UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21400

In the Matter of

MICHAEL SZTROM and
DAVID SZTROM,

Respondents.

REPLY BRIEF IN SUPPORT OF MOTION BY DIVISION OF ENFORCEMENT FOR SUMMARY DISPOSITION AGAINST RESPONDENTS MICHAEL SZTROM AND DAVID SZTROM PURSUANT TO COMMISSION RULE OF PRACTICE 250

OS Received 10/12/2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OS Received 10/12/2023

STATUTES

Investment Advisers Act of 1940

FEDERAL REGULATIONS

COMMISSION RULES OF PRACTICE

I. INTRODUCTION

The Division of Enforcement ("Division") of the Securities and Exchange Commission ("SEC" or "Commission") hereby replies to Respondents Michael Sztrom and David Sztrom (collectively "Respondents") Opposition to the Division's motion for summary disposition in this follow-on proceeding.

Respondents signed consent judgments stating that they would not be able to contest the allegations of the underlying complaint in this administrative proceeding. Yet in what is a now familiar pattern of conduct from these Respondents, they ignore the agreements they made and the rules that should govern their conduct. Just as they ignored their duties as fiduciaries and thwarted the reasonable controls established by Advanced Practice Advisors LLC ("APA") and Charles Schwab ("Schwab"), Respondents' opposition brief either disregards the terms of the consent judgments they both signed in the underlying district Court action, disregards the Commission's Rules of Practice and the jurisprudence interpreting them, or wrongly interprets both of those things in a manner that best suits them.

Respondents now pay only lip service to the agreements they signed by advancing strained arguments and purported defenses they spin as mere "additional facts." The "facts" alleged by Respondents are not *additional* facts; they directly and squarely contradict the allegations of the underlying complaint, as well as the testimony Respondents provided under oath during the investigation of this matter. The law is clear that in this situation: such "additional facts" must be disregarded.

Accordingly, there is no genuine issue of material fact that would preclude summary disposition. Respondents have been enjoined from violating the antifraud provisions of the federal securities laws, and it is in the public interest to bar them because their fraud was egregious, recurrent, and involved a high level of scienter, and because, despite remaining in the securities industry, neither Respondent has acknowledged the wrongfulness of their conduct nor provided any reasonable assurance against future violations. The Division therefore requests an order barring Respondents from association with any broker, dealer, investment adviser,

municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization.

II. LEGAL ARGUMENT

A. Respondents Cannot Litigate the Facts in the Underlying Complaint

First, the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against a respondent, whether resolved by consent, by summary judgment, or after a trial. *See SEC v. Scammell,* Initial Decision Release No. 516 (resolved by consent); *Jeffrey L. Gibson*, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2108 (injunction entered by consent); *John Francis D'Acquisto*, 53 S.E.C. 440, 444 (1998) (injunction entered by summary judgment); *James E. Franklin*, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713 (injunction entered after trial); *Demitrios Julius Shiva*, 52 S.E.C. 1247, 1249 & nn.6-7 (1997). In cases like this one, where Respondents consented to the injunction that was entered by the federal court, the Commission considers the facts alleged in the injunctive complaint in determining the appropriate sanction. *Marshall E. Melton*, 56 S.E.C. 695, 698-700 (2003).

Second, not only are Respondents held to their agreement not to contest the allegations of the underlying Complaint, it is also well-established that Respondents cannot avoid summary adjudication by changing their prior testimony. *Torres v. E.I. Dupont de Nemours & Co.,* 219 F.3d 13, 20 (1st Cir. 2000) ("It is settled that [w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.") (internal quotations and citations omitted); *Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004) (permitting a trial court to "disregard[ ] an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony"); *Raskin v. Wyatt Co.,* 125 F.3d 55, 63 (2d Cir. 1997) ("a party may not create a triable issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition

testimony.")

Here, Respondents' "Additional Facts" are nothing more than an impermissible attempt to relitigate the underlying case. First, they posit an alternative reality where their misconduct was approved of and facilitated by representatives of APA[1] and Schwab. Opp. at pp. 5-9. The "facts" put forward in support of these claims are the unsupported declarations of the Respondents which, in most cases, contradict both the allegations of the Complaint and Respondents own prior sworn investigative testimony. For example, Respondents repeatedly claim that they did nothing wrong because Schwab permitted Michael Sztrom to access the Schwab platform. However, the reality is that Respondents admitted in their investigative testimony, and the underlying Complaint alleges, that:

- Michael Sztrom knew when he left UBS that he was under investigation and investment adviser platforms did not want him as a result (SMF Nos. 10-19; Supplemental Declaration of Lynn M. Dean ("Supp. Dean Decl.") Ex. 1 at pp. 69:3-20)
- Michael Sztrom testified that he knew he could not work at APA because of the UBS investigation (SMF Nos. 14-19; Supp. Dean Decl. Ex. 1 at pp. 83:4-21);
- Michael Sztrom never consulted with compliance at APA about his plans to impersonate David Sztrom to Schwab (SMF Nos. 97-98; Supp Dean Decl. Ex. 1 at pp. 114:5-8);
- Respondents both admitted they knew it was wrong for Michael Sztrom to impersonate David Sztrom (SMF No. 99);
- Michael Sztrom only had access to the Schwab website for two months and then

[1] Ratification by representatives of APA, even if it had occurred, is not a defense to Respondents' own misconduct. As Respondents themselves admit, the SEC sued APA and its compliance officer for failure to supervise and other compliance failures in connection with Respondents' conduct. Opp. at pp. 4-5; *Advanced Practice Advisors, LLC and Paul C. Spitzer*, Advisors Rel. No. 5670 (Jan. 14, 2021).

was cut-off by Schwab (Supp Dean Decl. Ex. 1 at pp. 99:3-100:6);

- By November 2015, the same time that his son associated with APA, Michael Sztrom was told by Schwab that he could have no access to the Schwab website (Supp Dean Decl. Ex. 1 at pp. 98:6-22);
- Michael Sztrom was told by Schwab in November 2015 that Schwab wouldn't take his calls (Supp Dean Decl. Ex. 1 at pp. 100:17-25).

Next, Respondents put forward "facts" intended to contradict the Complaint's allegations that Michael Sztrom's representation to APA's compliance officer that he would only serve as a financial planner to clients who moved to APA was a ruse because: 1) APA required him to set up a legal financial planning entity; and 2) he did provide financial planning that he just did not charge fees for. Opp. at pp. 8-9 AF No. 18-19. Neither of these are "additional" facts. The first is in the Complaint, which clearly states that APA's compliance officer told Michael Sztrom to create a legal entity for financial planning services. SMF. Nos. 77-78. The second alleged fact – that Michael did provide financial planning services – directly contradicts the Complaint as well as Michael Sztrom's own representation to the State of California that his financial planning business "was never operational" and that he did not need to preserve any financial planning books or records because his financial planning business had "no books and records as the business was never operational." SMF Nos. 79-80.

The genuine fact disputes urged by Respondents are therefore illusory. They are uniformly based on Respondents' inappropriate efforts to contradict their prior sworn testimony and the consented-to allegations of the Commission's complaint in the underlying enforcement action.

B. Summary Disposition is Appropriate

Respondents next argue that the Division is attempting to deprive them of their "right" to a "live hearing." Opp. at p. 1. No such right exists. Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250, provides that a party may move for summary disposition of any or

all allegations of the OIP, after a respondent's answer has been filed and documents have been made available to the respondent for inspection and copying. A hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. Rule of Practice 250(b).

Citing only to the commentary to Rule 250, Respondents argue that summary disposition is "less common" in disciplinary proceedings. Opp. at p. 10. While that may be so in a litigated administrative proceeding where there is a legitimate dispute regarding material facts, that is not true in follow-on proceedings. In follow-on administrative proceedings, summary disposition is entirely appropriate. *See, e.g. Omar Ali Rizvi*, Initial Dec. Rel. No. 479 (Jan. 7, 2013), 2013 WL 64626 ("Commission has repeatedly upheld use of summary disposition in cases where the respondent has been enjoined and the sole determination concerns the appropriate sanction."), *notice of finality*, Release No. 69019, 2013 WL 772514 (Mar. 1, 2013); *see also SEC v. Scammell,* Initial Decision Release No. 516 (follow-on resolved by summary disposition); *Jeffrey L. Gibson*, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104 (same); *John Francis D'Acquisto*, 53 S.E.C. 440 (1998) (same); *James E. Franklin*, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708 (same); *Demitrios Julius Shiva*, 52 S.E.C. 1247 (1997).

Summary disposition is appropriate here because permanent injunctions have been entered by the district court, and because Respondents cannot dispute the factual allegations in the SEC complaint. The sole remaining determination concerns the appropriate sanction.

C. There Is No Genuine Issue With Respect To Any Material Fact

The material facts cannot be disputed, and summary disposition is therefore appropriate.

1. Respondents have been permanently enjoined

First, Respondents have been enjoined. On October 6, 2022, the district court permanently enjoined Michael Sztrom from future violations of the antifraud provisions of Section 206 of the Advisers Act and enjoined David Sztrom from future violations of the

antifraud provisions of Section 206 of the Advisers Act and from aiding and abetting future violations of Section 204 of the Advisers Act and Rule 204-2(a) thereunder. SMF No. 159; Dean Decl. Ex. 5. These injunctions provide the statutory basis for this administrative proceeding. *See, e.g.*, *Douglas G. Frederick*, Initial Dec. Rel. No. 356 (Sept. 9, 2008), 94 S.E.C. Docket 212, 2008 WL 4146090, *notice of finality*, 94 S.E.C. Docket 977, 2008 WL 4500336 (Oct. 8, 2008).

An antifraud injunction is considered to be particularly serious. *See Marshall E. Melton*, 56 S.E.C. 695, 710, 713 (2003). The public interest requires a severe sanction when a respondent's past misconduct involves fraud, because opportunities for dishonesty recur constantly in the securities business. *See Richard C. Spangler, Inc.*, 46 S.E.C. 238,252 (1976).

2. The public interest factors support permanent bars

Second, the public interest favors permanent bars. The criteria for assessing the public interest are found in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Jason A. Halek*, Release No. 1376, 2019 WL 2071396, at *3 (May 9, 2019). These public interest factors: (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 that the respondent's occupation will present opportunities for future violations all favor a bar here. *Id.* "The existence of an injunction can, in the first instance, indicate the appropriateness in the public interest of a suspension or bar from participation in the securities industry." *Michael V. Lipkin*, *supra*, 2006 WL 2422652 at *4.

a. Respondents' violations of the antifraud provisions were egregious, recurrent, and involved a high level of scienter

The first three *Steadman* factors are well-established here by the allegations of the underlying complaint and Respondents' own admissions. SMF Nos. 2-154, 163. First, the complaint alleges that for over two years, from November 2015 through March 2018, Respondents breached their fiduciary duties as advisers and defrauded the clients whom David

OS Received 10/12/2023

advised through APA. SMF Nos. 2-3, 8-20, 30-70, 88-115, 116-123. Indeed, Respondents admit that Michael impersonated his son on calls to Schwab at least 38 times. Thus, there is no question that Respondents' conduct was recurrent.

Second, Respondents' conduct was egregious. Respondents were acting as investment advisers, with a duty to act for the benefit of their clients, including the obligation to disclose to their clients all material facts, and to employ reasonable care to avoid misleading their clients. SMF Nos. 21-29, 128-131; *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortgage Adviser, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("Indeed, the Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations."). As fiduciaries, Respondents were required "to act for the benefit of their clients, … to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients." *SEC v. DiBella*, No. 3:04-cv-1342 (EBB), 2007 WL 2904211, at *12 (D. Conn. Oct. 3, 2007) (*quoting SEC v. Moran*, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996)), aff'd, 587 F.3d 553 (2d Cir. 2009); *see also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) ("Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients.").

In breach of that duty, Respondents, with scienter, knowingly deceived their clients. Upon David Sztrom's association with APA in November 2015, the advisory clients that followed Michael Sztrom from his prior firms and any new clients while David Sztrom was associated with APA (collectively, the "Sztrom clients") all signed an agreement to engage Sztrom Wealth Management, Inc. ("SWM") as their investment adviser representative with APA. SMF Nos. ¶¶ 18, 21. Both Respondents were paid by SWM. SMF Nos. 25-28.

Thus, from when David became associated with APA in November 2015 to when he left APA in March 2018, Defendants deceived the Sztrom clients in breach of their fiduciary duties by having Michael continue to act as the clients' investment adviser despite not being an IAR associated with APA and being prohibited from using Schwab's brokerage platform. SMF Nos.

30–53. Michael Sztrom communicated with Sztrom clients about investment advice, researched investments using David Sztrom's access to Schwab's platform, made portfolio recommendations to clients, conducted trades for clients, and accessed client information and portfolios. SMF Nos. 31–53. Respondents created the impression that Michael Sztrom was associated with APA by sharing office space and telephone lines, describing both Michael and David Sztrom on SWM's website, and referring to Michael Sztrom's 35 years of investment advising experience on SWM's website. SMF Nos. 54-70. Many Sztrom clients believed Michael Sztrom was their IAR with APA and authorized to make trades on their behalf, and Respondents failed to correct the Sztrom clients' confusion as to Michael Sztrom's association with APA out of concern that David Sztrom's inexperience would cause clients to leave. *Id.*

Further evidence of the egregiousness of this conduct is the fact that Michael Sztrom impersonated David Sztrom and purported to be associated with APA on approximately ***38*** separate telephone calls with Schwab between November 2015 and May 2016. SMF Nos. 88-100. In those calls, Michael Sztrom, acting as David Sztrom, discussed block trading, warrants trade allocation, and rebalancing Sztrom client accounts after he had executed trades. SMF No. 90. Defendants now try to argue that Schwab acquiesced in this (Opp. at p. 6), but when Schwab learned of the alleged impersonation, it terminated its relationship with APA and gave APA ninety days to find a new broker. SMF No. 99.

On June 2, 2016, Schwab sent a letter to all APA clients using the Schwab platform informing them that it was terminating its relationship with APA "due in part to failure to adhere to Schwab's process standards." SMF Nos. 105. When the Sztrom clients asked Defendants about the change, Respondents doubled-down on their deception and misrepresented the reason for Schwab's termination, for example, by telling one client Michael had only impersonated David on only one call with Schwab. SMF Nos. 101-15. Respondents knowingly provided false or misleading information to clients about the reason they recommended their clients leave the Schwab platform and move to a new brokerage firm. SMF Nos. 101-115, 116-127. 153.

Respondents argue that no clients were harmed by their conduct, but that is not the relevant inquiry. "The SEC need not prove injury in an action to enjoin violation of § 206 of the Investment Advisers Act." *SEC v. Rana Rsch., Inc.*, 8 F.3d 1358, 1363 (9th Cir. 1993) (citing *Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. at 195). The SEC need only establish that Respondents' conduct was egregious, recurrent, and involved a high degree of scienter. *Steadman*, 603 F.2d at 1140 (5th Cir. 1979). It has done so. Respondents' made material misrepresentations to clients in breach of their fiduciary duties and deceived their clients into believing that Michael Sztrom was an investment adviser associated with APA, and that he was permitted to access the Schwab trading platform. As a result of Respondents' deception, the Sztrom clients were unaware that the investment advice Michael Sztrom provided to them was not subject to any oversight or supervision by APA or other investment advisory entities. SMF Nos. 81-87. By providing Michael Sztrom with access to client information and allowing him to act as if he was their investment adviser David Sztrom exposed all of the Sztrom clients to risk of loss. Moreover, Michael Sztrom has been involved in misconduct that did cause serious investor harm in the past. In 2015, UBS settled two customer complaints regarding Michael Sztrom for $1.7 million and $450,000, respectively. Declaration of Lynn M. Dean, Ex. 9 at pp. 14-16. In 2014, UBS settled a customer complaint against him for $400,000. *Id.* at pp. 16-17. The possibility of harm to clients in allowing him unsupervised access at APA was therefore high.

Moreover, David Sztrom knowingly provided substantial assistance to APA's violation of Section 204 of the Advisers Act, 15 U.S.C. § 80b-4, and Rule 204-2 thereunder, 17 C.F.R. § 275.204-2. Specifically, David, while associated with APA, knowingly communicated, and permitted Michael to communicate, via text message on his personal smartphone with the Sztrom clients regarding: (i) recommendations made or proposed to be made and advice given or proposed to be given; (ii) receipt, disbursement or delivery of funds or securities; and/or (iii) the placing or execution of any order to purchase or sell any security, and did not retain these communications. SMF No. 132-152, 154. Because these communications did not place over the

APA email system, APA had no mechanism to review or preserve these communications. Thus, the first three *Steadman* factors weigh in favor of a bar.

b. Respondents have neither recognized the wrongful nature of their conduct, nor provided credible assurances against future violations

To date, Respondents have failed to recognize that they did anything wrong. SMF Nos. 155, 161; Ex. 7 at p. 9, Opp. at pp. 1-2; 5-8. When confronted by their clients about the reason why they could no longer access the Schwab platform, Respondents obfuscated the truth from them. They continued by setting forth denials in the district court action and in their answers in this proceeding. Now they are attempting to relitigate the underlying facts here and claim that they did not engage in any wrongdoing and there is no basis to impose any remedial sanctions against them. SMF Nos. 155, 161; Ex. 7 at p. 9, Opp. at pp. 1-2; 5-8.

Respondents' continued arguments that their conduct was not egregious, or was ratified by others, demonstrates that they have not meaningfully recognized the wrongful nature of their conduct, and they have not provided any assurances against future misconduct. *See Peter Siris*, S.E.C. Release No. 71068, 2013 WL 6528874, at *7 (Dec. 12, 2013), *pet. for review denied*, *Siris v. SEC*, 773 F.3d 89 (D.C. Cir. 2015); *Jose P. Zollino*, Release No. 2579, 2007 WL 98919, at *6 (Jan. 16, 2007).

c. Likelihood of future violations

Both Respondents continue to work in the securities industry and are providing advisory services to clients. SMF No. 164. Respondents' failure to acknowledge guilt or show remorse demonstrates there is a significant risk, given the opportunity, that they would commit future misconduct. Absent a bar, Respondents could seek to defraud clients in the future. *See, e.g., Peter Siris*, 2013 WL 6528874, at *7 (remaining in the securities industry "presents continual opportunities for dishonesty and abuse and depends heavily on the integrity of its participants and on investors' confidence").

III. CONCLUSION

For all the reasons set forth in the Division's motion and herein, the Division's motion for summary disposition should be granted, and Michael and David Sztrom should both be barred from the securities industry.

Dated: October 12, 2023

Respectfully submitted,

Lynn M. Dean
Senior Trial Counsel
Division of Enforcement
Los Angeles Regional Office
Securities and Exchange Commission
444 S. Flower Street, 9th Floor
Los Angeles, CA 90071
(323) 965-3245 (telephone)
Email: deanl@sec.gov

CERTIFICATE OF SERVICE
SERVICE LIST

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the:

REPLY BRIEF IN SUPPORT OF MOTION BY DIVISION OF ENFORCEMENT FOR SUMMARY DISPOSITION AGAINST RESPONDENTS MICHAEL SZTROM AND DAVID SZTROM PURSUANT TO COMMISSION RULE OF PRACTICE 250

was served on October 12, 2023 upon the following parties as follows:

By eFAP
Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549-1090
Facsimile: (703) 813-9793

By Email
Sean T. Prosser, Esq.
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
3580 Camel Mountain Road, Suite 300
San Diego, CA 92130
stprosser@mintz.com
Counsel for Michael and David Sztrom

Dated: October 12, 2023

[redacted]

Lynn M. Dean