UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5620 / October 26, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-20139

In the Matter of MOHAMMED ALI RASHID, Respondent.	RESPONDENT MOHAMMED ALI RASHID'S OPPOSITION TO DIVISION OF ENFORCMEENT'S MOTION FOR SUMMARY DISPOSITION

Movant Securities and Exchange Commission ("**SEC**" or "**Commission**") advances critically inconsistent positions in its effort to obtain summary disposition in this matter. On one hand, the Commission admonishes the parties not to relitigate the findings of the trial court. SEC Motion for Summary Disposition (the "**Motion**") at 6. On the other hand, the Commission blithely ignores the trial court's finding that Respondent Mohammed Ali Rashid ("**Respondent**" or "**Mr. Rashid**") did not act with scienter when it argues that Respondent "acted with a high degree of scienter," Motion at 10. Thus, the Commission advances a position in support of its argument that directly contradicts the very findings it proclaims are due deference. The likely reason for this inconsistency is the simple fact that the trial court specifically and soundly rejected the Commission's contention that Respondent acted with knowledge and intent to defraud investors. Such conduct as alleged by the Commission, if proven, might have ultimately supported a permanent associational bar. That is not, however, what happened here.

The trial court explicitly rejected the Commission's Section 206(1) Investment Advisors Act ("IAA") claim finding that the "the SEC failed to prove by a preponderance of the evidence

that Rashid acted with the scienter required of section 206(1)." *Sec. & Exch. Comm'n v. Rashid*, No. 17-CV-8223 (PKC), 2020 WL 5658665, at *24 (S.D.N.Y. Sept. 23, 2020). Indeed, the Commission's Motion does not mention the court's rejection of the Section 206(1) claim, nor make clear that the court only found Respondent liable for a non-scienter violation of the IAA, *i.e.*, Section 206(2). Instead, the Commission conflates a variety of concepts, facts, and legal standards resulting in a fundamentally lopsided retelling of events. In the end, the Commission still fails to show that its requested follow-on sanction—a permanent associational bar against Respondent—is appropriate here.

First, summary disposition is unwarranted given the presence of a genuine issue of fact as to the critical element of the materiality of Respondent's actions on investors and the market.

Second, a permanent associational bar is disproportionate to Respondent's offense and contrary to the public interest. Associational bars have long been understood to be the most severe penalty available to the Commission, described as "the securities industry equivalent of capital punishment." *PAZ Sec., Inc. v. S.E.C.*, 494 F.3d 1059, 1065 (D.C. Cir. 2007). In considering "associational bars, the presence of scienter can be the decisive factor in imposing a bar." *In the Matter of BDO China Dahua Cpa Co., et.al.*, Release No. 553 (Jan. 22, 2014). Here, the trial court found Respondent did not act with scienter, and only found Respondent liable for a non-scienter charge.

Third, several other factors further highlight the Commission's overreach. Respondent's violation occurred over seven years ago, and Respondent has not worked in the securities industry since (effectively serving a seven-year ban). Respondent's violation also only occurred due to a highly unique set of events which make re-offense extraordinary unlikely.

Finally, Respondent has accepted responsibility for his behavior, resolved the matter civilly with Apollo in his Separation Agreement well before the Commission brought the underlying action, and has suffered enormous personal consequences as a result of these events. Simply put, there is no evidence that Respondent poses a risk to the public moving forward much less one that would call for the most drastic remedy available.

It is well settled that "when the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors." *Steadman v. S.E.C.*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd*, 450 U.S. 91 (1981). Here, there is a genuine issue of fact regarding materiality and the Commission has failed to show a permanent associational bar is needed to protect the public interest. The Commission's request for summary disposition and the imposition of a permanent associational bar must therefore be rejected.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Respondent worked for Apollo Global Management, LLC ("Apollo") from 2000-2013. At Apollo, Respondent consistently received "very positive" reviews and was successfully promoted to principal, partner, and in late 2012, senior partner, becoming the youngest senior partner at Apollo and the first Muslim partner. ECF 185 at 16:21-24 (Becker)[1]; DX 140 (Rashid Decl.) ¶¶ 2, 3.

During a period from 2010 to 2013, Respondent submitted several reimbursement requests to Apollo which incorrectly categorized personal expenses as business expenses. Respondent has repeatedly acknowledged that he was negligent in not reviewing his expense reports that had been

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[1] All ECF citations are to the docket of Respondent's civil case, *Sec. & Exch. Comm'n v. Rashid*, No. 17-CV-8223 (S.D.N.Y).

prepared by his assistants and that he took a liberal approach to his expenses which "pushed the envelope" inappropriately. ECF 191 at 786:13-787:5 (Rashid); ECF 197 at 1229:1-4 (Rashid); DX 140 (Rashid Decl.) ¶ 6. As Respondent explained at his trial: "I obviously, you know, made a lot of mistakes vis-a-vis Apollo and my employer -- well, you know, many of which I'm obviously ashamed of and something that I will carry with me." ECF 197 at 1229:13-22.

But critically, at the time Respondent submitted his reimbursement requests, Apollo's Limited Partnership Agreements ("**LPAs**") with its investors stated that Apollo—via its management companies—would pay for all management costs borne by its professionals, which included Respondent. As the district court explained, "the limited partnership agreements that created the funds provided that expenses related to monitoring the fund would be borne by the Apollo-affiliated management company." *Rashid*, 2020WL 5658665, at *22. Thus, per Apollo's own policies, Respondent's incorrect reimbursement requests should have been paid for by Apollo.

However, unbeknownst to Respondent, Apollo had adopted a secret policy of passing on all expense reimbursements for its professionals directly to Apollo's investors. Apollo's "private-equity funds were billed regardless of the nature of the expense, in contradiction to the limited partnership agreements that governed the funds." *Id.* Put differently, "[Apollo's] Accounts Receivable Department charged all expenses to the relevant private equity fund, even those that should have been allocated to the Apollo management company." *Id.* at *22.

Apollo did not notify Respondent or any of its employees of this *de facto* policy. "The practices of the Account Receivable Department . . . were seemingly unknown to Apollo's employees." *Id.* at *27. Indeed, as the district court observed, "Marc Becker, who had the same job title as Rashid, and Apollo's current and former CFOs, Martin Kelly and Eugene Donnelly, de-

scribed only broad and generic understandings of the reimbursement process, including the apparent misapprehension that certain expenses were borne by Apollo management companies, when, in fact, they were paid by private-equity funds." *Id.* The net consequence of this was Apollo employees were ultimately being reimbursed by Apollo's investors rather than by Apollo itself, without the knowledge of the employees. "Thus, although Rashid seemingly believed that his expenses would be reimbursed by an Apollo management fund, they were in truth borne by investors." *Id.* at *21.

Despite having this information, including the Limited Partnership Agreements available to it, on October 26, 2017 the Commission initiated an action against Respondent in federal court, alleging that Respondent's reimbursement requests violated, and aided and abetted violations of, Sections 206(1) and 206(2) of the Investment Advisors Act (the "IAA"). After a nine-day bench trial, the district court held that Respondent had not acted with scienter and thus had not violated Section 206(1). The court concluded that "the SEC failed to prove that Rashid knew the source of reimbursement for his expenses, and therefore failed to prove that he knowingly and intentionally sought reimbursement from the funds he advised." *Id.* at *24. Instead, the court observed that "the policies and procedures within Apollo contributed heavily to any act of fraud that was effected on investors in the Apollo funds." *Id.* at *27. Specifically, the court found that:

> Apollo, and not Rashid, put in place a policy of invoicing expenses to funds that, pursuant to the limited partnership agreements, seemingly should have been borne by Apollo's own management companies. The practices of the Accounts Receivable Department, which were seemingly unknown to Apollo's employees, also deserve significant blame.

Id. Moreover, the trial court correctly noted that the "trial record does not contain any written guidance or official training or conversation with Rashid on allocation of expenses to the funds." *Id.* at *22.

The trial court, however, sustained the Commission's non-scienter 206(2) claim because it concluded Respondent was "indifferent to who paid the false business expense as long as it was not him." *Id.* at *23. As punishment for the Section 206(2) violation, the district court assessed a $240,000 civil penalty against Respondent and permanently enjoined him from future violations of Section 206 of the IAA. *Id.* at *28. On October 14, 2020, the district court issued its final judgment. ECF 213. On October 26, 2020, the Commission initiated follow-on proceedings against Respondent under Section 203(f) of the IAA. On November 25, 2020, the Commission submitted its Motion requesting an associational bar be imposed against Respondent.

ARGUMENT

I. THIS MATTER CANNOT BE RESOLVED AT THE SUMMARY DISPOSITION STAGE

"Commission Rule of Practice 250 provides that summary disposition is appropriate if there is no genuine issue with regard to any material fact and the movant is entitled to summary disposition as a matter of law." *In the Matter of Robert William Myers, Jr.*, Release No. 86208 (June 26, 2019). (internal punctuation omitted). As the Commission's Motion recognizes, one of the principal considerations in determining an appropriate sanction is the "degree of harm to investors and the marketplace resulting from the violation." Motion at 8.

In its Motion, the Commission does not present any argument or support to the extent of harm Respondent's conduct had on investors or the market. Nor can the Commission point to the trial court's opinion to buttress its argument on this point. Indeed, the trial court failed to make any finding on the materiality of Respondent's actions, even though both parties extensively briefed the issue and contested whether Respondent's actions satisfied Section 206's materiality requirement. Commission's Post-Trial Proposed Finings of Facts and Conclusions of Law the ("**Commissions' Post-Trial Brief**"), Doc. 206 at 68-69.

Nor did the trial court make findings that, in the end, investors bore the cost of Respondent's actions. While the trial court noted that investors initially paid Respondent's reimbursement requests (unbeknownst to Respondent), the trial court failed to resolve the parties' factual disagreement about whether the structure of Apollo's investment waterfall meant that "any expenses paid by the Funds, whether those expenses should have been paid by the funds, [were] returned to the investors as a priority with a compounded 8 percent annual interest rate." Rashid's Post-Trial Brief at 70. Nor did the trial court address the fact that Respondent's settlement with Apollo included a payment for all amounts Apollo claimed were wrongly billed regardless of whether he agreed with Apollo's assessment. DX-34.

Of course, whether investors bore the costs of Respondent's reimbursement requests over the long-term (which they did not, assuming that Apollo in fact reimbursed the investors from the monies provided in the settlement) would of necessity materially bear on this body finding's regarding the harm Respondent's actions had on investors and the market. No resolution to this critical, and essential, point can be found in the record. For that reason alone, summary disposition at this stage is inappropriate.

II. AN ASSOCIATIONAL BAR WOULD NOT FURTHER THE PUBLIC INTEREST

"When considering whether an administrative sanction serves the public interest, the Commission considers the factors identified in Steadman v. SEC." *BDO China*, Release No. 553 (Jan. 22, 2014). The *Steadman* factors include:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman, 603 F.2d at 1140. Along with the *Steadman* factors, the "Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation." *In the Matter of Ambassador Capital Mgmt., LLC, & Derek H. Oglesby*, Release No. 672 (Sept. 19, 2014).

An associational bar is the most severe sanction available to the Commission – one which the D.C. Circuit has described as "the securities industry equivalent of capital punishment." *PAZ*, 494 F.3d at 1065. In making the case for an administrative sanction, "the Commission must do more than say, in effect, petitioners are bad and must be punished." *Blinder, Robinson & Co. v. S.E.C.*, 837 F.2d 1099, 1113 (D.C. Cir. 1988). This is even more true when the Commission seeks a severe sanction like a permanent associational ban. "[W]hen the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors." *Steadman*, 603 F.2d at 1137. For that reason, in cases where an associational bar is sought, the defendant's degree of scienter takes on heightened importance, as the Commission itself has recognized. "[T]he presence of scienter can be the decisive factor in imposing a bar." *BDO China*, Release No. 553 (Jan. 22, 2014). Put differently, a "scienter-based violation supports associational bars, and substantial civil penalties, while [a] negligence-based violation [] support[s] lower civil penalties." *Ambassador Capital*, Release No. 672 (Sept. 19, 2014).

The Commission has failed to show that a permanent associational bar against Respondent would further the public interest, particularly considering the finding that Respondent did not act with scienter. As detailed above, the trial court rejected the Commission's lead 206(1) claim, finding the Commission had failed to prove Respondent acted with the requisite scienter necessary to sustain a Section 206(1) violation. As explained by the court, "Apollo's procedures in its Accounts

Receivable Department, and specifically its practice of seeking reimbursement from funds based on an employee's entry of portfolio company research codes, deserve significant blame for the fact that Rashid's expenses were ultimately paid by the funds." *Rashid*, 2020 WL 5658665, at *24. Indeed, the trial court noted that the Commission's own witnesses shared Respondent's "misapprehension that certain expenses were borne by Apollo management companies, when, in fact, they were paid by private-equity funds." *Id.* at *22. As for Mr. Rashid specifically, the court concluded that "[t]he SEC failed to prove that Rashid knew the source of reimbursement for his expenses, and therefore failed to prove that he knowingly and intentionally sought reimbursement from the funds he advised." *Id.* at *24.[2]

Respondent's lack of scienter not only weighs heavily against the issuance of a permanent associational bar, but also undermines the Commission's analysis of the other *Steadman* factors. "Conduct is egregious if it is extremely or remarkably bad or if it is flagrant." *In the Matter of Barbara Duka*, Release No. 1167 (Aug. 29, 2017) (internal punctuation and quotations omitted). Conduct is less likely to be considered egregious if it "resulted from negligence not fraudulent intent" and was not pursued "with the intent to defraud or deceive." *Id.*

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[2] The Commission repeatedly tries to elide the district court's analysis of Rashid's scienter by focusing on the court's statement that Respondent intentionally submitted personal expenses for reimbursement from Apollo as business expenses. On its own, Respondent's submission of incorrect reimbursement expenses to Apollo did not implicate the securities laws. To the extent, Respondent's actions implicated the securities laws, that was because those expenses (unbeknownst to Respondent) were passed onto Apollo's investors. As Judge Castel explained during trial: "This is not an employment case. You were right when you said that. . . . . [I]f you're cheating on your employer's expense account, that's not investment adviser fraud. It's not 206(1) and it's not 206(2)." Tr. 442-443. The appropriate inquiry for purposes of scienter is thus whether Respondent intended to defraud Apollo's investors, not Apollo itself. The district court understood this, and thus focused its analysis on whether Respondent intended to have investors pay for his personal expenses (ultimately concluding he did not).

In its Motion, the Commission argues that Respondent's behavior was egregious because "[h]e repeatedly, over a number of years, defrauded client funds to whom he owed a fiduciary duty." Motion at 9. That statement, however, is neither borne out by the record nor the findings of the trial court which are, as correctly noted by the Commission, due deference. Respondent's lack of scienter should compel a finding that Respondent's behavior did not constitute an egregious defrauding of client funds, or at a minimum, greatly reduce any degree of egregiousness. Here, the Commission seeks to treat Respondent as if he in fact intended to defraud Apollo's *investors*—a fact that has been expressly and unequivocally rejected by the district court.

Despite this, the Commission seeks to impose the harshest punishment available—*i.e.*, a permanent associational bar—on Respondent. Such a punishment should be reserved for the most egregious violations of securities law, where the violator acted with scienter and a clear intent to defraud. Respondent does not suggest that the trial court's findings exonerate him. Clearly it does not and includes the finding of recklessness and negligence. While not behavior of which he is proud, as noted above, Respondent's conduct is a far cry from the behavior the Commission attributes to him in its Motion. The Commission's requested sanction is thus not proportional to Respondent's actions and fails *Steadman's* edict that the Commission, when it pursues its most severe sanctions, show "why less severe action would not serve to protect investors." *Steadman*, 603 F.2d at 1137.

The Commission's analysis of the other *Steadman* factors likewise fails. The Commission argues that Respondent "has not accepted responsibility for his conduct." Motion at 11. This is untrue. Respondent has repeatedly acknowledged that he was negligent in not reviewing his expense reports and took a liberal approach to his expenses which "pushed the envelope" inappro-

priately. *Sec. & Exch. Comm'n v. Rashid*, No. 17-CV-8223 (PKC), ECF 191 at 786:13-787:5 (Rashid); ECF 197 at 1229:1-4 (Rashid); DX 140 (Rashid Decl.) ¶ 6. As Respondent explained at his trial:

> I obviously, you know, made a lot of mistakes vis-a-vis Apollo and my employer -- well, you know, many of which I'm obviously ashamed of and something that I will carry with me. But I settled those in 2013 and did everything I could to rectify that situation, paid back anything that was asked, did anything that was asked, cooperated to the fullest extent possible, but at no point did I ever try to or intend to or mean to or look to defraud a single dollar from an investor. And that's the reason why I have been fighting this for as long as I have.

ECF 197 at 1229:13-22. The Commission does not address, or even acknowledge, these statements are not addressed in its Motion. Nevertheless, Respondent has demonstrated his willingness to take responsibility for his conduct, which further confirms that an associational bar is not appropriate.

Finally, the Commission fails to demonstrate that Respondent presents a threat to the public. The Commission offers a single paragraph of analysis to support its contention that Respondent is likely to "have opportunities to commit future violations." Motion at 11. Within that paragraph, the Commission merely notes that Respondent enjoyed a successful career before his departure from Apollo, attended prestigious universities, and has kept industry connections sufficient to allow him to reenter the securities industry.

In analyzing Respondent's likelihood for re-offense and threat to the public, the Commission entirely fails to acknowledge the trial court's conclusion that Respondent's reimbursement requests were only paid for by Apollo's investors because of Apollo's independent—and hidden—decision to ignore its own contracts and bill all expenses to investors. As the district court explained, the LPAs prevented Apollo from billing investors for expenses incurred by management professionals like Respondent. Despite this, "private-equity funds were billed regardless of the nature of the expense, in contradiction to the limited partnership agreements that governed the

funds." *Rashid*, 2020 WL 5658665 at *22. In particular, the "Accounts Receivable Department charged all expenses to the relevant private equity fund, even those that should have been allocated to the Apollo management company." *Id.* Thus, although "Rashid seemingly believed that his expenses would be reimbursed by an Apollo management fund, they were in truth borne by investors." *Id.* at *21. Put differently, had Apollo followed its own agreements, Rashid's expenses would not have been passed onto investors, and his actions would not fall within the purview of the IAA.

This highly unusual situation—where Apollo itself was ignoring its own contracts and wrongfully passing on management expenses to investors—is not one Respondent (or any investment professional) is likely to face again.

Moreover, the evidence establishes that Respondent has also already paid, and continues to pay, a heavy price for his negligence and is thus unlikely to reoffend. Respondent lost his job at Apollo and has not worked in the securities industry since that time, effectively serving a seven-year industry bar. Respondent has also been subject to extensive public humiliation over the same lengthy period because of the SEC's allegations of intentional fraud. While ultimately rejected, such allegations of fraud obviously linger and are never fully cleared from the air. That is an unfortunate fact of life. But it is a fact, nonetheless. Put simply, the reputational and personal damage that has resulted and continues to flow from Commission's litigation has been disproportionately severe, albeit unintended, and there is no evidence in the record that Respondent poses a risk of repeating his negligence going forward.

CONCLUSION

The Commission's Motion does not support the imposition of an associational bar. There remains a genuine issue of fact regarding the materiality of Respondent's behavior as to investors

and the market. Additionally, it is clear that Respondent did not act with scienter, has repeatedly acknowledged his wrongdoing, and is unlikely to reoffend due to both the unique circumstances that led to his violations and the enormous personal consequences he has suffered over the last seven years. Finally, the Commission has utterly failed to show its most severe sanction—a permanent associational bar—is appropriate. Even viewing the Motion in a light most favorable to the Commission, the *Steadman* factors militate against imposition of the Commission's most severe sanction. As the D.C. Court of Appeals has repeatedly admonished, the "SEC must be particularly careful to address potentially mitigating factors before affirming a permanent bar." *Saad v. S.E.C.*, 718 F.3d 904, 913 (D.C. Cir. 2013) (internal quotations omitted). The same should be required here and, when considered and in light of all the other factors discussed herein, the most drastic sanction available is grossly disproportionate. .

For the foregoing reasons, the Commission's request for a permanent associational bar must be rejected.

Date: January 4, 2021

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