UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19510

In the Matter of

ALBERT K. HU,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

Dated: October 29, 2021

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I. SUMMARY

The Division of Enforcement ("Division") hereby replies to the submission by Respondent Albert K. Hu in opposition to the Division's Motion for Summary Disposition, pursuant to Rule 250 of the Commission's Rules of Practice. For the reasons set forth in the Division's Motion, and as discussed below, there remain no genuine issues of material fact. At the outset, it is important to clarify that the Division's Motion is directed to the sole question raised by this administrative proceeding: that is, whether it is appropriate to order any of the remedial measures set forth in Section 203(f) of the Investment Advisers Act of 1940 – particularly, a bar against Respondent's association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. Because it is appropriate, and it is in the public interest to do so, such a bar should be ordered.

Respondent's submission does not offer facts, or describe any circumstances, that would alter the *Steadman* analysis set forth in the Division's opening brief. *See* Div. Mot. S.D. at 8-17 (discussing factors set out in *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979)). Moreover, Respondent claims in his submission to also seek summary disposition, making clear that he also does not believe there to be genuine issues of material fact. Indeed, in his submission Respondent also repeatedly denies that he should be seen as attempting to fight the facts. *See* Resp. Opp. to Mot. S.D. at 5, 7. However, Respondent's arguments in his submission, if accepted, would require first, that his conviction for wire fraud not be considered a sufficient basis for a bar, and second, that the injunctions entered by the federal district court in the Commission's civil enforcement case against him be disregarded as contrary to the law. Both of these options are in direct opposition to the statute governing this proceeding. Moreover, the record simply does not support Respondent's suggestion that he should be suspended for a year or less, commensurate with the conclusion of his

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probation in 2022. Accordingly, the Division's Motion should be granted, and Respondent should be barred.

II. ARGUMENT

A. Respondent's Factual Recitation Should Be Given Little or No Weight

Respondent sets out in his submission to recite as "facts" various statements about himself, and his crime. *See* Resp. Opp. to Mot. S.D. at 5-6. As evidentiary support, Respondent refers to several "attachments" to his Answer, dated January 6, 2020. Those materials do not alter the critical facts here: *First*, Respondent was convicted of seven counts of wire fraud in violation of 18 U.S.C. §1343, which is a predicate basis for a bar, suspension or censure pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"). *See* Advisers Act Section 203(e)(2)(D) (the Commission may place limitations on a person associated with an investment adviser if, among other things, the person "has been convicted of any offense specified in paragraph (2) or (3) of subsection (e) [of Advisers Act Section 203] within ten years of the commencement of the proceedings."). *See* Ex. F, Div. Req. for Off. Not. (judgment in the criminal case, *United States of America v. Albert Ke-Jeng Hu, a/k/a Ke-Jeng Hu*, No. CR-09-00487-001-RMW (N.D. Cal.)). *Second*, Respondent was enjoined from securities law violations, including Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5, and Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-8, an additional predicate for a bar, suspension or censure under Section 203(f). *See* Ex. H (order granting summary judgment for the SEC in *Securities and Exchange Commission v. Albert K. Hu*, No. C-09-01177-RMW (N.D. Cal.) and further imposing injunctions).

The factual conclusions that Respondent suggests should be drawn from the materials he submitted with his Answer in January 2020, and the Attachment 1 to his submission in opposition to the Division's Motion, do not tend to diminish or change, or even put in context, the record of

Respondent's crime. Rather, Respondent overreaches by arguing that the prosecution did not prove its case, despite the jury verdict and the rejection of his appeal by the Ninth Circuit. For instance, Respondent reasserts his argument – rejected by the Ninth Circuit – that an FBI agent whose testimony was admitted, in part, as a lay opinion under the Federal Rules of Evidence, should not have been permitted to testify. *Compare* Resp. Opp. to Mot. S.D. at 5 (arguing that the agent should not have been permitted to testify because his education was not in accounting), *with* Ex. G at 3 ("The agent's testimony was simple lay testimony based on his tracing of funds."). Similarly, with respect to his Attachment 1, Respondent appears to argue that someone believed the funds had passed an audit with flying colors; however, as he is using a page from the trial transcript of the criminal case, it is clear that whatever conclusion he believes should be drawn from this statement was rejected by the jury. As evidence of the unfairness of the criminal trial, Respondent refers to the heavily redacted letters to him from his appellate lawyer, attached to his January 6, 2020 Answer, in which she offers short opinions about the case overall. Resp. Opp. to Mot. S.D. at 5. Opinions of a party's own counsel are not, however, relevant or admissible evidence. In short, these materials do not diminish the significance of the jury's verdict in the criminal case.

B. Respondent Cannot Re-litigate the Basis for Injunctions Ordered Against Him

In his submission, Respondent takes particular aim at the decision in the SEC's civil enforcement case against him, in which summary judgment was granted in favor of the SEC, arguing that the wire fraud statute upon which he was convicted is not sufficient basis for the finding of securities fraud violations (and thus for the injunctions). His argument is legally wrong, and offered years too late. The U.S. district court found, after hearing the appropriately noticed motion for summary judgment, that Mr. Hu's conviction for wire fraud – perpetrated against several investors in the context of an investment scheme – was sufficient basis to grant summary

judgment on the SEC's claims for securities fraud, including violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), (2), and (4) of the Advisers Act, and Rule 206(4)-8 thereunder. *See* Ex. H (order granting summary judgment). The court also found good cause to enjoin Hu from violations of these statutes and rules. *Id*.[1]

In his submission, Respondent alludes to the volume of materials, and his lack of resources to employ an attorney for his civil case, as reasons why he did not respond to the summary judgment motion in the SEC's civil enforcement action against him. *See* Resp. Opp. Mot. S.D. at 5-6.[2] But whatever the reasons were for his failure to respond, the conclusions he draws do not follow, nor are they legally relevant: namely, that he would have prevailed by showing that the "reliance" and "causation" elements for securities fraud had not been met. *Id*. at 3, 7.[3] Reliance and causation are not elements of the securities fraud violations found in the antifraud statutes and rules that the SEC alleged Hu violated; rather, those are additional elements to be proven by a private plaintiff seeking damages for claimed violations of Rule 10b-5. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-63 (2008) (distinguishing SEC enforcement

[1] The SEC complied with the district court's rules (and Ninth Circuit precedent) that requires that a special notice in the form of a cover notice to a motion for summary judgment be served upon any incarcerated, pro se party against whom summary judgment is sought. *See* Ex. I at i (notice of motion, describing separate, additional notice served upon Hu).

[2] Respondent also conflates his original detention in Hong Kong with his subsequent detention in the United States, suggesting he could not respond to the SEC case because he lacked even a pen. Resp. Opp. S.D. at 5. However, the SEC's summary judgment motion in the civil case was noticed and heard only after the judgment in the criminal case against Hu, as is clear from the SEC's motion and supporting materials. By then, Mr. Hu, a naturalized U.S. citizen, had long ago returned to the U.S. and stood trial.

[3] Respondent further suggests that the criminal case did not sufficiently establish the element of "scienter" (*id*. at 7), but that element was found by the jury, whose verdict was affirmed by the court of appeals. *See* Exs. D & G.

actions from private rights of action which require proof of reliance and the closely related causation issue for damages); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363-64 (9th Cir. 1993) (reliance is not an element the SEC must prove). In any event, Respondent does not dispute that he has made no effort to challenge the district court's ruling, and this proceeding is not the appropriate venue for disputing the wisdom of the federal court's orders against him. *Cf. In re Gary M. Kornman*, Rel. No. 2480, 2009 WL 367635, at *12 (Feb. 13, 2009) (law judge appropriately denied respondent's attempts to probe the SEC's counsel's actions during his criminal case as a collateral attack on the criminal proceedings, which should have been raised with the district court).

C. Respondent's Arguments Do Not Counter the Division's *Steadman* Analysis

Respondent addresses together the first three *Steadman* factors – egregiousness of the misconduct, the recurrent (or isolated) nature of the misconduct, and the degree of scienter involved – by offering his brief counterfactual description of his crime. *See* Resp. Opp. S.D. at 7-8. In Respondent's view, the years-long scheme in which he made misrepresentations to several investors was simply an investment club that hit a snag due to the financial crisis in 2008-2009. Respondent's recharacterization of the events does not alter the fact that his fraud was carried out over years, involved multiple victims, and several different misrepresentations; that he caused losses of more than $5 million to those victims; and that the jury found (beyond a reasonable doubt) that he acted "knowingly" and with "the intent to defraud" (*see* Ex. E, jury instructions at 1115). In contrast to the terse, recharacterization of the facts offered by Respondent, a jury heard from witnesses and examined relevant documentary evidence in finding that Respondent engaged in the years-long scheme. Thus, nothing in Respondent's submission alters the analysis of the first three *Steadman* factors, which weigh heavily toward the imposition of an industry bar.

Respondent also addresses in his submission the fourth and fifth *Steadman* factors, namely the sincerity of his assurances against future violations, and recognition by him of the wrongful nature of his conduct. Resp. Opp. S.D. at 8. Thus, Respondent states now that "there will be no future violations," and he further states that, objectively, a person of his age and experience in prison would not likely attempt future violations. *Id*. Respondent also states that he apologized to a victim, and "recognized the wrongful nature of my past conduct." *Id*. However, even taking his assurances as wholly genuine and sincere, looming large over them are his efforts to recast his prior conduct, including by suggesting his victims were complicit and that he did not commit securities fraud. As Respondent acknowledges, his efforts in his submission (like his Answer) appear to fight the facts. *See id*. at 3, 7. But Respondent completely misses the mark when claiming that he offers his counterfactual story simply to provide "mitigating" evidence. *Id*. at 8. While Respondent offers *some* mitigating facts – for instance, that he had not committed a crime prior to the investment scheme and that he has endeavored to engage in public service in prison and since leaving prison – none of the arguments he offers about the crime itself are mitigating. Rather, Respondent appears steadfast in his belief that the victims of his crime were unharmed by his fraud. His lack of awareness further weighs in favor of a bar to protect the public.

Respondent ultimately argues that his overall life story should outweigh his conviction for fraud in the assessment of whether there is a likelihood of future violations (the sixth *Steadman* factor). Respondent points to his accomplishments, including "decades of training in tech and business" and suggests that he has much to offer. Resp. Opp. S.D. at 8. He further contrasts his fraud conviction from individuals who have longer criminal records and have cheated hundreds of widows and orphans. *Id*. Respondent's arguments overlook the public interest in the integrity of the markets, and investment professionals. As the Commission has observed in considering whether to

bar or place limitations on the association of a person in the industry, investors' confidence depends on the integrity of market professionals. *See, e.g., In re Gary M. Kornman*, *supra*, 2009 WL 367635, at *7 ("The securities industry presents continual opportunities for dishonesty and abuse and depends heavily on the integrity of its participants and on investors' confidence.").

Based on his assessment of the *Steadman* factors, Respondent argues that he should effectively be suspended for a year or less, as that time would coincide with the conclusion of his probation. *See* Resp. Opp. Mot. S.D. at 4 ("respondent had asked only for the bar and sanction be ended concurrent with the end of respondent's probation in 2022"). In fact, the criminal judgment already prohibits Hu from occupying a position as a fiduciary, without first obtaining permission from his probation office for the duration of his probation. *See* Ex. F at 5 (point 4). Essentially, Respondent argues that his criminal sentence is alone sufficient and no further prophylactic measures are needed to protect the public. But an industry bar is not meant to be an extension of the criminal sentence that the Respondent has served. Rather, the purpose for such remedial measures is to protect the public, and Respondent's suggestion simply falls short of achieving this important end. *Cf. Kornman v. SEC*, 592 F.3d 173 (D.C. Cir. 2010) (upholding the Commission's decision imposing a permanent bar, and distinguishing punitive sanctions imposed in a criminal prosecution from a bar which is remedial in nature and is designed to protect the public).

III. CONCLUSION

For the reasons set forth in the Division's Motion, as well as the arguments above, the Division's Motion for Summary Disposition should be granted, and Respondent should be barred from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan F. LaMarca, certify that on October 29, 2021, a copy of the foregoing DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION was uploaded to the Securities and Exchange Commission's Electronic Filings in Administrative Proceedings ("eFAP") system, and served on the Respondent via email at the email address indicated below:

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