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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-17883

In the Matter of	
Warren D. Nadel	
Respondent.	

DIVISION OF ENFORCEMENT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT WARREN D. NADEL

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July 17, 2017

PRELIMINARY STATEMENT

The Division of Enforcement ("Division") respectfully submits this reply memorandum of law in further support of its motion for summary disposition against respondent Warren D. Nadel ("Nadel").[1] Nadel does not and cannot dispute that the District Court already found in the Civil Action that Nadel (1) engaged in more than three years of egregious, repetitive, fraudulent conduct against clients and prospective clients; (2) risked, and caused his clients to suffer, actual, substantial losses; (3) sought to deceive the Commission's examiners more than once through written misrepresentations, to conceal and continue his ongoing fraud; (4) displayed a lack of appreciation and remorse for his extensive wrongdoing during a relief proceeding hearing held after Judge Kuntz had already found that Nadel violated the antifraud provisions of the securities laws; and (5) absent restraint, it was reasonable to expect Nadel to commit future violations of the securities laws. *See* Division's June 16, 2017 Memorandum of Law ("Div. Mem.") at 6, 8.

Nadel now seeks largely to re-litigate the Magistrate Judge's findings that Nadel showed little appreciation for the wrongdoing he was found to have committed – largely through self-serving deflections of blame to his prior counsel, or, perhaps, some form of diminished capacity. Nadel July 7, 2017 Response ("Resp.") at 8-10. Worse, he continues to attempt to dispute the intentional nature of his misconduct and/or minimize the harmful impact of his fraudulent conduct on his clients. Resp. at 8-9. Nadel, finally, requests that this Court refrain from ordering a permanent bar, and instead permit Nadel to obtain employment in the securities industry within some vaguely-defined limitations. Resp. at 13-14.

Nadel's arguments are unavailing. First, Nadel is collaterally estopped from re-litigating

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the Division's Memorandum of Law in Support of Its Motion For Summary Disposition Against Respondent Warren D. Nadel dated June 16, 2017.

the District Court's findings. Second, Nadel's challenges, even if they were properly entertained in this proceeding (and they are not), are disingenuous, self-serving, and directly refuted by the evidence on which the District Court expressly relied. Indeed, to the extent Nadel's assertions are probative at all in this proceeding, they demonstrate only Nadel's continuing refusal to appreciate the nature of his fraudulent conduct. Even if Nadel genuinely believes what he is now telling the Court, it would merely add self-deception to the risks Nadel would pose to the investing public were full and permanent associational bars not ordered against him. The Commission has repeatedly stated in circumstances even less egregious than those presented here, that permanent associational bars are the proper remedy to protect the investing public.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS ESTABLISH THE BASIS FOR PERMANENT ASSOCIATIONAL BARS

Collateral estoppel bars any attempt by Nadel to "challenge the findings made by the court in the underlying proceeding," *Matter of Phillip J. Milligan*, Rel. No. 61790, 2010 WL 1143088, at *4 (S.E.C. Mar. 26, 2010), and those findings, in turn, substantially overlap with the factors the Court is to consider in determining the appropriate sanction here. *See also* Div. Mem. at 11, n.4 and cases cited therein.

Although Nadel suggests in his response that he is not contesting the District Court's findings, he nonetheless seeks repeatedly to dispute what he characterizes as the Magistrate Judge's "misinterpretations" that led to the conclusion that Nadel acted with a "high degree of scienter," "appeared dismissive," "presented a ... lackluster attitude," "back-pedaled" with respect to his prior sworn testimony, and "showed both indifference and a somewhat cavalier attitude regarding the underlying violations." Div. Mem. at 4-5, 6; Resp. at 5-6, 12. Nadel insists his admittedly cavalier demeanor was the product of (1) some combination of trial

strategy chosen with his counsel that in hindsight appears to have been a mistake (Resp. at 8-9), (2) an unexplained and unsubstantiated addiction (Resp. at 9), and/or (3) the lack of opportunity during the four-day evidentiary hearing to express his purported remorse. Resp. at 6-7.

Even were these challenges to the District Court's findings permissible now (and as noted above, they are not), they are unavailing. First, Nadel has not offered any substantiation for his belated claim of addiction, nor any explanation of its relevance to the Court's findings. Second, even were it true that Nadel's dismissive attitude was the result of a deliberate strategy chosen in consultation with his authorized trial counsel, it would only confirm the correctness of the Court's conclusions as to his conduct on the stand. Third, the suggestion that Nadel had no opportunity to express his remorse to the is false and entirely unsupported. Nadel testified extensively at trial (on direct and cross-examination), submitted extensive post-hearing briefing, and had ample opportunity to express whatever remorse he now belatedly claims to have about his prior conduct. Nor could Nadel complain that expressing remorse at the hearing would have been prejudicial, since that hearing occurred months after the District Court, on March 31, 2015, had already resolved Nadel's liability for his violations of the anti-fraud provisions of the securities laws. *See* Div. Mem. at 3-4.

The District Court, of course, based its findings not only on Nadel's admittedly indifferent and cavalier demeanor at trial, but also on: (1) his continued assertion of his Fifth Amendment privilege against self-incrimination regarding his misrepresentations about his assets under management ("AUM"); (2) the "magnitude, duration and persistent and ongoing misrepresentation concerning the amount of the [AUM]"; (3) his knowing concealment from his clients and prospective clients that his strategy was predicated almost entirely on cross-trading, and his evasion of that fact at trial; and (4) his written and knowingly false representations to the

Commission during its examination designed to conceal his false AUM claims, and his refusal to stop lying about his AUM even after he knew the Commission was examining the issue. Div. Mem. at 4-6.

It was not until the Commission instituted the instant proceeding before Nadel first expressed any hint of remorse, but his half-hearted and inconsistent assertions (in his response to this motion and in his Answer) appear grounded more in chagrin at the outcome of the Civil Action, than in genuine acceptance of responsibility and appreciation for his misconduct. Thus, Nadel continues to attempt to minimize the extent and impact of his fraudulent conduct. He has attached and discusses, for example, the reports of his retained expert (who did not testify at the hearing) (Resp. at 9, Exhs. X, XI, XII), ostensibly to suggest that the fraudulent manner in which he conducted his investment strategy might have been profitable for his clients – ignoring the District Court's detailed findings on both the risk of loss, and the *actual* and substantial losses Nadel's clients suffered because of his three-year fraud. Div. Mem. at 7. And he makes reference yet again to his purported understanding of his trade confirmations and his discussion of "potential" cross-trading with clients (Resp. at 10-12), in direct contradiction of the evidence, and the District Court's findings, that Nadel knowingly concealed from his clients the material fact that his strategy was almost entirely dependent on cross-trading. *See* Div. Mem. at 4-5.[2]

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[2] Nadel also references his pending bankruptcy case in *Warren Douglas Nadel*, 8:16-bk-74145-AST (E.D.N.Y.), which he filed last year, by attaching a June 27, 2017 letter from the Commission to Nadel. That letter notified him that the Commission had just learned of his filing, because Nadel had failed to list the Commission as a creditor in his petition, and thus the Commission had received no prior notice of it. Resp., Exh. III. The automatic stay under Section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), presents no impediment to the instant proceeding, pursuant to Section 362(b)(4) of the Bankruptcy Code. That section provides that the filing of a bankruptcy petition does not operate as a stay "under paragraph (1), (2), [or] (3) ... of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental

At best for Nadel on this summary disposition motion, his assertions in this proceeding, even if accepted as genuine, reflect a disturbing degree of self-deception as to the nature and extent of his wrongful conduct that serves only to confirm the necessity for the relief the Division has requested. More realistically, they betray the same disingenuousness with which he violated his fiduciary obligations to his clients, and misled the Commission when carrying out its regulatory responsibilities.

II. THE PUBLIC INTEREST REQUIRES THAT NADEL BE PERMANENTLY BARRED FROM ASSOCIATION WITH A BROKER, DEALER, OR INVESTMENT ADVISER

The Commission "has consistently held that antifraud injunctions merit the most stringent sanctions and that '[o]ur foremost consideration must ... be whether [the] sanction protects the trading public from further harm.'" *Matter of James C. Dawson*, Rel. No. 3057, 2010 WL 2886183, at *6 (S.E.C. Jul. 23, 2010) (citation omitted). In *Dawson*, the Commission affirmed the ALJ's order of a permanent associational bar against an investment adviser who had (unlike Nadel) settled the Commission's civil action against him, based on, among other things, a fraudulent two-year "cherry-picking scheme," but who (like Nadel) still sought to dispute his scienter and investor harm. Dawson urged the Commission to order a modified bar that would allow him to continue in the industry in limited fashion, much like Nadel does today, based on

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unit's ... police or regulatory power." 11 U.S.C. § 362(b)(4). The purpose of Section 362(b)(4) is to prevent a debtor from "frustrating necessary governmental functions by seeking refuge in bankruptcy court." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir.1991) (internal quotation marks omitted). Therefore, "where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." *Id.* (*citing* S.Rep. No. 989, 95th Cong.2d Sess. at 52 (1978); H.R.Rep. No. 595, 95th Cong.2d Sess. at 343 (1978); U.S. Code Cong. & Admin. News 1978, pp. 5787, 5838, 6299). Courts have traditionally held that the SEC's enforcement actions are an exercise of the Commission's police and regulatory powers to protect the public interest, and hence are exempt from the automatic stay. *See, e.g., SEC v. First Financial Group of Texas*, 645 F.2d 429, 437 (5th Cir. 1981); *SEC v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000); *SEC v. Towers Financial Corp.*, 205 B.R. 27, 30-31 (S.D.N.Y. 1997).

(1) his clean disciplinary record over 30 years in the industry, (2) his settlement of the underlying federal action that demonstrated the sincerity of his remorse, and (3) the purported lack of harm to his investors. *Id.* at *5-6.

The Commission rejected these contentions, noting that the "'securities business is one in which opportunities for dishonesty recur constantly,'" and that the allegations that he had defrauded his advisory clients of more than $300,000 over more than two years, raised "significant doubts about his integrity and his fitness to remain in the securities industry." *Id.*a t *6 (citation omitted). The Commission rejected Dawson's insistence on some form of modified bar, both because of the "practical difficulties in enforcing compliance with such a proposal," and because of the seriousness of his misconduct. *Id.*; *see also Matter of Robert Bruce Lohmann*,Re l. No. 2141, 2003 WL 21468604, at *5 (S.E.C. June 26, 2003) (affirming initial decision that ordered a permanent associational bar against respondent based on his insider trading violations occurring over several days, and rejecting respondent's insistence, based in part on his clean disciplinary history, on a "program of enhanced supervision" instead of a full bar, because, the Commission noted, he acted with a high degree of scienter, unlawfully tipped three people and, though he was not currently employed in the securities industry, there was "no assurance that he will not try to reenter the industry and have the opportunity to commit future violations"); *Matter of Stephen J. Horning*, Rel. No. 167, 2007 WL 4236161, at *13 (S.E.C. Dec. 3, 2007), *aff'd sub nom. Horning v. SEC*, 570 F.3d 337 (D.C. Cir. 2009) (affirming permanent supervisory bar based on respondent's failure to supervise firm that violated net capital rules, and rejecting respondent's insistence on a subject-matter limited supervisory bar restricted to the areas in which the violations occurred, holding that there was no basis for "carving out" subject areas from the bar).

The foregoing decisions (and those the Division cited previously, *see* Div. Mem. at 12-14) apply *a fortiori* here, where Nadel's misconduct was particularly long-lasting, deliberate and egregious, caused substantial harm to his own clients (while generating millions of dollars in illicit gain for him), and where Nadel has consistently demonstrated both a lack of appreciation for his misconduct throughout the long history of the Civil Action (and even in this proceeding), and his avowed intention of seeking to reenter the securities industry.

Nadel's request for an ill-defined "carve-out" from a permanent bar with enhanced "supervision," moreover, is not merely vague and impractical, as the case law above demonstrates, but particularly inadequate to protect the investing public in this case, where Nadel's violations were egregious, and where he displayed an eager willingness to mislead supervisory authorities. In *Matter of Gary M. Kornman*, for example, the Commission affirmed the ALJ's order of a permanent associational bar against the owner and registered representative of broker-dealer, and investment advisor to hedge funds, based solely on his conviction for a false statement to the Commission during its investigation of insider trading – and rejected the respondent's request for leniency because his violation (unlike Nadel's) was isolated and based on his putatively sincere expressions of remorse. Rel. No. 2840, 2009 WL 367635, *7 (S.E.C. Feb. 13, 2009). The Commission emphasized that deception of regulators, even standing apart from other violations, justifies the imposition of full associational bars:

> Indeed, the importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business. Here, the egregiousness of Kornman's dishonest behavior is compounded because he made his false statement to Commission staff during an ongoing investigation into possible insider trading violations. Providing information to investigators is important to the effectiveness of the regulatory system, and the information provided must be truthful. We have consistently held that deliberate deception of regulatory authorities justifies the severest of sanctions.

Id. (citations omitted).

CONCLUSION

For the foregoing reasons, and those previously stated, the Division respectfully requests that its motion for summary disposition be granted and that the Court issue an order permanently barring Nadel from association with any broker, dealer or investment adviser.

Dated: July 17, 2017
New York, New York

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CERTIFICATE OF SERVICE

I, Richard G. Primoff, certify that on the 17th day of July 2017, I served a true and correct copy of the Division of Enforcement's Reply Memorandum of Law in Further Support of its Motion for Summary Disposition against Respondent Warren D. Nadel, by UPS Overnight Delivery and email, on the Court and Respondent Warren D. Nadel, as follows:

The Honorable Cameron Elliot
Administrative Law Judge
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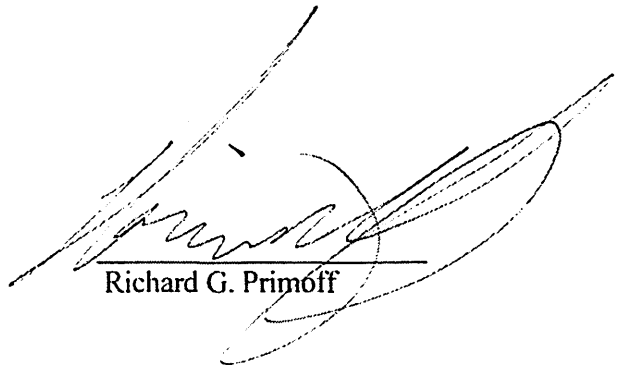
Dated: New York, New York
July 17, 2017



Richard G. Primoff