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UNITES STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18867

In the Matter of

DANIEL JOSEPH TOUIZER,

Respondent.

RESPONDENT'S MOTION TO COMPEL DISCLOSURE OF *BRADY* MATERIAL, FOR A STAY OF THE SUMMARY DISPOSITION PROCEEDINGS AND FOR A NEW SCHEDULING ORDER

[Opposition to Motion for Summary Disposition, Declaration of Daniel Joseph Touizer with Exhibits A-X thereto, and Declaration of David S. Harris with Exhibits A and B thereto Filed Concurrently Herewith]

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Respondent, Daniel Joseph Touizer ("Respondent" or "Touizer") hereby respectfully moves for an order compelling the Division to turn over the requested *Brady* material, for a stay of the Division's Motion for Summary Disposition ("MSD"), and for a new briefing schedule following the production of *Brady* material.

Relevant Procedural and Factual Background

On October 12, 2018, the Commission issued an Order Instituting Proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934. On December 21, 2018, Touizer moved to stay this matter pending the resolution of the appeal of his conviction and sentence currently pending in the Eleventh Circuit Court of Appeals, Case No. 18-14951-J. The request was denied. On June 6, 2019, Touizer filed an Answer and a Motion for More Definite Statement, which was denied.

On July 19, 2019, the Division of Enforcement ("Division") filed a Motion for Summary Disposition. On August 8, 2019, the undersigned counsel filed a Notice of Appearance as new lead counsel for Respondent as well as a motion for extension of time to oppose the MSD, making the opposition due by September 9, 2019.

On August 16, 2019, in preparation for the opposition to MSD, the undersigned reached out to counsel for the Division to schedule an inspection of the Division's files as set forth in the Division's July 12, 2019 Notice (appended to Touizer's August 8, 2019 Motion as Ex. A). Counsel for the Division proposed electronic production of the files, which the undersigned agreed to. The files were electronically produced on August 26, 2019. On August 27, 2019, the undersigned made a written request for *Brady* material. Specifically, Touizer made a written request for:

> disclosure of all exculpatory facts contained within the notes, memoranda, emails, letters, opinions in the custody or control of the Securities and Exchange Commission ("Commission") which formed the basis to the Commission's conclusion that the Commission does not recommend an enforcement action in

> connection with the Wheat entities as reflected in the Commission's letter dated June 6, 2017 that was included in [the Division's] August 26, 2019 production, including, but not limited to, all of the documents pertaining to discussions with investors of Wheat I, Wheat II, Wheat III and WCM, and all forensic analysis that was prepared during the interactions among the Commission, Mr. Touizer's then-counsel and Wheat's then-Chief Financial Officer.

Ex. B to the declaration of David S. Harris filed concurrently herewith.

The Division indicated in its response thereto that the requested information is "not material to [Touizer's] 'guilt or punishment'" and that "Touizer agreed [that the MSD] would be decided before the parties engaged in *any* discovery." Ex. B to Harris Decl. (emphasis in original).

This motion follows.

ARGUMENT

I. The Division Must Comply With Its *Brady* Obligations And Related Authorities

The MSD should be stayed and the Division should be ordered to produce the requested *Brady* material. The affirmative obligations which arise under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) have been incorporated into the Commission's Rules of Practice since July 24, 1995—the effective date of 17 C.F.R. § 230(b)(2). *See, e.g., Sec. & Exch. Comm'n Release Notice*, Release No. 586 (July 30, 1999). Rule 201.230(b)(2) provides that "[n]othing in [§ 201.230] paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence."

In addition to the Division's obligation to produce exculpatory evidence, the respondent must be afforded "a full opportunity to conduct discovery" to obtain the "affirmative evidence" that is "essential to his opposition" to summary disposition. *In the Matter of the Application of Justin F. Ficken for Review of Disciplinary Action Taken by Nasd*, Release No. 54699 (Nov. 3, 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) (holding that "summary judgment

[should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition")).

The Division's argument that "Touizer agreed [that the MSD] would be decided before the parties engaged in *any* discovery" does not obviate the need for the Division to comply with *Brady* and produce the information specifically requested by Respondent. *First*, *Brady* is not a discovery device, *see, e.g., In the Matter of Thomas C. Bridge James D. Edge & Jeffrey K. Robles*, Release No. 9068 (Sept. 29, 2009) (holding that "*Brady* is not a discovery rule"); *see also, generally, United States v. Bell*, 321 F. App'x 862, 864 (11th Cir. 2009) (stating that "*Brady* is not a discovery device"), but, rather, a substantive rule of criminal law that is applied in administrative proceedings to assure that due process and fairness requirements are met. *Second*, the Commission addressed this issue in its Scheduling Order and expressly rejected the notion that the instant MSD proceedings against Touizer should (or could) adequately proceed without an opportunity to conduct discovery. *Id.*, at n. 2. *Third*, the Division's August 26, 2019 production of the files the Division made available for inspection conflicts with the Division's argument that no discovery would be conducted prior to the disposition of the MSD. In sum, *Brady* material cannot be withheld based on the no-discovery reasoning the Division voiced in its September 3, 2019 response.

II. This Motion Is Appropriate At This Juncture Of The Proceedings

The undersigned counsel for Respondent only recently became counsel of record, immediately requested and was granted the maximum length of an extension to oppose pursuant to 17 C.F.R. § 201.161 on August 12, 2019, and thereafter requested to inspect the Division's files on August 16, 2019. In response, the Division provided its files electronically on August 26, 2019.[1]

[1] The brief delay between August 16 and 26, 2019 was not caused by the Division.

Respondent diligently reviewed the produced files the same day and made a specific written *Brady* request the following day, August 27. The parties have been negotiating the *Brady* issue since Touizer made the request. *See* Ex. B to Harris Decl. Due to these facts, Touizer could not have requested a stay of this proceeding pending the production of *Brady* materials sooner, let alone when he made the request for a 21-day extension to oppose.

Additionally, the Commission has previously held that a respondent should first file an opposition to MSD, based on which the Commission would decide, for example, whether an evidentiary hearing is appropriate. *See, e.g., In the Matter of United Dev. Funding III, L.P., United Dev. Funding IV, & United Dev. Funding Income Fund V*, Release No. 85197 (Feb. 26, 2019). Concurrently herewith, Touizer is filing extensive objections to the MSD. Because (a) Touizer could not have raised the *Brady* issue sooner, (b) the Commission now has the benefit of reviewing Touizer's remaining arguments in opposition to the MSD, and (c) the purpose of *Brady* is to assure that administrative proceedings comport with the principles of "fundamental fairness and due process," *Sec. & Exch. Comm'n Release Notice,* Release No. 586 (July 30, 1999), Touizer respectfully submits that this Motion is timely and appropriate at this juncture, and that the MSD proceedings must be stayed.

III. The Importance Of *Brady*

In *Brady v. Maryland,* 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court, in addressing a prosecutor's discretion, cautioned that "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." 514 U.S. 419, 437–38, 115 S. Ct. 1555, 1567–68. Furthermore,

a "[c]umulative analysis of the force and effect of the undisclosed pieces of favorable evidence matters because the sum of the parts almost invariably will be greater than any individual part." *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1347 (11th Cir. 2009).

Brady also "requires the disclosure of material evidence favorable in the sense of mitigation or ... for impeachment purposes." *Calley v. Callaway*, 519 F.2d 184, 221 (5th Cir. 1975). *Brady* "rests upon an abhorrence of the concealment of material arguing for innocence by one arguing for guilt." *Id.*, at 223 (citation omitted). In sum, it is settled that *Brady* is "a fundamental element of a fair" proceeding. *United States v. Bagley*, 473 U.S. 667, 695, 105 S. Ct. 3375, 3390 (1985).

Since 1995, when *Brady* became an inescapable obligation in SEC administrative proceedings, the Commission has acknowledged that "[a]dministrative decisions applying *Brady* tend to emphasize fundamental fairness and due process." *Sec. & Exch. Comm'n Release Notice,* Release No. 586 (July 30, 1999). *Brady* material in administrative proceedings has generally been defined as constituting "information that is both favorable and material to the respondent's defense." *Orlando Joseph Jett*, 52 S.E.C. 830 (1996).

IV. Touizer Makes a Plausible Showing That The Requested Information Is Material And That He Is Entitled To Its Disclosure

Respondent must make a plausible showing that the requested information is both favorable and material to his defense.[2] Touizer respectfully submits that the factual bases contained within the Commission's investigative files, including exculpatory facts contained within the Commission's memoranda, emails, notes and correspondence and its communications with the investors, which led to the Commission's conclusion that the Wheat entities did not engage in any

[2] The "'plausible showing' language in *Jett*[, *supra*,] comes from *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987), a retrospective application of *Brady* that predated *Strickler* [*v. Greene*, 527 U.S. 263, 119 S.Ct. 1936 (U.S.Va.,1999)]." *Sec. & Exch. Comm'n Release Notice,* Release No. 586 (July 30, 1999).

fraudulent activity is fully consistent with Touizer's defense and conflict with the Division's argument that an industry bar is in the public interest. The information is material because not only do the Wheat entities constitute the majority of the investments during the relevant period, they are also reflected in the district court's rulings and were alleged to be a centerpiece in the purported fraud and money laundering scheme at issue. S*ee, e.g.,* Ex. B to Touzier Decl. filed concurrently herewith. The exculpatory facts will also suggest that the government's claims as to the other entities are just as unfounded, as can be explained with more specificity once the material is produced, and which would be consistent with the Fiske reports exonerating Touizer in connection with all of the charged entities (Ex. A to Touizer Decl.) as well as the results of the Office Financial Regulation investigation into the charged entity, Covida Holdings (Ex. T to Touizer Decl.). As the evidence submitted concurrently herewith shows, the Commission spoke with every investor, Exhs. W and X to Touizer Decl., and the information it obtained that led to its conclusion not to bring an enforcement action are undoubtedly material to Touizer's defense.

In short, it can hardly be disputed that the exonerating facts contained within the Commission's own files and conclusions are relevant to the decision whether a bar by the Commission would be appropriate. Touizer makes a more than plausible showing that the information would have a mitigating effect and would substantially impact the *Steadman* analysis that is discussed in Touizer's opposition to MSD.

This is unlike the majority of cases in which the Commission has rejected the respondent's *Brady* claims. Touizer's specific request does not warrant a "wholesale 'fishing expedition' into investigative material," *Haight & Co.*, 44 S.E.C. 481, 510-11 (1971), nor is the information "readily available from another source," *Rooney Pace, Inc.,* 48 S.E.C. 602, 606 n.7 (1986), nor is the request based on a "[m]ere speculation that government documents may

contain *Brady* material," *Jett, supra*, 52 S.E.C. 830. In fact, the Division has not denied (nor can it deny) that the information exists and has been withheld. To the contrary, the Division has proposed a stipulation to the effect that the Commission "did not find evidence of wrongdoing related to the matters under investigation [in connection with the Wheat entities], namely, potential misappropriation or misuse of investor proceeds and promises of outsized or guaranteed returns," which is a concession that such exculpatory facts exist and have not been produced. Ex. B to Harris Decl.

For these reasons, should the Commission not be inclined to outright deny the Division's MSD based on the evidence already before it as argued in the opposition filed herewith, the matter should be stayed and the Division should be compelled to meet its *Brady* obligations.

V. The Information Is Not Exempt

Though the Division has not asserted that the requested information in connection with memoranda, opinions, notes and correspondence is exempt from disclosure, including under the deliberative process, work product or other privilege, Respondent will nevertheless briefly address it, as it is well-settled that "opinions and mental impressions of the case are ... discoverable under *Brady*[*/Giglio*] [if] they contain underlying exculpatory facts." *United States v. Kohring*, 637 F.3d 895, 907 (9th Cir. 2011) (quoting *Morris v. Ylst,* 447 F.3d 735, 742 (9th Cir.2006)); *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (holding that the deliberate process privilege "does not permit the nondisclosure of underlying facts"); *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 87-88, 93 S. Ct. 827, 836 (1973) ("memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government"); *EPA v. Mink,* 410 U.S. 73, 87-91, 93 S.Ct. 827, 836-38 (1973) (holding that under the deliberative process privilege, factual information generally must be disclosed.);

Quarles v. Department of Navy, 893 F.2d 390, 392 (D.C.Cir.1990) (finding that "the prospect of disclosure is less likely to make an adviser omit or fudge raw facts"). Any underlying exculpatory facts contained within such otherwise privileged materials, precisely as Touizer requested, must thus be produced.

And under a theory that extraordinary circumstances exist, the memos, opinions, notes and correspondence should be produced in full. *See, generally, Williamson v. Moore,* 221 F.3d 1177, 1182–83 (11th Cir. 2000) (stating that "extraordinary circumstances" justify a departure from exemptions). Touizer respectfully submits that the deliberative process privilege does not apply because "the disclosure of materials would [not] expose [the Commission's] decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Rather than having built its own case against Touizer, the Commission is basing this proceeding exclusively on the criminal conviction. The Commission also does not deny that it found no evidence of wrongdoing as stated in the proposal for a stipulation, Ex. B to Harris Decl. For these reasons, full disclosure would be justified.

In the event the Division nevertheless asserts that a portion of the requested information is exempt from disclosure, the Division should submit affidavits in support of its position, which is considered "the primary tool for resolving *Brady* disputes over privileged materials," whereas *in camera* review is only a secondary tool under Rule 230(b)(2). *Sec. & Exch. Comm'n Release Notice,* Release No. 586 (July 30, 1999). Indeed, it has been held that *in camera* review "could ... create problems on appeal, as the Commission and perhaps an appellate court might have to conduct a similar examination of the same documents to determinate if an ALJ's handling of the

issue were right or wrong. A court should [thus] not resort to *in camera* review routinely on the theory that "it can't hurt." *Id.* (citing *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978)).

CONCLUSION

For the foregoing reasons, unless the Commission is inclined to immediately deny the MSD based on the record now before it, the MSD proceedings should be stayed and the Division should be ordered to produce *Brady* material.

Dated: September 9, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David S. Harris, hereby certify that, on this 9th day of September, 2019, an original and three copies of the foregoing were sent by overnight delivery for filing with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549, and a copy of the foregoing was sent by facsimile to (202) 772-9324. Additionally, a true and correct copy of the foregoing has been served by electronic mail at APFilings@sec.gov and schiffa@sec.gov and by overnight delivery on September 9, 2019, on the following persons entitled to notice:

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