UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18867

In the Matter of

DANIEL JOSEPH TOUIZER,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

I. Introduction

Respondent Daniel Touizer would have the Commission do what it has frequently held that it will not do, namely, revisit the facts underlying his criminal conviction. The Commission has already determined that this proceeding should go forward, regardless of Touizer's appeal, based on his conviction in the district court based on his guilty plea. Even if the Commission were to consider the matters Touizer proffered as mitigation, they do not rise to the level of "extraordinary" mitigation that would call for a remedy less than an industry bar. Therefore, the Commission should grant the Division's summary disposition motion.[1]

II. Criminal Proceedings

A more detailed review of the criminal case that resulted in Touizer's conviction help put his claims in context. As noted in our opening brief, in May 2018, Touizer pled guilty to one count

[1]In footnote 1 of his response, Touizer mistakenly claims that the Division's Motion for Summary Disposition violated Rule 250's length limitations, citing a superseded version of that rule. The current version makes clear that the motion's supporting documents do not count against the word limitations. *See* Rule 250(e), 17 C.F.R. § 201.250(e).

of conspiracy to commit mail and wire fraud. In the plea agreement, the Government agreed to dismiss the Indictment's other counts and to recommend that Touizer receive a Sentencing Guideline reduction for acceptance of responsibility and a sentence at the low end of the guideline range.[2] Touizer and the Government agreed that the offense involved more than ten victims and resulted in substantial financial hardship to one or more victims, and that Touizer had organized and led criminal activity that involved five or more participants and was otherwise extensive.[3] The parties did not stipulate as to the loss level for guideline purposes but did "agree to work in good faith to resolve this adjustment prior to the sentencing hearing."[4] Touizer also agreed that five separate pieces of real estate, one automobile, and eleven bank accounts "constitute[d] or was derived from proceeds traceable to the offense . . ."[5] Finally, Touizer acknowledged that the Court would "order restitution for the full amount of the victims' losses," although no agreement was reached as to the amount.[6]

On the eve of sentencing, the Government and Touizer agreed that for guidelines purposes, the loss was greater than $3.5 million but less than $9.5 million.[7] The parties further agreed that Touizer could argue for a below-guidelines sentence on the basis that the stipulated loss overstated the seriousness of the offense because Touizer used substantial funds for legitimate business expenses and reimbursed funds advanced to him for personal expenses.[8] The Government agreed

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[2]Exh. 1 (Plea Agreement, May 14, 2018, DE 93, *United States v. Touizer*, No. 0:17-cr-60286-BB (S.D. Fla.), ¶ 6).

[3]*Id.* ¶ 7.

[4]*Id.*

[5]*Id.* ¶ 13.

[6]*Id.* ¶ 19.

[7]Exh. 2 (Defendant's Notice of Stipulations Re Sentencing, July 23, 2018, DE 152).

[8]*Id.*

to recommend a sentence of 78 months and reserved the right to oppose a below-Guidelines sentence.[9]

At sentencing, Touizer continued to acknowledge his guilt, submitting an "Acceptance of Responsibility" letter, which he relied on in lieu of personally addressing the Court.[10] In the letter, Touizer stated:

> I take full responsibility for my actions. I realize what I did was wrong. I want to apologize to the victims who lost money investing in my companies, to the Court, to the United States, and my family for the embarrassment and anguish that it's caused them.
>
> Regarding my conduct, I, along with others, made false statements and/or omissions to investors to induce them to invest money in my various companies. That was wrong, and I will do whatever is necessary to make sure the victims are paid back.[11]

At sentencing, Touizer's counsel argued that Touizer's fraud was mitigated, and therefore a reduced sentence appropriate, because he spent the fraudulently raised money on the business: "He lied to investors to get them to invest. But he didn't take their money and put it in his pocket."[12] In the end, while the Court agreed that Touizer incurred many "legitimate business expenses" and that it was not "all a sham," the Court recognized "that the business was the vehicle in which you created the illusion of investments for many individuals that have been harmed . . . ."[13] The Court granted Touizer a "slight variance," sentencing him to 68-months imprisonment.[14]

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[9] *Id.*

[10] Sentencing Transcript, July 24, 2018, DE 171, at 95:11-15, 104:11-16. A copy of the transcript is attached as Exhibit 6 to the Division's Motion for Summary Disposition.

[11] Exh. 3 (Restitution Hearing Transcript, Oct. 10, 2018, DE 240), at 149:6-19.

[12] *E.g.*, Sentencing Transcript [Exh. 6 to Division's Motion for Summary Disposition], DE 171, at 94:25-95:1-2.

[13] *Id.* at 110:24-111:6.

[14] *Id.* at 111:24-112:3, 112:13-15.

Restitution proceedings were held several months after the sentencing, with the Court ordering Touizer to pay a total of $8,667,713.93, of which $1,810,000 was owed solely by Touizer and the remainder was joint and several with the co-defendants.[15]

Thus, before the district court, Touizer accepted the benefits of the plea agreement—the dismissal of counts and the downward adjustment for acceptance of responsibility—and never sought to withdraw his plea. Having secured those benefits, it is only now, before the Eleventh Circuit and the Commission, that Touizer is arguing his innocence.

III. Touizer is Bound in this Proceeding by His Guilty Plea

Touizer claims that he is "factually and legally innocent," Opp. at 5, and that his conduct did not amount to a scheme to defraud, *id.* at 8. He goes on to enumerate 12 reasons why this is so. *Id.* at 5-8. However, "Touizer [cannot] collaterally attack the validity of his conviction in this proceeding." *Daniel Joseph Touizer*, Exch. Act. Rel. No. 85321, at 2, 2019 WL 1225724 (Mar. 14, 2019). The Commission has already determined not to stay this proceeding during Touizer's appeal; rather, his remedy if his conviction were vacated would be to "petition the Commission for reconsideration of any remedies imposed in this proceeding." *Id.* at 3. Thus, the Commission must reject Touizer's arguments premised on the notion that he is innocent and did not engage in a scheme to defraud. *See Eric S. Butler*, Exch. Act Rel. No. 65204, at 9-10, 2011 WL 3792730 (Aug. 26, 2011) ("[W]e have long held that follow-on proceedings based on a criminal conviction are not an appropriate forum to revisit the factual basis for, or legal defenses to, the conviction.") (quotation and footnote omitted).

[15]Exh. 4 (Amended Judgment of Conviction, DE 231).

IV. A Permanent Industry Bar is Appropriate

In its Motion for Summary Disposition, the Division showed that Touizer was subject to a remedy under Exchange Act Section 15(b) if (a) the Division timely filed the action, (b) Touizer was convicted of a qualifying offense, and (c) Touizer was associated with a broker at the time of the misconduct. In his opposition, Touizer neither disputes that these are the correct elements nor claims that they are not satisfied here. Thus, summary disposition is appropriate with respect to the issue of whether Touizer is subject to sanction.

With respect to the proper remedy, summary disposition is also appropriate. To be entitled to an evidentiary hearing, Touizer must present evidence that, if believed by the fact-finder, would constitute "extraordinary mitigating circumstances" justifying a sanction less than a permanent industry bar. *Butler*, Exch. Act Rel. No. 65204, at 9, 2011 WL 3792730 (affirming law judge's grant of summary disposition imposing bar when respondent "offer[ed] no evidence of such extraordinary circumstances"); *David G. Ghysels*, Exch. Act Rel. No. 62937, at 9, 2010 WL 3637005 (Sept. 20, 2010) (same).

Touizer raises twelve points in support of his argument that he is innocent. As shown above, the Commission will not re-examine the finding of guilt or the factual basis for the conviction. However, even if the Commission were to consider Touizer's twelve arguments as mitigation rather than exculpation, they do not, individually or collectively, establish the "extraordinary" mitigation required to avoid an industry bar:

1. Paragraphs 1, 3 6, 7, 8, 9, and 11 all relate to Touizer's argument that he did not misappropriate the fraudulently obtained investor funds but instead used them to pursue his business ventures. However, obtaining money by fraud to fund a business venture is a common species of investment fraud and not at all "extraordinarily" mitigating. The very fact that Touizer

presses this argument shows the need for a permanent bar, as Touizer fails to understand the wrongfulness of, as his counsel put it, "l[ying] to investors to get them to invest" even if the funds are used to pursue the business venture.

2. In paragraph 2, Touizer cites to investor forms acknowledging that the securities bore risk. Again, the very making of this argument shows the need for a bar, as Touizer apparently thinks it permissible to defraud investors who acknowledge the business risks of an investment. *See Jose P. Zollino*, Exch. Act Rel. No. 55107, at 9 & nn 24-25, 12 & n.35, 2007 WL 98910 (Jan. 16, 2007) (declarations from investors who stated that they "were never told that the securities they purchased were risk free" did not establish extraordinary mitigating circumstances).

3. In paragraph 4, Touizer relies on declarations he obtained from investors that recite that they are unaware of false statements Touizer made to them. However, these declarations do not show that these investors have the knowledge of the true state of affairs that would allow them to opine as to whether they were defrauded. By contrast Touizer—who is in a position to know—has already admitted that he *did* defraud them. There is nothing mitigating, let alone extraordinarily mitigating, about the investor statements. *See Zollino*, Exch. Act Rel. No. 55107, at 9 & nn 24-25, 12 & n.35, 2007 WL 98910 (mitigation not established by declarations from investors "who stated that they were satisfied with their investments").

4. In paragraph 5, Touizer relies on supposed concessions by the Government during the criminal proceeding. Similarly, in paragraph 10, Touizer challenges the district court's finding at the restitution hearing that a fraud involving Protectim Insurance Services "was part and parcel of the conduct alleged in this case and was a related scheme."[16] However, Touizer's challenges to the criminal proceeding "'are appropriately reserved for the federal courts.'" *Butler*, Exch. Act

[16]Exh. 3 (Restitution Hearing Transcript, Oct. 10, 2018, DE 240), at 151:9-11.

Rel. No. 65204, at 10, 2011 WL 3792730 (quoting *Ghysels*, Exch. Act Rel. No. 62937, at 11, 2010 WL 3637005). As this proceeding stands, Touizer has been found guilty by his own admission of having led a multi-year, multi-participant fraud that defrauded numerous investors and required restitution to victims (including Protectim investors) of more than $8.6 million.

5. In paragraph 11, Touizer refers to an internal memorandum of the Florida Office of Financial Regulation, with no explanation as to how it is supposedly mitigating.

6. In paragraph 12, Touizer refers to the fact that the Commission staff investigated the Wheat entities and did not recommend an enforcement action. However, the criminal authorities conducted their own investigation, secured an indictment, and obtained Touizer's admission of fraud. Thus, the fact that the staff did not uncover fraud with respect to the Wheat entities did not mean that there was no fraud with respect to those entities, let alone the others with respect to which Touizer admitted his wrongdoing.

In sum, the matters relied upon by Touizer do not, either separately or collectively, rise to the level of extraordinary mitigating circumstances. If anything, his failure to accept responsibility shows the need for a bar without a right to reapply.[17] Accordingly, the Commission should grant the Division's motion for summary disposition.

V. The Division has Complied with Its *Brady* Obligations

The Division adopts by reference its response to Touizer's Motion to Compel Disclosure of *Brady* Material, for a Stay of the Summary Disposition Proceedings and for a New Scheduling

[17]Touizer relies on *Alan E. Rosenthal*, Exch. Act Rel. No. 40387, 1998 WL 549558 (Sept. 1, 1998), to argue that a bar with a right to reapply would be appropriate. In *Rosenthal*, the Commission relied on the "particular circumstances presented by this record," namely, Rosenthal's conviction was based on a "single incident of wrongdoing, the conduct underlying the conviction [was] twelve years old," there was no other disciplinary history, and the criminal sanctions were lenient. 1998 WL 549558, *3. Here, by contrast, the fraud—which Touizer led—extended over a number of years, the conduct continued through 2017, and Touizer was sentenced to more than five years in prison.

Order. As shown therein, nothing in Rule 230 requires the production of any further material or is an impediment to the Commission considering on the current record the Division's Motion for Summary Disposition.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the foregoing were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served on this 20th day of September 2019, on the following persons entitled to notice:

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