UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19951

In the Matter of	:
SEAN R. STEWART,	:
Respondent.	:

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

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Pursuant to Rule 250(f) of the Commission's Rules of Practice, Respondent Sean R. Stewart submits this memorandum in opposition to the Motion for Summary Disposition filed by the Commission's Division of Enforcement ("Division") seeking to bar him from associating with an investment adviser, among other securities industry registrants and intermediaries. The Division's Motion should be denied because it fails to establish that an investment adviser bar is warranted by the evidence submitted in support of the Division's Motion, or by the provisions of the securities laws on which the Division relies.

For example, the evidence the Division offers to prove that Mr. Stewart was associated with an investment adviser—a prerequisite for a bar under Section 203(f) of the Investment Advisers Act—is both internally inconsistent and contradicts one of the principal allegations in the Commission's Order Instituting Administrative Proceedings ("OIP") concerning Mr. Stewart's past industry associations. Similarly, the Division does not dispute that the definition of "investment adviser" found in the Advisers Act precludes Mr. Stewart, as a matter of law, from ever having been "associated with" an investment adviser for the purposes of Section 203(f).

Perhaps most important, the Division offers no evidence, as it must, to show that barring Mr. Stewart from being associated with an investment adviser would serve any remedial purpose or protect any member of the investing public from harm in the future. The Commission admonished the Division just this summer that it must do more than "recite, in general terms, the reasons why [a respondent's] conduct is illegal" before the Commission will impose an associational bar. *See Shawn K. Dicken*, Exchange Act Release No. 89526, 2020 WL 4678066, at *1-2 (Aug. 12, 2020) (internal citations, quotation marks, and alterations omitted). Here, however, the Division offers nothing more than a summary of Mr. Stewart's underlying securities law violations as the justification for the relief it seeks. Because that offering does not satisfy the

Division's legal burden, Mr. Stewart respectfully requests that the Commission deny the Division's request for a bar prohibiting him from associating with an investment adviser in the future.

ARGUMENT

I. The Division Failed to Establish That Mr. Stewart Was Associated With an Investment Adviser.

To prevail on a Motion for Summary Disposition under Rule of Practice 250(b), the Division must, at a minimum, demonstrate that the material facts it relies on are undisputed. *Healthway Shopping Network*, Exchange Act Release No. 34-89374, 2020 WL 4207666, at *2 (July 22, 2020) (citing Commission Rule of Practice 250(b)). In at least one critical respect, however, the evidence the Division offers to prove that Mr. Stewart was associated with an investment adviser fails to meet this threshold requirement. And because the Division cannot make that showing, it also cannot invoke Section 203(f) as the basis for seeking to bar Mr. Stewart from associating with an investment adviser in the future.

As explained in Mr. Stewart's Motion, the Commission's authority to impose bars under Section 203(f) of the Investment Advisers Act of 1940 is limited to persons who are or were in some way associated with an investment adviser. (Stewart Mot. Summ. Disposition at 10.) To prove this, the Division relies on information contained in FINRA's Central Registration Depository ("CRD") that purports to show that Mr. Stewart was employed by a registered investment adviser—JPMorgan Securities LLC—"[f]rom October 2008 through October 2011."[1] (Division Mot. Summ. Disposition at 2.) But the CRD information attached to the Division's Motion is internally inconsistent in its recitation of Mr. Stewart's work history, including his

[1] The Division does not argue, nor does the OIP allege, that Perella Weinberg Partners L.P. was registered or acting as an investment adviser, and it was not. (*See* Stewart Mot. Summ. Disposition at n.3.)

purported employment at JPMorgan Securities LLC. Specifically, the CRD purports to show that Mr. Stewart was employed by three different entities at the same time: JPMorgan Securities LLC, Bear Stearns & Co., Inc., and JPMorgan Chase & Co. (Division Mot. Summ. Disposition Exhibit 3, at 6-7.) It seems unlikely that Mr. Stewart had three different employers simultaneously, and yet nothing in the CRD record attached to the Division's Motion disproves that conclusion, or clarifies which (if any) of the three was Mr. Stewart's actual employer.

Moreover, the CRD record is refuted by JPMorgan's own internal records—which were produced to the Division and are among the documents in its investigative file—and also by Mr. Stewart's own recollection of where he worked. According to JPMorgan's records, Mr. Stewart was employed by JPMorgan Securities, *Inc.*, a wholly separate subsidiary of JPMorgan, at least as late as December 2010—two years later than what the CRD record purports to show. (Stewart Mot. Summ. Disposition at 6 and Exhibits 4 and 5 thereto (identifying Mr. Stewart as a Vice President of "J.P. Morgan Securities, Inc." in two different JPMorgan documents dated 2010).) This is what Mr. Stewart recalls, too. (Stewart Mot. Summ. Disposition Exhibit 1, ¶ 2.) In fact, the CRD information the Division cites is not even consistent with the Commission's own allegations concerning Mr. Stewart's work history, as set forth in the OIP. (*Compare* OIP at 1 (alleging that Mr. Stewart began working at JPMorgan Securities LLC in "2006"), *with* Division Mot. Summ. Disposition Exhibit 3, at 7 (purporting to show that Mr. Stewart began working at JPMorgan Securities LLC two years later, in "2008").)

Because the evidence the Division cites in support of its allegations about Mr. Stewart's association with an investment adviser is self-contradictory and contrary to the Commission's own allegations, that evidence cannot, of course, be "undisputed" for the purposes of a Rule 250(b) motion. Instead, the only internally consistent evidence in the record is that reflected in

JPMorgan's internal documents and Mr. Stewart's Declaration, which together establish that Mr. Stewart was employed by JPMorgan Securities, *Inc.*, which was not an investment adviser. (Stewart Mot. Summ. Disposition at 7.) That is, the only undisputed record evidence establishes that Mr. Stewart was not associated with a registered investment adviser during his time at JPMorgan.

II. Mr. Stewart Could Not, As a Matter of Law, Have Been Associated With an Investment Adviser.

More to the point, the Division does not dispute that Mr. Stewart *could* not, as a matter of law, have been associated with an investment adviser during his time at JPMorgan due to limitations imposed by the Investment Advisers Act itself. As discussed in Mr. Stewart's Motion, the definition of "investment adviser" in the Advisers Act necessarily excludes the JPMorgan investment banking group Mr. Stewart worked in while he was employed at the firm. So even if the Division could prove that Mr. Stewart was nominally employed by a subsidiary of JPMorgan that was registered as an investment adviser, which it has not, it still cannot establish that he was associated with an investment adviser for the purposes of Section 203(f) of the Advisers Act.

Section 202(a) of the Advisers Act excludes from the definition of "investment adviser" any "banking institution . . . doing business under the laws of any State," 15 U.S.C. § 80b–2(a)(2)(C), if its investment advisory services are "performed through a separately identifiable department or division," in which case "the department or division, and not the bank itself, shall be deemed to be the investment adviser." 15 U.S.C. § 80b–2(a)(11).[2] During Mr. Stewart's time

[2] The definition of "banking institution" in Section 202(a) also requires that a "substantial portion of the [institution's] business . . . consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks," and that the institution "is supervised and examined by State or Federal authority having supervision over banks." 15 U.S.C. § 80b–2(a)(2)(C). JPMorgan Chase & Co. meets these requirement as well. (Stewart Mot. Summ. Disposition at n.5.)

at the firm, JPMorgan Chase & Co. was a "banking institution" doing business under the laws of the state of Delaware. (Stewart Mot. Summ. Disposition at 11-12.) The Division does not dispute that Mr. Stewart's investment banking group at JPMorgan—the "department or division" where he worked—did not perform any investment advisory services. (Stewart Mot. Summ. Disposition Exhibit 1, ¶ 4.) In fact, the exhibits to the Division's Motion confirm that Mr. Stewart was employed as an "investment banking analyst" at JPMorgan during his entire tenure at the bank (2003 to 2011), not an investment adviser. (Division Mot. Summ. Disposition Exhibit 3, at 6.) Nothing in the record or the Division's investigative file or Motion suggests otherwise. (*See* Stewart Mot. Summ. Disposition Exhibit 1, ¶¶ 4, 5, 7, 8 (establishing that Mr. Stewart did not provide any investment advisory services at either JPMorgan Securities, Inc. or Perella Weinberg Partners L.P.).) In short, because it is undisputed that Mr. Stewart's group at JPMorgan did not provide investment advisory services, he could not have been associated with an investment adviser as that term is defined in the Advisers Act, regardless of which JPMorgan entity he was formally employed by. Section 203(f) is therefore inapplicable to him.

III. The Division Failed to Establish That an Investment Adviser Bar Serves Any Remedial Purpose Or Is Necessary to Protect the Investing Public.

Nothing in the Division's Motion suggests, much less proves, that a bar preventing Mr. Stewart from associating with an investment adviser is necessary to protect the investing public or would serve any remedial purpose. As the basis for the relief it seeks the Division instead relies entirely on the fact of Mr. Stewart's past securities law violations, which the Commission recently deemed insufficient to support the Division's request for securities industry bars. *Shawn K. Dicken*, Exchange Act Release No. 89526, 2020 WL 4678066, at *1-2 (Aug. 12, 2020). Where, as here, the Division seeks a sanction that does not serve its intended remedial purpose or is otherwise excessive, the Commission abuses its discretion in granting the relief the Division requests.

Earlier this year the Commission reiterated that the Division must do more than " 'recite[], in general terms, the reasons why [a respondent's] conduct is illegal' " before the Commission will impose remedial sanctions in follow-on administrative proceedings. *Dicken*, 2020 WL 4678066, at *1-2 (declining to grant the Enforcement Division's motion seeking securities industry and penny stock bars because the Division failed to demonstrate that the facts of the respondent's underlying criminal violation "establish that industry and penny stock bars are warranted") (quoting *McCarthy v. Sec. and Exch. Comm'n*, 406 F.3d 179, 189 (2d Cir. 2005)). Instead, the Division must demonstrate that the sanction it seeks is both proportional to the violation from which it arises, and that it serves a definite remedial purpose—in other words, that it would prevent a respondent from doing again in the future the wrong he has done in the past. *See, e.g.*, *McCarthy*, 406 F.3d at 188 (the reviewing court's "foremost consideration must . . . be whether [the respondent's] sanction protects the trading public from further harm"). To satisfy this requirement, the Division must "support the sanction chosen with a meaningful statement of 'findings and conclusions, and the reasons or the basis therefor, on all the material issues of fact, law, or discretion presented on the record.' " *Id*. (quoting *Reddy v. Commodity Futures Trading Comm'n*, 191 F.3d 109, 124 (2d Cir. 1999)).

The Division has failed to meet these requirements. It offers no explanation whatsoever of how barring Mr. Stewart from being associated with an investment adviser would protect the investing public, or how such a bar would serve to remediate any past misconduct.[3] Nor is it

[3] As an example of his purported misconduct, the Division argues that Mr. Stewart "knowingly violated the terms of his bail" by liquidating a bank account that was used to secure his bond, suggesting that Mr. Stewart took affirmative steps to improperly withdraw money that he had pledged as bond. (Division Mot. Summ. Disposition at 6.) As the Division's own exhibits show, however, this argument significantly misrepresents what actually occurred. As Mr. Stewart testified at trial, "I received notification from UBS that as a registered representative who had been charged with a crime, they were no longer going to hold the money in my account. They sent me two checks that summer, liquidating the account." (*Id*. Exhibit 7, at 1316.) That is, Mr. Stewart did not "liquidate" his account—UBS did, unilaterally, and Mr.

possible for the Division to make such a showing given the record it has compiled because that record includes no evidence that Mr. Stewart's securities law violations resulted in, or even threatened, harm to the investing public. The record also fails to show that those violations—which have nothing at all to do with the investment advisory business, the Investment Advisers Act, or harm to the investing public—would be remediated by an investment adviser bar. (*See* Stewart Mot. Summ. Disposition at 12-15.)

The Division tries to make up for this shortfall by claiming that Mr. Stewart poses a danger to investors because he failed to acknowledge the wrongfulness of his past conduct. (Division Mot. Summ. Disposition at 13.) As part of his sentencing submission in his criminal matter, however, Mr. Stewart provided letters from faculty members of Georgetown University, Fordham University, and Rutgers University that prove just the opposite. The letters recount talks Mr. Stewart gave—voluntarily—to students at each of the universities in which he publicly and repeatedly expressed his "remorse[]" for his conduct, acknowledged the "seriousness of his offence," and "took complete ownership of his lack of professional judgment in sharing client confidential information."[4] The Division ignores these public acknowledgments of wrongdoing, which are part of the public record, and instead relies on a rote recitation of Mr. Stewart's past misconduct to prove likelihood of future harm, which, again, the Commission has deemed insufficient to support the relief the Division seeks. *Dicken*, 2020 WL 4678066, at *1-2.

Stewart was only made aware of it after the fact, when the bank contacted him. The Division makes similar arguments about Mr. Stewart's "deception of compliance officials and FINRA" (*id.* at 4-6), which Mr. Stewart is prohibited from disputing here by the terms of his Consent Agreement with the Commission.

[4] These letters are part of the record in Mr. Stewart's criminal matter and are available to the public (including the Division's staff) through the federal courts' Public Access to Court Electronic Records (PACER) system. *See* Sentencing Submission Exhibits B, F and O, *United States v. Sean Stewart*, Criminal Action No. 15-CR-287 (S.D.N.Y. Nov. 26, 2019) (Dkt. No. 364).

IV. The Cases the Division Cites Confirm That an Investment Adviser Bar is Not Appropriate Given the Facts of This Case.

Finally, the case law the Division relies on to show that Mr. Stewart should be barred from associating with an investment adviser instead confirms that such a bar is excessive and, therefore, inappropriate. In each case, the Commission determined that the respondent was associated with an investment adviser at the time of his wrongdoing, was motivated by personal financial gain and profited from his wrongdoing, and either harmed the investing public or the Commission itself. In other words, in each of the cases the Division cites the sanction the Commission imposed was proportional to the gravity of the underlying violation and served a discrete remedial purpose directly related to the respondent's past conduct. By contrast, given the facts and circumstances of this case, an investment adviser bar would be disproportional to the violation from which it arises, and could serve no remedial purpose at all.

In *Peter Siris*, cited repeatedly in the Division's Motion, the Commission found that the respondent was "the founder and managing director of . . . an investment adviser" who personally "reap[ed] ill-gotten gains" from lying to investors in the funds he managed. Exchange Act Release No. 34-71068, 2013 WL 6528874, at *1-3, 5 (Dec. 12, 2013). Based on these facts, which the Commission noted were "central to [its] determination of sanctions" sought by the Division, the respondent was ordered to pay $592,942.39 in disgorgement and a civil penalty of $464,011.93. *Id*. at *1.

In *Gary M. Kornman*, also cited extensively by the Division, the Commission determined that the respondent "was . . . associated with Heritage Advisory, which . . . was an investment adviser within the meaning of the Advisers Act." Exchange Act Release No. 34-59403, 2009 WL 367635, at *4 (Feb. 13, 2009). In that role, the respondent "unjustly enriched himself" in the amount of $143,465, which he was ordered to pay back as disgorgement. *Id*. at *2. The

Commission further found that "the Commission's processes were harmed by [the respondent's] false statements to the Commission's staff," which were the basis of the Division's request for associational bars in the first place. *Id*. at *1-3.

The Division also relies on *Justin F. Ficken* for the general proposition that "[t]he securities business is one in which opportunities for dishonesty recur constantly." (Division Mot. Summ. Disposition at 14 (quoting *Ficken*, Exchange Act Release No. 34-58802, 2008 WL 4610345, at *3 (Oct. 17, 2008)) (internal quotation marks omitted).) But the mere fact that a person may continue in the securities industry is not the standard by which the propriety of associational bars is evaluated—as *Ficken* itself makes clear. Instead, the Commission's decision in that case was based in large part on the fact that the respondent's "violations were . . . motivated by the prospect of financial gain," market participants were "harmed by the [respondent's] fraud," and the respondent received, and was ordered to disgorge, $589,854 in ill-gotten gains. *Ficken*, 2008 WL 4610345, at *1-2 and n.32 (internal quotation marks omitted). Moreover, as in *Siris* and *Kornman*, the Commission's decision in *Ficken* was premised on the fact that the respondent was associated with a registered investment adviser at the time of his misconduct. *Id*. at *1.

Finally, the Division cites *Shreyans Desai* to support its claim that "this case does not present the 'extraordinary mitigating circumstances' that would be needed to depart with the precedent and allow Respondent to remain in the industry he has abused." (Division Mot. Summ. Disposition at 15 (quoting *Desai*, Exchange Act Release No. 34-80129, 2017 WL 782152, at *4 (Mar. 1, 2017)).) But like the other cases the Division cites, the misconduct at issue in *Desai*—which the Division omits from its discussion—was far more egregious than that in this case. There, the respondent personally perpetrated a scheme to defraud members of the investing public for the purpose of enriching himself by claiming false commissions based on overstated values of his

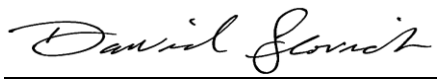
customers' investments. *Desai*, 2017 WL 782152, at *1. As a result of his misconduct, the respondent was ordered to pay $167,229.39 in disgorgement and a civil penalty in the same amount. *Id*. at *2. And, as in the other cases the Division cites, the Commission's decision in *Desai* was premised on the fact that the respondent "was associated with an investment adviser for purposes of Advisers Act Section 203(f)." *Id*. at *3.

In short, none of the case law the Division relies on bears any resemblance to this case. As established in his Motion, uncontested record evidence proves that Mr. Stewart's securities law violations were not motivated by pecuniary gain, he did not profit from his misconduct, did not defraud or otherwise harm his clients or any other member of the investing public, and that he had no regulatory history of any kind prior to the government's investigation of the events at issue here. (Stewart Mot. Summ. Disposition at 2-4, 8.) Presumably as a result, the Division did not seek, and Mr. Stewart was not ordered to pay, disgorgement, restitution, or civil penalties in the Commission's district court action. *See* Final Judgment as to Defendant Sean R. Stewart, *Sec. and Exch. Comm'n v. Sean R. Stewart*, Civil Action No. 15-CV-3719 (S.D.N.Y. Aug. 12, 2020). Nothing in the record, or even in the Division's allegations, suggests that Mr. Stewart poses a danger to any investment adviser he may become associated with, or to any member of the investing public. Because the Division has failed to make this showing, a bar prohibiting Mr. Stewart from associating with an investment adviser cannot be remedial; to the contrary, it would necessarily be "disproportionate to the violation" underlying it, would "not serve its intended purpose," and, if imposed, would therefore amount to an abuse of the Commission's discretion. (Stewart Mot. Summ. Disposition at 15 (citing *McCarthy*, 406 F.3d at 188).)

CONCLUSION

For the reasons set forth above and in his previously-filed Motion for Summary Disposition, Respondent Sean R. Stewart requests that the Commission issue an order denying the Division's Motion for Summary Disposition in its entirety, and finding that an administrative bar under either Section 15(b) of the Securities Exchange Act of 1934 or Section 203(f) of the Investment Advisers Act of 1940 prohibiting Mr. Stewart from being associated with an investment adviser is not in the public interest and therefore inappropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of Respondent's **Opposition to the Division of Enforcement's Motion for Summary Disposition** were filed with Vanessa A. Countryman, Office of the Secretary, Securities and Exchange Commission, 100 F Street, NW Washington, DC 20549-1090, by U.S. Mail on this 3rd day of December, 2020. Copies of this document were also served on this this 3rd day of December, 2020, on the following persons by email:

Julia Green, Esq.
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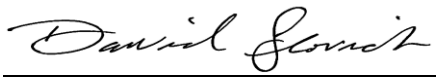
Per Section IV of the OIP, a courtesy copy of Respondent's **Opposition to the Division of Enforcement's Motion for Summary Disposition** was also served by email on this 3rd day of December, 2020, on the Securities and Exchange Commission at APFilings@sec.gov.



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