UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19951

In the Matter of

Sean R. Stewart,

Respondent.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

DIVISION OF ENFORCEMENT
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The Division of Enforcement (the "Division") submits this memorandum of law in opposition to Respondent's Motion for Summary Disposition filed on November 13, 2020 ("Respondent's Motion" or "Resp. Mot.").

PRELIMINARY STATEMENT

Sean Stewart ("Respondent") refuses to come to terms with his own wrongdoing. A felony conviction and civil injunction notwithstanding, he persists in minimizing his offenses, suggesting his insider trading scheme harmed no one and that he is somehow less culpable as the tipper who enabled others to make over $1 million in illicit profits. Respondent has yet to provide any assurances against future violations or even to acknowledge his past misconduct in this proceeding. Instead he asks the Commission to overlook his behavior and to allow him to work in the industry as an investment adviser—a trusted fiduciary.

In avoiding the fact of his own transgressions, Respondent fails to address the issues that make him unfit for the industry. As described in the Division's Motion for Summary Disposition (the "Division's Motion" or "Div. Mot."), the *Steadman* factors demonstrate that an industry-wide bar would serve the public interest. In this case, an investment adviser bar is a crucial component of the remedy: Respondent cannot be trusted to abide by the fiduciary duties that govern investment advisers. Respondent has repeatedly betrayed client confidences and misappropriated client information for his own purposes, putting his self-interest before the interests of his clients. And Respondent's lies to compliance professionals and his deception of FINRA reflect a disrespect for the regulatory system that cannot be tolerated in our fiduciaries.

Respondent glosses over his own misconduct and instead bases his entire motion on a single assertion—that he did not work for an investment adviser. This argument is both factually wrong and legally deficient. As shown below, Respondent was undeniably associated with an investment adviser—J.P. Morgan Securities LLC—for a substantial portion of the relevant time period.

Moreover, Respondent does not dispute his association with two different broker-dealers, which in and of itself supplies the predicate for the Commission to impose an industry-wide bar.

Respondent has incurred a felony conviction and civil injunction for securities fraud arising from conduct that occurred while he was associated with registered entities. The facts and circumstances of Respondent's misconduct—including his four-year serial insider trading scheme, his lies to compliance professionals and deception of FINRA, and his failure to acknowledge his own wrongdoing—warrant excluding him from all sectors of the securities industry. The Division respectfully requests that the Commission deny Respondent's Motion and instead grant the Division's Motion to bar Respondent from the securities industry.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 13, 2020, the Division moved for summary disposition requesting that the Commission bar Respondent, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 [15 U.S.C. § 78 *et seq.*] ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 [15 U.S.C. § 80b-1 *et seq.*] ("Advisers Act"), from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO"), or from participating in an offering of penny stock. The Division incorporates the Statement of Facts and Procedural History set forth in the Division's Motion.

Also on November 13, 2020, Respondent cross-moved for summary disposition, arguing solely that he should not be barred from association with an investment adviser. Respondent does not contest the bar from association with other securities market participants or the penny stock bar.

In seeking to associate with an investment adviser, Respondent posits that such association would not pose any danger to the investment adviser or the investing public. Resp. Mot. 15. But Respondent does not address his history of betraying client confidences and misappropriating client

information for his own personal purposes. Nor does he address the recurrent and extended nature of his misconduct, the size of his scheme, his numerous lies to compliance personnel, or the resulting deception of FINRA.

Respondent disputes his previous association with an investment adviser and argues that, if he was not previously associated with an investment adviser, a bar from such association would be an abuse of discretion. Resp. Mot. 6-7, 10-15. Respondent does not acknowledge the fact that one of the employers Respondent exploited for his scheme was J.P. Morgan Securities LLC, a registered investment adviser. Nor does Respondent address the explicit statutory authorization for collateral bars, which has been in effect for over a decade.

Respondent expresses no contrition for his past conduct. He explains that he agreed to settle the Commission's district court action only "[i]n light of the probable collateral estoppel effect of his prior criminal conviction." Resp. Mot. 3.

Respondent offers no assurances that he will refrain from similar violations in the future.

ARGUMENT

I. The Facts and Circumstance of this Case Support an Industry-Wide Bar

Respondent's conduct meets the standard for an industry-wide bar. As described more fully in the Division's Motion, Div. Mot. 2-9, Respondent operated an egregious insider trading scheme that spanned nearly four years. He exploited positions at two different investment banks, using his access to sensitive and confidential information to arm his father with an unfair trading advantage on six different occasions. Respondent's father, Robert Stewart, used that trading advantage with Richard Cunniffe ("Cunniffe") to generate over $1 million in illicit profits. Respondent acted with a high degree of scienter, as evidenced by lies in his annual compliance certifications to J.P. Morgan Securities LLC and Perella Weinberg Partners ("Perella Weinberg") and lies to a J.P. Morgan compliance executive and counsel to deceive the FINRA regulators who identified questionable

trading. In this proceeding, Respondent offers no assurance against future violations or recognition of the wrongful nature of his conduct. Respondent neglects to address these considerations, each of which weighs in favor of a severe sanction. *See* Div. Mot. 11-15 (applying the factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)).

Although he threatens appellate reversal, Resp. Mot. 13, the case law Respondent cites stands for the uncontroverted proposition that "each case must be considered on its own facts." *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005). The Second Circuit has explained, "so long as an agency has articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made, we will uphold its choice of sanctions." *Reddy v. CFTC*, 191 F.3d 109, 124 (2d Cir. 1999) (quotation marks and citations omitted). *See also PAZ Securities, Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) (upholding sanctions where the Commission "gave adequate reasons for holding the sanctions are warranted to protect investors. We require no more.").[1] The particular facts and circumstances of this case that demonstrate that Respondent should be barred from the securities industry.

II. An Investment Adviser Bar is an Important Component of the Remedy in this Case

Respondent is particularly unfit for association with an investment adviser. "Investment advisers and their associated persons have a fiduciary duty to their clients." *Sherwin Brown*, Advisers Act Release No. 3217, 2011 WL 2433279, at *6 (June 17, 2011)). "An investment adviser is a

[1] Respondent also cites the Commission release, *Shawn K. Dicken*, Exchange Act Release No. 89526, 2020 WL 4678066 (Aug. 12, 2020), which illustrates this same principle. In *Dicken*, the respondent, who had been criminally convicted of multiple violations of Michigan state law, defaulted in the Commission's follow-on proceeding, and the Division moved for a bar. The Commission directed the Division to provide further briefing regarding the factual predicate for respondent's state law convictions and—significantly—the reasons for the dismissal of the count charging fraudulent sale of securities. The Commission explained that it "must consider the question with reference to the underlying facts and circumstances of the case." *Id.* 2020 WL 4678066, at *1 (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979)).

fiduciary in whom clients must be able to put their trust. . . . [I]t is an occupation which can cause havoc unless engaged in by those with appropriate background and standards." *Ahmed Mohamed Soliman*, Exchange Act Release No. 35609, 1995 WL 237220, at *3 (April 17, 1995) (quotation marks and citation omitted). As fiduciaries, investment advisers and their associated persons are required "to act for the benefit of their clients, . . . to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients." *SEC v. DiBella*, No. 04-CV-1342 (EBB), 2007 WL 2904211, at *12 (D. Conn. Oct. 3, 2007) (quotation marks and citations omitted). Respondent cannot be trusted to uphold these standards.

Respondent's misuse of client information demonstrates that he would be ill-suited to serve as a fiduciary. The disclosure of confidential client information "violate[s] one of the most fundamental ethical standards in the securities industry." *Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 WL 56755, at *4 (Jan. 9, 2009). Not only did Respondent disclose confidential client information on multiple occasions, he misappropriated it for his own purposes—an anathema to fiduciary principles.

Respondent should also be barred from association with an investment adviser in light of his deceptive practices. Investment advisers and their associated persons have an "affirmative duty" of "full and fair disclosure of all material facts." *Fundamental Portfolio Advisors, Inc.*, Advisers Act Release No. 2146, 2003 WL 21658248, at *15 (July 15, 2003). In an analogous case, the Commission considered the conduct of Marshall Schield, who participated in deceptive behavior in connection with an examination by the Commission's Office of Compliance Inspections and Examinations. *Schield Mgmt. Co. and Marshall L. Schield*, Exchange Act Rel. No. 53201, 2006 WL 231642, at *6 (Jan. 31, 2006). The Commission barred Schield from association with any investment adviser, reasoning "[t]he industry cannot tolerate an investment adviser that, holding a fiduciary position, would undermine the regulatory system by deliberately thwarting a Commission examination." *Id.* at *10.

See also Soliman, 1995 WL 237220 (imposing an investment adviser bar on an individual who was convicted of presenting false information to the IRS). Likewise, Respondent's lies to compliance personnel and counsel and his deception of FINRA reflect a disrespect for the regulatory system that should disqualify him from association with an investment adviser.

III. No Mitigating Factors Justify Allowing Respondent to Remain in the Industry

Respondent points to no mitigating factors that would overcome the compelling case for an industry bar. Rather, Respondent mischaracterizes his record and emphasizes considerations that the Commission and courts have previously rejected as insufficient or incorrect. Respondent attempts to minimize his own role in the scheme, arguing that he was a tipper who did not personally profit from the trading at issue. Resp. Mot. 15. In addition, he mistakenly claims that his conduct did not defraud or otherwise harm his clients or any other members of the investing public and suggests that he was an "exemplary employee" prior to the government's investigation of the events at issue here. Resp. Mot. 8, 15. These considerations do not amount to the "extraordinary mitigating circumstances" that would be needed to justify allowing Respondent to remain in the industry. *Shreyans Desai*, Exchange Act Release No. 80129, 2017 WL 782152, at *4 (Mar. 1, 2017) (quotation marks and citation omitted).

As the Commission explained in another case involving unlawful tipping, a respondent's "argument that his conduct was not so bad because he was 'only a tipper' fails to acknowledge how destructive that conduct was." *Thomas D. Melvin, CPA*, Exchange Act Release No. 75844, 2015 WL 5172974, at *4 (Sept. 4, 2015) (permanently disqualifying accountant from appearing or practicing before the Commission pursuant to Rule 102(e)). *See also United States v. Gupta*, 904 F.Supp.2d 349, 351 (S.D.N.Y. 2012) (describing tipping as an "egregious breach of trust"), *aff'd*, 747 F.3d 111 (2d Cir. 2014). Had Respondent not misappropriated confidential client information and passed it along to his father, "the ensuing improper trading . . . would not have happened, making [Respondent's]

conduct in some respects more directly culpable than that of the tippees who personally traded." *Melvin*, 2015 WL 5172974, at *4 (quotation marks omitted).

The fact that Respondent did not personally profit from his insider trading scheme does not diminish his culpability when his father and Cunniffe made over $1 million from the scheme. Robert Stewart's and Cunniffe's gains are attributable to Respondent, even if Respondent did not personally trade. *Melvin*, 2015 WL 5172974, at *4. Respondent's tipping in the expectation that his father would trade or cause another to trade is tantamount to Respondent trading himself and then giving the trading profits to those individuals. *Id.*

Respondent ignores precedent with the suggestion that his conduct "did not defraud or otherwise harm his clients or any other member of the investing public." Resp. Mot. 15. Respondent defrauded the clients whose information he misused, "feigning fidelity to the source of the misappropriated information and thus engaging in fraud akin to embezzlement." *Melvin*, 2015 WL 5172974, at *3 (citing *United States v. O'Hagan*, 521 U.S. 642, 654-55 (1997)). As the Second Circuit has recognized, insider trading risks harm to the companies involved in mergers and acquisitions because it can artificially inflate the price the acquirer must pay for the target, resulting in overpayment by the acquiring company and its shareholders. *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 967 F.2d 742, 747-51 (2d Cir. 1992). *See also Melvin*, 2015 WL 5172974, at *3 (noting that tipping undermines the integrity of the negotiating process for a tender offer, thus creating the risk of substantial losses to both the target company and the potential acquirer). Respondent's insider trading scheme also harmed innocent investors, who in effect experienced losses from trading without the benefit of Respondent's inside information. *See SEC v. Gupta*, No. 11-CV-7566 (JSR), 2013 WL 3784138, at *2 (S.D.N.Y. July 17, 2013) (barring tipper who did not himself trade from association with a broker-dealer or an investment adviser), *aff'd*, 569 Fed. Appx. 45 (2d Cir.

2014). Insider trading works "a huge unfairness on innocent investors." *United States v. Gupta*, 904 F. Supp. 2d at 352 (S.D.N.Y. 2012).

Respondent cannot characterize himself as an "exemplary employee," Resp. Mot. 8, in light of the extended insider trading scheme that he operated while working at J.P. Morgan Securities LLC and Perella Weinberg. Respondent flouted the rules of both of those employers, ignoring their confidentiality requirements, jeopardizing their relationships with clients, and lying about it all. Respondent's misconduct was not an isolated departure from an otherwise spotless career: Respondent used his positions to misappropriate MNPI on six occasions and routinely lied about his activities in annual compliance certifications. Respondent's conduct may have gone undetected, but he was far from exemplary. In any event, "the absence of disciplinary history is not mitigative as securities professionals should not be rewarded for complying with securities laws." *Mitchell M. Maynard and Dorice A. Maynard*, Advisers Act Release No. 2875, 2009 WL 1362796, at *12 (May 15, 2009) (imposing an investment adviser bar on respondents who had no disciplinary history prior to the conduct at issue).

IV. Because Respondent was Associated with an Investment Adviser and a Broker-Dealer, the Commission has the Authority to Institute a Bar under Both the Advisers Act and the Exchange Act

Not only does Respondent attempt to gloss over his own misconduct, he also attempts to elide the simple fact that he was employed by—and therefore associated with—an investment adviser. There can be no genuine dispute that during the relevant period, Respondent was employed by J.P. Morgan Securities LLC, a registered investment adviser. *See* J.P. Morgan IARD [Ex. 1]. Thus, the central argument of Respondent's motion rests on a demonstrably false fact.

Respondent attempts to deny his association with J.P. Morgan Securities LLC, claiming that he worked for a different J.P. Morgan entity—J.P. Morgan Securities Inc.—during the relevant period. Resp. Mot. 4, 6-7, 10; Stewart Dec. ¶ 2. But, by the time of the conduct at issue, J.P.

Morgan Securities Inc. *had become* J.P. Morgan Securities LLC.[2] J.P. Morgan Securities LLC is the successor to J.P. Morgan Securities Inc. This fact is reflected in numerous sources, which are subject to official notice, including: FINRA's Investment Adviser Registration Depository ("IARD") "Snapshot" for J.P. Morgan Securities LLC, J.P, Morgan IARD [Ex. 1] at 16; JPMorgan Chase & Co.'s September 30, 2010 Form 10-Q, which is accessible through EDGAR, JPMC 10-Q [Ex. 2] at 5; and the Form ADV filed by J.P. Morgan Securities LLC on September 3, 2010, which is accessible through the IARD, J.P. Morgan Form ADV [Ex. 3]. The conversion of J.P. Morgan Securities Inc. to J.P. Morgan Securities LLC became effective September 1, 2010—before any of the unlawful conduct at issue in this case.[3] *See* J.P. Morgan IARD [Ex. 1] at 16.

Thus, FINRA's Central Registration Depository ("CRD") reflects that Respondent was employed by J.P. Morgan Securities LLC. Stewart CRD [Ex. 4] at 7. And Kendle reported to FINRA that it engaged J.P. Morgan Securities LLC as the investment banker for its transaction, and that representatives of J.P. Morgan Securities LLC, including Respondent, attended a meeting of Kendle's Board of Directors relating to the transaction. Kendle FINRA Response [Ex. 5] at SEC-ATL-0000073 ("The company executed an engagement letter with J.P. Morgan Securities LLC. . . ") and SEC-ATL-0000087 (board meeting minutes reflecting the attendance of certain employees of J.P. Morgan Securities LLC, including Sean R. Stewart). Respondent used J.P. Morgan Securities LLC as his business address, Stewart Letter [Ex. 6], and Respondent appears to have received business cards reflecting his association with J.P. Morgan Securities LLC shortly after the conversion

[2] Respondent also discusses the regulatory status of JPMorgan Chase & Co., the parent company of J.P. Morgan Securities LLC. Resp. Mot. 10-12. *See also* JPMC 10-Q [Ex. 2] at 5. There is no suggestion that Respondent was employed by JPMorgan Chase & Co at any time. Thus, the rules governing banking institutions are not relevant here.

[3] The earliest unlawful tip at issue here related to Dionex Corp. and occurred in or after October 2010. *See* Div. Mot. 3.

from J.P. Morgan Securities Inc. to J.P. Morgan Securities LLC. Email to Stewart [Ex. 7].[4] In sum, from at least September 1, 2010 until he left J.P. Morgan to work at Perella Weinberg, Respondent was an employee of J.P. Morgan Securities LLC, a registered investment adviser.[5]

The claim that Respondent did not provide advisory services while working at J.P. Morgan Securities LLC is not relevant. The Advisers Act defines associated person as follows:

> The term "person associated with an investment adviser" means any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, ***including any employee of such investment adviser***, except that for the purposes of section 203 of this title (other than subsection (f) thereof), persons associated with an investment adviser whose functions are clerical or ministerial shall not be included in the meaning of such term.

Advisers Act § 202(a)(17) (emphasis added). This definition does not depend on the employee's function within an investment adviser; indeed, even employees who provide only clerical or ministerial services constitute associated persons for the purposes of Section 203(f), the provision at issue here. The suggestion that an investment banker would not qualify as an associated person while a clerical worker does defies logic and equity.

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[4] Respondent's exhibits do not create a genuine issue of fact on this point. Respondent relies on a July 2010 deal document, a December 2010 internal J.P. Morgan working group list, and statements in his own declaration. Resp. Exs. 1, 4, 5. The presentation, Resp. Ex. 5, predates the conversion from J.P. Morgan Securities Inc. to J.P. Morgan Securities LLC and all of the conduct at issue here. The working group list, Resp. Ex. 4, is an internal document, which does not purport to reflect the formal structure of J.P. Morgan Securities Inc. or J.P. Morgan Securities LLC. And Respondent's own declaration, Resp. Ex. 1, does not create a genuine issue of fact in the face of multiple formal filings with the Commission and FINRA reflecting the conversion of J.P. Morgan Securities Inc. to J.P. Morgan Securities LLC on September 1, 2010.

[5] The Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 and Notice of Hearing (the "OIP") alleged that Respondent was associated with J.P. Morgan Securities LLC from July 2006 until October 2011. The Division acknowledges that Respondent was actually associated with the predecessor entity, J.P. Morgan Securities Inc., for a portion of this time. By September 1, 2010, however, Respondent was associated with J.P. Morgan Securities LLC, and he remained associated with J.P. Morgan Securities LLC when he unlawfully tipped his father MNPI concerning Dionex, Kendle, and Kinetic. *See* Div. Mot. at 3.

As an employee of J.P. Morgan Securities LLC, Respondent was a person associated with an investment adviser when he committed acts that give rise to his felony conviction and civil injunction; the threshold requirements for a bar under Advisers Act Section 203(f) have been satisfied. Respondent does not dispute that the threshold requirements for a bar under Exchange Act Section 15(b)(6) have also been satisfied. Thus, the Commission has statutory authority to proceed under both provisions.

V. The Commission is Authorized to Impose a Collateral Bar

Even putting aside his clear association with an investment adviser, Respondent's association with two broker-dealers—which he concedes—is sufficient to establish authority for the Commission to impose an industry-wide bar under Exchange Act Section 15(b)(6).

Respondent suggests that any collateral bar would be an abuse of discretion—a position that ignores the plain language of the statutes and the case law applying them. Respondent claims that he was neither associated with nor performed any of the functions of an investment adviser in the past, and therefore an investment adviser bar would be "an extremely excessive remedy—and an abuse of the Commission's discretion." Resp. Mot. 12. In essence, Respondent argues that he cannot be barred from association with an investment advisor because there is insufficient nexus between his conduct and the investment advisory business. As described above, this argument rests on a factual mistake. Respondent's argument also fails as a matter of law because Congress eliminated the nexus requirement in 2010 with the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank").

Dodd-Frank empowered the Commission to "impose collateral bars on individuals in order to prevent wrongdoers in one sector of the securities industry from entering another sector." 156 Cong. Rec. H5233-01, 2010 WL 2605437, at *H5237 (June 30, 2010) (statement of Rep. Kanjorski). Before Dodd-Frank, the Commission "could not bar an individual from a class that he had no

association—no 'nexus'—with." *Bartko v. SEC*, 845 F.3d 1217, 1220 (D.C. Cir. 2017) (citing *Teicher v. SEC*, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999)). Following Dodd-Frank, "the Commission is now able to bar a securities market participant from the six listed classes—broker-dealers, investment advisers, municipal securities dealers, transfers agents, municipal advisors and NRSROs—based on misconduct in only one class." *Bartko*, 845 F.3d at 1220-21.

Thus, even if Stewart had not been associated with an investment adviser, his fraudulent misconduct while associated with broker-dealers and qualifying felony conviction and injunction would be sufficient bases for a collateral bar under Exchange Act Section 15(b)(6). Where, as here, an industry-wide bar serves the public interest, the Courts of Appeals have affirmed that a collateral bar is not an abuse of the Commission's discretion. *Perres v. SEC*, 695 Fed. Appx. 980 (7th Cir. 2017) (finding the Commission did not abuse its discretion in entering an industry-wide bar against an unregistered broker-dealer pursuant to Exchange Act Section 15(b)(6)); *Siris v. SEC*, 773 F.3d 89, 97 (D.C. Cir. 2014) (finding Commission did not abuse its discretion in imposing a collateral bar); *Malouf v. SEC*, 933 F.3d 1248, 1269 (10th Cir. 2019) (same), *cert. denied*, 140 S.Ct. 1551 (2020).

As described above, Respondent was also associated with an investment adviser for three of the instances of insider trading at issue. Therefore, the Commission has authority to impose an industry-wide bar under Advisers Act Section 203(f) in addition to Exchange Act Section 15(b)(6).

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Commission deny Respondent's Motion, grant the Division's Motion, and enter summary disposition barring Respondent from associating with any investment adviser in addition to any broker, dealer, municipal securities dealer, municipal advisor transfer agent, or NRSRO, or from participating in an offering of penny stock.

Dated: December 4, 2020
Philadelphia, Pennsylvania

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 4, 2020, I caused a true and correct copy of the Division of Enforcement's Opposition to Respondent's Motion for Summary Disposition to be filed and served by email to the following:

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