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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 OPPOSITION TO THE DIVISION'S MOTION FOR SUMMARY DISPOSITION

[Declaration of Daniel Joseph Touizer with Exhibits A-X thereto, Declaration of David S. Harris with Exhibits A and B thereto, and Motion to Compel *Brady* Disclosure and for a Stay of Summary Disposition Proceedings Filed Concurrently Herewith]

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Respondent, Daniel Joseph Touizer ("Respondent" or "Touizer"), by and through the undersigned counsel, hereby respectfully opposes the Division's Motion for Summary Disposition ("MSD").

Introduction

This is an exceptional case meriting application of controlling Commission precedent directing that summary disposition based on a criminal conviction is not appropriate where "a material fact is genuinely disputed," *In the Matter of Diane M. Keefe*, Release No. 3016, at n.1 (Apr. 16, 2010) and the "extraordinary circumstances mitigat[e] the seriousness" of the respondent's alleged conduct, *In the Matter of Eric S. Butler*, Release No. 3262 (Aug. 26, 2011). Among the extraordinary circumstances at issue are the undisguised admissions by the prosecution after it induced Touizer to plead guilty that it could neither prove criminal liability nor that any financial loss to any investor resulted from the alleged conduct. It is also undisputed that the prosecution was unable to rebut the only reliable forensic evidence in the record of the criminal action overwhelmingly proving Touizer's innocence, which is consistent with the Commission's own finding that certain of the core entities at issue were free from fraud or other controversy following its 2016-17 investigation.

Mindful of the U.S. Supreme Court's instruction as an "undeniable fact that the claim of 'actual innocence' is much more likely to be available in guilty-plea cases," *Bousley v. United States*, 523 U.S. 614, 633–34 (1998), the extraordinary circumstances either (a) preclude a finding that an industry bar is in the public interest under the *Steadman* analysis and/or (b) create genuine issues with regard to material fact which cannot be resolved without an evidentiary hearing. Additionally, the Commission should be ordered to comply with its *Brady* obligations as

requested in the motion to compel filed concurrently herewith, and the MSD proceedings should be stayed and a new briefing schedule set accordingly.

ARGUMENT

I. The Evidence Shows That An Industry Bar Would Not Be In The Public Interest

A. General Applicable Legal Standards

Though it has generally been held that a criminal conviction cannot be collaterally attacked in a follow-on administrative proceeding, *William F. Lincoln*, 53 S.E.C. 452, 455-56 & n.7 (1998), summary disposition pursuant to 17 C.F.R. § 201.250 is not to be entered mechanically. As an initial matter, summary disposition is only permitted if "there is no genuine issue with regard to any material fact." *In the Matter of Becker*, Release No. 252 (June 3, 2004). Further, as the Division acknowledges, it is the Commission's duty—based on its *independent* review of the facts—to determine whether "industry and penny stock bars ... are in the public interest." MSD, at 8; *see also, e.g.*, *Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *7-8 (Mar. 7, 2014) (Commission must "review each case on its own facts" to make findings).

In making a public interest determination, the Commission considers the so-called *Steadman* factors: 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. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979). 17 C.F.R. § 201.250(a) provides that a hearing officer must "accept[] all of the non-movant's factual allegations as true and draw[] all reasonable inferences in the non-movant's favor."

B. Touizer Is Not Estopped From Presenting Evidence To Dispute The Purported Material Facts And Seriousness of The Alleged Conduct

Any finding by the Commission that Touizer is collaterally estopped from presenting the evidence that creates a genuine dispute of material issues and mitigate the seriousness of the alleged conduct would render meaningless the Commission's clear rule that a respondent "must [or may] present specific facts showing a genuine issue of material fact," *In the Matter of Jay T. Comeaux*, Release No. 3902 (Aug. 21, 2014), and the Commission's acknowledgement that, even following a conviction, "[i]t is ... possible that a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct, ... under [which] circumstances, an order granting summary disposition would not be appropriate." *John S. Brownson*, 77 SEC Docket 3636, 3640 n.12 (Jul. 3, 2002); *see also*, *Butler, supra*, Release No. 3262 (convicted respondent may present "evidence of extraordinary circumstances mitigating the seriousness of his [alleged] conduct."); *Keefe*, *supra*, Release No. 3016, at n.1 (summary disposition based on conviction is not appropriate where a "material fact is genuinely disputed"); *Gary M. Kornman*, Release No. 2840 (Feb. 13, 2009) (suggesting that respondent may submit "materials [which relate to] the existence of a genuine issue of material fact").

In conducting the *Steadman* analysis, the Commission makes independent determinations on the record. *See, e.g., In the Matter of Don Warner Reinhard*, Release No. 3139 (Jan. 14, 2011) (independently determining the seriousness of the specific misrepresentations by respondent based on *Steadman* factors); *Kornman, supra*, Release No. 2840 ("We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal" because the question whether a bar is in the public interest "depends on the facts and circumstances of each case").

As an Administrative Judge once aptly noted in considering the need for an evidentiary hearing, "it is difficult to understand how a respondent could show 'extraordinary mitigating circumstances' if he is not allowed an opportunity through some type of hearing to introduce mitigating circumstances, if any exist, that could impact whether and to what extent sanctions or penalties are in the public interest." *In the Matter of A.S. Goldmen & Co., Inc., etc.*, Release No. 607 (Mar. 26, 2003). The Judge cited to *Blinder, Robinson & Co. v. S.E.C.*, 837 F.2d 1099 (D.C. Cir. 1988), in which the Court extensively cautioned that

> [p]recluding [respondents] in administrative disciplinary proceedings from presenting all evidence relevant to the issue of sanctions—whether or not previously presented to a District Court—would do violence to the considered allocations of adjudicatory responsibilities.... The statutory obligation placed on the SEC to exercise *its* judgment is not satisfied simply by having the SEC adopt the findings of the District Court. ... [It was] Congress' intent that the SEC exercise its own judgment in these circumstances. [T]he SEC cannot turn a deaf ear to evidence that should, in reason, bear upon the judgment that the Commission is called upon to render. ... [T]he fundamental principle of administrative law that an agency act in a non-arbitrary, non-capricious fashion is necessarily implicated by the SEC's refusal to permit evidence with respect to a salient factor. That is, in meting out sanctions, the Commission cannot adequately weigh the factors that it concedes should be considered without having before it the full set of facts necessary for reasoned consideration. ... In this setting, the Commission is not simply rendering a policy judgment; nor is it simply regulating the securities markets; it is, rather, singling out and directly affecting the livelihood of ... and terminating (possibly forever) the professional career of the [respondent]. Faced with a task of such gravity, the Commission must craft with care.

837 F.2d 1099, 1111-13 (emphasis in original).

C. <u>The Evidence Overwhelmingly Shows Touizer Has Not Harmed And Will Not Harm The Public</u>

Not many respondents can point to competent unrebutted exculpatory evidence and exonerating findings by the district court in the underlying criminal action despite his conviction based on a plea of guilty. Yet this is that rare case. Filed herewith and incorporated by reference are the declaration of Daniel Joseph Touizer, Exhibits A-X thereto, and the declaration of David Harris with Exhibits A and B thereto in rebuttal of the Division's position that an industry bar is

in the public interest.[1] The overwhelming evidence shows that Touizer is both factually and legally innocent of the government's allegations and that, therefore, an industry bar is not in the public interest. Indeed, as a matter of common sense, and contrary to the Division's hasty presumption that "Touizer can offer no evidence to rebut [the] inference" that future violations will allegedly occur, MSD, at 9, a past violation that actually never occurred in the first place is not likely to occur in the future, and conduct which fails to rise to the level of a scheme to defraud is not likely to harm the public (*see also* section II, *infra*). The evidence is summarized as follows:

1. The Fiske & Company forensic reports show as to each of the entities at issue that, among other things, there is "no evidence of any funds stolen by Daniel Touizer," and that Touizer put more money into the companies than he was paid back. Ex. A to Touizer Decl. (DE:142-6:19; DE:142-5:6,13); *see also* Touzier Decl. at ¶2. The district court found that the evidence is unrebutted that "the services [rendered to the entities at issue] ... were legitimate" and that the entities were not "all a sham." Ex. B to Touizer Decl. (DE 171:107,111). The evidence shows that Touizer did not actually misappropriate investment funds, lie about the use of the investment capital or omit material information.

2. A Subscription Agreement was signed by every investor (Composite Ex. C to the Touizer Decl. is a selection thereof; *and see id.*, Ex. D). The evidence shows that each investor acknowledged the risk factors. Contrary to the government's claims, investors could thus ultimately not have been misled about the risk factors associated with their investments.

[1] Though Respondent recognizes that these submissions are voluminous, Respondent also notes that the Division's MSD submissions are more than five times more voluminous than permitted by 17 C.F.R. § 201.250(c) without having sought leave, and due process of law requires that Touizer be given an adequate opportunity to respond. *See, e.g., In the Matter of the Application of S. Brent Farhang, Cpa for Review of Disciplinary Action Taken by the Pcaob,* Release No. 83494 (June 21, 2018) (acknowledging that "'Parties whose rights are to be affected are entitled to be heard'" in a meaningful manner) (citing *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972)). Touizer's submission, of which he respectfully requests the Commission to take official notice pursuant to 17 C.F.R. § 201.323, should thus be considered in full.

3. The Private Placement Memoranda show that investors were not misled about the accurately disclosed management fees. Exhs. E and F to Touzier Decl.

4. The voices of investors themselves—under oath—further confirm that investors were not defrauded.[2] Ex. G to Touizer Decl.

5. Long after the government induced Touizer to plead guilty to Count 1 of the Indictment, the prosecution admitted in open court that it was not "sure [it was] right" about its claims and that it had not even "tie[d] down what the fraud to Count 1 was." Ex. I (DE239:17). The government made numerous additional admissions to the effect that it was mistaken or could not prove its allegations. Ex. J (DE239:77-115) (government forensic accountant Cummings admitting that numerous government theories were false); Ex. K (DE146; DE170:14) (prosecutor admitting one day before sentencing that it could not prove losses purportedly caused by Touizer); Ex. L (MDE26:55-58) (Agent Abelard conceding that certain of her allegations in the criminal complaint were not accurate and that the investigation was still ongoing at the time).

6. Steven Hofer of Fancy Color Consulting confirmed under oath that he rendered extensive legitimate services to Investment Diamonds (an entity at issue). Ex. M (DE153-2); *compare*, Ex. N (GX5) and Ex. N1 (DE239:66-68, 100-03) (reflecting government's misguided Hofer/Fancy Color claims).

7. The $110,000 wire transfer from the Wheat entities to Touizer which the government had alleged was evidence of fraud was in truth a properly documented loan repayment. Ex. O to Touizer Decl. (MDE26:21-22, 66–68, 77–81), *and see* Ex. A to Touizer Decl. (DE142-5:10).

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[2] In an attempt to rebut the investor affidavits, the prosecution presented oblique and misleading hearsay testimony from FBI agent Brannon to the effect that "[h]ad [investors] known that [Touizer's statements to them were] false, [they] would [not] have invested." *See* Ex. H to Touizer Decl. Defense counsel was precluded by the district court from showing that the testimony was misleading and based on untruths. *Id.* In any event, the basis of Brannon's questions during these out-of-court interviews directly conflicts with the only forensic evidence ever introduced in the criminal case, Ex. A to the Touizer Decl.

8. Despite his plea, Touizer also maintained throughout the criminal proceedings that the independent and unrebutted evidence shows that the investor funds were not misappropriated and that Touizer did not fraudulently gain or make material misrepresentations or omissions that were not cured by written disclosures. Ex. P to Touzier Decl.[3]

9. Though the government was able to obtain from codefendants John Reech and Saul Suster guilty pleas to count one of the indictment as well as purported admissions that 50% to 80% of investor funds were misappropriated in seven entities, the evidence shows Reech and Suster could not possibly have been able to intelligently attest to these statements. Ex. Q (DE142:6,12); Ex. R (DE85:2,3,6.7).

10. The evidence shows that purported restitution claimant Howard Yagerman unlawfully transferred $173,000 of investor funds from the Protectim account to his attorney, Ex. S (DE240:91-140), and that the government had excluded Protectim and Wheat entities from its loss model, Ex. T (DE239:8). This shows that the district court's finding that Protectim was involved in a scheme because "Protectim was integrated into Wheat, which was integrated into other companies," Ex. U (DE240:152), is not supportable and cannot be a basis for a finding that an industry bar is in the public interest. *See also*, Ex. A to Touzier Decl. (DE142-5:12) (showing Wheat repaid Protectim loans).

11. The report of the Office Financial Regulation following its investigation into the charged entity, Covida Holdings, LLC, further confirms that no evidence of wrongdoing was found. Ex. V to Touzier Decl.

[3] Though defense counsel lodged with the district court a stipulation one day before sentencing in which the defense agreed to withdraw certain PSI objections, DE152, Touizer did not withdraw his objections to paragraphs 23, 32, 34, 37, 44, 46, 53, 54, 64 and 108 of the PSI, *id.*

12. In about 2016, the Commission conducted its own investigation into the Wheat entities, which comprise the majority of the investment funds at issue. The Commission expressly declined to recommend an enforcement action. Ex. W, Touzier Decl. The investigation was extensive, as evidenced by the Division's recently produced files and the excerpts of the criminal record. Ex. X, Touzier Decl. (DE17:17-19,32,47); Ex. A to Harris Decl. The Commission's own conclusions thus weigh against a finding that an industry bar by the Commission would be in the public interest.

In sum, because the evidence surrounding Touizer's alleged culpability, at a minimum, mitigate the seriousness of the alleged conduct, an industry bar is not in the public interest, and "an order granting summary disposition would not be appropriate." *Brownson, supra*, 77 SEC Docket 3636, 3640 n.12.

II. An Industry Bar Is Also Not In The Public Interest Because The Government's Claims, Even If True, Do Not Amount To A Scheme To Defraud

The Commission has recognized that, even despite a criminal conviction, "[s]ummary disposition may not be appropriate in every case." *Brownson, supra*, Release No. 46161 n.12. An additional ground giving rise to a finding that an industry bar is not in the public interest is that even if Touizer's plea could be deemed knowing and voluntary (a question currently pending on appeal, Eleventh Circuit Case No. 18-14951, of which the Commission is respectfully requested to take official notice), the factual allegations underlying the plea never rose to the level of a scheme to defraud under well-settled Eleventh Circuit precedent. Indeed, "a schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick" ... "even if the transaction would not have occurred but for the trick," because there was "no intent to harm." *United States v. Takhalov*, 827 F.3d 1307, 1313 (11th Cir. 2016). *United States v. Livoti*, 756 Fed.Appx. 841 (11th Cir. 2018), for example, is distinguishable because in *Livoti,* the defendant "never disclosed the[] risks to investors," *id.*, at

849, whereas each investor in Touizer's entities signed a Subscription Agreement. As the Supreme Court instructed, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). In short, this is that rare case where the Respondent can "show that his conviction involved violations that were less than egregious." *Becker, supra,* Release No. 252.

III. Alternatively, The Evidence Justifies Leniency

The Commission has "on occasion found that certain criminal convictions warrant less severe sanctions." *Brownson, supra*, Release No. 46161 n. 12 (citing *Alan E. Rosenthal*, 53 S.E.C. 767 (1998)). In the *Rosenthal* proceeding, the Commission found, based "on the particular circumstances presented [surrounding the criminal conviction,] ... that a collateral bar is [not] appropriate," and that, "under all the circumstances of th[e] case, [it was] appropriate to modify the permanent bar to grant Rosenthal the right to apply to reenter the securities industry after three years." *In the Matter of the Application of Alan E. Rosenthal*, Release No. 40387 (Sept. 1, 1998). Respondent respectfully submits that he made an even stronger showing that a collateral bar is inappropriate, *see* sections IC and II, Touizer Decl. and exhibits thereto, and that, should the Commission not be inclined to the deny the Division's MSD, a similar right for reentry should be given to Touizer as was given to Rosenthal.

IV. The Division Has Not Complied With Its *Brady* Obligations

Summary disposition is not appropriate for the additional reason that the Division has not complied with its obligations under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), 17 C.F.R. § 201.230(b)(2) and other authorities and grounds delineated in detail in the Motion to Compel and Stay filed concurrently herewith ("*Brady* motion"). As set forth in the *Brady* motion, the exculpatory information the Division does not deny exists but has refused to turn over mitigates

the seriousness of the conduct alleged by the government and is material to the question whether an industry bar is in the public interest.

V. In The Alternative Or In Addition, The Issues Necessitate An Evidentiary Hearing

Unless the Commission finds that Touizer has made a sufficient showing that sanctions are not in the public interest based on the parties' submissions, Touizer respectfully requests an evidentiary hearing. A respondent "can request a hearing to offer evidence on whether the Division's recommended sanctions are in the public interest." *A.S. Goldmen & Co., supra,* Release No. 607. Evidence of "a genuine issue [generally] necessitat[es] an in-person [evidentiary] hearing." *Kornman, supra*, Release No. 2840. Indeed, "[a]t the summary disposition stage, the hearing officer's function is ... to determine whether there is a genuine issue for resolution at a hearing." *Becker, supra,* Release No. 252; *cf., Gibson v. S.E.C.*, 561 F.3d 548, 553 (6th Cir. 2009) (finding that only "[w]hen the facts underlying [respondent's] relevant misconduct are undisputed [in follow-on proceedings], it stands to reason that there is no genuine issue of fact"). Though the Division is expected to argue in its reply that Touizer does not dispute the existence of his plea and conviction, the relevant question under *Steadman*, as extensively discussed above, is whether the Commission's *independent* review of the record supports the conclusion that an industry bar is truly in the public interest.

CONCLUSION

For the foregoing reasons and based on the evidence submitted herewith, the MSD should be denied or, alternatively, the MSD proceedings should be stayed pending the resolution of the *Brady* issues.

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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