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 REPLY IN SUPPORT OF 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 Reply in support of his previously-filed Motion for Summary Disposition of the Order Instituting Administrative Proceedings ("OIP") filed against him by the Commission on September 1, 2020. *See Sean R. Stewart*, Exchange Act Release No. 89720, 2020 WL 5229315 (Sept. 1, 2020). The arguments the Commission's Division of Enforcement ("Division") makes in its Opposition to Mr. Stewart's Motion are all based on a common premise, with which Mr. Stewart agrees: In the Dodd-Frank Act, Congress authorized the Commission to impose collateral bars on securities industry professionals whether or not their misconduct occurred in the segment of the industry from which the Commission proposes to bar them. So, for example, broker-dealers can be barred from acting as investment advisers, and investment advisers can be barred from acting as municipal securities dealers. From this premise, the Division concludes that Mr. Stewart should be barred from participating in all segments of the financial services industry by virtue of his prior violations of the securities laws, whatever their extent and whatever type of financial services they involved. Missing from the Division's argument, however, is any meaningful analysis of whether the sanctions it seeks are proportional to the violations from which they arose, or whether those sanctions would serve any specific remedial purpose.

Mr. Stewart does not dispute that the Commission's authority to bar individuals from participating in the securities industry is broad. But it is not unlimited, and the enhancements to the Commission's authority conferred by the Dodd-Frank Act did not eliminate the constraints imposed by long-standing federal court decisional law. Despite Dodd-Frank, the Division still must establish, based on record evidence, the proportionality between a respondent's misconduct and the remedial sanctions it seeks, and demonstrate how those sanctions will serve specific remedial ends. Where the Division cannot make this showing, as it cannot show here that an investment adviser bar would be either proportional or remedial, an administrative sanction becomes a punishment, which is beyond the Commission's discretion to impose. Because the Division seeks relief to which it is not entitled, Mr. Stewart respectfully requests that the Commission grant his Motion for Summary Disposition in its entirety and find that barring him from associating with an investment adviser is not in the public interest.

ARGUMENT

I. The Division's Exhibits Establish That Mr. Stewart Cannot Have Been Associated With an Investment Adviser As That Term is Defined in the Advisers Act.

In his Motion for Summary Disposition, Mr. Stewart established, as a matter of law, that he could not have been associated with an investment adviser as that term is defined in the Investment Advisers Act during his time at JPMorgan. Section 202(a) of the Advisers Act expressly excludes from the definition of investment adviser any "banking institution . . . doing business under the laws of any State" if its investment advisory services are "performed through a separately identifiable department or division." In that case, "the department or division, and not the bank itself, shall be deemed to be the investment adviser." (Stewart Mot. Summ. Disposition at 11.) The Division does not disagree with Mr. Stewart's reading of the Advisers Act, nor does it dispute that JPMorgan Chase & Co. was a "banking institution" according to this definition, or that JPMorgan did not perform investment advisory services through the "department or division" where Mr. Stewart worked. (*Id.* at 11-12 and n.5; *see generally* Division Opp. Mot. Summ. Disposition.)

The Division's response instead consists of a single, factual argument: "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." (Division Opp. Mot. Summ. Disposition at n.2.) But that Mr. Stewart was "employed by JPMorgan Chase & Co." is clearly established by the

Division's own exhibits. Specifically, the FINRA CRD Report the Division relies on to prove Mr. Stewart's "Employment History" plainly states that "From 06/2003 To 10/2011," Mr. Stewart's entire tenure at JPMorgan, he worked at "JPMorgan Chase"—the parent company, not a subsidiary. (Division Mot. Summ. Disposition Exhibit 3, at 6.) The same page of the CRD Report distinguishes between "JPMorgan Chase" (the parent company) and its various subsidiaries, including "J.P. Morgan Securities, Inc." and "Bear, Stearns & Co. Inc.," confirming that the report was careful to differentiate parent company from subsidiary when appropriate. (*Id*.) Although Mr. Stewart highlighted this page of the FINRA CRD Report in his Opposition to the Division's Motion, the Division makes no attempt, with either evidence or argument, to refute what it shows. (Stewart Opp. Mot. Summ. Disposition at 4.)

That Mr. Stewart was employed by JPMorgan Chase & Co. is also established by JPMorgan's September 30, 2010 Form 10-Q, which the Division cites in its Opposition. As explained in that and other JPMorgan periodic reports, all of the JPMorgan entities relevant to this proceeding, including JPMorgan Securities, Inc. and JPMorgan Securities LLC, are simply subsidiaries of JPMorgan Chase & Co., which is "a financial holding company" that does business through its various "bank subsidiaries"—including JPMorgan Securities, Inc. and JPMorgan Securities LLC. *See* JPMorgan Chase & Co. Sept. 30, 2010 Form 10-Q at 5, available at https://jpmorganchaseco.gcs-web.com/node/78101/html (last visited Dec. 17, 2020). The profits and losses of these subsidiaries (including JPMorgan's investment banking activities) roll up to, and are reported on a consolidated basis with, the financials of JPMorgan Chase & Co. as a whole (*id*. at 11) because the subsidiaries are *part of* the bank. Stated differently, like many organizations of its size, because JPMorgan Chase & Co. is the ultimate parent of JPMorgan Securities, Inc. and

JPMorgan Securities LLC, two subsidiaries though which it does business, it is also the ultimate employer of those subsidiaries' employees.

It is precisely because big national banks are organized this way, with distinct types of financial services work parceled out to distinct groups within a single banking entity, that Section 202(a) of the Investment Advisers Act differentiates between bank employees who perform investment advisory services and those who do not. By excluding bank employees performing non-investment advisory services from the definition of "investment adviser," Congress intended to distinguish, for regulatory purposes, persons performing different financial services functions within the same organization. Which makes sense: investment advisers are not bankers, and bankers are not investment advisers, and they should not be regulated the same way, even when they are employed by the same entity.

But the Division's implicit argument—that employees of bank subsidiaries are not also employees of the parent bank of which the subsidiaries are a part—would render Section 202(a) meaningless. If that were so, there would be no need to differentiate bank employees performing non-investment advisory services from other bank employees; employees of groups performing investment advisory services within a bank could never be considered employees of a "bank" for the purposes of Section 202(a)(11) of the Advisers Act, and there would be no need to single them out for special treatment in the Act's definition of "investment adviser." The logic of the Advisers Act coupled with the Division's own evidence proves that, given his role at JPMorgan, Mr. Stewart could not have been associated with an investment adviser while he worked for that firm. (*See* Stewart Mot. Summ. Disposition at 11-12.)

II. Mr. Stewart's Job Responsibilities at JPMorgan and Perella Are Directly Relevant to the Commission's Assessment of the Division's Request for Relief.

The foregoing discussion of the proper regulatory treatment of bank employees performing non-investment advisory services is not an academic exercise, nor is it irrelevant, as the Division argues, to the Commission's consideration of the appropriate remedy here. (Division Opp. Mot. Summ. Disposition at 10.) The roles Mr. Stewart performed (and did not perform) at JPMorgan and Perella Weinberg are directly relevant to whether the bars the Division seeks are proportional to the conduct from which these proceedings arise, and to whether the Division can satisfy its burden to show that those bars will serve a discrete remedial purpose. Although the Commission's authority to bar individuals from participating in the securities industry is broad, it is not unlimited, and the enhancements to the Commission's authority conferred by the Dodd-Frank Act did not eliminate the constraints imposed by federal court decisional law.

As Mr. Stewart explained in his Motion for Summary Disposition, Dodd-Frank notwithstanding the Commission abuses its discretion where it imposes " 'a sanction [that is] palpably disproportionate to the violation,' " *McCarthy v. Sec. and Exch. Comm'n*, 406 F.3d 179, 188 (2d Cir. 2005) (quoting *Reddy v. Commodity Futures Trading Comm'n*, 191 F.3d 109, 124 (2d Cir. 1999)), in other words, where "the sanction is excessive or does not serve its intended purpose." *Id*. A corollary of this rule is that an agency 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*, 191 F.3d at 124). The "intended purpose" of associational bars, in turn, is to remediate past misconduct—to prevent a respondent from doing again in the future the wrong he has done in the past. *See, e.g.*, *Howard F. Rubin*, Exchange Act Release No. 34-35179, 1994 WL 730446, at *1 (Dec. 30, 1994) ("It is well-settled that such administrative proceedings are not punitive but remedial. When we suspend or bar a person, it is to protect the public from future harm at his or her hands."). Thus, in reviewing the Commission's imposition of administrative sanctions, the reviewing court's "foremost consideration must . . . be whether [the respondent's] sanction protects the trading public from further harm." *McCarthy*, 406 F.3d at 188.

The Division makes no effort to address these requirements in either its Motion or its Opposition. Instead, it falls back on the argument—which Mr. Stewart does not dispute—that, with the Dodd-Frank Act, Congress authorized the Commission to impose collateral bars under Section 203(f) of the Advisers Act and Section 15(b) of the Securities Exchange Act. (Division Opp. Mot. Summ. Disposition at 11-12.) But that new authority did not relieve the Commission of its obligation to establish, through record evidence, that the bars it chooses to impose serve a concrete remedial purpose, or its obligation to establish that the sanctions it chooses are proportional to the underlying misconduct. Those requirements arise from the Second Circuit's (and other circuits') case law and were unaffected by the Dodd-Frank Act's amendments to the securities laws.

The deficiency is not made up by general statements of law excerpted from the cases the Division cites because those cases involved facts distinctly different from the facts at issue here. The Division only satisfies its legal burden if it supports the relief is seeks with specific facts from the record in *this* case, not by reference to factually dissimilar cases. *McCarthy*, 406 F.3d at 188; *Shawn K. Dicken*, Exchange Act Release No. 89526, 2020 WL 4678066, at *1-2 (Aug. 12, 2020) (In considering the Division's request for securities industry bars "the Commission must consider the question with reference to the underlying facts and circumstances of the case"). For example, citing what it calls "an analogous case," the Division suggests that an investment adviser bar would serve a remedial purpose here because Mr. Stewart engaged in "deceptive practices." (Division

Opp. Mot. Summ. Disposition at 5 (citing *Schield Mgmt. Co. and Marshall L. Schield*, Exchange Act Release No. 53201, 2006 WL 231642 (Jan. 31, 2006)).) But in that case the respondent had "destr[oyed] . . . company e-mails" and "personal identification numbers . . . related to client and adviser accounts, . . . alter[ed] . . . Individual Position Review . . . logs . . . during a Commission examination," and in general "prevented the examination"—a far cry from Mr. Stewart's conduct. *Schield Mgmt. Co.*, 2006 WL 231642, at *1-2. In addition, unlike Mr. Stewart, the respondent had defrauded its clients by withholding more than $592,000 owed to them as a result of the firm's trading errors. *Id*. at *4. Also unlike this proceeding, the investment adviser bar imposed in *Schield* was demonstrably remedial because the individual respondent in that matter violated the securities laws while he was the "majority owner and former president" of a "registered investment adviser." *Id*. at *1.

Similarly, the Division relies on *Thomas D. Melvin, CPA* to show that unlawful tipping—as opposed to unlawful insider trading—by itself warrants an administrative bar. (Division Opp. Mot. Summ. Disposition at 6-7 (citing *Melvin*, Exchange Act Release No. 75844, 2015 WL 5172974 (Sept. 4, 2015)).) The bar in that case, however, imposed under Commission Rule of Practice 102(e), was objectively proportional to the underlying misconduct and served a discrete remedial purpose. There, the Commission barred the respondent from appearing before the Commission *as an accountant* because of securities law violations that stemmed from his conduct *as an accountant*. *Melvin*, 2015 WL 5172974, at *1-3. Further, like the respondent in *Schield Mgmt. Co.* but unlike Mr. Stewart, the respondent in *Melvin* acted with the intent to enrich himself at his clients' expense. *Id*. at *3 (finding that the respondent "disclosed a client's confidential information in order to favor his own interest in establishing a collegial relationship" and "abus[ed] his position of trust to enhance professional relationships that could yield him pecuniary gain").

The Division also cites *Securities and Exchange Commission v. Gupta* to show that Mr. Stewart's conduct "harmed innocent investors," and further claims that he "defrauded the clients whose information he misused." (Division Opp. Mot. Summ. Disposition at 7 (citing *Gupta*, No. 11-CV-7566 (JRS), 2013 WL 3784138, at *2 (S.D.N.Y. July 17, 2013).) Both claims are refuted by the *Gupta* case. The iteration of *Gupta* the Division cites was a follow-on district court proceeding to determine what civil sanctions should be imposed on the defendant after he was convicted of insider trading in a parallel criminal matter. In the criminal matter, District Court Judge Jed Rakoff explained that,

> [w]hile insider trading *may* work a huge unfairness on innocent investors, *Congress has never treated it as a fraud on investors, the Securities Exchange Commission has explicitly opposed any such legislation, and the Supreme Court has rejected any attempt to extend coverage of the securities fraud laws on such a theory*. . . . In the eye of the law, Gupta's crime was to breach his fiduciary duty of confidentiality to Goldman Sachs; or to put it another way, Goldman Sachs, not the marketplace, was the victim of Gupta's crimes as charged.

United States v. Rajat Gupta, 904 F. Supp. 2d 349, 352 (S.D.N.Y. 2012) (emphasis added). This distinction is important for the Commission's decision in this matter for several reasons. First, it disproves the Division's blithe assertion that Mr. Stewart's "insider trading scheme . . . harmed innocent investors" because it clarifies that investors are *not* the victims of insider trading. Second, the excerpt shows that while insider trading "may" work an unfairness on investors, that is not the necessary result of such conduct. Here, the Division has offered no evidence at all to show that any investors were harmed by Mr. Stewart's conduct, and the unsubstantiated possibility alone cannot warrant the relief the Division seeks. Mr. Stewart is not aware of any evidence or specific allegation, in either this matter or in the parallel criminal case, that any investor was harmed as a result of his conduct.

Third, and most important, Judge Rakoff's tutorial makes clear that insider trading is not fraud. For the purposes of the relief the Division seeks, this distinction is critical. As explained in his Motion, Mr. Stewart did not defraud or otherwise harm any member of the investing public; certainly the Division has offered no evidence (or even specific allegations) to prove that he did. As a result, the Division cannot demonstrate that Mr. Stewart is likely to defraud or otherwise harm members of the investing public in the future, and it therefore cannot establish an indispensable element of the relief it seeks. *McCarthy*, 406 F.3d at 188 (In reviewing the Commission's administrative sanctions, the reviewing court's "foremost consideration must . . . be whether [the respondent's] sanction protects the *trading public* from *further* harm") (emphasis added).

In short, like its Motion for Summary Disposition, the Division's Opposition relies on highly generalized—and sometimes incorrect—statements of law that appear in decisions that were limited to the specific facts they involved. (*See* Stewart Opp. Mot. Summ. Disposition at 9-11 (distinguishing the Division's case law).) Those cases provide no support for the Division's arguments about how an investment adviser bar could serve a proportional, remedial end given the facts of *this* case. And without those cases, which are not even analogous, much less dispositive, the Division's argument boils down to the claim that Mr. Stewart should be barred from being associated with an investment adviser because he violated the securities laws—which is not enough to satisfy the Division's legal burden. (Stewart Mot. Summ. Disposition at 12-13.)

III. The Division's Evidence of Mr. Stewart's Work History is Contradictory and Therefore Does Not Establish That He Was Associated With an Investment Adviser.

In its Opposition to the Division's Motion for Summary Disposition, Mr. Stewart pointed out that the evidence the Division relies on to establish the timeline of Mr. Stewart's work history at JPMorgan is internally inconsistent. (Stewart Opp. Mot. Summ. Disposition at 3-5.)

Specifically, the FINRA CRD Report submitted with the Division's Motion purports to show that Mr. Stewart was employed by at least two different financial services firms at the same time: JPMorgan Securities LLC and Bear Stearns & Co., Inc. (*Id*. at 4; Division Mot. Summ. Disposition Exhibit 3, at 6-7.) Nothing in the CRD Report attached to the Division's Motion disproves that conclusion, or clarifies which (if either) of these two entities was Mr. Stewart's actual employer.

The Division responds to this inconsistency by arguing that two JPMorgan subsidiaries—JPMorgan Securities, Inc. and JPMorgan Securities LLC—are really one and the same. (Division Opp. Mot. Summ. Disposition at 8-9.) But even if that were true it would not resolve the central conflict presented by the Division's evidence: at the exact same time the Division claims Mr. Stewart was employed by JPMorgan Securities LLC (2008 to 2011), the CRD Report shows that he was working at "Bear, Stearns & Co., Inc." (Division Mot. Summ. Disposition Exhibit 3, at 6.) And to confuse matters further, the Division does not disagree that the evidence of Mr. Stewart's work history submitted in support of the Division's Motion is contradicted by the allegations of the OIP itself. (Division Mot. Summ. Disposition at n.5.)

The upshot of all of this is that, taken together, the Division's evidence does not provide the "undisputed facts" required by Commission Rule of Practice 250(b) that establish where Mr. Stewart worked and when he worked there. However, the Division's theory about how Mr. Stewart became associated with an investment adviser, if true, *would* show that the Division's request for an investment adviser bar is dependent on an arbitrary change of corporate form that Mr. Stewart was unaware of, that did not affect Mr. Stewart's job responsibilities, and that indisputably had no impact on the investment banking group at JPMorgan. It follows that it would also be arbitrary to base a remedial sanction that will determine the future course of Mr. Stewart's life on a happenstance that in no way implicates the Commission's authority to regulate investment advisers (or investment bankers). In any case, because the evidence the Division relies on to show that Mr. Stewart worked for an investment adviser is at best inconclusive, it cannot be "undisputed" for the purposes of the Commission's resolution of the Division's Motion.

IV. The Division Refuses to Recognize That Mr. Stewart Has Repeatedly and Publicly Acknowledged His Wrongdoing.

Finally, the Division's continued refrain that Mr. Stewart "fail[ed] to acknowledge his own wrongdoing" and "expresses no contrition for his past conduct" (Division Opp. Mot. Summ. Disposition at 2, 3) is puzzling given that Mr. Stewart repeatedly and publicly acknowledged the wrongfulness of his conduct a long time ago. Among other acknowledgments of responsibility made to over one hundred people in three different public forums, Mr. Stewart "admitted that what he did was wrong with sincerity and remorse," acknowledged the "seriousness of his offence," and "took complete ownership of his lack of professional judgment in sharing client confidential information." (Stewart Opp. Mot. Summ. Disposition at 8.) The Division's refusal to acknowledge these public statements is even less explicable given that they have been a part of the public record in Mr. Stewart's criminal case—which the Division otherwise relies on so heavily—for more than a year.[1] But to dispel any remaining doubt, Mr. Stewart submits with this memorandum a Declaration which makes clear that he acknowledges that what he did was wrong, that insider trading is a serious legal violation, and that he bears sole responsibility for his conduct and its consequences. Mr. Stewart's Declaration also provides clear assurances that Mr. Stewart will not commit violations of the federal securities laws in the future, and that he is fully aware of the

[1] Mr. Stewart's public acknowledgements of wrongdoing are memorialized in letters written on his behalf by faculty members of Georgetown University, Fordham University, and Rutgers University. (Stewart Opp. Mot. Summ. Disposition at 8 and n.4.) The letters have been available to the public since November 2019 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).

gravity of the consequences of violating the law, company policies, and client obligations and confidences. (*See* Stewart Decl., attached hereto as Exhibit 1.)

CONCLUSION

For the reasons set forth above and in his previously-filed Motion for Summary Disposition and Opposition to the Division of Enforcement's Motion for Summary Disposition, Respondent Sean R. Stewart requests that the Commission issue an order (1) granting his Motion for Summary Disposition in its entirety, (2) denying the Division's Motion for Summary Disposition in its entirety, and (3) 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 **Reply in Support of 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 18th day of December, 2020. Copies of this document were also served on this 18th day of December, 2020, on the following persons by email:

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Per Section IV of the OIP, a courtesy copy of Respondent's **Reply in Support of Motion for Summary Disposition** was also served by email on this 18th day of December, 2020, on the Securities and Exchange Commission at APFilings@sec.gov.

David S. Slovick

Exhibit 1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19951

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

Declaration of Sean R. Stewart Pursuant to 28 U.S.C. § 1746(2)

I, Sean R. Stewart, declare under penalty of perjury as follows:

1. I am 39 years old and currently reside in New York, New York. I make this Declaration based on my personal knowledge of the facts set forth herein.

2. Between June 2003 and May 2015 I was employed in the investment banking groups of JPMorgan Chase & Co. ("JPMorgan") and Perella Weinberg Partners L.P. ("Perella"). I began working at JPMorgan in June 2003 and worked there continuously until October 2011. I began working at Perella in October 2011 and worked there continuously until May 2015.

3. On August 17, 2016, I was convicted by a jury in the U.S. District Court for the Southern District of New York of unlawfully sharing with a family member material, non-public information obtained while I was employed by JPMorgan and Perella. My conviction was later vacated by the appellate court and I was convicted after a second trial and sentenced to twenty four months' incarceration, which I served. I was released in September 2020 and have since begun the process of rebuilding my life.

4. In 2019 I voluntarily agreed to speak with students at Georgetown University, Fordham University, and Rutgers University about my insider trading conviction and the misconduct that caused it. I gave the talks in public forums and, between the three universities, I reached more than 100 students and faculty members.

5. During these talks I candidly admitted that providing my family member with confidential client information was wrong, expressed my remorse for my misconduct, acknowledged the seriousness of my offence, and took ownership of my lack of judgment in improperly sharing confidential client information. Some of my remarks at these talks were memorialized in letters provided to the federal district court by faculty members of Georgetown University, Fordham University, and Rutgers University. To the best of my knowledge, these letters have been a part of the public court record since late November 2019.

6. My view of my conduct between then and now has not changed. I still acknowledge that what I did was wrong, that insider trading—including tipping—is a very serious legal violation, and that I bear sole responsibility for my conduct and its consequences. Nor could I forget these facts. As a result of my conduct I was summarily dismissed from Perella and subsequently incarcerated for two years. I will be labeled a felon for the rest of my life and the career that I worked so hard to build over many years has ended.

7. In light of my experience over the past five years and the punishments I have endured, I can absolutely assure the Commission that I will in no way commit any further violations of the federal securities laws, or any other laws, in the future. I have learned, and am reminded on a daily basis, that the consequences of violating the law, company policies, and client obligations and confidences are too grave.

I declare under penalty of perjury that the foregoing facts are true and correct.

Executed on December 17, 2020

Sean R. Stewart