ADMINISTRATIVE PROCEEDING

FILE NO. 3-14700

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

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| In the Matter of | : | |
| | : | REPLY TO DIVISION'S BRIEF IN |
| GREGORY BARTKO, ESQ. | : | OPPOSITION TO PETITION FOR REVIEW |
| | : | |

I. Preliminary Comments

Pages 1 through 9 of the Division's Brief in Opposition to Bartko's Brief in Support of Petition for Review of Initial Decision ("Brief in Opposition"), recites background information and snippets of language found in the January 17, 2012 order filed in Bartko's criminal case giving rise to the Commission's January 18, 2012 Order Instituting Proceedings ("OIP"). Bartko's reply to this information can be found in his direct appeal docketed before the Fourth Circuit Court of Appeals, United States v. Gregory Bartko, Case No.: 12-4298. Although in reply in this proceeding Bartko has much to say and much to argue, there is no point in doing so here. It is undisputed that Bartko was indicted, tried, convicted and sentenced to a term of imprisonment of 276 months---wrongfully so. The real question is whether the system will

recognize this. See Respondent's Memorandum of Law In Response to Division's Motion for Summary Disposition; Petitioner's Brief in Support at 1.

Bartko's conviction was obtained, at least in part, by government misconduct perpetrated by at least two staff members of the Commission in the Atlanta District Office and representatives of the United States Attorney's Office ("AUSA") that handled Bartko's prosecution. The Division is not responsible for the misadventures of another federal agency, but it is responsible for the violations of Bartko's due process rights inflicted by its own staff. See Bartko's Answer to OIP dated February 14, 2012. It is with this in mind that Bartko finds it fascinating that one-half of the Division's Brief in Opposition is consumed with highlighting the prosecution's theory of Bartko's criminal case. Even though the Division and the Initial Decision concluded that none of it matters.

More to the point of this reply is that nowhere does the Division address the legal or factual arguments raised in Bartko's Brief in Support. Instead, the Division attempts to respond to Bartko's arguments related to: (i) his efforts to obtain production of documents from the Division (Brief in Opposition at 10) and to obtain a stay of these proceedings. Id.; and (ii) seeks to preserve the Initial Decision even in the face of what is a clear lack of subject matter jurisdiction in this proceeding. Brief in Opposition at 18. These arguments are addressed below, but preliminarily Bartko wishes to address the procedural statements made by the Division in its Brief in Opposition.

## II. Procedural and Factual Rebuttal

Although it is not clear, the Division seems to contend that it complied with its obligations for the production of documents to Bartko pursuant to 17 C.F.R. Section 201.230. Bartko notes that the Division's document production obligation is not an elective option---it is mandatory. Id. Using the

transcript of the pre-hearing conference held by Administrative Law Judge Elliott ("ALJ"), the claim seems to be that Bartko was told then that the Division had no investigative file materials. According to the Division, the inquiry ends there. The transcript, attached to the Brief in Opposition as Exhibit "A," is clear that Bartko intended to seek the production of documents relevant to the factual issues raised by his Answer. A representation was made by the Division counsel at the pre-hearing conference that "there is no investigative file." (Brief in Opposition, Exh A at 7). However, the Division could simply avoid any requests for production of documents pursuant to Rule 230 by asserting that it is not in its investigative file. That is not a good faith approach to discovery in an administrative proceeding. In fact, it could be construed as a sanctionable response if it was made in the context of federal court civil litigation. But, there is more in the transcript of the pre-hearing conference of relevance.

Division counsel stated that, "And we don't necessarily have all the papers that were filed in the DOJ case. We have papers related to the conviction, which is what this action is premised on." Id. at 7. This statement is not limited to documents publicly available on PACER which Bartko readily admitted that he could obtain elsewhere. Id. at 8. "Papers relating to the conviction, which is what this [the OIP] is premised on" is certainly an indicator that the Division's file materials relative to this action are what is accessible to the Division. Bartko's request for document production from the Division, the scope of the proposed subpoena duces tecum Bartko requested the ALJ to issue and his arguments made in Bartko's Memorandum in Response to the Division's Motion for Summary Disposition at 9-10 are sufficiently specific and relevant to this proceeding. The Division produced nothing. The Division appears not to have even searched its records to determine if there were documents that were responsive to Bartko's requests outside of the rubric of the "investigative file." Moreover, since Rule 230 specifically mandates that the Division must produce all "Brady" material to a respondent, Bartko contends that in order to comply with that mandate, the Division has a duty to search its files and make inquiry of other federal

agencies connected to the investigation giving rise to the issuance of the OIP. To satisfy the Division's duty to search, inquiry must have been made of the USAO that prosecuted Bartko. That office conducted pre-trial interviews with Rue and McLellan; it obtained a compendium of documents used in Bartko's prosecution; and contains communications exchanged between Rue and the prosecution and between Rue and McLellan. Brady material found in this population of documents would have to be turned over to Bartko pursuant to Rule 230. None of this apparently occurred. The "secret report" referred to in Bartko's Answer is likely among these materials.

The ALJ refused Bartko any discovery knowing at the time of the pre-hearing conference that he was inclined not to permit document production. Brief in Opposition, Exh. A at 9-10. Bartko followed the discovery procedure outlined in Rule 230 and as instructed by the ALJ and got nowhere. Not one piece of paper was ever produced by the Division. Rule 230 is designed to enable a respondent to conduct some rudimentary, basic discovery before a hearing takes place on the OIP. The Division has a responsibility to comply with Rule 230, not just the Atlanta District Office of the Division, but the Division itself. Rule 250 specifically states that summary disposition is premature if document production has not been completed. None of these procedural requirements were considered in granting summary disposition on the Division's motion. There is no indication anywhere in the record that Division counsel made any reasonable inquiry to determine whether there were documents responsive to Bartko's Rule 230 requests. Even though Rule 230 is pretty clear in terms of the Division's obligations, the ALJ blithely stated at the pre-hearing conference that, "I'm not trying to be funny when I say this, but we literally don't have it [discovery]." Id. at 9. The ALJ then identified what procedure Bartko was required to follow to obtain a subpoena or order of production, which Bartko dutifully followed. Id. The ALJ then denied Bartko's Motion For Issuance of Subpoena. Order Denying Motion For Issuance of Subpoena. In short, Bartko followed the relevant SEC Rules of Practice; announced at the

pre-hearing conference his intentions vis-à-vis certain document production; and the Division and the ALJ frustrated Bartko's requests at every turn. Bartko still has none of the requested document production described in his motion seeking a subpoena. Again, in federal court civil litigation, such conduct would likely be sanctionable. The Division's Brief in Opposition (n.3) does not alter this procedural conundrum.

Bartko's Motion For Stay, addressed in the Brief in Opposition at 11, is now of no consequence. The issue is moot. However, Bartko represents to the Commission that he did not receive any order dated April 23, 2012 denying his motion, nor does he recall receiving the Division's opposition to the motion. Bartko was in transit from his address in Tarboro, NC from May 4, 2012 through May 21, 2012. It is most likely any mail containing these filings did not reach him, nor does Bartko have access to the internet to locate them on the SEC website.

III. Rebuttal Argument

The Division continues to assert that the ALJ properly granted summary disposition by the Initial Decision dated August 21, 2012. What the Division has continually failed to address are the factual issues made relevant in this proceeding by Steadman v. SEC, 603 F.2d 1126 (5th Cir. 1979) (aff'd on other grounds, 450 U.S. 91 (1981), which are described in detail in grounds' Answer. Accepting Bartko's factual statements in his Answer as true, as the ALJ was bound to do, and as the Commission continues to be bound to do pursuant to 17 C.F.R. Section 201.250(a), these factual issues have never been addressed as to the appropriate sanction, if any, against Bartko following his criminal conviction. The Division's position is that the Commission staff's misconduct by employee, Alex Rue and David McLellan, doesn't matter and should have no bearing on what discipline should be imposed against Bartko in this proceeding. This logic is faulty for two reasons if not more.

The facts and the relationships of the principal parties involved in Bartko's criminal prosecution, those involved from the Commission's staff that interacted with Bartko for a number of reasons in his role as securities counsel in a number of SEC investigations, and Bartko's securities registrations with the Commission, all bring a unique set of complexities to this proceeding. As recited in his Answer, Bartko was dealing with Alex Rue for months trying to resolve an SEC investigation on behalf of the very client who was the government's key witness against him at his trial. Rue was also dealing with the same AUSA who led Bartko's prosecution, as was the court appointed receiver in the ancillary SEC enforcement action which was the subject of Rue's investigation, referred to as the Mobile Billboards of America investigation.

During the course of Rue's investigation of Bartko's client, Bartko and Rue discovered that the client (Hollenbeck) was continuing his past fraudulent sales activities by creating and distributing unauthorized written offering materials to interested investors. Not only was the distribution unauthorized, but Hollenbeck was later found to have created bogus and forged offering literature on his word processor that was produced by whiting out key limitations on their use. Upon this discovery, Bartko openly and completely responded to a series of Rue's requests for more information. Bartko thereafter proceeded to return all invested funds under his control to the investors entitled thereto through a federal court interpleader action that transparently achieved that result. Once this was accomplished, Rue and his supervisor(s) apparently believed no further inquiry of Bartko was warranted, or so Bartko was led to believe. In reality, Rue and a second Commission staff member, David McLellan, apparently decided they would dupe Bartko into producing documents and providing information concerning the investment activities of Bartko's private equity fund under the guise of conducting an unannounced broker-dealer examination. As the "Trojan Horse" for the AUSA that Rue and the SEC receiver were working with, the

Commission staff committed numerous instances of misconduct; misrepresented the scope and purpose of a broker-dealer examination; and essentially engaged in a parallel investigation of Bartko on behalf of the prosecutors who ultimately indicted Bartko. Reports were written, documents compiled and information gathered---all of which was funneled to the AUSA who was the lead AUSA prosecuting Bartko. The same AUSA who prosecuted Bartko's former client, Hollenbeck and the same AUSA who prosecuted securities counsel for Mobile Billboards of America, Inc., Barry Maloney. Maloney and his counsel claimed that there was similar collusion between SEC staff and the same prosecutors that indicted and tried Maloney. Of interest is the fact that Maloney was acquitted, resulting in no further scrutiny of the misconduct.

Both Commission staff employees testified against Bartko at his criminal trial. The documents and reports generated by those same staff employees were used extensively in Bartko's prosecution. Simply put, the Commission staff engaged in a collusive investigation of Bartko that severely prejudiced him at his criminal trial. This is a clear violation of due process and should not be overlooked by the Commission in reviewing the propriety of the Initial Decision. Cases cited in Bartko's Brief In Support demonstrate similar due process violations. See Brief in Support at 10-13. The question on review to the Commission becomes, assuming the above-described staff misconduct is true, and assuming this misconduct resulted in a collusive investigation of Bartko in tandem with Bartko's prosecutors, how should these factors weigh into the analysis of what sanction is appropriate for Bartko as a result of the OIP. Bartko contends that at a minimum, the weight of these factors can only be determined in the context of a full and fair hearing rather than a perfunctory summary disposition. As a result, the ALJ erred in merely accepting the findings made in a post-conviction proceeding designed to determine if Bartko was entitled to a new trial under the law. Such a determination does not turn on any recognized evidentiary standard such as beyond a reasonable doubt, by clear and convincing evidence, or even by a

preponderance of the evidence. The fact is that the very opinion relied upon by the Division as the basis for sanctions following the OIP, is a post-conviction order that addresses yet other misconduct by the federal prosecutors responsible for Bartko's wrongful conviction. Bartko's new trial motions decided by his criminal trial judge on January 17, 2012 cannot be used for any preclusive effect in this proceeding. It was therefore error for the ALJ to merely adopt those findings in his Initial Decision. Error that requires vacating the Initial Decision.

This is the correct result for other compelling reasons as well. The facts set forth in Bartko's Answer were not actually litigated anywhere in his criminal proceeding. There is even discord among the federal circuits on the scope of the preclusive effect of a guilty plea to a criminal offence and why they may not be appropriate for issue preclusion. Otherson v. Dep't of Justice, 711 F.2d 267, n.8 (D.C. Cir. 1983). The Division erred in bringing this administrative proceeding in reliance on the January 17, 2012 order in Bartko's criminal case. Accordingly, no issue preclusion or collateral estoppel is appropriate and the Commission should vacate the Initial Decision and dismiss the OIP with prejudice.

Even if the Commission believes that issue preclusion from Bartko's criminal case is appropriate in this proceeding, the Initial Decision must be set aside for lack of subject matter jurisdiction. The Initial Decision at 5, n. 9 intimates that bringing this disciplinary proceeding against Bartko under Section 15(b)(6)(A) of the Securities Exchange Act of 1934 ("Exchange Act") was improper because at the time the OIP was issued, Bartko had not been "convicted" (sentenced) for purposes of the statute authorizing disciplinary proceedings against a person associated with a broker-dealer. This interpretation is correct since the statute clearly refers to "commencement of proceedings" as the trigger date for such a proceeding. On that basis, on January 18, 2012, it was inappropriate for the Division to bring any disciplinary action against Bartko pursuant to Section 15 (b) (6)(A) of the Exchange Act. Instead of

dismissal of this proceeding, which is the action the ALJ should have taken, the disciplinary decision was rendered under the authority found in Sections 202(a)(6) and 203(f) of the Adviser's Adviser's Act. However, it is now undisputed that there is no statutory authority to sanction Bartko as an investment adviser under Section 203(f) of the Adviser's Act since Bartko was not an investment advisor or associated with an investment adviser at the time of the alleged misconduct in the OIP. The Division tacitly admits this defect in bringing this proceeding. Brief in Opposition at 18-19.

In its Brief in Opposition, the Division claims Bartko waived this objection and "admitted that he was associated with an investment adviser at the time of the misconduct." Id. at 18. Bartko did no such thing. Bartko filed his Answer to the OIP during his incarceration without access to even one piece of paper relating to this proceeding. Bartko recalled that his broker-dealer, Capstone Partners, L.C., was approved as an NASD member in 1999 and so stated in his Answer. Bartko's statement, "During the relevant time....." is certainly no admission of a fact alleged that was untrue to begin with, rather it was a reference to the actual dates that Bartko became associated with an investment adviser. These precise dates are not within Bartko's knowledge and it should be explained by the Division why allegations were made against Bartko in his capacity as an investment adviser when the alleged misconduct at issue transpired several years before he became associated. As between Bartko (incarcerated) and the Division, who can access the dates of Bartko's investment adviser's registration through the Commission data base in a matter of minutes---shame on the Division.

Aside from the above, it is unnecessary to feed this debate since under the statutory authority to impose discipline on Commission-registered persons, the Commission must have "subject matter jurisdiction" to do so. It does not have subject matter jurisdiction over Bartko in this proceeding as either being associated with a broker-dealer or an investment adviser. Subject matter jurisdiction is

never waived by inaction or even consent of the parties and pursuant to Fed. R. Civ. Pro. 12(h)(3), which the Rules of Practice were patterned after, the ALJ had a duty to raise the issue sua sponte, but failed to do so.

IV. There Is No Subject Matter Jurisdiction to Support the OIP

The Initial Decision now under review by the Commission must satisfy the procedures outlined in the Administrative Procedures Act, 5 U.S.C. Section 701, et seq. Upon further judicial review, if any, of Commission findings in this matter, the same holds true. The Initial Decision is clearly not in accordance with applicable law with respect to subject matter jurisdiction as alleged in the OIP, pursuant to Sections 203(f) and 203(e)(4) of the Adviser's Act. The burden of accurately alleging and establishing subject matter jurisdiction in this case (the right or the power of the Commission to discipline Bartko) as an investment adviser is non-waivable. Athens Community Hosp. v. Schweiker, 686 F.2d 989, 992 (D.C. Cir.). It is a condition precedent to the validity of any discipline imposed upon Bartko in the Initial Decision. If the Commission on review perpetuates this jurisdictional defect by affirming the Initial Decision, the affirmance will be deemed in any judicial review to be arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law. 5 U.S.C. Section 706(2)(A); MFS Securities Corp. v. SEC, 380 F.3d 611, 617 (2nd Cir. 2004). See also Seghers v. SEC, 548 F.3d 129, 132, 383 U.S. App. D.C. (D.C. Cir. 2008).

The law is clear that a challenge to a court's jurisdiction maybe raised at anytime, even for first time on appeal. United States v. Bustillos, 31 F.3d 931 (10th Cir. 1994); Fed. R. Civ. Pro. 12(h)(3). In Athens Community Hosp. v. Schweiker, supra, the court made clear the rule that, '[i]t is axiomatic that subject matter jurisdiction may not be waived (citing Fed. Civ. R. Pro. 12(h) and Laffey v. Northwest Airlines, Inc., 185 U.S. App. D.C. 322, 567 F.2d 429, 474 (D.C. Cir. 1976), cert denied 434 U.S. 1086 (1978) and the

courts may raise it sua sponte." "It is even of no moment that the defense of lack of subject matter jurisdiction is raised for the first time in a reply brief on appeal. Brown v. Phila. Hous. Auth., 350 F.3d 338, 346-347 (3rd Cir. 2003). In this proceeding, Bartko did not admit that he was associated with an investment adviser in 2004-2005 during the time of the alleged misconduct. Bartko raised the lack of statutory authority to sanction him as an investment adviser due to the findings made in the Initial Decision. The Division can claim no surprise or unfair lack of notice of this defect since the Division has known of this jurisdictional defect since the Initial Decision was rendered. In fact, Bartko contends that the Division had an affirmative duty to disclose this jurisdictional defect. Bartko's Petition for Review raises a number of grounds, one of which is that the Initial Decision is arbitrary and capricious and contrary to law.

V. Relief Requested

Bartko has contested this proceeding in good faith since he received the Division's offer of settlement many months ago in March 2012. The Division rejected Bartko's overtures for resolving this disciplinary matter without the time and expense that has already been incurred. Now the Division has put the respondent in the position of requesting that the OIP be dismissed with prejudice based upon what is clearly a lack of statutory authority (synonymous with subject matter jurisdiction) for the draconian discipline against Bartko included in the Initial Decision. This is wrong under the facts and wrong under the law. The Commission should so find.

Dated this 3rd day of December, 2012.

Respectfully Submitted,

SBB for Gregory Bartko

Gregory Bartko, Respondent