UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17828

In the Matter of

ROSALIND HERMAN,

Respondent.

DIVISION OF ENFORCEMENT'S
REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT ROSALIND HERMAN

Respectfully submitted,

DIVISION OF ENFORCEMENT

By its attorneys,

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The Division of Enforcement (the "Division") submits this reply to Respondent Rosalind Herman's ("Herman") opposition to the Division's motion for summary disposition against her. This reply brief is filed after December 15 because of the Division's counsel's misunderstanding of the effect of the Commission's November 30, 2017 Order concerning the ratification of prior decisions in pending administrative proceedings. The Division's counsel asks that this brief be accepted three business days late because of that misunderstanding.

Herman's opposition, which consists largely of exhibits covered in her handwritten commentary, fails to address any of the arguments or caselaw supporting the Division's summary disposition motion. Herman's opposition does not deny the bedrock facts of her criminal conviction and sentence for investment adviser fraud. She fails utterly to address the Division's arguments about why the sanction of a permanent associational and collateral bar is in the public interest and should be imposed on Herman. Instead, the entire thrust of Herman's opposition is her claim that she is innocent of the crimes for which she was convicted. That argument cannot be entertained in this proceeding.

I. Herman Is Foreclosed From Arguing Her Innocence In This Proceeding.

On April 5, 2016, Herman was convicted of, *inter alia*, one count of conspiracy in violation of 18 U.S.C. §371, one count of investment adviser fraud in violation of 15 U.S.C. §80b-6 and 80b-17, and four counts of wire fraud in violation of 18 U.S.C. §1343, before the United States District Court for the District of Massachusetts in *United States v. Rosalind Herman*, Crim. No. 12-10015-WGY. *See* Declaration of Kathleen Shields ("Shields Dec."), submitted with Division's Motion for Summary Disposition, Ex. A, ¶2. Herman then appealed her conviction and sentence, and the First Circuit affirmed. *See United States v. Herman*, 848 F.3d 55 (1st Cir. 2017). The Supreme Court denied certiorari on April 17, 2017. *See United*

States v. Herman, 137 S. Ct. 1603 (2017).

All of the arguments that Herman makes in contesting the Division's motion for summary disposition are focused on her claim that she is not guilty of a crime because: 1) her co-conspirator, Gregg Caplitz, forged her name to various documents and falsely implicated her in his crimes, 2) she was unaware of the Forms ADV being filed by the Commission-registered investment adviser that she controlled, 3) various unidentified people at numerous banks falsified or forged documents that are relevant to Herman and her children spending defrauded investors' money, and 4) she paid another set of attorneys for legal services relating to her purported hedge fund and no evidence relating to their work was produced to her. At least the first two of these arguments were the foundation of Herman's defense at her criminal trial, where she was represented by counsel. *See* Supplemental Declaration of Kathleen Shields ("Supp. Shields Dec."), Ex. 6 (Trial Transcript, Apr. 5, 2016) at 62-76. The jury thus had the opportunity to consider Herman's current claims that Mr. Caplitz was lying to them, and that Herman was not sufficiently sophisticated, knowledgeable, or in control to be criminally responsible for the theft of the investment clients' funds. *See id.* at 64, 67, 71-72 (Herman's counsel describing Caplitz's testimony as "pure horse manure," calling him a "sociopath" who "has no conscience whatsoever and whoever gets in his way, the heck with it" and arguing that Caplitz told Herman that the investors' money was hers to "spend as [she] see[s] fit" and that "he never told her that he was stealing money from the clients"). But even Herman's counsel's closing argument conceded "I'm not going to claim that Mrs. Herman was an innocent victim of [Mr. Caplitz's] deception," because the evidence clearly did not support such a finding. *Id.* at 62. The jury's verdict, finding Herman guilty on all of the counts against her, was a sound rejection of Herman's defense. *See* Shields Dec., Ex. C at 1.

The Commission's well-established precedent prevents Herman from re-litigating her

criminal liability in this proceeding. As the Commission has previously held, a respondent "is collaterally estopped from challenging in this administrative proceeding the decisions of the district court in the injunctive proceeding. The doctrine of collateral estoppel precludes the Commission from reconsidering the injunction as well as factual and procedural issues that were actually litigated and necessary to the court's decision to issue the injunction. The appropriate forum for [Respondent's] challenge to the validity of the injunction and the district court's evidentiary rulings is through an appeal to the United States Court of Appeals." *In the Matter of James E. Franklin*, Rel. No. 56649, 2007 WL 2974200, *4 (Oct. 12, 2007). Though *Franklin* was decided after a civil jury trial, its holding is equally applicable to the verdict of a criminal jury, and the criminal sentence resulting therefrom. *See In the Matter of Joseph P. Galluzzi*, Rel. No. 46405, 2002 WL 1941502, *3 (Aug. 23, 2002) (finding that "a party cannot challenge his injunction or criminal conviction in a subsequent administrative proceeding"); *Ira W. Scott*, 68 S.E.C. Docket 58, 1998 WL 658791, *3 (Sept. 15, 1998) (because "[a] criminal conviction cannot be collaterally attacked in an administrative proceeding" Commission declined to hear Respondent's arguments concerning false testimony, failure to call witnesses conflicting evidence and similar issues); *In the Matter of Jonathan D. Davey, CPA,* Rel. No. 959, 2016 WL 537549, *2 (Feb. 11, 2016) ("the Commission does not permit criminal convictions to be collaterally attached in its administrative proceedings").

The doctrine of collateral estoppel clearly bars Herman from contesting, in this proceeding, whether she is guilty of investment adviser fraud as the jury found, the district court judge found, and the First Circuit affirmed. Read charitably, almost all of the documents Herman cites in her two opposition pleadings (one dated October 27, 2017 and one dated November 15, 2017) pertain to her claim that she is not criminally liable. As Attachment A to this brief demonstrates, most of the exhibits that Herman claims that she never saw before, and

were forged by Caplitz, were exhibits at her criminal trial and were admitted based on the testimony of Caplitz or investor witnesses, or without the objection of her counsel.

Herman argues that these documents do not support her criminal conviction – but the proper time for her to have raised these arguments was when they were admitted in her presence at her criminal trial or on appeal of her conviction to the Court of Appeals. Herman's criminal trial counsel repeatedly asked questions and made arguments suggesting that Caplitz was untruthful, and bore sole responsibility for some of these documents. There is no basis on which Herman can now challenge the district court's decision to admit these documents in this forum. *See William F. Lincoln*, 66 S.E.C. Docket 972, 1998 WL 80228, *2 (Feb. 9, 1998) (prohibition on collateral attacks on criminal conviction extends to issues "including the credibility of the evidence presented at trial and any defenses to the criminal charge").

Still other documents about which Herman now complains in her opposition pleadings were the subject of a stipulation by which Herman agreed that the documents were authentic and constituted admissible business records. *See, e.g.* Herman 11/15 Opp. Ex. H (stipulation concerning authenticity and business records).[1] This stipulation eviscerates Herman's current complaints about Exhibits D (partial), E, F and J in her October 27, 2017 Opposition, and Exhibits L, Q, and W in her November 15, 2017 Opposition.

Herman also complains about summary charts used at trial by the prosecution. *See* 10/27 Opp. at Ex. K, 11/15 Opp. at Ex. E, F, T. These are the prosecutors' summaries of information available in other, more voluminous, documents – and Herman's counsel did not object to their admission. Herman could have introduced her own summary charts containing different information if she thought that the jury should see other information. *See, e.g.,*

[1] Herman's complaint that the stipulation is not signed ignores district court practice under which counsel's typed signature is equally valid and effective as counsel's handwritten signature. *See* Herman 11/15 Opp., ¶H.

Herman 11/15 Opp. at Ex. F; Supp. Shields Dec., Ex. 5 (Trial Ex. 434, admitted on April 4. 2016 at p. 142-43 with no objection from counsel, summarizing payments to attorneys from three bank accounts that had been the subject of trial testimony and into which investors' money had been deposited).

Yet another set of exhibits about which Herman complains appear to be documents selected from the Commission's investigative file that were not used as trial exhibits to convict her. *See* Herman's 10/27/17 Opposition, Ex. G (print out from www.adviserinfo.sec.gov); Ex. H (print out from FINRA's CRD database), Ex. I (print out from CRD database), Ex. L (photograph not shown at trial); Herman's 11/15/17 Opposition, Ex. A (print out from CRD database), Ex. D (Commission's correspondence re document subpoena response), Ex. I (correspondence with SEC in response to investigative subpoena), Ex. K (correspondence between potential witness, SEC staff and others), Ex. O (2 pages from application for investment adviser registration), Ex. P (correspondence with entity not included as victim in criminal case nor to whom Herman was ordered to pay restitution (*see* Shields Dec., Ex. C at 6-7)), Ex. R (printout from IARD database), Ex. Y (documents relating to contact information for potential witness), Ex. Z (correspondence between potential witness, SEC staff and others), Ex. AA (printout from CRD database), Ex. BB (FINRA Broker Check search results), Ex. CC (printout from www.adviserinfo.sec.gov), Ex. DD (SEC correspondence relating to returned document production), Ex. EE (fax cover sheet relating to investigative correspondence), Ex. GG (investigative correspondence relating to document request), Ex. HH (printout relating to company information collected during investigation). It is unclear what relevance these documents have to her claim that she should not be barred in this proceeding.

Further, even to the extent that Herman is arguing that her criminal conviction is subject to some type of collateral challenge and should be vacated as a result of that challenge, that

argument poses no impediment to imposing a bar on her at this time. As the Commission has held, she can return to this court for reconsideration if her conviction is vacated, but the pendency of any such collateral proceeding is not a reason to delay a remedy in this matter. *See Kenneth E. Mahaffy, Jr.*, Exchange Act Rel. No. 68462, 2012 WL 6608201, *1 (Dec. 18, 2012) (bar vacated after conviction that provided the basis for that bar was reversed by federal appeals court); *In the Matter of Rahfco Mgm't Group, LLC*, SEC Rel. No. 1047, 2016 WL 4363903, *3 (Aug. 16, 2016) (challenge to conviction based on asserted ineffective assistance of counsel "should be brought before the court in which the case was heard").

II. Herman's Requested Discovery Should Be Denied.

Herman requests that she be allowed to conduct significant additional discovery. Specifically, she requests: 1) an expert handwriting analysis to prove that she did not sign certain documents; 2) phone records to demonstrate that she did not receive certain faxes or phone calls or control certain telephone numbers; 3) a forensic computer analysis to prove that certain emails were forged; 4) a forensic accountant to analyze her taxes; and 5) document discovery from a law firm (Sadis & Goldberg) that previously represented her and/or one or more of the entities she controlled. With respect to requests 1, 3 and 4, Herman is also implicitly asking the Court to provide and pay for, such experts. There is no provision in the Commission's Rules of Practice that would authorize such expert retentions.

More fundamentally, however, all of these requests should be denied because they seek evidence that is irrelevant to this proceeding. All of these discovery requests are intended to support Herman's argument that she is not guilty of her crimes. The subpoenas that she seeks to serve appear designed to relitigate whether she was properly found guilty of investment adviser fraud or tax fraud. Herman should not be permitted to serve such subpoenas because they would be "unreasonable, oppressive, excessive in scope [and] unduly burdensome" under the Commission's

Rule of Practice 232(b) because they would seek to elicit information that is not relevant to any issue to be decided in this proceeding. There is no factual dispute that Herman was convicted of numerous federal crimes, including investment adviser fraud, and that her conviction was affirmed on appeal. That undisputed fact provides a complete factual predicate for this proceeding and the Division's requested relief.

CONCLUSION

Herman requests an evidentiary hearing so that she can argue that she is innocent of the crimes of which she was convicted. Such a hearing would not be proper because, for the reasons articulated above, Herman may not challenge her conviction in this proceeding. *See James S. Tagliaferri*, SEC Rel. No. 4650, 2017 WL 632134, *7 (Feb. 15, 2017) (hearing not required when many of the issues identified for the hearing were issues related to respondent's "criminal conviction that he is collaterally estopped from relitigating"). Therefore there is no relevance to the evidence that she seeks to present. It is appropriate to resolve this proceeding by summary disposition because all of the necessary facts have been resolved by Herman's criminal conviction and the *Steadman* factors strongly weigh in favor of imposing a collateral industry bar against her to protect the public interest. Accordingly, the Division requests that Herman be collaterally barred from the securities industry pursuant to Section 203(f) of the Investment Advisers Act of 1940.

Respectfully submitted,

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