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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 DISMISS ORDER INSTITUTING REMEDIAL SANCTION OF BAR ON SUPERVISORY ACTIVITIES**
ADVANCED PRACTICE ADVISORS, LLC))	
AND)	
PAUL C. SPITZER,)	
Respondent(s) and Appellant(s))))	

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STATEMENT OF THE CASE

The U.S. Securities and Exchange Commission ("SEC") filed an Order against Advanced Practice Advisors, LLC ("APA") and Paul C. Spitzer "instituting administrative proceedings making findings and imposing remedial sanctions" in January 2021 (the "Order") (attached hereto as Attachment 1). After an investigation that lasted two years, the SEC alleged that two investment adviser representatives ("IARs") employed by APA conspired to defraud their advisory clients, and did defraud such clients, by not disclosing the true identity of the person actually exercising investment discretion and otherwise managing their assets. The Order found that Mr. Spitzer should have known of the fraud and, thus, he failed to reasonably supervise the two IARs. After a year-long enforcement action, Mr. Spitzer consented to the entry of the Order in December 2020. It included a fine in the amount of $20,000 and certain remedial sanctions, notably including a bar on Mr. Spitzer's supervisory activities.

STATEMENT OF APPEALABILITY

This appeal is from the Order of the SEC and is authorized by Rule 193 of the SEC's Rules of Practice.

STATEMENT OF FACTS

Since its founding in 2010, Mr. Spitzer served as the chief executive officer of APA. In his capacity as CEO, Mr. Spitzer ultimately oversaw all of APA's operational functions including, in relevant part, hiring and compliance. At various times over the years, APA

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employed and supervised approximately seventeen investment adviser representatives (IARs"), not one of whom had any history of misconduct under Mr. Spitzer's supervision.

In 2015, Mr. Spitzer hired David Sztrom as an IAR. When hired, David Sztrom had no advisory clients of his own. However, David's father, Michael Sztrom, had had a long and successful career as an IAR at another firm. The younger Sztrom represented to Mr. Spitzer that he expected to eventually take over his father's book of clients/business. Mr. Spitzer hired the younger Sztrom with the understanding that he would develop and advise his own book of advisory clients, albeit comprised largely of the father's old clients.

In late 2015, a representative of APA's custodian at the time, Charles Schwab & Company, notified Mr. Spitzer that Schwab had reason to believe the elder Sztrom was actually the one managing his son's client accounts, even though he was not formally associated with APA. The Schwab representative based this conclusion on evidence the elder Sztrom was impersonating his son in telephone calls to Schwab's trading desk and entering trades in such accounts which, among other bad things, violated the terms of Schwab's prime brokerage and custody agreements with APA.

Following the Staff's lengthy investigation of the matter, the SEC alleged in the Order that Mr. Spitzer knew or should have known the elder Sztrom was advising APA clients because he knew the younger Sztrom had no real investment management experience, no clients of his own, and that the elder Sztrom, who previously worked as an IAR at another firm, shared an office with the younger Sztrom.

Mr. Spitzer has always contended that he had no knowledge of the Sztrom fraud, largely because the Sztroms deliberately and carefully circumvented the APA system by

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using their personal telephones to correspond with clients by text message, thereby violating APA's compliance policies and controls.

The SEC eventually filed a Complaint instituting a separate enforcement action against the Sztroms (attached hereto as Attachment 2). The Sztroms quickly moved to have the enforcement action dismissed by the U.S. District Court (Southern District of California). In the District Court's opinion, which denied the Sztrom defendants Motion to Dismiss Complaint, it 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 (attached hereto as Attachment 3).

ARGUMENT

Without intending to relitigate the APA/Sztrom matter, the SEC's recent consents to final judgment as to the Sztrom defendants (attached hereto as Attachments 4 and 5) created several anomalies that should be very difficult to ignore and/or justify:

I. The SEC treated Mr. Spitzer more harshly than the primary violators.

The primary actors in the Sztrom/APA matter were Michael and David Sztrom, father and son, respectively. In the Complaint, the Staff wrote that APA was deceived by the Sztroms: "While David was associated with APA, APA failed to retain required documents, including 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). Complaint at ¶156. Further, the Staff conceded "[b]y circumventing APA's email system, APA could neither

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review nor preserve these client communications for compliance purposes." Complaint at ¶166. Further still, the Complaint states in various places that the Sztrom defendants, "and each of them, directly or indirectly . . . knowingly, recklessly and/or negligently engaged in . . . transactions, practices, or courses of business which operated as a fraud or deceit upon clients or prospective clients." Complaint at ¶¶174, 181. *It should also be said their knowing and reckless practices operated as a fraud or deceit upon APA and Mr. Spitzer.*

The U.S. District Court (Southern District of California) agreed. In its opinion which denied the Sztrom defendants' Motion to Dismiss Complaint it stated that the SEC adduced sufficient evidence to show that Sztrom's affirmative actions to communicate with Sztrom clients outside of the APA system in violation of APA's compliance system "*led directly* to APA's inability to review or preserve the client communications for compliance purposes." (Emphasis added).

These findings bear repeating—to paraphrase, both the SEC and the District Court found the "failures" to which APA was forced to consent were the direct result of the Sztrom's deceptive behavior. Notwithstanding the foregoing findings, there is a material discrepancy in the remedies meted out to Mr. Spitzer and the remedies to which the Sztrom defendants were allowed to consent. Specifically, Mr. Spitzer—as the alleged aider and abettor—was compelled to consent to a cease and desist order, a censure, a $20,000 civil penalty and a bar on supervisory activities. In contrast, David Sztrom—also found to have aided and abetted the Sztrom's fraud—was let off with just a cease and desist order and a small civil penalty. *No censure; no bar!*

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The same was true for Michael Sztrom—the primary violator. He was found to have committed the fraud by impersonating his son on numerous occasions. Yet, he was allowed to consent to the same limited remedies. *No censure; no bar.*

In essence, the SEC compelled Mr. Spitzer to consent to extreme penalties for aiding and abetting the Sztrom fraud. Yet, it allowed the actors who conceived and perpetrated the fraud, *and deceived Mr. Spitzer in the course of their conduct*, to consent to relatively minor penalties. *No censure; no bar!*

II. APA's Compliance Policies and Procedures Were Reasonably Designed.

The Order (to which Spitzer consented) and the Complaint (filed by the SEC in the Sztrom matter) contain two irreconcilable versions of Mr. Spitzer's conduct. In the Order, the SEC states that Mr. Spitzer should have known of the fraud and his failure to "adopt and implement policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules constituted aiding and abetting violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder (which require, among other things, that a registered investment adviser adopt and implement written policies and procedures)." (Order at ¶15).

The Complaint paints a very different picture. It states: "As an SEC-registered investment adviser during the relevant time period, APA (and, thus, Spitzer) was required to make and keep books and records related to its advisory business." Complaint at ¶148. It continues to state: "During the relevant period, APA confirmed these obligations by requiring all supervised persons to use its electronic recordkeeping system, and prohibiting them from using personal email accounts to communicate with clients."

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Complaint at ¶150. In the Complaint, the SEC further conceded that APA required all IARs, on an annual basis, to acknowledge that they had received and reviewed APA's compliance manual. Complaint at ¶153.

Section 206(4) of the Advisers Act and Rule 206(4)-7[1] is not absolute. The actual text of the Rule requires SEC-registered advisers to adopt policies and procedures *reasonably designed* to prevent violations of the federal securities laws. In view of the foregoing SEC statements in the Complaint, and the facts that (1) APA's written policies and procedures were prepared and implemented by Spitzer with the assistance of Ms. Jill Young, his seasoned CCO,[2] (2) its procedures explicitly prohibited IARs from using personal accounts to communicate with clients, and (3) APA and Spitzer were deliberately deceived by the Sztroms, it is hard to reconcile the SEC's two versions of the relevant events. Respectfully, the SEC's statement in the Complaint ("APA confirmed [its compliance obligations] by requiring all supervised persons to use its electronic recordkeeping system, and prohibiting them from using personal email accounts to communicate with clients" and its allegation in the Order (that Spitzer's failure to "adopt and implement policies and procedures reasonably designed to prevent violations of the Advisers Act and its rule) represent two different conclusions. They cannot be rationalized because they are directly opposed to one and other.

III. <u>The SEC found the Sztrom's conduct was the product of "scienter."</u>

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[1] Rule 206(4)-7, [17 CFR 275.206(4)-7]

[2] Prior to joining APA, Jill Young was the chief compliance officer of Gupta Wealth Management ($1.5B in assets) and Rainier Wealth Management ($3 billion in assets). On information and belief, today Ms. Young serves as the chief compliance officer of LourdMurray), a large advisory firm with over $3 billion in assets and 23 employees. .

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In contrast to the simple negligence findings involving Mr. Spitzer, the SEC stated that the actions of the primary violators, Michael and David Sztrom, were the product of scienter. "During all relevant times, Defendants acted with scienter." Complaint at ¶139. "By engaging in the conduct described above, Defendants, directly or indirectly, by the use of the mails or means and instrumentalities of interstate commerce, with scienter, employed devices or artifices to defraud clients or prospective clients." Complaint at ¶171.

One should expect that violations involving simple negligence would be treated less severely than acts involving knowing, reckless and intentional acts of fraud (scienter). Yet, that was not the case here. Despite being found to have knowingly, recklessly and intentionally defrauded its clients with scienter, each of the Sztrom Defendants were allowed to consent to minor penalties in relation to the penalties to which Mr. Spitzer was forced to consent.

IV. The Order's remedial sanctions have had unintended, potentially catastrophic, consequences.

On information and belief, the Staff did not intend for the limitations and restrictions placed on Mr. Spitzer's supervisory activities to have the effect of preventing him from associating with the industry's brokers—that is, to effectively result in a collateral bar.

Since 2021, Mr. Spitzer has been associated with Ingham Wealth Management, LLC of San Diego, California (CRD #147188) ("IWM"), a two-person firm consisting of its sole owner, Robert H. Ingham (CRD #2394680), and now Mr. Spitzer. In Mr. Spitzer's capacity as an IAR, Mr. Spitzer continues, under supervision, to advise clients he has served over the

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years, approximately 80% of whom have stayed with Mr. Spitzer for thirty-five years or more. Indeed, Mr. Spitzer still has four of his first five clients—the fifth client was with him until the client died.

Mr. Spitzer's relationship with IWM is in jeopardy. When Schwab learned of the alleged misconduct of the Sztrom father and son team in 2015, it ostensibly kicked APA off the Schwab platform. At that time, Mr. Spitzer was forced to move all of APA's clients (including his own) to TD Ameritrade's ("TDA") platform where he continued doing business until January 2021.

Mr. Spitzer's current employer, IWM, presently does business on the TDA platform. When Schwab completes its acquisition of TD Ameritrade, the two platforms will be integrated—and all TDA's clients, including IWM, are expected to become clients on Schwab's platform. Mr. Spitzer fears he will be kicked off the Schwab platform again unless this Motion is approved. If that were to happen, he would be unable to continue working for IWM, jeopardizing his ability to continue his relationships with his long-standing advisory clients—his only source of income.

In a letter dated December 21, 2020, Mr. Spitzer informed the Staff, through counsel, that he was meeting with TDA to determine how the language of the Order might affect Mr. Spitzer's relationship with TDA. He stated therein that he would not agree to the SEC's proposed settlement offer and terms if the language of the eventual Order would result in him being "kicked off" TDA's platform.

As set forth in that letter (attached hereto as Attachment 6), throughout the course of his settlement discussions with the Staff, Mr. Spitzer's top priority was resolving the

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Sztrom matter on terms that would preserve his ability to earn a living by continuing to advise his long-term clients (albeit under supervision). In response to this letter, the Staff essentially stated that the bar on his supervisory activities "should not" have that effect. After receiving this statement from the Staff and tentatively positive feedback from TDA, Mr. Spitzer agreed approximately one week later to the language of the Order. He believed at that time that if he performed all of the things the Staff was seeking, he would be allowed to make a living under supervision.

Mr. Spitzer is certain that upon the completion of the Schwab/TDA transaction this Spring, he again will be "kicked off" the Schwab platform unless the relief he is seeking is by this Motion is granted. This is because Schwab's policy is to treat any "BAR" as a "COLLATERAL BAR." If this happens, Mr. Spitzer and his wife will be left with no practical means of earning their living and, thus, supporting themselves. To fully appreciate the urgency of this Motion, one must consider its very real effect on the Spitzers' lives. The Staff's investigation was over three years in the works. During these years, all of its IARs left APA (except one), resulting a total loss of the Spitzers' $3 million investment in APA and 13 years of hard work. Further, Mr. Spitzer has already incurred substantial legal fees and costs. The Spitzers have depleted their home equity, retirement savings and liquid cash. For all practical purposes, they have no assets left. At this stage in their lives, the Spitzers must live on whatever income Mr. Spitzer can earn from his remaining clients, and nothing else. If Schwab does not allow Mr. Spitzer back on its platform, he will have no way of earning even that. Mr. Spitzer is now 73. He has had a life-long career in the securities industry with no personal misconduct. He has no practical prospect to be re-employed or

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even to start over. To a very real extent, the Spitzers' future survival depends on the outcome of this Motion.

V. No clients lost money as a result of the Sztroms' fraud.

No clients complained about Sztrom's conduct or lost money as a result of it. Indeed, on information and belief, substantially all of Sztrom's old clients are still with him.

VI. All financial penalties have been satisfied.

Mr. Spitzer made timely payment of his financial penalty.

VII. Supervision. In his capacity as an IAR, Mr. Spitzer serves in a non-supervisory role. Mr. Spitzer is one of Ingham's two advisers—the other is Mr. Ingham himself. Mr. Spitzer's advisory activities are supervised by Mr. Ingham.

VIII. The "public interest."

1. Confidence in the Institution.

The U.S. Congress has properly given the SEC a lot of power. It is in the public interest that the SEC is perceived as wielding its enforcement powers fairly and evenhandedly. This is especially true today when the public's confidence in many of the nation's institutions is being challenged.

Neither Mr. Spitzer's nor the public's interest was fairly served by the outcome of this matter for all of the anomalous reasons set forth above, especially the fact that the persons who were found to have knowingly, recklessly and intentionally, with scienter, perpetrated the fraud were treated far less severely than Mr. Spitzer who, the SEC alleges, merely "should have known" of the fraud.

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2. The "Remedies Act," the "Steadman" Factors, and the "Sarbanes Oxley Act."

In 1990, Congress passed the Securities Enforcement Remedies and Penny Stock Reform Act ("Remedies Act") which granted the SEC the express authority to seek several new remedies, including certain bars.

In applying the Remedies Act, courts quickly adopted a "substantial unfitness" test, initially suggested in a 1992 law review article by Professor Jayne Barnard. Her "substantial unfitness" test ostensibly became the law of the land in the seminal case of *Steadman v SEC.*

When determining the public interest, the Commission utilizes the well-established factors set forth in *Steadman*. They include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations.

In 2002, Congress passed the Sarbanes-Oxley Act.[3] In relevant part, Congress amended the officer bar statutes by changing the standard for obtaining a bar from "substantial unfitness" to mere "unfitness."[4] Just as "substantial unfitness" was undefined in the Remedies Act, "unfitness" was also undefined in Sarbanes-Oxley.

To that end, we consider the Steadman factors in light of the "unfitness" test (as we understand it):

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[3] Sarbanes-Oxley Act of 2002 § 305, 15 U.S.C. §78u (2006); S. REP. No. 107- 205, at 26-27.

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(i) *Egregiousness of the underlying violation*: The violation was not egregious because (i) no client of Sztrom or APA lost any money, (ii) there was no misappropriation, and (iii) there were no client complaints (from the affected Sztrom clients). In other words, there were no victims (except APA and Spitzer).

(ii) *Isolated or recurrent nature of the infraction*: There were no past violations of law relating to Mr. Spitzer's supervisory activities. To the contrary, the supervisory failure in this case was isolated, as evidenced by the fact that neither Mr. Spitzer nor the seventeen other IARs on the APA platform had any disciplinary problems over the 10+ years of APA's existence.

(iii) *Degree of Scienter*: Mr. Spitzer was found to be "negligent." He was not found to have acted with "scienter."

(iv) *Sincerity of the respondent's assurances against future violations.* There can be no stronger indication of Mr. Spitzer's sincerity than his voluntary undertaking (set forth below) to never again put himself in a position of supervisory authority or otherwise exercise authority over any supervised person in the securities industry.

(v) *Recognition.* Mr. Spitzer cooperated with Schwab and the Staff during the course of their investigation of the Sztrom impersonations. He eventually consented to the Order and paid the financial penalties. Mr. Spitzer is not seeking to be exonerated. He understands that he must live with the entry of the Order for his remaining years in the securities industry.

(vi) *Likelihood that Misconduct Will Recur*: Mr. Spitzer is very unlikely to commit future violations given his past record, the harshness of his penalties and monetary

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fines. Add to this the very important fact that he has exited the supervisory business and is voluntarily disabling himself from recommission of the offense (among other things, by taking a position as an IAR with Ingham Wealth Management where he has no supervisory responsibilities and moving all of what is left of his clients to that advisory platform). This experience has been a difficult but ultimately invaluable lesson in compliance which, as a result, will make Mr. Spitzer a better financial advisor to his clients.

CONCLUSION

Whether Mr. Spitzer should have prevented and/or detected the Sztroms' misconduct is conjectural. In the view of the SEC, there were certain "red flags" that Mr. Spitzer and his seasoned chief compliance officer both missed. However, as articulated by the District Court, the Sztroms' affirmative use of personal telephones and other means to deliberately conceal their client communications in violation of APA's compliance policies and procedures "led directly to APA's *inability* to review or preserve the client communications for compliance purposes" (emphasis added). Both points of view have some validity.

That said, the public interest is not served by ostensibly "barring" Mr. Spitzer from continuing to make his future living as an investment adviser. All evidence suggests that his violation was isolated and not egregious, there was no scienter, his assurances against future violations are sincere and given that Mr. Spitzer has no intention of ever again acting in a supervisory capacity, there is zero likelihood of any recurring misconduct.

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This is the view of the people who have worked with Mr. Spitzer over the years. The advisory clients who have entrusted him with their assets over the past thirty-five years have expressed their view of him by staying with Mr. Spitzer throughout this ordeal. His current employer, Robert Ingham, voluntarily expressed his total confidence in Mr. Spitzer in the letter accompanying this Motion (attached hereto as Attachment 7). Given the longevity of their professional association, it would be fair to say Robert Ingham knows Paul Spitzer very well.

At the time he consented to the Order, Mr. Spitzer believed he would be allowed to continue making his living as an investment adviser if he performed all of the things the Staff was seeking. He has done so. Nevertheless, the unintended consequences of the bar on supervisory activities threaten to end his career when the Schwab/TDA transaction is completed.

REQUESTED RELIEF

Mr. Spitzer respectfully asks that the authority empowered to consider this Motion to vacate the current bar on supervisory activities and grant such other relief as necessary so that brokers and custodians might allow him access to the institutional platforms in the future.

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DATED: December ___, 2022

Respectfully submitted,

/ss/ Paul C. Spitzer

Paul C. Spitzer

THE SECURITIES LAW GROUP

/ss/ James E. Grand

James E. Grand, Esq.

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