingly, Wulf falls within the Commission's regulatory oversight.

B. The ALJ Properly Relied on Summary Disposition Procedure in this Proceeding.

Wulf repeatedly complains about the summary procedure utilized by the ALJ to decide this case. *See, e.g.*, (Petition at 4, 11-12, 16.) Wulf's complaints in this regard are simply wrong. The ALJ correctly adjudicated this matter through summary disposition procedure based on Wulf's criminal conviction. Rule 250(b) of the Commission's Rules of Practice provides that summary disposition should be granted when 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." *See also Conrad P. Sehgers*, S.E.C. Rel. No. 2656, 2007 WL 2790633 at **4-6 (Sept. 26, 2007).

The Commission has often upheld the use of summary disposition in follow-on proceedings arising from a respondent's criminal conviction. *See Gary M. Korman*, Exchange Act Rel. No. 59403, 2009 WL 367635, at *14 (Feb. 13, 2009), *pet. denied Korman v. SEC*, 592 F.3d 173 (D.C. Cir. 2010); *Martin A. Armstrong*, Initial Decision Rel. No. 372, 2009 WL 482831, at *6 (Feb. 25, 2009) *aff'd by Martin A. Armstrong*, S.E.C. Rel. No. 2926, 2009 WL 2972498 (Sept. 17, 2009). Where the criminal conviction involves fraud, as is the case here, summary disposition is especially appropriate. *See Jesse C. Litvak*, Initial Decision Rel. No. 739, 2015 WL 271259, at *2 (Jan. 22, 2015) (noting that it "will be rare" when the circumstances in which summary disposition in a follow-on proceeding arising from fraud is not appropriate) (*citing John S. Brownson*, 55 S.E.C. 1023, 2002 WL 1438186, n. 12 (2002)); *see also Frank L. Constantino*, Initial Decision Rel. No. 414, 2011 WL 1341151, at *2 (Apr. 8, 2011).

The record irrefutably shows that Wulf was convicted on multiple fraud-based charges. (Div. Ex. B.) Wulf also has not raised any reason why the use of summary disposition procedure would be inappropriate here. His claims of innocence, prosecutorial misconduct and ineffective assistance of counsel have no bearing on mitigation. *See Gregory Bartko*, S.E.C. Rel. No. 71666, 2014 WL 896758, at **13, 17-18 (Mar. 7, 2014) ("Summary disposition on sanctions is appropriate when ...the respondent has failed to establish a genuine issue concerning mitigation...[Respondent's] claims, even taken as true, are not mitigating.") Thus, summary disposition was appropriate here.

C. The ALJ Properly Reached Findings and Conclusions Based on the Records and Facts Officially Noticed.

Wulf's Petition is replete with sweeping assertions that the ALJ never reviewed the arguments and evidence that he presented in his favor. *See, e.g.,* (Petition at 1-3, 11-14.) Contrary to these claims, the ALJ stated in the Initial Decision that he reached his findings and conclusions based on the record and on facts officially noticed pursuant to Rule 323 of the Commission's Rules of Practice. (Initial Decision at 2.) The ALJ cited not only the Division's Motion, but also Wulf's Answer and Wulf's 28 U.S.C. § 2255 motion. (*Id.*) Wulf has not filed any other documents in this proceeding. Accordingly, the ALJ considered all of Wulf's submissions. The weight that the ALJ applied to Wulf's arguments and evidence was also proper for the reasons explained below.

D. The Initial Decision Properly Adopted the District Court's Factual Findings and Legal Conclusions and Rejected Collateral Attacks on the Conviction.

Wulf's Petition argues the ALJ should have considered that: (i) he had ineffective assistance of counsel in his criminal case; (ii) the prosecutors engaged in misconduct in his criminal trial; and (iii) he has uncovered exculpatory evidence in his favor—in other words, the

arguments Wulf raised in support of his 28 U.S.C. 2255 motion before the District Court. (Petition at 1-4.) Wulf's pleas of innocence are misplaced in this forum. As the ALJ explained to Wulf at the prehearing conference, Wulf cannot collaterally attack his criminal conviction in this administrative proceeding. (Div. Ex. E at 7-8.)

The Commission has "long held that follow-on proceedings based on a criminal conviction are not an appropriate forum to 'revisit the factual basis for,' or legal defenses to, the conviction." *See Eric S. Butler*, S.E.C. Rel. No. 3262, 2011 WL 3792730, at *5 (Aug. 26, 2011) (*quoting Jose P. Zollino*, Exchange Act Rel. No. 55107 (Jan. 16, 2007)); *see also Gregory Bartko*, Initial Decision Rel. No. 467, 2012 WL 3578907 at *2 (Aug. 21, 2012) ("The findings and conclusions made in the underlying action are immune from attack in a follow-on administrative proceeding ...The Commission does not permit a respondent to relitigate issues that were addressed in a previous proceeding against the respondent.") (internal citations omitted); *Sherwin Brown et al.*, S.E.C. Rel. No. 3217, 2011 WL 2433279, at *4 (Jun. 17, 2011) (finding that the doctrine of collateral estoppel precludes the Commission from reconsidering litigated issues and noting that "...we have repeatedly stated that a respondent in a follow-on administrative proceeding may not challenge the findings made by the court in the underlying proceeding) (citations omitted).

Likewise, the doctrine of collateral estoppel precluded the ALJ from considering Wulf's claims of prosecutorial misconduct and ineffective assistance of counsel in these proceedings. *See Gregory Bartko*, 2014 WL 896758, at **13, 17-18; *Martin A. Armstrong*, 2009 WL 2972498, at *4. Accordingly, the ALJ correctly denied Wulf's attempts to relitigate the factual findings and legal conclusions underlying his criminal conviction.

E. The ALJ Properly Adhered to the Commission's Rules of Practice Governing this Administrative Proceeding.

Wulf broadly claims that he was "denied due process." (Petition at 11.) Wulf complains about several aspects of the administrative proceeding process. For starters, Wulf argues that he was never "given any specific charges to which [he] could defend [himself]." (*Id.* at 4, 11.) This assertion is not true. Wulf was served with a copy of the OIP on February 10, 2015. (Initial Decision at 2, n.1.) Wulf clearly received both the OIP and the Division's Motion because he answered the OIP and mailed a copy of his 28 U.S.C. § 2255 motion in response to the Division's Motion. (Initial Decision at 2.) Wulf participated in the telephonic prehearing conference, and the ALJ afforded him the opportunity to ask questions. (Div. Ex. E.) Thus, Wulf received ample notice of the nature and basis for this administrative proceeding. *See Timbervest, LLC et al.,* S.E.C. Rel. No. 4197, 2015 WL 5472520 at **19-20 (Sept. 17, 2015) (finding that an OIP defines the "scope" of an administrative proceeding).

Wulf also contends that the "time tables have been ridiculously short" and conflicted with his deadlines in other proceedings. (Petition at 12.) The truth, however, is that the ALJ followed the scheduling guidelines set out in the OIP and the Rules of Practice. *See, e.g.,* Rule 360(a)(2). And, in any event, Wulf never sought any extensions.

Wulf also submits that the ALJ should have stayed these proceedings pending resolution of his 28 U.S.C. § 2255 motion. (Petition at 4.) Once a criminal judgment is entered, however, a bar is appropriate notwithstanding the pendency of any appeal or post-trial motion. *See Sherwin Brown et al.*, 2011 WL 2433279, at *4 (imposing a bar notwithstanding a pending appeal); *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.") Wulf suffers no unfair prejudice because he maintains the right to seek to vacate the administrative action if his criminal judgment is vacated or reversed. *Conrad P. Sehgers*, 2007 WL 2790633 at **3-4.

Finally, Wulf challenges the propriety of the Commission's administrative proceeding process. (Petition at 12.) (expressing his personal agreement with the critics of the Commission's administrative process). In doing so, however, Wulf raises only legal arguments that have already been rejected. *Timbervest, LLC et al.*, 2015 WL 5472520 at **23-25 (rejecting constitutional challenges to the administrative forum and the appointment process for administrative law judges).

F. Wulf Must Be Permanently Barred From The Securities Industry To Protect The Investing Public.

The Commission has the authority to sanction Wulf under Section 203(f) of the Advisers Act and Section 15(b) of the Exchange Act, because he (i) was convicted of wire fraud, 18 U.S.C. § 1343 within ten years that the Division instituted the OIP;[6] (ii) was associated with an investment adviser and broker dealing during the period of his misconduct; and (iii) the sanctions serve the public interest. *See* (Initial Decision at 7) (*citing* Section 203(f) of the Advisers Act and Section 15(b)(6) of the Exchange Act); *See also Gregory Bartko*, 2014 WL 896758, at *7.

The record unequivocally supports that Wulf was found guilty of wire fraud. (Div. Ex. B.) The record also reflects that Wulf committed these crimes while he was associated with both an investment adviser and a broker.[7] (Div. Exs. G, H.) Moreover, Wulf's Petition does not contest the existence of his convictions or his prior associations. Accordingly, the ALJ properly

[6] Section 203(e)(2) of the Advisers Act and Section 15(b)(4)(B) of the Exchange Act specify that a violation of 18 U.S.C. § 1343 is an offense, among others, that could trigger sanctions.

[7] Wulf was convicted for crimes committed from approximately 1992 through 2008. (Div. Ex. B.)

found that the statutory predicates for a bar were met. *See* (Initial Decision at 8); *see also Eric S. Butler*, 2011 WL 3792730, at *3 (finding that statutory requirements have been satisfied due to a criminal conviction and prior associations)

The only remaining issue is whether the sanctions imposed against Wulf were appropriate and within the public interest. *See e.g., Shaw Tehrani*, Initial Decision Rel. No. 42, 1993 WL 528211, at *2 (Dec. 15, 1993). Barring Wulf from the securities industry is vital to protecting the investing public. The ALJ had "little difficulty concluding that imposing a full collateral bar would serve the public interest." (Initial Decision at 8.) The ALJ determined that the investing public already suffered "at least $435 million in losses" due to Wulf's protracted fraud, and that Wulf was not suited to continue to serve the public. (*Id.* at 9.) The ALJ justified this conclusion by noting that Wulf's crimes involved fraud. Likewise, the ALJ considered that the "the jury necessarily found that in committing his offenses, Wulf acted with intent to defraud." (*Id.* at 8.) Thus, the ALJ determined that "severe" sanctions were necessary. (Initial Decision at 9) (*citing Daniel Imperato*, Exchange Act Rel. No. 74596, 2015 SEC LEXIS, at *17 (Mar. 27, 2015)).

1. Wulf failed to raise any extraordinary mitigating circumstances that sanctions are not necessary notwithstanding his multiple fraud-based convictions.

The Initial Decision follows existing precedent, which provides that severe sanctions are mandated when a respondent's conviction involves fraud. *John J. Bravata*, Initial Decision No. 737, 2015 WL 220986, at *6 (Jan. 16, 2015) ("The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business."); *see also Alan Brian Baiocchi*, Initial Decision No. 382, 2009 WL 2030524, at *3 (July 14, 2009) (same).

Commission precedent routinely has imposed bars when a respondent's past conduct involved fraud. "Absent extraordinary mitigating circumstances, such an individual cannot be permitted to remain in the securities industry." *John S. Brownson*, 2002 WL 1438186, at *2, *pet. denied, Brownson v. SEC*, 66 Fed. Appx. 687 (9th Cir. 2003) (unpublished). *See also Eric S. Butler*, Initial Decision Rel. No. 413, 2011 WL 174245, at *6 (Jan. 19, 2011); *Alan Brian Baiocchi*, 2009 WL 2030524, at *4; *Alberto E. Vilar*, Initial Decision Rel. No. 375, 2009 WL 1684733, at *2 (April 17, 2009); *Richard P. Callipari*, Initial Decision Rel. No. 237, 2003 WL 22250402, at *6 (Sept. 30, 2003).

Wulf has not raised a single legitimate factor that serves to mitigate his criminal behavior. Instead, he persists in refusing to accept any responsibility for his fraudulent actions. *See* (Petition at 3, 16) ("I was unaware of this [fraud] and had nothing to do with the fraud.") Protestations of innocence do not equate to mitigation. *Gregory Bartko*, 2014 WL 896758, at ** 13, 17-18.

2. It is in the public interest to permanently bar Wulf from the securities industry.

The ALJ properly concluded that a full bar is within the public interest according to the *Steadman* factors: (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. (Initial Decision at 10-11) (*citing Steadman v. SEC*, 603 F.2d 1126, 1140 (5th. Cir. 1979)). In analyzing whether sanctions are in the public interest, the Commission takes a flexible approach and does not treat any *Steadman* factor as dispositive. *Gregory Bartko*, 2014 WL 896758, at *11.

a. Wulf's crimes were egregious.

In applying the *Steadman* factors, the ALJ found "Wulf's actions easily qualify as egregious." (Initial Decision at 9.) The ALJ concluded that Wulf "violated his fiduciary duty in a brazen fashion." (*Id.*) This violation of fiduciary duty renders Wulf's misconduct particularly egregious because he violated his clients' trust on top of the financial losses that he caused. (*Id.*) The Commission generally views those who violate their fiduciary obligations as ill-suited for the securities industry. *See Sherwin Brown et al.*, 2011 WL 2433279, at *6; *Conrad P. Sehgers*, 2007 WL 2790633 at *7.

The $435 million in losses that Wulf inflicted upon victims further reinforces the egregiousness of Wulf's misconduct. Wulf cannot escape or explain away the damage he caused. Yet, Wulf attempts to blame his co-conspirators entirely for the amount of financial losses and asserts that, "There is no logic in using the [restitution] judgment against me in this SEC proceeding." (Petition at 12.) Commission precedent, however, provides that the extent of the harm suffered by victims may be quantified by the amount of restitution ordered in an underlying criminal case. *Adam Harrington*, Initial Decision No. 484, 2013 WL 1655690, at *4 (April 17, 2013); *Frank L. Constantino*, 2011 WL 1341151, at *5. The District Court ordered Wulf to pay $435,515,234 in restitution. (Div. Ex. B at SEC-Wulf-000230.) The Commission has barred other respondents who have caused far less harm to victims. *See, e.g., Gregory Bartko*, 2014 WL 896758, at *11 (imposing a bar against a respondent who caused hundreds of thousands of dollars in losses).

b. Wulf's crimes were recurrent.

Wulf inflicted this massive harm over the course of sixteen years. As the ALJ succinctly put it, "By any measure, Wulf's conduct was recurrent." (Initial Decision at 9.) This 16-period

of malfeasance far exceeds the period of time other respondents were found to have committed recurring misconduct. *Gregory Bartko*, 2014 WL 896758, at *11 (finding that a scheme lasting for over year was "neither brief nor isolated"); *Richard P. Callipari*, Initial Decision Rel. No. 237, 2003 WL 22250402, at *5 (Sept. 30, 2003) (a scheme lasting several weeks constituted recurring and egregious behavior); *Eric S. Butler*, 2011 WL 174245, at *5 (a scheme lasting several years reflected recurrent conduct); *Brion G. Randall*, Advisers Act Rel. No. 3632, 2013 WL 3776679, at *2 (July 18, 2013) (a scheme lasting over five years constituted recurring and egregious conduct).

c. Wulf acted with a high degree of scienter.

The very nature of a fraud-based crime reflects a high degree of scienter. *See Adam Harrington*, 2013 WL 1655690, at *4; *Alan Brian Baiocchi*, 2009 WL 2030524, at *3; *Richard P. Callipari*, 2003 WL 22250402, at *5. Indeed, in Wulf's criminal trial the District Court instructed the members of the jury that in order to find Wulf guilty of wire fraud they had find that he acted "with the intent to defraud" and "with the intent to deceive". (Div. Ex. I at Jury Instr. No. 12.) The ALJ astutely concluded that "Wulf cannot seriously claim that he accidentally participated in the looting of $435 million over a period of at least sixteen years." (Initial Decision at 10.)

d. Wulf poses a risk to the public and a bar is necessary to deter future misconduct.

Wulf has spent most of his career in the securities industry. He steadfastly refuses to "...give up any of [his] legal rights or remedies with respect to the SEC or anyone else." (Petition at 3.) He denies his wrongdoing. *See, e.g.*, (*Id.*) ("I was shut off from any knowledge of the fraud.") He gives no indication that he will stop his criminal behavior.

Wulf's obstinate refusal to take any responsibility for his crimes indicates the ongoing risk that Wulf poses to the public. *See Eric S. Butler*, 2011 WL 3792730, at *4 (finding that the respondent's refusal to acknowledge his wrongdoing "raises serious concerns about the likelihood that [Respondent] will engage in similar misconduct if presented with the opportunity"); *Conrad P. Sehgers*, 2007 WL 2790633 at *5 (finding that a bar protects the public by deterring wrongdoers from committing further harm). It is telling that the District Court found it necessary to restrict Wulf's oversight of business upon his release from prison. (Div. Ex. J at 15:15-17; 16:12-15.) The same reasons that compelled the District Court to impose such restrictions on Wulf's post-incarceration activities apply here. Said differently, if Wulf cannot be trusted to oversee a business, he certainly cannot be trusted to properly serve the investing public and act as a fiduciary.

Overall, the balance of the *Steadman* factors demonstrates that a bar is necessary to protect the investing public. *See e.g., Shaw Tehrani*, 1993 WL 528211, at *3 (barring the respondent from the brokerage business based on his past conduct because he posed a "threat to the investing public, and the public needs to be protected from the potential of further misconduct at his hands"); *Daniel J. Gallagher*, Initial Decision Rel. No. 644, 2014 WL 3749734, at *4 (July 31, 2014) (barring the respondent from the brokerage business and from trading in any penny stock based on his securities and wire fraud convictions, since "The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business.")

IV. CONCLUSION

For these reasons explained above, the Division requests that the Commission permanently bar Wulf from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, and from participating in any offering of a penny stock.

Dated: November 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

Ana D. Petrovic, an attorney, certifies that on November 19, 2015, she caused a true and correct copy of the Division of Enforcement's Memorandum of Law in Opposition to Respondent David R. Wulf's Petition for Review to be served on the following:

Mr. David R. Wulf
[redacted]stitution
Terre Haute IN [redacted]
(via certified mail)

Honorable James E. Grimes
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
(via email)

Dated: November 19, 2015

Respectfully submitted:

Division of Enforcement
U.S. Securities and Exchange Commission