Defendant
Paul C. Spitzer

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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

File No: 3-20204

In the Matter of)	**MOTION TO APPEAR AND ARGUE AT HEARING BEFORE COMMISSION**
ADVANCED PRACTICE ADVISORS, LLC)	
AND)	
PAUL C. SPITZER,)	
Defendant(s))	

OS Received 02/08/2023

Defendant Paul C. Spitzer ("Spitzer"), by and through counsel, hereby respectfully requests that the Commission hold a hearing on Spitzer's application to lift the limitation on supervisory activities imposed on Spitzer by the Commission's order dated January 14, 2021 (the "Order") and that counsel for Mr. Spitzer be permitted to make argument at that hearing.

Semantics aside, the sanction on Mr. Spitzer's supervisory activities, which the Division attempts to minimize as a mere "restriction" on supervisory activities in its Response to Spitzer's Motion to Dismiss (hereinafter the "Response"), is a defacto "permanent bar" from the securities industry. Whether or not a person should be barred from the industry—*especially* in a case like this one where no one lost money, no one complained about the alleged misconduct and Mr. Spitzer has had a clean record covering more than thirty-five years in the industry—should not be decided by *ex parte* communications between the SEC's Division of Enforcement (the "Division") and the Commission alone.

Courts have deemed such sanctions to be the equivalent of capital punishment. Given the draconian consequences of such a sanction, which have adversely affected virtually every aspect of Mr. Spitzer's professional and personal life (even beyond the securities industry), the Division must better explain why imposing the most severe sanction, and therefore apparently punitive sanction, is in fact in the public interest, particularly in light of the mitigating factors in the record. To present those mitigating factors and to assist the Commission in properly evaluation them, counsel for Mr. Spitzer

should be allowed to bring such mitigating factors to the attention of the Commission free of the Division's biased interpretations.

The all-important principle of fairness before the law argues for no less than a forum where the advocates can fully articulate their respective views on the need for such a draconian sanction.

Dated: February 8, 2023

Respectfully Submitted,

[redacted]

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 8, 2023, he caused a copy of Defendant's Motion to Appear and Argue in a Hearing Before Commission and the accompanying Memorandum of Points and Authorities to be sent by electronic mail and by eFAP for immediate delivery:

Gary Y. Leung
U.S. Securities Exchange Commission
Division of Enforcement
444 S. Flower Street
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Teresa M. Melson
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Dated: February 8, 2023

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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

File No: 3-20204

In the Matter of)	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO APPEAR AND ARGUE AT HEARING BEFORE COMMISSION**
ADVANCED PRACTICE ADVISORS, LLC)	
AND)	
PAUL C. SPITZER,)	
Defendant(s))	

OS Received 02/08/2023

In support of his motion for counsel to appear and argue at hearing before the Commission at the time it considers Mr. Spitzer's application to lift the limitation on supervisory activities imposed on Spitzer by the Commission's order dated January 14, 2021 (the "Order"), Mr. Spitzer relies on the following points and authorities.

I.

Procedural due process embodies the need for fair and open proceedings before administrative agencies. The courts have long acknowledged this requirement:

There is a general policy favoring disclosure of administrative agency proceedings. FCC v. Schreiber, 381 U.S. at 293, 85 S.Ct. 1459. Further, when performing quasi-judicial functions, agencies must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play. Morgan v. United States, 304 U.S. 1, 22, 58 S.Ct. 773, 778, 82 L.Ed. 1129 (1938). Mr. Spitzer's application to lift the limitation on supervisory activities imposed on Spitzer by the Order is such a proceeding. Due process and fairness require no less.

II.

The Administrative Procedure Act ("APA") recognizes the right of a respondent to participate in agency deliberations concerning sanctions. Decisions of this magnitude - bearing as they do on a person's livelihood - should be held in a forum with participation by the defendant and not occur behind closed doors and decided solely upon ex parte communications between the enforcement staff and the Commission. Subsection (a) of section 556 of the APA, 5 USC §556, provides that the provisions of 556 shall apply when

section 554, which governs agency adjudications, applies. The APA defines an "adjudication" as "agency process for the formulation of an order." 5 U.S.C. §51(7). An "order" includes all dispositions of an agency, whether affirmative, negative, or declaratory in form in a matter other than rulemaking but including licensing. 5 U.S.C. § 551(6].

Subsection (d) of Section 556 of the APA states the conditions under which an order issuing sanctions can be imposed.

> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. **A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts**. USC §556(d) (emphasis added).

Accordingly, the APA recognizes that a person like Mr. Spitzer should be permitted to participate in the Commission's deliberations, require that the Commission consider the full record that has been developed by the staff, present evidence, and make rebuttal argument. Fairness and impartiality require no less.

1. **Impropriety of Staff Ex Parte Communications**

Of great concern to Mr. Spitzer is the Commission's practice of only allowing the staff to address the Commission when deciding sanctions. Under the APA, an "ex parte communication" is defined as "an oral or written communication not on the public record with respect to which reasonable prior notice is not given." 5 U.S.C. § 551(14). Section 557(d) of the APA, which forbids ex parte communications by persons outside the agency

to members of the body comprising the agency, is silent on the propriety of ex parte communications between the staff and the Commission. However, the spirit of the APA and the purpose of its ban on ex parte communications ensure that agency decisions are not influenced by private, off-the-record communications from those personally interested in the outcome. The rule banning ex parte communications ensures that the proceedings are conducted in a fair manner with all parties present and that all parties have the same information as the ultimate decision maker.

The instant proceeding does not involve a decision to charge someone or institute initial enforcement proceedings, which are traditionally non-public proceedings, where the staff may need to discuss behind closed doors the evidence gathered in its investigation pointing to possible violations of the federal securities laws. In that context, the staff and the Commission need to discuss the quality of that evidence and the implications of such conduct on the Commission's various policies and enforcement programs, without worry of the risk of reputational injury.

Those same policy considerations are not present here. Therefore, ex parte communications between the staff and the Commission should not be allowed when considering Mr. Spitzer's application to lift the Commission’s sanction, especially under the "public interest" standard.

2. The “Public Interest” Standard

Because the "public interest" standard easily lends itself to subjective determinations and opinions, persons who are the target of such subjective determinations have a right to participate. The "public interest" standard should not be defined either in the first instance or in the final analysis by the very people who brought the law enforcement proceedings in the first place. The

risk of bias is too great. Self-justification can pervade such a proceeding. Just as the enforcement staff needs to justify its own enforcement proceedings, so too Mr. Spitzer's views should be given equal time and weight as to why a given sanction should now be terminated. Further, there must be some objective criteria by which "in the public interest" is measured in the context of sanctions when the enforcement staff insists that it must remain in full force.

Contrary to the staff's assertion that by pursuant to the Offer, Mr. Spitzer waived all hearings, proceedings before a hearing officer and all post-hearing procedures, Section IV.D of the Order itself invites Mr. Spitzer to make this application:

> "Any application to act in a supervisory capacity will be the subject of applicable laws and regulations governing the re-entry process, and permission to act in such a supervisory capacity may be conditioned upon a number of factors, including but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the defendant, (b) the satisfaction of any ordered arbitration award ordered by the Commission, (c) the satisfaction of any self-regulatory arbitration award to a customer, (d) any restitution order by a self-regulatory agency." Order, Section IV.D.

The Commission cannot offer with one hand a sanction and words of relief in order to obtain settlement, but then on the other hand withdraw the "carrot" and insist on the "stick" of the sanction in perpetuity.

3. Need for Continued Sanction

These considerations are particularly pronounced is this proceeding where the Commission's hearing will decide the continuation of a sanction. When a sanction, like this one, has become so seemingly punitive, the Commission carries the burden of explaining and articulating why it must continue and why it is not punishment. That is no place for ex parte communications between the staff and the Commission alone. In this case, the Commission is considering the need for continuation of a sanction that has outlasted its remedial purpose. The hue and cry of the enforcement staff that Mr. Spitzer's case demands continued "limitations" is illogical, particularly in

light of the fact that the enforcement staff settled with the primary violators, who conceived and perpetrated the fraud that Mr. Spitzer was only found to have negligently aided and abetted, on terms that required no such sanctions. The staff simply cannot, as required by section 556(d) of the APA, carry its burden of proving the likelihood of future misconduct. There can be no such proof, because there is none; and such proof must be based on something other than the argument or inference that past misconduct alone suggests repetition in the future. It does not and cannot. Therefore, how the Commission decides its sanctions and the terms under which and the extent to which the Commission will continue various sanctions are precisely matters a defendant, who will be affected by those decisions, should have a participatory role in discussing.

III Consideration of Mitigating Factors

The United States Court of Appeals for the District of Columbia Circuit requires the Commission to consider mitigating factors when imposing sanctions. So that such mitigating factors are presented and appropriately considered by the Commission from Mr. Spitzer's perspective, unfiltered by the staff's view of them, counsel should be permitted to present them. In Saad v. SEC, the United States Court of Appeals for the District of Columbia Circuit recognized that a lifetime bar is "the equivalent of capital punishment." Given Mr. Spitzer's advanced age, 73, the continuation of the instant sanctions amounts to a lifetime bar—its most severe sanction. The Commission must explain why imposing the most severe sanction only on Mr. Spitzer, who was found to have negligently aided and abetted the fraud, and not on the Sztroms is, in fact, remedial, particularly in light of the fact that the Sztroms conceived and perpetrated the fraud and were found to have acted with scienter). Here we have acts involving *negligence* being punished more severely than acts involving *scienter*.

In his initial Motion dated December 29, 2022 and his supplemental Reply to the Staff's Response dated January 27, 2023, both of which were submitted to the staff in connection with Mr.

Spitzer's application to lift the limitations on supervisory activities imposed by the Commission, Mr. Spitzer has recounted his ejection from the various institutional platforms available to institutional investment advisers without which he cannot conduct business as an investment adviser. There can be no doubt that the Commission's position is punitive. It can only be explained by the self-interest and the enforcement staff's need to justify its own enforcement proceedings. That there is no longer any further remedial need for it is beyond doubt. If the staff believes that "public interest" standard justifies further continuation of this bar order, Mr. Spitzer, through counsel, should be permitted to rebut those arguments before the Commission at the same time that the staff presents them.

Dated: February 8, 2023

Respectfully Submitted,

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