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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

File No: 3-20204

In the Matter of)	**REPLY BRIEF TO THE DIVISON OF ENFORCEMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS THE COMMISSION'S ORDER INSTITUTING REMEDIAL SANCITON OF BAR ON SUPERVISORY ACTIVITIES**
ADVANCED PRACTICE ADVISORS, LLC))	
AND)	
PAUL C. SPITZER,)	
Defendant(s))))	

Defendant

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Paul C. Spitzer ("Spitzer"), by and through counsel, hereby respectfully enters this Reply to the Enforcement Division's Response, dated January 27, 2023, to Defendant's Motion to Spitzer's Motion to Dismiss the Commission's Order Instituting Remedial Sanction of bar on Supervisory Activities.

OS Received 02/08/2023

TABLE OF CONTENTS

I. **INTRODUCTION** 2

II. **ARGUMENT** 2

A. Conduct at Issue 3

B. Timing 5

C. Compliance Record 6

D. Unanticipated Consequences 7

E. Fair and Reasonable 8

1. The penalties are not fair 9

2. The penalties are not reasonable 9

F. The public interest 10

III. CONCLUSION **11**

OS Received 02/08/2023

TABLE OF AUTHORITIES

CASES

In re Peter Siris,
Securities Exchange Act Release No. 71068, 2013 WL 6528874 (Dec. 12, 2013) 3

In re Brett Thomas Graham,
Investment Company Act Release No. 33225, 2018 WL 4348490 (September 12, 2018) 5

In re Michael H. Johnson,
Exchange Act Rel. No. 75894, 2015 WL 5305993, (Sept. 10, 2015) 5

In the Matter of Kenneth W. Haver, CPA,
Rel. No. AE-2517, 2006 WL 34211789 (S.E.C. Nov. 28, 2006) 5

In re Eric David Wanger
Exchange Act Release No. 81111, 2017 WL 5305993. (July 10, 2017) 8

FEDERAL STATUTES

Section 206(1)
[15 U.S.C. §§ 80b-6(1)] 6

Section 206(2)
[15 U.S.C. §§ 80b-6(2)] 6

Section 10b
[15 U.S.C § 78j(b)] 3, 5

OS Received 02/08/2023

I. INTRODUCTION

The enforcement staff's response to Spitzer's motion is a predictable compilation of its usual position on applications to lift sanctions. It largely ignores the central argument presented in Mr. Spitzer's Motion to Dismiss—that the limitations on supervisory activities to which he consented is excessive, unfair and unreasonable, and it should be reconsidered under the circumstances.

In its recitation of the factual background, the staff oversimplifies facts it cherrypicked to highlight, and predictably presents them in their absolute worst possible light. The staff speaks solely of Mr. Spitzer's so-called compliance failures. There is no mention of the deliberate steps Spitzer took to avoid the violations ultimately committed by the Sztroms. For example, it states that Spitzer did not require the son to maintain separate office space from his father or take other precautionary measures to prevent the sharing of confidential client information with the father. The staff strategically ignores the fact that Mr. Spitzer initially placed APA's compliance officer in their office for six weeks to monitor this very possibility, that Mr. Spitzer insisted that the father promptly form his own firm (and separately register it so he could lawfully advise his own long-time clients), and that Mr. Sptizer was deceived by the Sztroms.[1]

Although the response is rife with such examples, Mr. Spitzer does not wish to argue the facts the staff has picked for highlighting, or to re-litigate the matter. We recognize that such argument will not serve Spitzer's immediate purpose, which is to demonstrate that there are compelling reasons to lift or moderate the Commission's supervisory limitations at this time.

II. ARGUMENT

[1] See Attachment 3 to Motion to Dismiss; Order Denying Defendant's Motion to Dismiss: "The District Court found that the Sztroms' "***affirmative and deceptive***" actions to communicate with Sztrom's clients outside of the APA system in violation of APA's compliance policies "led directly to APA's inability to review or preserve the client communications for compliance purposes."

OS Received 02/08/2023

The staff opens its opposition brief by stating "Spitzer fails to demonstrate that this is the type of case where modifying or vacating a supervision limitation is justified." We disagree.

A. Conduct at Issue

Spitzer violated Section 206(2) of the Advisers Act—one the antifraud provisions contained in the Advisers Act. In their totality, the "securities laws" contain numerous antifraud provisions, including, for example, those found under Section 206 of the Advisers Act, Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Exchange Act.

The staff cites *Siris* for the proposition that "violations of the antifraud provisions of the securities laws are especially serious and subject to the severest of sanctions." In re Peter Siris, Secs Exch Act Release No. 81111 (Dec. 12, 2013). To make the blanket suggestion that all violations of the anti-fraud provisions of the securities laws warrant the "severest of sanctions" is to ignore the varying *mens rea* required to establish liability thereunder.

The *Siris* case is distinguishable from the instant case. Indeed, the staff is offering the "subject to the severest of sanctions" quote out of context. Among other independent violations related to recurrent insider trading, Mr. Siris was found to have violated the following anti-fraud provisions: Sections 17(a) if the Securities Act, Sections 10(b) of the Exchange Act and Sections 206(4) of the Advisers Act. His injunction was based on alleged conduct that included numerous instances of insider trading over almost two years that resulted in ill-gotten gains of over half-a-million dollars. In charging Mr. Siris, the staff asserted that he acted with "a high degree of scienter," impliedly conceding that not all frauds are equal—rather, just as there are various fraud statutes across the securities laws, there are varying degrees of fraud.

The staff did not assert that Mr. Sptizer acted with scienter. Rather he was found to have violated Section 206(2), the least serious of the various anti-fraud rules in the Advisers Act and the rules promulgated thereunder. For example, in contrast with Section 206(1), which applies to a

OS Received 02/08/2023

scienter-based standard of conduct, Section 206(2) applies a willful negligence standard and does not imply or include any element of scienter.

In making its case for the "seriousness" of Spitzer's conduct, it is telling that the staff overlooks these facts: (1) ***in the two years since the entry of the Order, no customer, trustee or agent of the same has claimed any form of loss and not a single legal or equitable claim arising from the loss has been asserted against Spitzer, APA or the Sztroms in any forum***, and (2) ***Spitzer did not profit or otherwise derive any benefit from APA's association with the Sztroms***. The most compelling evidence of the latter statement is the fact that APA was not required to disgorge any management fees as part of the Order.

Yet, in making its case for the severest of sanctions on Mr. Spitzer, the staff refers to the "seriousness . . . of Spitzer's conduct." When you think about this statement you must conclude that it is either a gross exaggeration or an effort by the staff to justify itself. In contrast to the Sztroms, who conceived and perpetrated the misconduct at issue, Mr. Spitzer was found only to have negligently aided and abetted the misconduct. The facts underlying the allegations against Mr. Spitzer and the Sztroms were identical, yet the staff apparently concluded that the "seriousness" of the Sztroms' conduct did not warrant a censure or sanctions. How is it possible that the ***negligent*** actions of the person who was found to have aided and abetted the primary violator's fraud can be viewed and treated more harshly than the actions of the person who, with ***scienter***, set the fraud in motion and perpetrated it?

In apparent response to this question, the staff states: "[w]hether the Sztroms should be barred in the public interest remains to be litigated and is not relevant here." This statement is misleading. The staff's settlements in the Sztroms' case are ***final judgments***. The Sztrom consents, and each of them, state in relevant part: [t]he Defendant hereby consents to the entry of final

OS Received 02/08/2023

Judgment in the form attached hereto (the "Final Judgment").[2] Further, the Commission waived further jurisdiction over the Sztrom matter "except to enforce the terms of this Final Judgment." Perhaps the staff is trying to say it will prosecute the Sztroms again—this time more vigorously—if they re-violate. This amounts to affording the Sztroms a "second chance." The staff must explain why Mr. Spitzer should not be entitled to the same treatment?

B. Timing

The staff objects to Spitzer's Motion in part because it was filed "less than two years after the supervisory limitation was imposed on him (to be exact, 19 days less). To support its position, the staff first cites *Graham* (denying request to modify settlement offer and finding that Graham waited less than two years after the Order was entered to request that we modify it"). In re Bret Thomas Graham, Inv Co Act Release No. 33225, 2018. It then separately cites two other cases: Johnson (denying motion to modify bar where only sixteen months had passed since the entry of the bar") and Haver for the same proposition. In re Michael H. Johnson, Secs Exch Act Release No. 75894, 2015; In the Matter of Kenneth W. Haver, Rel. No. AE-2517 (S.E.C. Nov. 26, 2006). All three of these cases are inapposite. Indeed, full readings in all three cases reveal that the staff is using dicta from such cases out of context.

For one thing, all three defendants, Graham, Johnson and Haver, each consented in their respective settlements to violations of Section 10(b) and Rule 10b-5, the most serious of the anti-fraud statutes. More importantly, the separate orders to which each of them consented stipulated when their bars would become subject to the to the right of re-entry: after three years in Graham, after five years in Johnson ("sought re-entry after one year instead of five years") and in Haver ("even the five year period after which Haver may apply for reinstatement has not yet passed").

[2] Case No. 3:21-CV-00086-H-RBB

OS Received 02/08/2023

Spitzer did not consent to such restrictions. In relevant part, the Order states:

"Spitzer shall be, and hereby is, subject to the following limitations on his activities: Respondent Spitzer shall not act in a supervisory capacity with any . . . investment adviser." **Any action to act in such a supervisory capacity will be subject to the 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 … ."** The factors include, but are not limited to (a) satisfaction of any disgorgement ordered against respondent (there was none); (b) satisfaction of any arbitration award related to the conduct that served as the basis for the Commission's action (there was none); (c) satisfaction of any arbitration award to a customer (there was none); and (d) satisfaction of any restitution order (there was none).

(Comments and emphasis added).

The Order to which Spitzer consented does not stipulate a waiting period for re-application. As far as we understand them, Mr. Spitzer is following the applicable laws and regulations governing the re-entry process.

Oddly, in my view, the staff also cites a case where the bar was not vacated until more than 26 years after it was imposed against an individual who had been continuously employed in the securities industry for the past 24 years. Mr. Spitzer is 73 years old. In 26 years, if he is still living he will be 99 years old! The Commission's three-year investigation of Mr. Spitzer bankrupted him and his wife. They have no retirement resources left. As a very real matter, Mr. Spitzer probably has no more than five good years left to do what he can to re-build their retirement savings. In short, he does not have five years to wait.

C. Compliance Record

The Commission put Mr. Spitzer in a "Catch-22" of the Commissions own making. On the one hand, the staff acknowledges "it may be difficult for [Spitzer] to find a clearing broker who will work with him" and the supervisory limitation "may well impede his ability to obtain employment in the securities industry." On the other, it demands a record of compliance in the securities industry—preferably over a period of years.

OS Received 02/08/2023

The full record supports Mr. Spitzer's request to lift the Commission's supervisory limitation. Spitzer fully complied with the terms of the Order. Following the Order, such compliance involved hours of compliance training, and almost two years of work as an investment adviser under a registered adviser's supervision. The staff ignores the letter submitted by Robert Ingham, Spitzer's former employee and now supervisor over this two-year period, which states that over the twelve years Mr. Ingham has known Mr. Spitzer he has always been impressed by Spitzer's experience, knowledge of the securities industry and "client first" focus. Further, Mr. Ingham stated: "Spitzer always emphasized building a culture of compliance as one of primary tenets of APA's compliance department." This demonstrated history of compliance, as attested to by his long-term colleague and present supervisor, along with Mr. Spitzer's exemplary record of 35-plus years in the highly regulated securities industry, is compelling evidence of Spitzer's ability and willingness to comply with all regulatory requirements.

D. Unanticipated Consequences

Let us put to rest the staff's comment about the "credulity" of Mr. Spitzer's "unsubstantiated" claim that the staff gave him some assurances concerning the likelihood of clearing brokers permitting him access to their platforms. Such assurances were qualified, but they were given in the week prior to the completion of the settlement agreement, and communicated through Mr. Spitzer's counsel.

When settling with the Commission on the terms he did, Mr. Spitzer genuinely did not anticipate that the word **BARRED** would be conspicuously stamped on his *BrokerCheck* record in capital letters. Mr. Spitzer had no reason to expect that a limitation on supervisory activities would be lumped together with a collateral bar in the eyes of the various clearing brokers. The enforcement staff knew (or should have known) that clearing brokers do not distinguish between a limitation on supervisory activities and a "bar." Fairness dictates that the staff should have shared

OS Received 02/08/2023

its knowledge with Mr, Spitzer when, through counsel, he specifically stated that he would not settle with the Commission if the terms of settlement would result in him "being kicked-off [the [clearing brokers] platforms." As counsel stated in his letter to the staff [3]: "I have been saying from the outset, both verbally and in writing, Mr. Spitzer's top priority is resolving this matter on terms that will preserve his ability to earn a living by continuing to advise his long-term clients."

By denying the statements counsel is attributing to it, the staff's opposition statement mischaracterizes the settlement negotiations in which it participated. It cannot be disputed that being "kicked-off" the clearing brokers' platforms was an unanticipated consequence of the Order.

It is telling that perpetrators of the fraud at the heart of this matter are still on the Schwab platform while Mr. Spitzer cannot be. The Commission must explain this illogical anomaly.

E. ***Fair and reasonable***

The staff again cites Wanger, this time for the proposition that "there is no requirement that the Commission's sanctions be uniform." The staff further asserts that it has made clear that "whether a particular sanction is excessive cannot be determined by comparison with the sanctions imposed on respondents ***to other cases***." (Emphasis added). This line of reasoning is wrong for two reasons. First, the Sztrom case is not an "***other case***." Second, Mr. Spitzer is taking issue with or otherwise questioning the outcome of the Sztrom settlement, he is asking the staff to explain its justification for continuing insistence on treating Mr. Spitzer's failure(s) more seriously than the Sztroms' misconduct—that is, ***why the "seriousness" of Spitzer's negligent conduct calls for the "severest of sanctions,"***

[3] See Attachment 6 of Spitzer's Motion to Dismiss

OS Received 02/08/2023

while the staff apparently did not think the same could be said of the seriousness of the Sztroms' conduct, who were found to have acted with scienter.

1. *The penalties are not fair*

To the extent the staff addresses this anomaly at all, the staff argues, in essence, that the Sztroms "are distinct parties who engaged in different conduct and who were charged with different violations in a different forum." This statement is correct in one aspect and just plain false in another. The staff is correct that the parties were charged with different violations—Spitzer with ***negligence*** and the Sztroms with ***scienter***. However, they are not distinct parties. They are the very parties to the very same matter that brought both the Sztroms and Mr. Spitzer into this unfortunate action.

2. *The penalties are not reasonable*

The Commission's opposition brief ignores the central argument of Spitzer's motion: that the anomalous treatment of Spitzer and the Sztroms is unreasonable under the circumstances. In the staff's own words "APA clients were misled and deceived by the Sztroms and, more importantly, ***Spitzer failed to prevent the deception and enabled it to continue***." This statement is inconsistent with the staff's own version of the events set forth in documents it filed in the federal district court. In its filed opposition to Sztroms' Motion to Dismiss the Commission's complaint, the staff states: "While [the son] was associated with APA, APA failed to retain required client communications, because Michael and David *circumvented the APA's email system* and used their personal phones to correspond with clients by text message outside the APA system." (Emphasis added). The District Court accepted this version of events in dismissing the Sztrom action. In its opinion, it zeroed in on that very statement. The District Court found that the Sztroms' "***affirmative and deceptive***" actions to communicate with Sztrom's clients outside of the APA system in

OS Received 02/08/2023

violation of APA's compliance policies "led directly to APA's inability to review or preserve the client communications for compliance purposes." In other words, the staff successfully argued to the Federal District Court that APA (i.e., Mr. Spitzer) was deceived by the Sztroms, yet it argues in its opposition to this motion that Mr. Spitzer's "***failure to prevent the deception" deserves the sanctions imposed by the Commissions while the Sztroms' fraud does not***. I liken this to a situation where a car is stolen and the judge lets off the thief with a light penalty and "throws the book" at the owner for leaving his door unlocked.

F. The public interest

The staff's conclusory statement that "it would not be in the public interest to agree to Spitzer's request to strip the Order of critical investor protection provisions" is not reasonably related to the facts—***it is an undisputed fact that no investors were harmed*** as a result of Mr. Spitzer's failure. To the contrary, Mr. Spitzer's punishment should be reasonably related and proportional to his conduct.

The relief being sought is incremental. Mr. Spitzer is not asking the staff to lift the limitation on supervisory activity unconditionally. He has represented to the staff that he has no intention of undertaking any supervisory role in the future, and he will not do so. He simply wants to be able to continue advising the book of clients he has worked with, in some cases, for 35 years.

The staff may take the position that it cannot police or enforce such a representation. This is untrue. As a component of any modification the staff will agree to, or a hearing officer may grant, Mr. Spitzer will make the foregoing representation to the Commission in a writing that will, among things the staff or Commission may require, acknowledge that the relief he was granted was a condition of the Commission's willingness modify the Order.

This representation is not meaningless or inconsequential. With the representation in hand, the staff will have, in effect, a confession of judgement. In the event Mr. Spitzer is found to be

OS Received 02/08/2023

engaging in actions contrary to the representation, the staff will have the enhanced ability to quickly and vigorously prosecute Mr. Spitzer in the future for any violations of the kind with which it is concerned.

III. **CONCLUSION**

Given the immense disparity in power and resources between the federal government and an individual litigant, it is critically important that any resolution—including one reached via settlement—meet an objective standard of fairness and reasonableness. It is respectfully submitted that the Commission should not impose unfair and unreasonable punishment on a party because the staff was able to pressure the party into consenting to it; rather, the Commission's orders must reflect a resolution that is objectively reasonable and in the public interest. Viewed by this standard, the *de facto* bar issued against Mr. Spitzer was unduly severe and not reasonably related to his underlying failure(s).

The continued enforcement of the Order is not reasonably related to the SEC's primary goal of protecting investors—no investors were harmed as a result of Mr. Spitzer's conduct and not a single legal proceeding has been threatened or commenced by an investor, trustee and any other party in the two years since the entry of the Order despite full knowledge of the facts. Instead, it should now be clear that the Enforcement Division's zealous prosecution and its proposed settlement terms were not proportional to Mr. Spitzer's failure(s). Perhaps the Enforcement Division's initial settlement terms were imposed in good faith, but the same cannot be said of its failure to change course now. //

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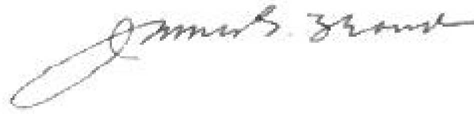
Dated: February 8, 2023

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that on February 8, 2023, I caused the foregoing document to be served on the following persons, in the manner described below:

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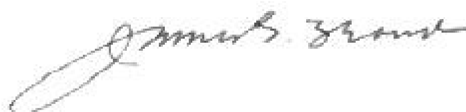

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