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 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"), pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. §201.250, and with the leave of the Court, hereby moves for summary disposition against Respondent Rosalind Herman ("Herman"). All facts necessary for summary disposition have been resolved by Herman's federal criminal conviction for committing investment adviser fraud in violation of 15 U.S.C. §80b-6, and -17. Herman may not re-litigate the jury's finding of guilt, which has been affirmed on appeal. She also may not contend in this case that she is innocent of a crime, by challenging the evidence that established her criminal conviction. Summary disposition is appropriate in this matter and a permanent associational and collateral bar is in the public interest and should be imposed on Herman.

I. Procedural History

On February 7, 2017, the Securities and Exchange Commission ("Commission") issued an Order Instituting Proceedings ("OIP") pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Herman. *See* Declaration of Kathleen Shields ("Shields Dec."), Ex. A. On or about June 2, 2017, Herman answered the OIP. *See id.,* Ex. B. The Commission produced discovery to Herman under Commission Rule of Practice 230 on March 17, 2017 and again on July 2, 2017.

The OIP alleged that 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* Shields Dec., Ex. A, ¶2. Herman was sentenced to seven years in prison and ordered to pay approximately $1.82 million in

restitution. A copy of the criminal judgment against Herman is attached to the Shields Declaration as Ex. C. Heman's Answer to the OIP admits both the facts of her criminal conviction and her sentence. *See* Shields Dec., Ex. B, ¶2. Following Herman's criminal conviction, she appealed her conviction and sentence. The First Circuit affirmed and certiorari was denied. *See United States v. Herman*, 848 F.3d 55 (1st Cir.), *cert. denied*, 137 S. Ct. 1603 (2017).

II. Factual Background Concerning Herman's Crimes

The indictment on which Herman was convicted alleged that Herman was an investment adviser who fraudulently induced her investment clients to loan money to her and to her business partner and co-defendant Gregg Caplitz ("Caplitz"), diverted investment clients' funds for her and her family's uses, and lulled her clients into allowing her to continue to control the clients' investments by fraudulent means. *See* Shields Dec., Ex. D (Indictment, ¶6, Counts 1, 2, 4-7). In ordering forfeiture of approximately $1.3 million against Herman, the district court found "the evidence at trial established that [Herman] and co-defendant Gregg Caplitz [] defrauded investors of $1,385,257 from May, 2008 through March 2013, telling them that their funds would be invested in a hedge fund company, when instead the money was used to fund the personal spending account of [Herman]" and that the court's calculation was supported by the trial testimony of Herman's victims, the bank records of Herman's companies and the testimony of the government's summary witness. *See* Shields Dec., Ex. E (Order of Forfeiture (Money Judgment)) at 2.

Herman admits that she was the president and chief executive officer of Financial Resources Network d/b/a Insight Onsite Financial Solutions ("Insight Solutions"). *See* Shields Dec., Ex. B, ¶1. Insight Solutions was a Commission-registered investment adviser from August 7, 1996 to April 17, 2012. *See* Shields Dec., Ex. K (printouts from FINRA's IARD

database and Investment Adviser Public Disclosure website). The period of Insight Solutions' registration overlaps with the time periods of both Herman's investment adviser fraud and wire fraud convictions. *See* Shields Dec., Ex. D, ¶¶53, 57.

In addition, Herman held various officer and director positions in several other financial planning businesses including Financial Family Holdings, LLC, Financial Designing Consultants, Inc., The Knew Finance Experts, Inc., Insight Onsite Strategic Management, LLC ("Insight Management") and Insight Onsite Strategic Partners, LLC ("Insight Partners"). Shields Dec., Ex. D, ¶¶8-11, 15-18; Ex. L at 24. Herman was the President, Chief Executive Officer and Chief Investment Officer of Insight Management, which was an investment adviser registered with the Commission. *See* Ex. D, ¶¶15-16. "According to its Limited Liability Company Agreement, which was signed by Herman, Insight Partners was formed, among other things, to serve as the general partner of Insight Onsite Strategic Fund, LP (the "Insight Fund"), a hedge fund that Herman and Caplitz purported to be starting." *Id.*, ¶19. Caplitz and Herman fraudulently induced their existing investment advisory clients to purchase ownership shares in Insight Partners. *See id.*, ¶¶23-24. Instead of using the clients' funds to start or operate a hedge fund, the clients' money was deposited into bank accounts primarily belonging to Insight Management, and The Knew Finance Experts, from which Herman and Herman's family members spent those funds to fund their lifestyle and to pay Caplitz. *See id.*, ¶¶28-30; *see also* Shields Dec., Ex. G at 98-99 (district court jury charge explaining necessary elements of fraud based on government's argument that Herman engaged in fraud by setting up the hedge fund and the selling of shares in the management of the hedge fund). As a result of Herman's fraud, clients' money "was used to pay for personal expenses such as car payments, vacations, debt payments, legal bills, pet care, Las Vegas hotel rooms, shopping trips and fitness club memberships, among many other things." Shields Dec., Ex. D, ¶30; Ex. E, at 2.

When clients asked about the status of their investments or being repaid, Caplitz and Herman told a number of lies to their clients, provided them with false documents, made partial payments to some, and made false promises of payments to others, all in order to lull the clients into allowing Caplitz and Herman to continue to control their investment funds. *See* Shields Dec., Ex. D, ¶¶31-32.

Caplitz pled guilty for his role in the investment adviser fraud scheme described above and testified against Herman at her trial. *See United States v. Caplitz*, Crim. No. 12-cr-10015-WGY (D. Mass.). Caplitz was sentenced to three and a half years in prison and was ordered to pay restitution of approximately $1.9 million. *See* Shields Dec., Ex. F. Caplitz was also barred by the Commission from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. *See In the Matter of Gregg D. Caplitz*, Advisers Act Rel. No. 4644 (Feb. 7, 2017).

Herman's crimes targeted particularly vulnerable victims, including a telephone operator who had a progressively disabling medical condition and saved for her medical costs in retirement, and other small business owners who saved for their retirement. *See* Shields Dec., Ex. J at 16 (transcript of sentencing hearing, judge adding two levels to Guidelines sentencing calculation because "Herman knew or should have known that the victims of the offense were vulnerable"), at 18 (summarizing effects of Herman's crime on her victims).

III. Argument

Summary disposition in favor of the Division is appropriate in this case because 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." Comm'n Rule of Practice 250(b). "Use of the summary disposition procedure has been repeatedly upheld in case such as this one where the respondent has been enjoined or convicted, and the sole determination

concerns the appropriate sanction." *In the Matter of Jeffrey Gibson*, Exchange Act Rel. No. 2700, 2008 WL 294717, *5 (Feb. 4, 2008).

A. Herman's Criminal Conviction Provides a Basis for a Collateral Industry Bar.

Section 203(f) of the Advisers Act allows the Commission, if it is in the public interest, to censure, place limitations on the activities of, or suspend or bar from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, who has been convicted of any offense described in Section 203(e)(2) of the Advisers Act within ten years of the commencement of the proceedings or has willfully violated any provision of the Advisers Act. *See* 15 U.S.C. §80b-3(f).

Section 203(e)(2) lists a number of types of offenses for which sanctions may be imposed. Section 203(e)(2)(B) pertains to persons who have been convicted of any felony or misdemeanor that "arises out of the conduct of the business of a[n]. . . investment adviser." 15 U.S.C. §80b-3(e)(2)(B). Section 203(e)(5) pertains to people who have "willfully violated any provision of . . . this title." 15 U.S.C. §80b-3(e)(5). Herman's crime of investment adviser fraud fits into both of these categories.

Herman was convicted of the crime of investment adviser fraud, in violation of 15 U.S.C. §80b-6. *See* Shields Dec., Ex. C. Herman's conviction occurred less than a year before this action was commenced and is thus within the 10 year statutory time limit. *See* Shields Dec., Exs. A, C (OIP instituted on February 7, 2017; criminal judgment issued July 29, 2016). Herman's investment adviser fraud necessarily arose out of her business as an investment adviser as required by subsection (e)(2)(B). *See* Shields Dec., Ex. G at 98-99. Herman's

criminal conviction also establishes that "at the time of the alleged misconduct, [she was] associated or seeking to become associated with an investment adviser." *See* 15 U.S.C. §80b-3(f). One of the elements of investment adviser fraud that the government had to prove beyond a reasonable doubt is that Herman "was an investment advisor or she was a person associated with an investment advisor." Shields Dec., Ex. G (district court's jury instructions on investment adviser charge) at 99. The Court's full charge on this element read:

> Third, that she was an investment advisor or she was a person associated with an investment advisor. Now what does that mean? Be specific here. That means that they must prove the following. The term "person associated with an investment advisor" means any partner, officer, director of such investment advisor, or any person performing similar functions, or any person directly or indirectly controlling or controlled by such investment advisor, including any employees of such investment advisor. Now the government argues it both ways, they say they've got evidence that she was a registered investment advisor herself and, if you don't believe that, they say well she was a person associated with any investment advisor, the investment advisor being Mr. Caplitz. That's what they argue to you. But they've got to prove one of those, either she was an investment advisor or a person associated with an investment advisor.

Shields Dec., Ex. G at 99-100. The jury's verdict of guilt thus established that Herman was an investment advisor or a person associated with an investment advisor.

Another essential element of Herman's crime was also that she act willfully. As the district court instructed the jury: "[t]he second thing that the government has to prove as to investment advisory fraud is that Ms. Herman did so, did the acts knowingly, knowing that's what she was doing, willfully, heedless of the consequences, with the idea, the intent to deceive, manipulate or defraud." Shields Dec., Ex. G at 99. By finding her guilty of this crime, the jury necessarily found that Herman violated Title 15 "willfully." The jury verdict's finding Herman guilty of investment adviser fraud establishes that Herman meets each of the requirements of Section 203(f) of the Advisers Act.

In her Answer to the OIP, Herman disputes certain of the facts alleged in the criminal

indictment, and disputes her role as an officer of Insight Management. *See* Shields Dec., Ex. B at ¶¶1, 3. Herman contends that she was not an investment adviser or associated with an investment adviser, did not have the necessary sophistication to commit any crimes, and that Caplitz, not her, was the person who defrauded the victims in this case. Herman's attempts to deny and deflect the jury's findings that underpin essential elements of her criminal conviction – that she was an investment adviser or associated with an investment adviser and that she acted knowingly – are barred by the doctrine of collateral estoppel.

Under the doctrine of collateral estoppel, summary judgment is appropriate when all issues were "actually and necessarily resolved in a prior proceeding." *SEC v. Freeman*, 290 F. Supp. 2d 401, 404 (S.D.N.Y. 2003); *see also SEC v. Chapman*, 826 F. Supp. 2d 847, 855-56 (D. Md. 2011) (granting motion for summary judgment on SEC's investment adviser fraud claim after defendant convicted in parallel criminal case of mail and wire fraud for identical conduct). A criminal conviction, whether by jury verdict or guilty plea, collaterally estops a defendant from disputing the facts that formed the basis of that conviction in a subsequent civil action. *See SEC v. Shehyn*, 2010 WL 3290977, *3 (S.D.N.Y. Aug. 9, 2010) (citing *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978)). As observed by one district court: "[t]he prevalence of estoppel in civil cases following their criminal counterparts is due in part to the court's desire to avoid inconsistent verdicts in light of the higher burden of proof required in the prior criminal case." *SEC v. Blackwell*, 477 F. Supp. 2d 891, 899 (S.D. Ohio 2007); *see also Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 382 (S.D.N.Y. 2007).

Collateral estoppel should be applied when (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and actually decided; (3) there was a full and fair opportunity for litigation in the prior proceeding; and (4) the issue

previously litigated was necessary to the judgment. *See Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986). "It is well-settled that a criminal conviction, whether by a jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." *Podell*, 572 F.2d at 35. Courts have applied collateral estoppel in investment adviser fraud cases because the elements necessary to establish civil liability under the Advisers Act antifraud provisions are identical to, and in some ways, even less than, those needed to prove criminal liability under those same provisions. *Haligiannis*, 470 F. Supp. at 383 (granting SEC's motion for summary judgment where defendant entered guilty plea to investment adviser fraud in criminal case).

Like the district courts, the Commission does not permit a respondent to re-litigate issues that were addressed and actually litigated in a prior proceeding and were determined adversely to the respondent, like Herman's criminal liability here. 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"); *In the Matter of 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 with 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"). Herman's efforts to convince this court to revisit the necessary elements underlying her conviction, including the findings that she acted as or was associated with an investment adviser or that she acted knowingly, should be rejected.

B. Herman's Egregious Misconduct Justifies Imposition of an Industry Bar.

Section 203(f) of the Advisers Act provides that the Commission shall sanction a respondent if such sanction is in the public interest. The facts stated above demonstrate that this Court should impose an industry bar upon Herman.

To determine whether an industry bar is in the public interest, this Court must consider the factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979). *See, e.g.*, *Douglas L. Swenson, CPA*, Admin. Proc. Rulings Release No. 795, 2015 SEC LEXIS 1957, at *13 (May 19, 2015); *In the Matter of Robert Burton*, Rel. No. 1014, 2016 WL 3030850, *4 (May 27, 2016). Those factors include "the egregiousness of the [respondent's] actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the [respondent's] assurances against future violations, the [respondent's] recognition of the wrongful nature of his conduct, and the likelihood that the [respondent's] occupation will present opportunities for future violations." *Swenson,* at *13-14 (*citing Steadman*, 603 F.2d at 1140); *Burton*, at *4. The Commission may also consider "the degree of harm to investors" resulting from the violation. *Burton*, at *4. "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." *Burton*, *4 (quoting *Vladimir Boris Bugarski*, Exchange Act Rel. No. 66842, 2012 SEC LEXIS 1267, *18 n. 26 (Apr. 20, 2012)).

In this case, it is beyond question that the public interest would be served by imposing a collateral industry bar upon Herman. Each of these factors weighs in favor of imposing a bar.

Herman's conduct was egregious, persistent, and purposeful. She was convicted of conspiracy and investment adviser fraud that spanned five years – from May 2008 to March 2013 – when her conspiracy with Caplitz was interrupted by the Commission's filing of a civil case against Caplitz and an asset freeze prevented further theft of their investment advisory clients' assets. *See* Shields Dec., Ex. C (criminal judgment); Shields Dec., Ex. D at ¶41 (listing overt acts in furtherance of the conspiracy between Herman and Caplitz); Shields Dec., Ex. H (docket in *SEC v. Caplitz et al.*, No. 1:13-cv-10612-MLW; Dkt. No. 10 (temporary restraining order sought on Mar. 15, 2013, issued on Mar. 17, 2013)). Herman was also convicted of four counts of wire fraud spanning the years 2008 through 2012 and of committing a corrupt endeavor to impede the Internal Revenue Service during the years 2003 through 2012. *See* Shields Dec., Ex. C, D at ¶¶57, 61. Herman committed investment adviser fraud while already under indictment for tax fraud. *See* Shields, Ex. I (docket in *United States v. Herman*).

The egregiousness of Herman's misconduct is further demonstrated by the vulnerability of the victims from whom she stole and the large sum of money that she stole. Herman's victims were not wealthy or sophisticated investors. They were retirees, some were ill or disabled, and she stole a meaningful part of their retirement savings. *See* Shields Dec., Ex. J at 18 (sentencing argument by United States summarizing victims' testimony).[1] Herman was

[1] The Assistant United States Attorney summarized the trial evidence as follows: "Folks like Patricia Wentzell who worked for 28 years as a telephone operator and saved every penny so that she knew she would be in a position to take care of herself and her health issues as she aged. Folks like the Bigelows who had a small plumbing company

ordered to pay restitution in the amount of over $1.3 million to 13 victims of her crimes. *See* Shields Dec., Ex. C at 6-7. Herman's misconduct was not an isolated instance. Instead, she victimized – again and again – people who trusted her as their investment adviser. The significant amount of money that Herman stole, combined with her multiple criminal convictions for crimes that spanned years, amply justify the Division's requested bars. *See Burton*, *4 (multiple securities fraud and tax fraud convictions were "egregious and recurrent" and demonstrate a high degree of scienter); *In the Matter of Jonathan D. Davey, CPA*, Rel. No. 959, 2016 WL 537549, *3 (Feb. 11, 2016) (same).

Next, the *Steadman* factors relating to the "sincerity of the [respondent's] assurances against future violations," and "the [respondent's] recognition of the wrongful nature of [her] conduct," strongly weigh in favor of a bar. As demonstrated by Herman's Answer to the OIP, and as the criminal court found, Herman has refused to accept any responsibility for her crimes. She continues, as she did at trial, to try to pin the blame for crimes on her co-conspirator Caplitz. *See* Shields Dec., Ex. B at ¶III.A-C. Despite the overwhelming proof at trial that Herman orchestrated the dissipation of her investment clients' funds to bankroll the lifestyle choices that she and her children made, she continues to deny any responsibility for the harm she has caused to others. The District Court summarized it best:

> Ms. Herman, you're in denial here. I don't doubt that Mr. Caplitz was the brains here, I haven't doubted that for a moment, but you knew precisely what was going on – I take that back, not precisely, you knew what was going on was criminal from the get-go, and you knew that you were stealing people's money, for years and years you were stealing people's money.

Shields Dec., Ex. J (transcript of sentencing hearing), at 32.

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and saved their money so that they could have a comfortable retirement. Your Honor had the benefit of hearing the testimony from many of these victims, . . . regular folks who did not have significant income and who were not sophisticated investors." *Id.*

The last of the *Steadman* factors, the likelihood that Herman's "occupation will present opportunities for future violations," also weighs in favor of a bar. As demonstrated by the multiplicity of financial services and investment-related companies for which Herman has been an officer, director or owner since the mid-1990's, her primary business for the last two decades has been in providing financial and investment advice and management services. *See* Shields Dec., Ex. D, ¶¶8-19; Ex. K; Ex. L at 24. This line of work put Herman in direct or indirect contact with investors who trusted and relied on her for investment advice and management. Herman severely abused her position by stealing from her clients time after time for her own personal benefit. Allowing Herman to remain in the industry would provide her with additional opportunities to engage in the same sort of fraudulent conduct she committed in the past. Further, it would be reasonable to infer that there is a likelihood Herman would commit future violations, given the repeated and egregious nature of her misconduct. *See SEC v. Keller Corp.*, 323 F.2d 397, 402 (7th Cir. 1963) (improper past conduct "gives rise to the inference that there [is] a reasonable likelihood of future violations," even if a defendant has ceased her illegal activities prior to the commencement of an action).

The additional factor of the degree of harm also counsels in favor of a bar. Thirteen victims lost over $1.3 million because of Herman's crimes. *See* Shields Dec., Ex. C at 6-7. Her criminal sentencing calculations were increased, as the trial court found, because her offenses caused "substantial hardship to five or more victims" and because "Ms. Herman knew or should have known that the victims of the offense were vulnerable." *See* Shields Dec., Ex. J at 15-16. Herman deprived hard-working individuals of their investment funds to fund her family's lifestyle. Her conduct renders her utterly unworthy to serve as an investment adviser or to act in any other capacity in the securities industry.

CONCLUSION

For all of these reasons, the Court should impose a collateral industry bar upon Herman pursuant to Section 203(f) of the Investment Advisers Act of 1940.

Respectfully submitted,

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