

UNITED STATES OF AMERICA Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

DONALD J. FOWLER,

Respondent.

ADMINISTRATIVE PROCEEDING
File No. 3-19740

MOTION AND BRIEF FOR STAY
AND GENERAL DENIAL

Pursuant to SEC Rule of Practice 401, 17 C.F.R. § 201.401, Respondent Donald J. Fowler respectfully moves for an order staying this proceeding pending the outcome of his appeal in the United States Court of Appeals for the Second Circuit (20-1081).

A stay will cause no prejudice or harm either to the Commission, or to the public interest. It is our understanding from counsel to the Enforcement Division that the sole relief sought in this action is a lifetime bar from the securities industry. The undersigned has advised the Enforcement Division that Respondent does not currently work in the securities industry, nor does he intend to do so in the future absent a successful appeal of the jury verdict against him. The undersigned has further advised the Enforcement Division that Respondent is willing to reflect that intention in a binding stipulation or order.

Respondent's opening appeal brief is due on August 6, 2020. We expect a decision in early 2021. We respectfully submit, as discussed below, that there is a significant chance the Second Circuit will reverse the judgment below. As a matter of judicial economy, it would be a waste of the Commission's limited resources to oversee a "follow-on" administrative proceeding based solely on a judgment which will shortly be subject to appellate review.

Specifically, and without limitation, the judgment should be reversed because:

- a. the District Court improperly allowed the SEC to avoid its obligation to prove a key element of a claim for quantitative unsuitability--control of the account by the broker;
- b. the District Court improperly ruled that Respondent was not entitled to obtain or use at trial evidence relating to customer investment experience, sophistication, history and objectives given that: (i) such evidence is relevant to establishing Respondent's de facto control of the customer accounts for purposes of the SEC's claim that Respondent churned or excessively traded the accounts in violation of the quantitative suitability obligation; (ii) such evidence is relevant to establishing the SEC's claim that the Respondent violated the customer-specific suitability obligation; and (iii) such evidence may be relevant for purposes of impeachment;
- c. the District Court improperly lowered the evidentiary bar by permitting the SEC to establish unauthorized trading without eliciting direct testimony from Respondent's customers on the issue;
- d. the District Court improperly permitted the SEC to establish scienter by offering evidence of other lawsuits or arbitrations against Respondent involving "churning" claims, which the SEC ultimately withdrew; and
- f. the penalty imposed by the District Court was excessive.

To the extent this stay is not granted, pursuant to SEC Rule of Practice 220, 17 C.F.R. § 201.220, Respondent hereby enters a general denial of each and every allegation in the Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing (the "Order"), and respectfully refers to the documents referenced in the Order for the true and correct contents thereof.

Respondent reserves the right to amend this General Denial pursuant to Rule 220(e).

Respondent thanks the Commission for its consideration in this respect.

Dated: New York, New York
June 8, 2020

EMMET, MARVIN & MARTIN, LLP

A handwritten signature in blue ink, appearing to be "H. M." followed by a long horizontal line.

By: _____

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Donald J. Fowler

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that per 17 C.F.R. § 201.150, the notice of the foregoing Motion and Brief for Stay and General Denial (“Motion”) has been mailed to David Stoelting at 200 Vesey Street, Suite 400, New York, NY 10281 and emailed to David Stoelting at StoeltingD@sec.gov on this 8th day of June, 2020. Additionally, an electronic copy was submitted to apfilings@sec.gov.

/s/ Beth Khinchuk

Beth Khinchuk