UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19826

In the Matter of

LOUIS NAVELLIER and
NAVELLIER & ASSOCIATES, INC.,

Respondents.

DIVISION OF ENFORCEMENT'S REPLY TO RESPONDENTS' OPPOSITION TO SUMMARY DISPOSITION

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Respondents attempt to throw up several procedural impediments to summary disposition. But not one of them is legally supported, or supportable. They try to re-argue the facts and legal conclusions found by the District Court when deciding liability on summary judgment and in the imposition of an injunction in the final judgment. And they submit reams of materials that they had submitted there, including a 44-page, near-verbatim copy of their Statement of Facts from summary judgment. But Respondents cannot challenge the District Court's findings and conclusions (or the summary judgment as a whole) in this forum. Finally, Respondents address some of the *Steadman* factors. But their arguments amount to not much more than claims that they didn't do what the District Court found they did, and a willful blindness to prior Commission warnings and to the wrongfulness of their conduct overall. There are no impediments to resolving this proceeding now, and the public interest strongly points to an associational bar for Mr. Navellier and the de-registration of NAI. The Division requests summary disposition.

ARGUMENT

I. No Legal Impediment Exists to Summary Disposition at This Time

A. Summary Disposition is Appropriate and No Hearing Is Required

The Commission has "upheld summary disposition in cases … where a court has enjoined … a respondent and the sole determination concerns the appropriate sanction." *Marl Feathers*, Release No. 1403, 2020 WL 5763383, at *1 (Sept. 25, 2020). Despite Respondents' efforts to do so, "follow-on proceedings are not an appropriate forum to revisit the factual basis for, or legal challenges to, an order issued by a federal court, and challenges to such orders do not present genuine issues of material fact in our follow-on proceedings." *Peter Siris*, Release No. 3736, 2013 WL 6528874, at *11 (Dec. 12, 2013)(internal quotation omitted).

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Respondents make a confused argument claiming that the District Court's Final Judgment is not a final judgment because the Circuit Court will review de novo the summary judgment ruling. They then argue that collateral estoppel on the facts found by the District Court is precluded by this de novo review. Not so. The cases Respondents cite do not hold what Respondents claim. They are correct that "[t]he federal rule is that pendency of an appeal does not suspend the operation of a final judgment for purposes of collateral estoppel, except where appeal review constitutes trial de novo." *Nixon v. Richey*, 513 F.2d 430, 438 n.75 (D.C. Cir. 1975). But Respondents confuse "de novo review" (as performed by a Circuit Court reviewing summary judgment) and "trial de novo" ("a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken," most often occurs by statutory mandate in review of certain administrative agency actions). *Spano v. W. Fruit Growers*, 83 F.2d 150, 152 (10th Cir. 1936); *see also In re THB Corp.*, 94 B.R. 797, 802 (Bankr. D. Mass. 1988) (highlighting the difference between "trial de novo" and "de novo review"); *In re Price-Watson Co.*, 66 B.R. 144, 149 (Bankr. S.D. Tex. 1986) ("'de novo review' … does not mean 'de novo trial'"). Because the Circuit Court's review of the District Court's rulings does not amount to trial de novo, the standard federal rule of collateral estoppel applies.

Respondents also cite *SEC v. Resnick* to claim that collateral estoppel cannot apply here. 604 F. Supp. 2d 773, 779 (D. Md. 2009). But *Resnick* holds the opposite of what Respondents claim. *Resnick* addresses whether a "full and fair opportunity to litigate" was given to the party against whom collateral estoppel applies:

> [W]here the non-moving party had the incentive to litigate vigorously in the prior proceeding, and was able in that proceeding to examine the evidence against him, present his own evidence, cross-examine witnesses, be represented by competent counsel, and otherwise enjoy the protections of due process as relates to the issue under dispute, he will generally be

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> considered to have had a full and fair opportunity to litigate that issue for purposes of collateral estoppel."

Resnick, 604 F. Supp. 2d at 780. While Respondents' appeal may claim that the District Court should not have granted summary judgment, there is no claim that they weren't given the opportunity to litigate. Respondents' argument reduces to the proposition that there can be no collateral estoppel when a case is decided by summary judgment—a claim for which there is no legal support.

Respondents also try to preclude collateral estoppel by vaguely claiming that there were "procedural irregularities." They can do so only by stretching that term beyond its breaking point by arguing the District Court's ruling on materiality and scienter were procedurally improper. Here, Respondents' argument is that there can never properly be summary judgment on a fraud claim. Again, this claim has no legal support. *See SEC v. Ficken*, 546 F.3d 45, 51 (1st Cir. 2008) ("Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely on conclusory allegations, improbable inferences, and unsupported speculation.")(quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*¸896 F.2d 5, 8 (1st Cir. 1990)).

In addition, Respondents' challenge to the Division's arguments about the *Steadman* factors does not preclude summary disposition or mandate a hearing. "Use of the summary disposition procedure has been repeatedly upheld in cases such as this one where the respondent has been enjoined or convicted, and the sole determination concerns the appropriate sanction." *Jeffrey L. Gibson*, Exch. Act Rel. No. 57266, 2008 WL 294717, at *5 (Feb. 4, 2008). There is no dispute the Respondents have been enjoined by the District Court and found to have been acting as investment advisers at the time of their violations. Thus, there is no impediment to deciding follow-on sanctions by summary disposition.

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In short, this is an unremarkable case in which the District Court made factual and legal findings, granted summary and then final judgment, and then an appeal was filed. No impediment exists to this case proceeding with the application of collateral estoppel principles.

B. The Supreme Court's Review of *Cochran* Should Not Stay this Proceeding

There is no merit to Respondents' argument that this proceeding should be stayed pending the Supreme Court's resolution of *SEC v. Cochran*, 142 S. Ct. 2707 (2022). In *Cochran*, the Supreme Court was asked to determine "[w]hether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing Securities and Exchange Commission administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge who will conduct the proceeding." Resolution of that distinct jurisdictional issue, however, is irrelevant to Respondents' claim that the administrative proceeding against him is unconstitutional. Indeed, Respondents' claim is doubly flawed because it rests on the incorrect assertion that, in the underlying decision in *Cochran*, the court of appeals held that administrative proceedings are unconstitutional. *See* Br. at 24. To the contrary, the court of appeals made clear that the case "presents only the issue of whether the Exchange Act divested district court jurisdiction over claims that SEC ALJs are unconstitutionally insulated from the President's removal power; our holding extends no further . . . ." *Cochran v. SEC*, 20 F.4th 194, 211 (5th Cir. 2021). As this proceeding does not involve any question of District Court jurisdiction, Respondents' argument should be rejected.

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C. Respondents' First Circuit Appeal Should Not Stay this Proceeding

Respondents argue that this Proceeding should be stayed pending the resolution of their appeal to the First Circuit.[1] Appeal of the underlying action by a Respondent to a Commission follow-on proceeding does not require a stay. The Commission has stated that it "strongly disfavor[s]" requests for postponement of an administrative proceeding "except in circumstances where the requesting party makes a strong showing that denial [of stay] would 'substantially prejudice their case." Commission Rule of Practice 161, 17 C.F.R. § 201.161. "A pending judicial appeal … is generally an insufficient basis upon which to prolong a Commission proceeding." *Lynn Tilton, et al.*, Release No. 3885, 2017 WL 3214456, at *1 (Commission Op., July 18, 2017)(denying stay request)(citing *Paul Free*, Exch. Act. Rel. No. 66260, 2012 WL 266986, at *2 (Jan. 26, 2012))(cleaned up); *see also Francis V. Lorenzo*, Release No. 10460, 2018 WL 994316 (Feb. 21, 2018)(denying stay based on possible Supreme Court review). Respondents point to no particular harm other than the possibility that they could win their appeal and the Commission's possible order would need to be reversed. That possibility does not rise to "substantial prejudice" and their request should be denied.

Nor can Respondents explain away their refusal to recognize the wrongfulness of their conduct by citing their appeal of the judgment. The D.C. Circuit has already rejected that type of claim:

> Before the district court, [the defendant/respondent] was given the option of recognizing the wrongfulness of his conduct or refusing to do so and risking more severe remedial action. He chose the latter, a factor the district court cited in permanently enjoining Seghers from violating the securities laws … The Commission, acknowledging Seghers's dilemma, gave [defendant/respondent] a similar option and he once again risked a more severe sanction by refusing to acknowledge the wrongfulness of his

[1] Respondents have not moved under Commission Rule of Practice 161 for the stay. Rather their summary disposition opposition contains a stay-related argument.

> conduct. The option did not unconstitutionally burden [defendant/ respondent] in the district court … nor did it deny him due process before the SEC.

Seghers v. SEC, 548 F.3d 129, 136-37 (D.C. Cir. 2008).

In short, Respondents' appeal does not affect the availability of summary disposition.

II. Respondents Are Collaterally Estopped from Challenging Here the District Court's Basis for Summary Judgment and the Imposition of the Injunction

Respondents spend much of their brief arguing facts that they are collaterally estopped from challenging here. Pages 11 through 16 and 21 through 24 of their brief merely argue the District Court's findings were incorrect:

RESPONDENTS' CHALLENGED FINDINGS	DISTRICT COURT'S FINDINGS (EX. A – SUMMARY JUDGMENT RULING)
Respondents made false statements	p. 15
Respondent Mr. Navellier committed fraudulent actions	pp. 15-17
Respondents acted with scienter	pp. 16-18
Respondents' statements were material	p. 16

These arguments, which are beyond the *Steadman* factors, should be ignored.

Respondents have also filed an additional 44-page "Statement of Facts." Of its one hundred eighty-four paragraphs, one hundred eighty-two appear to be copied directly from the Respondents summary judgment statement of facts before the District Court (the other two paragraphs merely summarize an argument they make on appeal). This filing should be disregarded as it does not comply with Rules of Practice 154(c) and 250(e & f)) (setting length limitations for pleadings) and addresses only with Respondents' factual contentions from the summary judgment proceedings and not facts related to the *Steadman* factors.

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III. Respondents' Assessment of the *Steadman* Factors Ignores the Facts

A. Scienter

Respondents argue that because their clients made profits on their investments, they could not have acted with scienter. [Opp. p. 28.] But, of course, whether clients made money on an investment is unrelated to whether Respondents could have acted with scienter. In fact, as in many investment adviser cases, Respondents used fraudulent misrepresentations to attract clients from whom they then earned advisory fees. The point is not that clients received a money-losing investment; the point is that an investment adviser, while acting as a fiduciary, lied to its clients about the investment it recommended to them. [*E.g.*, Ex. A, p. 16 (finding material that clients had been falsely told that investment product had been told a historical track records and was not backtested).]

Respondents also argue that before this case (involving a multi-year, multi-million dollar, multi-statement fraud scheme), the SEC "had never brought any enforcement action" against them. [*Id.*, p. 29.] True. But Respondents carefully omit the District Court's first factual finding: that the Office of Compliance Inspections and Examinations (now the Division of Examinations) warned Respondents three times in eight years of deficiencies in their performance advertising materials and of the potential consequences of their recidivist behavior. [Ex. A, p. 3.] Not two years after the third warning, Respondents engaged in their fraudulent scheme. Respondents' claim of a spotless record (but for the fraudulent scheme here, of course) is simply not true.

B. Repetitive and Egregious

Here Respondents only argue that their statements were not false, so their conduct could not be repetitive or egregious. Again, Respondents are estopped from contesting the District Court's findings on the falsity and materiality of their fraudulent statements. [Ex. A, pp. 15-18.]

Respondents' scheme was particularly egregious because, as the District Court found, Respondents decided to sell their Vireo line of business because they knew the track record had been misrepresented as live traded (not backtested). Respondents then sold that business and transferred all of their clients—to F-Squared, who had also fraudulently misrepresented these products—without ever telling their clients "that there was no evidence to support the performance record of the … strategy … or any evidence that the strategy had been live traded and not backtested as they had marketed." [Ex. A., p. 7]. The District Court, in finding that the sale of the Vireo business was causally connected to the fraudulent scheme, wrote:

> As the Vireo sale price was largely dependent on the number of clients who transferred to F-Squared (instead of terminating their client relationship), Defendants had a substantial incentive not to disclose their misrepresentations and the reason they were selling the business. Additionally, [Mr.] Navellier appears to have wanted to sell the Vireo business before the fraud became public and the firm faced a "big SEC enforcement fine," instead of disclosing to clients the problems.

[Ex. B, p. 9.] In other words, Respondents, knowing that they would make $14 million more by again lying to their clients, doubled down on their fraud and pocketed the cash, rather than fulfil their fiduciary duties of honesty and loyalty. *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 194 (1963) (investment advisers have 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 clients). This final step of the Respondents' scheme shows both the egregiousness of their conduct and the high level of scienter with which they committed that scheme.

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C. Assurances Against Future Violations

Respondents claim that they have given assurances against future violations of the securities laws because, back in 2017, as part of failed settlement discussions between Respondents and the Division,[2] NAI offered (or acquiesced) to hire an outside independent compliance consultant. Opp. at 38. When viewed in the shadow of Respondents' absolute vehemence that they did nothing wrong despite the uncontroverted evidence of their multi-year fraud at summary judgment, Respondents' six-year-old offer of a compliance consultant offers little assurance. Nor would a limited engagement compliance consultant prevent a future violation.[3] Respondents' fraud, their total failure to recognize anything wrong in their conduct, and their insistence that, because clients made money on their investment, nothing wrong happened, demonstrate Respondents' complete lack of understanding of the fiduciary duties of an investment adviser and the high likelihood that they would, colloquially, "do it again."[4]

D. Opportunity to Violate in the Future

Respondents dispute that they will be able to violate the securities laws again. [Opp. at 39.] But their only arguments are that they have provided excellent advice to clients in the past, and that they are appealing the District Court's rulings. Neither of these arguments refutes the clear opportunity Respondents would have if they can keep running an investment advisory firm despite their fraud. While Respondents highlight that their "employees and independent

[2] And under terms where Respondents specifically said that the offer "may not be used in any way in the above referenced pending civil lawsuit or in any other proceeding, action or otherwise other than if this offer is accepted and a settlement is entered into by NAI, Mr. Navellier, and the Commission." No settlement was reached.

[3] NAI had an independent compliance consultant during their fraud, who advised Respondents on performance advertising. An NAI executive even told the consultant about the backtesting and incorrect performance results in NAI's advertising materials. The advice of that consultant did not then prevent Respondents from committing their fraud. So there is no reason a new consultant would end with a different result.

[4] As a final note on Respondents' references to the failed settlement negotiations between the parties, when rejecting the Respondents' selective enforcement claim, the District Court stated, "the record indicates that settlement negotiations between the parties broke down before any settlement was agreed to by both parties." [Ex. A, p. 11.]

contractors" will need new jobs if NAI is de-registered, that fact does not affect whether Respondents can violate the securities laws again.

In addition, Respondents' most recent Form ADV (filed March 29, 2023) reports that Respondents have advertisements that include performance results (their problems area over the three OCIE warnings and their fraudulent scheme), making more tangible Respondents' opportunity to violate again. If Respondents do not face the remedies requested by the Division, they will be able to offend again.

IV. Respondents' Claim of Selective Enforcement Was Rejected by the District Court

Finally, Respondents repeat, practically verbatim, their claim of selective enforcement. This claim was rejected by the District Court on summary judgment. [Ex. A, pp. 8-13.] The Court found that the Respondents failed to establish the existence of similarly situated entities or individuals being treated differently, any "gross abuse of power, invidious discrimination, or fundamentally unfair procedures," any bad faith, the existence of a "class of one," or any lack of a "rational [basis] for any differences in enforcement as compared to other similarly situated entities and individuals." [*Id.*] Respondents' unsubstantiated claim that there are other entities and individuals who committed the same types of violations but remain unbarred does not prevent the Commission from applying the appropriate sanctions here.

CONCLUSION

The Division's requested relief is in the public interest. Respondents have shown that they will be a continued and significant risk to clients if left as investment advisers. The Division requests the grant of summary disposition.

Dated: March 30, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Commission's Order of July 8, 2022 (IA-6066) and Rule 150(c), the Division of Enforcement certifies that it served its Reply to Respondents' Opposition to Summary Disposition on counsel for Respondents on March 30, 2023.

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