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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16274

In the Matter of

Gregory Viola,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY TO RESPONDENT VIOLA'S OPPOSITION TO MOTION FOR SUMMARY DISPOSTION

Respondent does not raise a genuine issue of material fact in his Opposition to the Division of Enforcement's Motion for Summary Disposition ("Opposition"). Instead, in a collateral attack not proper in the present forum, he disputes the facts already established through his guilty plea and conviction in the criminal case against him, *United States v. Viola*, Case No. 3:12-cr-25 (D. Conn.), *aff'd*, 555 Fed. Appx. 57 (2d Cir. 2014), *cert. denied*, 190 L. Ed. 2d 389 (2014). Furthermore, Respondent's arguments in his Opposition do not create a material question of fact about the predicates for the imposition of the bar and the application of the factors laid out by *Steadman v. SEC*, 603 F.2d 1126, 1150 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). Accordingly, the Division respectfully requests that the Court grant the Division's Motion for Summary Disposition and impose a permanent associational bar, including all collateral bars, against the Respondent.

A. Respondent Contests Facts Underlying His Criminal Conviction But Does Not Contest Any of the Predicates for the Imposition of Associational Bars

1. *Respondent's appeal of his criminal conviction and denials of previously admitted conduct are irrelevant to the determination of whether summary disposition is warranted*

Each statement in the Division's Proposed Findings of Fact is supported by the February 1, 2012 Criminal Information to which Respondent pled guilty (Exhibit A to the Declaration of Ellen Bober Moynihan in Support of Division of Enforcement's Motion for Summary Disposition ("Moynihan Decl.")), his February 1, 2012 Waiver of Indictment/Guilty Plea (Moynihan Decl. Ex. B), and/or the October 5, 2012 Judgment in a Criminal Case issued by the Court following Respondent's guilty plea (Moynihan Decl. Ex. C).

By contrast, Respondent's Opposition offers only unsupported arguments and assertions about the conduct of the victims of his crimes, the prosecutors and his defense counsel. Respondent relies on claims made in a complaint filed by the Chapter 7 trustee in his pending involuntary bankruptcy proceedings, *In re: Gregory Viola, Debtor*, Case No. 11-32113 (JBR) (D. Conn.) (Opposition Ex. A), as grounds for both his motion for a new trial in his criminal case and his request that summary disposition be denied in the present matter. Respondent's Opposition asserts that his criminal conviction will be overturned in his new trial (if one is granted) because two of the victims committed perjury that was suborned by the criminal prosecutor and because Respondent was represented by ineffective counsel (Opposition at 1-2). Respondent argues that summary disposition therefore cannot be granted against him because these purported events create issues of material fact that must first be resolved in connection with his motion for a new trial (*Id.* at 3). As stated in the Division's Motion for Summary Disposition and repeatedly in relevant precedent, however, the pendency of an appeal or motion for a new trial is neither grounds to postpone

resolution of a follow-on proceeding, nor a mitigating factor in determining sanctions. *Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *21 n.28 (Mar. 7, 2014); *see also Ira William Scott*, 53 S.E.C. 862, 865 n.8 (1998) ("We need not await the outcome of any post-conviction proceeding in order to proceed."); *Charles Phillip Elliott*, 50 S.E.C. 1273, 1277 n.17 (1992), *aff'd*, 36 F.3d 86, 87 (11th Cir. 1994) ("Nothing in the statute's language prevents a bar to be entered if a criminal conviction is on appeal"). If Viola is granted a new trial and prevails, such that the statutory basis for the bar is no longer present, he may petition the Commission for reconsideration of this proceeding. *See Jilaine H. Bauer, Esq.*, Securities Act of 1933 (Securities Act) Release No. 9464, 2013 SEC LEXIS 3132 (Oct. 8, 2013); *Richard L. Goble*, Exchange Act Release No. 68651, 2013 SEC LEXIS 129 (Jan. 14, 2013); *Jon Edelman*, 52 S.E.C. 789, 790 (1996) ("If [Respondent] succeeds in having his conviction vacated, he can then apply to us for reconsideration of any sanctions imposed in the administrative proceeding.").[1]

Furthermore, it is well established that issues decided in a criminal proceeding resulting in a criminal conviction cannot be relitigated in follow-on administrative proceedings. *See In the Matter of John Allan Russell,* Release No. 750, 2015 WL 862107, at *4-5 (March 2, 2015) ("In a follow-on administrative proceeding after a criminal conviction based on a guilty plea, a respondent is collaterally estopped from attacking the factual basis for the plea."); *In the Matter of Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758 *12 at n.70 (March 7, 2014), *citing Studer v. SEC,* 148 F. App'x 58, 59 (2d Cir. 2005) (finding that respondent, in an appeal of a follow-

[1] While the merits of Respondent's factual assertions are not relevant to or properly considered in these proceedings, it is noteworthy that Respondent has not offered any affidavits or other support for the purported factual information asserted in his Opposition beyond reference to as-yet unadjudicated claims made in his Motion for a New Trial and bankruptcy proceedings. In addition, it is worthy of note that the Second Circuit affirmed the criminal judgment against Respondent, and the Supreme Court denied his petition for a Writ of Certiorari.

on administrative proceeding "is prohibited from relitigating the factual and legal conclusions of the district court regarding his violations of federal securities laws").

2. ***Respondent's arguments in his Opposition do not create a material question of fact regarding the applicability of § 203(f) of the Investment Adviser's Act of 1940 and the appropriateness of sanctions***

Respondent's Opposition fails to contest the predicates for the imposition of associational bars pursuant to § 203(f) of the Investment Adviser's Act of 1940 ("Adviser's Act") [15 U.S.C. § 80b–3(f)]. As set forth in greater detail in the Division's motion for summary disposition, Respondent admitted in his Answer to the Order Instituting Proceedings ("OIP") that:

1) while conducting an investment business, he received asset-based compensation while engaged in the business of advising others as to the advisability of investing in, purchasing, or selling securities [Answer, at ¶ B.3 and ¶ B.4] (conduct satisfying the definition of an investment adviser as set for the in Advisers Act §202(a)(11) [Title 15 United States Code § 80b–2(a)(11)]); and

2) he pleaded guilty to two counts of mail fraud in violation of Title 18 United States Code, § 1341 [Answer at ¶ B.2], based on conduct involving the purchase or sale of a security [Answer at ¶ B.4] and the misappropriation of investor funds by commingling them with his own funds and using them to pay personal expenses [Answer at ¶ B.3] (offenses enumerated in Advisers Act § 203(e) [Title 15 United States Code § 80b-3(e)] as required for Advisers Act § 203(f) [Title 15 United States Code § 80b–3(f)] to apply);

These admissions establish the first two conditions for the Court's jurisdiction under Advisers Act Section 203(f). As to the third requirement – that associational bars be in the public interest – Respondent's Opposition fails to address the issue of sanctions or to counter the Division's analysis of the *Steadman* factors, as set forth in its Motion for Summary Disposition in support of its assertion that full associational bars against him are warranted.

CONCLUSION

For the reasons stated above and in the Division's Motion for Summary Disposition, the Division respectfully requests that the Court grant the Division Summary Disposition in its favor, and impose a permanent associational bar, including all collateral bars, against the Respondent.

Respectfully submitted,

DIVISION OF ENFORCEMENT

By its attorneys,

/s/ Ellen Bober Moynihan

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Date: April 3, 2015

Certificate of Service

I certify that on April 3, 2015, in addition to filing the same with the Secretary of the Commission, I caused true and correct copies of the foregoing **Division of Enforcement's Reply to Respondent Viola's Opposition to Motion for Summary Disposition** to be served on the following parties and other persons entitled to notice to the following addresses:

Honorable Carol Fox Foelak
Office of Administrative Law Judges
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
(by electronic mail)

Mr. Gregory Viola, [redacted]

Ayer, MA 01432
(Respondent)
(via certified mail)

/s/ Ellen Bober Moynihan

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April 3, 2015

By Overnight Mail and Fax (703-813-9793)

RECEIVED
APR 06 2015
OFFICE OF THE SECRETARY

Brent J. Fields
Office of the Secretary
U.S. Securities & Exchange Commission
100 F. Street, NE
Washington, DC 20549

Re: In the Matter of Gregory Viola (AP File No. 3-16274)

Dear Secretary Fields:

In connection with the above-referenced proceedings, enclosed please find the original and three (3) copies of the Division of Enforcement's Reply to Respondent Viola's Opposition to Motion for Summary Disposition.

Thank you very much for your attention to this matter.

Sincerely,

Ellen Bober Moynihan
Senior Investigations Counsel
Boston Regional Office

Enclosures

cc: The Honorable Carol Fox Foelak (by electronic mail)
Gregory Viola (by certified mail)