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) **ADVANCED PRACTICE**) **ADVISORS, LLC**) **AND**) **PAUL C. SPITZER**,) **Defendant(s)**)))	**REPLY BRIEF TO THE DIVISON OF ENFORCEMENT'S RESPONSE TO DEFENDANT'S MOTION TO APPEAR AND ARGUE AT HEARING BEFORE THE COMMISSION**

Defendant

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Paul C. Spitzer ("Spitzer"), by and through counsel, hereby respectfully enters this Response to the Division of Enforcement's Response to his Motion to Appear and Argue at a hearing before the Commission.

I. INTRODUCTION

Spitzer filed a motion on February 8, 2023 asking to be permitted to appear and argue at a hearing before the Commission. The Division of Enforcement filed its brief in opposition to the motion on March 1, 2023. The full record of the Division's opposition to Defendant's motions[1] reflect an arrogance that can only be attributed to the need for "self-justification." The Division's response totally ignores the factual issues raised in Mr. Spitzer's brief. Rather, it skips over all such issues and relies solely on procedural grounds for rejecting Spitzer's application.

II. ARGUMENT.

We respectfully submit that the Division of Enforcement should not be permitted to impose unjustifiably severe punishment just because the Staff was able to pressure a party into consenting to it. Given the immense disparity of power and resources between the Securities and Exchange Commission and individual members of the securities industry, it becomes critically important that any resolution—**including one reached via settlement**—meet an objective standard of fairness and reasonableness. Spitzer's prior briefs in support of its motions[2] present the argument that that the Order is not reasonably related to Spitzer's underlying conduct constituting **negligence,** and objectively unreasonable given the leniency the Staff ultimately showed to the Sztroms notwithstanding the Sztrom parties' underlying conduct constituting **scienter**. Under any standard

[1]*See* Division of Enforcement's Response dated January 27, 2023 to Spitzer's Motion to Dismiss Order Instituting Remedial Sanction of Bar on Supervisory Activities; See also Division of Enforcement's Response to Spitzer's Motion to Appear and Argue at Hearing Before the Commission

[2] *See* Motion to Dismiss Order Instituting Remedial Sanction of Bar on Supervisory Activities dated December 28, 2022; See also, Reply Brief to the Division of Enforcement's Response to Defendant's Motion to Dismiss the Commission's Order Instituting Remedial Sanction of Bar of Supervisory Activities dated February 8, 2023.

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of fairness and reasonableness, the Division of Enforcement should be called upon to answer the central question repeatedly raised in Spitzer's briefs, but wholly ignored by the Division's responses—that is, how the public's interest is served by allowing the perpetrators of the fraud (the Sztroms) to continue operating in securities industry and, on the exact same facts, effectively barring for life Mr. Spitzer (as aider and abettor). How is it possible for Mr. Spitzer's bar to be defended as necessary in the public interest while no such necessity appeared to be warranted for the persons who intentionally committed the fraud Spitzer was found to have aided and abetted? The disparate outcomes reflect the fact that Mr. Spitzer was forced under threat to agree to a settlement, while the Sztroms had the resources to defend themselves. There can only be one answer. The Division ultimately concluded that it could not sustain its burden to show that a bar against the Sztroms was justified in the public interest. How then can it justify Mr. Spitzer's bar?

A. We are at a loss to understand the Division's statements regarding the Administrative Procedures Act ("APA"). Spitzer's supporting brief does rely on an assertion that it is compelled by the APA. To the contrary, Spitzer's support brief does not mention the APA.

B. We take exception to the Division's comment to the effect that Spitzer's brief conceded that it should have been brought as a Rule 193 petition. After a brief telephone call with the Staff on or about December 4, 2022, on December 5, 2022, on its own volition, counsel submitted (to the Staff) a draft petition captioned: **Application Pursuant to Rule 193 for Relief from a Bar On Supervisory Activities**. On December 6, 2022, the Staff advised counsel, via email: "[A]though we cannot give legal advice, you may want to think about styling your filing as a motion to vacate. That is up to you, but I think it might better fit the relief you are seeking." Counsel then made the decision to rewrite the draft as a motion to vacate, rather than a Rule 193 petition. True copies of the original petition and the above-referenced email are available for inspection.

C. The Division repeatedly emphasizes the fact that Spitzer is seeking relief from a settled order that he voluntarily consented to. There are two things wrong with this statement.

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First, for a settlement to truly be voluntary, the settlor must be aware of all of the relevant facts. If Mr. Spitzer had had the financial resources to continue to defend himself, and he knew the Division was proposing to settle with the Sztroms' on relatively lenient terms, he would not have agreed to settle the matter on such harsh terms. Second, in early December, 2022, the Staff informed Spitzer, through counsel, that if he did not sign the Staff's Offer to Settle by December 31, 2022, the Division of Enforcement would withdraw the foregoing Offer and, in addition to the terms set forth therein, it would seek a collateral bar (rather than a bar on supervisory activities) and add new charges under the following statutes and rules: the Advisers Act Section 206(1), Securities Act Section 17 and Securities Exchange Act Section 10(b).

D. The Division's position regarding *ex parte* communications between the Commission and the Staff is unconvincing. The Division seems to be saying the Commission's practice of prohibiting the staff from addressing the Commission only applies under certain circumstances—i.e., only when an adjudication is required by statute to be determined on the record after an opportunity for an agency hearing. In other words, the Division is conceding that *ex parte* communications are not prohibited by Commission practice in cases such as this. Without stating its position on *ex parte* communications, or addressing Mr. Spitzer's legitimate concerns that the Division might have and utilize such an unfair advantage, we cannot be sure that Mr. Spitzer's arguments will be properly addressed. Decisions of this magnitude, bearing as they do on Mr. Spitzer's livelihood, should be held in an open meeting with participation by Mr. Spitzer, and not behind closed doors with influence by *ex parte* communications between the Enforcement Division and the Commission.

E. The Division of Enforcement has taken the position that Spitzer's motion and supporting brief "lay out his factual arguments in detail" and, thus, "a hearing would not significantly aid [the Commission's] decisional process. We could not disagree more. As set forth in the Introduction, the Division has not even attempted to refute Mr. Spitzer's factual arguments.

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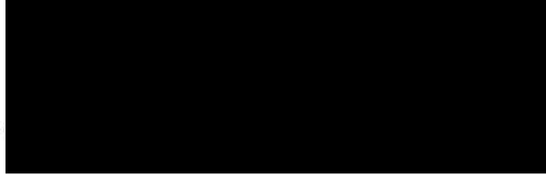
Why is it afraid to explain the reasonableness of a position that treats an aider and abettor more severely than the perpetrators of the intentional fraud the aider and abettor supposedly should have uncovered and stopped? We close with the question previously presented in our Reply Brief: Why was the car thief let off lightly and the car's owner booked for failing to lock the driver's door? These questions deserve a hearing.

Dated: March 07, 2023

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that on March 7, 2023, I caused the foregoing document to be served on the following persons, in the manner described below:

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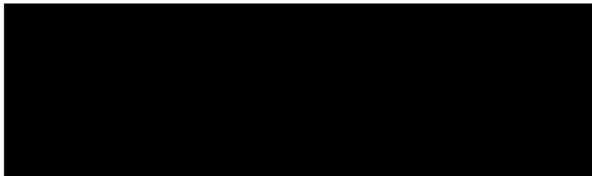

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