UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20586

In the Matter of **DANIEL B. KAMENSKY,** **Respondent.**	**DIVISION OF ENFORCEMENT'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT DANIEL B. KAMENSKY**

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The Division of Enforcement ("Division") respectfully submits this reply in further support of its motion for summary disposition against Respondent Daniel B. Kamensky ("Kamensky").

I. INTRODUCTION

Kamensky is a convicted felon. He is also a securities fraud offender who has been permanently enjoined by federal court from violating the antifraud provisions of the federal securities laws.

Kamensky pled guilty to extortion and bribery in connection with bankruptcy. Through extortion, he manipulated an offering so that Kamensky's fund could buy the securities at an artificially lower price. His fraudulent conduct also violated his fiduciary obligations to the bankruptcy committee he was entrusted to lead.

Given Kamensky's intentional, egregious misconduct, it is in the public interest to permanently bar Kamensky from the securities industry. Indeed, Commission precedent holds that in the absence of extraordinary mitigating circumstance, it is in the public interest to bar a respondent who is criminally convicted or enjoined from violating the antifraud provisions.

Kamensky has shown no extraordinary mitigating circumstance to warrant any lesser sanction. As discussed below, what he has presented is a rehashed version of his sentencing submissions in his parallel criminal case, with many, previously filed character reference letters and a few select findings from the sentencing court, which considered Kamensky's criminal conduct through the prism of the 18 U.S.C. § 3553(a) sentencing factors, not under the requisite public interest factors for a bar.

Whatever effect Kamensky's submissions may have had with the sentencing court, his arguments—including his principal argument that the Commission should defer to the sentencing

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court's findings—have already been rejected or found legally insufficient as a mitigating factor by the Commission. A permanent bar against Kamensky is amply warranted.

II. ARGUMENT

A. Kamensky Should be Permanently Barred from the Securities Industry.

The Commission has repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws. Division of Enforcement Motion for Summary Disposition against Respondent Daniel B. Kamensky and Memorandum of Law in Support ("Div. Mem.") at 8 (citing *Peter Siris*, Exchange Act Rel. No. 71068, 2013 WL 6528874, at *6 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014); *Chris G. Gunderson, Esq.*, Exchange Act Release No. 61234, 2009 WL 4981617, at * 5 (Dec. 23, 2009)).

The Commission has held the same view for conduct that results in a criminal conviction. Div. Mem. at 8 (citing *Michael C. Pattison, CPA*, Exchange Act Release No. 3407, 2012 WL 4320146, at *7 n. 39 (Sept. 20, 2012); *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *7 (Feb. 13, 2009)). Thus, the Commission has long held that, absent extraordinary mitigating circumstances, a person convicted of a criminal offense "cannot be permitted to remain in the securities industry." *Eric S. Butler*, Exchange Act Release No. 65204, 2011 WL 3792730, at * 4 (Aug. 26, 2011) (internal quotation marks omitted).

Having recently been convicted and enjoined from violating the antifraud provisions,[1] Kamensky cannot remain in the securities industry either. As discussed in the Division's opening

[1] Kamensky erroneously asserts that the follow-on OIP against him is based on his criminal conviction only. Kamensky Response in Opposition to Division of Enforcement's Motion for Summary Disposition ("Opp.") at 3. The OIP is based on the entry of the injunction *and* the criminal conviction. OIP ¶¶ 2-4 at 2.

memorandum in support of its motion for summary disposition, Div. Mem. at 7-14, and this reply, all public interest factors in *Steadman* strongly favor the issuance of a permanent securities industry bar against Kamensky.

B. Kamensky Has Shown No Extraordinary Mitigating Circumstance Warranting a Lesser Sanction.

Kamensky has shown no extraordinary mitigating circumstance warranting any lesser sanction than a permanent bar from the Commission. If anything, Kamensky's almost 350-page opposition submissions, which appears to be largely taken from his sentencing submission in the parallel criminal case, tips the *Steadman* scale towards imposing a bar.[2]

1. Kamensky intentionally engaged in egregious, multi-faceted, and recurrent conduct.

Kamensky does not—indeed, cannot—dispute that he recently acted with a high degree of scienter when he violated the antifraud provisions of the federal securities laws. Opp. at 16. Yet he claims that his misconduct was "not sufficiently egregious" to warrant a permanent bar. *Id*. at 10. He asserts that his extortion of a rival market participant/investor from Jefferies ("JE1"), in violation of his fiduciary duty to creditors, "while wrongful," was an "extremely isolated," "highly aberrant" conduct, "amounting to two phone calls, both a few minutes in length, over the course of a few hours on a single afternoon" of July 31, 2020. *Id*. at 10, 15, 16.

[2] Kamensky mentions, for the first time in this proceeding, that he is cross-moving for summary disposition on the same sanctions issues here. Kamensky Opp. at 7-8. Even if it is appropriate to make such cross-motion under Rule 250(b) at this late stage (that is, *after* Kamensky proposed the parties' briefing schedule for the Division's motion for summary disposition, *after* the parties held a prehearing conference in which no mention of Kamensky's cross-motion was made by his counsel, and *after* almost a month from the date the Division moved for summary disposition), the Division respectfully suggests that this cross-motion be denied for the reasons stated in the Division's submissions, including in this reply, in support of its motion for summary disposition.

Kamensky's "spin" on what occurred is wrong. He blurs and glosses over much of the undisputed allegations of the Commission's Complaint and the incontrovertible evidence of his misconduct that the United States Trustee obtained after its investigation ("UST investigation"), which led to the parallel criminal action. In fact, Kamensky has downplayed, minimized, and trivialized his intentional, egregious, and recurrent misconduct beyond recognition.

First, as a matter of law, Kamensky's misconduct is more than sufficiently egregious to warrant a permanent bar. The Complaint's allegations, which Kamensky is collaterally estopped from contesting, *see Gary M. Kornman*, 2009 WL 367635, at *8, provides that Kamensky used his position on the bankruptcy committee that facilitated the offering of securities for the bankruptcy estate to manipulate the offering so that Kamensky's fund could purchase the securities at an artificially lower price. Div. Ex. 2 (Complaint) ¶ 1. The Complaint also provides that Kamensky's fraudulent conduct violated his fiduciary obligations to the bankruptcy committee (the Official Committee of Unsecured Creditors or "UCC") in the Neiman Marcus Chapter 11 bankruptcy. *Id*. ¶ 41.

The Commission has consistently found both types of misconduct to be egregious. *See, e.g.*, *James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *4 (July 23, 2010) ("[W]e have consistently viewed misconduct involving a breach of fiduciary duty or dishonest conduct on the part of a fiduciary, such as the fraud committed by [the respondent] on his clients, as egregious."); *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *4 (Oct. 24, 2011) ("Market manipulation—which [the respondent] was intent on achieving—is one of the most egregious securities law violations.").

Second, the incontrovertible record contradicts Kamensky's characterizations. Kamensky's fraudulent conduct was *not* "extremely isolated," or "highly aberrant" conduct

"amounting to two phone calls, both a few minutes in length, over the course of a few hours on a single afternoon" of July 31, 2020.

The record from the UST investigation (Div. Ex. 3) shows as follow:

Events before July 31st:

- On July 4, 2020, Kamensky sought to do a self-interested transaction involving his firm (Marble Ridge Capital LP or "MRC") purchase of certain MyTheresa-related litigation claims from debtor Neiman Marcus Group. Div. Ex. 3 at 8. Neither the United States Trustee nor the federal bankruptcy court was aware of the conduct. *Id*. at 29 n.10. The UST concluded that Kamensky's "earlier conduct [his attempts to buy the debtor's MyTheresa-related litigation claims (Series B Shares)] between July 4 and July 30 was problematic." *Id*. at 29.

Events of July 31st:

- Upon learning that Jefferies was interested in bidding the Series B Shares, Kamensky contacted Jefferies. Div. Ex. 3 at 12. At 3:20 PM (all times Eastern), Kamensky began communicating with JEI using Instant Bloomberg chat messages. *Id*. at 13. In a series of texts, Kamensky told JE1 not to bid for the Series B Shares: Kamensky told JE1 to "Tell [another Jefferies employee, "JE2"] to stand DOWN," asking "Do I need to reach out to [him][?]", and "DO NOT SEND IN A BID" for the Series B Shares. *Id*. at 13-14.

- At 3:45 PM, at Kamensky's request, a telephone call between Kamensky and JE1 and JE2 occurred. Div. Ex. 3 at 16. Kamensky told them to stand down and not put in a bid. *Id*. Kamensky said that he was determined to acquire the shares, so Jefferies' bid would only accomplish driving up his final price and cost him money. *Id*. Kamensky also said that as co-chair of the UCC, he would prevent Jefferies from buying the shares. *Id*. Kamensky said that he had been a good partner to Jefferies, but if Jefferies moved forward with its bid for the Series B Shares, then they would not be partners going forward. *Id*.

- At about 4:07 PM, JE1 and JE2 called Kamensky. Div. Ex. 3 at 18. JE1 explained that Kamensky was an important relationship, and Jefferies would withdraw from making any bid for the Series B Shares. *Id*. However, JE1 told Kamensky that Jefferies would also be transparent about why it was withdrawing its bid; that is, Jefferies would disclose its reason for withdrawing with both its investor client, who sought to buy the shares, and with the UCC. *Id*.

- At about 5 PM, JE1 and JE2 then contacted UCC counsel (Richard Pachulski) to advise that Jefferies was withdrawing its bid for Series B Shares because a significant client had asked it to do so. Div. Ex. 3 at 20. Pachulski asked if the

client was Kamensky. JE1 said yes. *Id*. Pachulski responded by saying, "I've got a big problem." *Id*.

- After MRC's bankruptcy counsel (Edward Weisfelner) learned of the earlier call between Kamensky and Jefferies from Pachulski, Weisfelner contacted Kamensky. Div. Ex. 3 at 21. Kamensky told him that while he contacted Jefferies about its potential bid, there was a "misunderstanding" about his intention in doing so. *Id*. According to Weisfelner, Kamensky had told Jefferies to bid if it was serious. If it was not serious, it should back off to avoid disruption to the Neiman Marcus bankruptcy. *Id*. Based on what he was told by Kamensky, Weisfelner told Pachulski of the false version of the call at 7:30 PM. *Id*.

- At 7:42 PM, Kamensky contacted JE1 by Instant Bloomberg chat. Div. Ex. 3 at 21. Kamensky and JE1 soon thereafter began a phone conversation. *Id*. Kamensky began the call by saying, "*this conversation never happened.*" *Id.* (emphasis supplied). Disturbed by Kamensky's comment, JE1 started to audio-record the phone conversation. *Id*. (Kamensky was apparently unaware of the recording.)

- In the recorded call, Kamensky asked why JE1 had told UCC counsel (Pachulski) that Kamensky had threatened JE1 and asked if JE1 knew this could cause Kamensky to go to jail. Div. Ex. 3 at 22. JE1 responded, that he had planned to bid, then Kamensky demanded Jefferies stand down to preserve their business relationship. *Id*. In response, Kamensky repeated that he could go to jail, and urged JE 1 to agree that Kamensky asking Jefferies to stand down was just a "large misunderstanding." *Id*.

- Kamensky then said on the recorded call: "It's too late now…. The U.S. Attorney is going to investigate this. *My position to them is this. I said to them, this a huge misunderstanding, okay, humongous misunderstanding and I told them – the only thing I said was if you're not real don't bid and if they're real then they should bid. Because otherwise the U.S. Attorney is investigating this then, okay? They're going to report it, okay, and my position is - is -- going to be look, this is was a huge misunderstanding. I never in a million years would have told them not to do that. I – all I told them was if they're not real they shouldn't bid.*" Div. Ex. 3 at 22 (emphasis supplied).

- JE1 refused to adopt Kamensky's made-up story, reminding him that JE 2 was also on the earlier call. Div. Ex. 3 at 23. Kamensky pleaded with JE 1 to reconsider, "if you're going to continue to tell them what you just told me, I'm going to jail, okay? Because they're going to say that I abused my position as a fiduciary, which I probably did, right? Maybe I should go to jail. But I'm asking you not to put me in jail." *Id*.

- Kamensky then repeated what he had just said: "*But I'm telling you that is exactly what I intended to say and I'm just begging you to please appreciate that's what I*

meant to say and that this conversation never happened." Div. Ex. 3 at 24 (emphasis supplied).

Events after July 31st:

- At 8:31 AM, on August 1, 2020, before an emergency UCC meeting, MRC's bankruptcy counsel (Weisfelner) emailed UCC counsel (Pachuslski) on behalf of Kamensky and MRC. Div. Ex. 3 at 24. Weisfelner again advanced Kamensky's false "misunderstanding" explanation of his conduct from the day before, claiming that Kamensky had only contacted Jefferies to make sure it was truly committed to bidding, not to discourage a bid. *Id.* at 24-25.

- At 1:15 PM on August 1, Weisfelner wrote to the United States Trustee ("UST") to offer MRC's resignation from the UCC. Div. Ex. 3 at 25. In discussing the reasons for the resignation, Weisfelner again provided the UST the substantially same "misunderstanding" explanation of Kamensky's July 31 conduct that he had provided to the UCC. *Id*.

- On August 4, Kamensky caused Weisfelner to file under seal with the United States Bankruptcy Court in the Southern District of Texas a declaration in Weisfelner's own name, which provided a false account of what occurred on the earlier July 31st 3:45 PM call with JE1 and JE2. Div. Ex. 3 at 26-27. Weisfelner once again pushed the same "misunderstanding" explanation of Kamensky's actions, which the UST later determined was "not consistent with the facts that the United States Trustee has established during the subsequent investigation." *Id*. at 27.

Thus, the UST investigation shows that Kamensky's conduct was egregious, multi-faceted, and recurrent. Over at least several days, Kamensky, who is a bankruptcy lawyer, (1) extorted Jefferies for his/his firm's economic advantage; (2) lied about the extortion to his firm's bankruptcy counsel; (3) asked (remarkably) the victim, JE1, to lie about the extortion itself to cover it up from law enforcement's investigation (U.S. Attorney's Office); and (4) caused his bankruptcy counsel to submit a false declaration to repeat the same "misunderstanding" explanation of Kamensky's actions to further cover up the extortion in the federal bankruptcy court presiding over the Neiman Marcus Chapter 11 bankruptcy.

Finally, as he has done in his parallel criminal case, Kamensky submitted (and discusses at substantial length) a large collection of character references (more than 30) from his friends and

former colleagues/business associates to mitigate his egregious misconduct. Opp. at 5-7, 11-15, 18-19, 23-26. These letters, however, do not mitigate.

Except for two (Pachulski and Mohsin Meghji), all of the rest of his friends and former colleagues/business associates have no personal knowledge of any part of Kamensky's egregious misconduct here. As to Pachulski and Meghji, they appear to have worked with Kamensky in the past and on the UCC; Meghji credited Kamensky for getting him hired to be on the UCC. Excerpts of sworn UST Interview of Meghji (Div. Ex. 12) (attached hereto) at 20 (testifying that "Dan was very helpful in getting us hired."). While they repeat some of Kamensky's legally insufficient grounds for mitigation, neither of them were subjects of Kamensky's extortion and/or his subsequent, recurrent cover-up efforts. Indeed, they received only some after-the-fact information of Kamensky's misconduct. For example, when asked by the United States Trustee's Office, Pachulski testified that he did not know and did not consider whether the "misunderstanding" explanation of Kamensky/Weisfelner was true or not. Excerpts of sworn UST Interview of Pachulski (Div. Ex. 13) (attached hereto) at 150-151 ("My problem wasn't – I don't know he said; she said. So it wasn't a matter of credible or not. My difficulty was that the [Kamensky] call was made. What was said during that call, I have no clue.").

If any of these letters tip the *Steadman* public interest scale in any appreciable direction, they tip towards a permanent bar. They show that, if Kamensky, as an experienced and well-connected securities professional, is not barred, he will have opportunities for future violations.

2. Kamensky failed to recognize the wrongful nature of his conduct or make assurances against future violations before the Commission.

Kamensky claims that he "quickly recognized the wrongfulness of his actions" and made "multiple sincere assurances, many of which are legally binding, against future violations." Opp. at 17. This is not true for this proceeding.

While Kamensky has accepted responsibility for his misconduct in the parallel criminal case, he has neither recognized the wrongful nature of his conduct nor made assurances against future violations in matters involving the Commission when he had ample opportunities to do so. To be sure, the best that Kamensky can muster in his response is his claim that he settled the underlying civil action with the Commission, but he is also quick to point out that he "is not required to admit" the allegations in the Commission's Complaint. Opp. at 3 n.1, 21. Kamensky also adverts to "legally binding" actions that he undertook, but all of those actions, except for the above-mentioned (no admissions) settlement, involved other parties (not the Commission). *See id*. at 17-20.

Kamensky next suggests that merely accepting his responsibility in a parallel criminal action is sufficient. Opp. at 21. But the ALJ's initial decision in *Mark Megalli*, Initial Decision Release No. 1253, 2018 WL 3199049 (May 31, 2018) (Foelak, J.), which Kamensky relies on, does not say that. In fact, the ALJ's initial decision includes Megalli's counsel's in-court acknowledgment that "[Megalli] recognizes that it's misconduct" and Megalli's own statement that he "would have loved to have settled with the SEC if they would have been amenable to settle for an amount I could pay" in the underlying SEC action. 2018 WL 3199049 at *5, 7. Finally, Kamensky shifts the burden of showing his contrition to the Division, and demands that the Division show him "further steps" he should undertake to recognize the wrongful nature of his *own* misconduct at this point. *Id*.

Kamensky's failure to accept his responsibility in the underlying civil action or here, when he had ample opportunities to do so, is troubling: it shows how he has *not* been contrite vis-a-vis the Commission. At the start of the underlying civil action, Kamensky moved to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure; he claimed that the Commission did not have a

cognizable securities fraud claim under Section 17(a)(1) against him – the precise claim that Kamensky later consented to in settlement. Div. Ex. 1 (ECF Nos. 30-32).

Perhaps more significant, despite the application of collateral estoppel here, *see Gary M. Kornman*, 2009 WL 367635, at *8, Kamensky has, as discussed above, downplayed, minimized, and trivialized his intentional, egregious, and recurrent misconduct. As the Commission has recognized, such behavior shows that "he does not fully understand the seriousness of securities fraud" and such "failure[s] to recognize the wrongfulness of his conduct presents a significant risk that, given th[e] opportunity, he would commit further misconduct in the future." *John W. Lawton*, Adviser Act Release No. 3513, 2012 WL 6208750, at *12 (Dec. 13, 2012) (brackets in original).

Finally, as discussed in the Division's opening memorandum, even if Kamensky had recognized the wrongful nature of his conduct and made assurances against future violations here, such efforts do not preclude imposing a permanent bar against him. Div. Mem. at 12 (citing and quoting *Kornman*, 2009 WL 367635, at *6).

3. Kamensky confirmed that he will be presented with new opportunities for future violations in the securities industry.

Kamensky does not dispute that his occupation as a securities professional (investment adviser) will likely present opportunities for future violations. To the contrary, Kamensky has submitted letters from those who purportedly want to invest or continue to invest with him, *see* Opp. at 26, confirming that he *will* have such opportunities. Kamensky also has not renounced his intention to return to the securities industry from his incarceration.[3] Thus, this *Steadman* factor favors imposing a permanent bar against him.

[3] Again, quite to the contrary, as noted in the Division's opening memorandum, Kamensky has provided at least one media interview to ready his future investors for a potential Michael Milken-like return. Div. Mem. at 13 n.6.

Kamensky, however, argues that consideration of this *Steadman* factor should be "sufficiently mitigated by the judgment of the court in the criminal case." Opp. at 22. He argues that the federal judge in that case did not believe that Kamensky will likely violate the law in the future, and that the judge's finding at Kamensky's sentencing should effectively trump any other fact in consideration of this *Steadman* factor. *Id*. Kamensky's argument cannot be sustained for at least four reasons.

First, a trial court's sentencing finding, even one from a well-known and respected jurist, made under the 18 U.S.C. § 3553(a) sentencing factors, is not dispositive in consideration of any *Steadman* factor. The Second Circuit has repeatedly ruled that "precluding relitigation on the basis of [sentencing] findings should be presumed improper." *United States v. U.S. Currency in the Amount of $119,984.00*, 304 F.3d 165, 172 (2d Cir. 2002) (quoting *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 306 (2d Cir. 1999)) (brackets in original).

Second, and more important here, the Commission has already considered and rejected this precise argument. In the Commission's summary affirmance of *Joseph Contornis*, Securities Act Release No. 72031, 2014 WL 1665995 (Apr. 25, 2014), the respondent pointed out, in mitigation, that the sentencing court had said that "he did not think there is any chance that Contorinis was going to commit crimes in the future." *Id*. at *2 (internal quotation marks omitted). The Commission was unpersuaded, explaining that "the [court's] statement was unsubstantiated and neither the law judge nor the Commission is bound by it in *our independent assessment of the public interest.*" *Id*. (emphasis supplied).

Third, Kamensky's reliance on two initial decisions issued by ALJ Foelak, *Mark Megalli*, 2018 WL 3199049, and *Maher F. Kara*, Initial Decision Release No. 979, 2016 WL 1019197 (Mar. 15, 2016), *see* Opp. at 23, is misplaced. Aside from the Commission's decision in *Contornis*, which

is controlling here, these ALJ initial decisions did not subordinate to the sentencing court's findings.

In *Megalli*, the Commission and the criminal authorities charged a respondent for insider trading. 2018 WL 3199049 at *7. In considering what sanctions should be imposed in the public interest, the ALJ examined two sets of issues: (1) whether the Commission counsel, through his equivocal statements in court about whether the Commission would be seeking an associational bar, waived any claim to the bar (or at least mitigate against imposing a bar); and (2) whether the balance of the *Steadman* factors, including the consideration of the sentencing court's finding that Megalli was unlikely to reoffend, favored a bar or a lesser sanction. *Id*. at *7. The ALJ did not subordinate the *Steadman* factors to the sentencing court's findings.[4]

Kara is no different. There, the Commission and the criminal authorities also charged a respondent for insider trading. 2016 WL 1019197 at *1. Kara agreed to the operative facts supporting his insider trading and admitted making untruthful statements to Commission staff during its investigation in the Joint Stipulation of Facts submitted in the follow-on administrative proceeding. *Id*. at 4. Kara also provided "extraordinary cooperation" with law enforcement, including participating in two trials and testifying against relatives. *Id*. at *3. Thus, the ALJ found that Kara "unequivocally recognized the wrongful nature of his conduct." *Id*. at *7. Importantly, before imposing any sanctions, ALJ Foelak considered all other *Steadman* factors and the court's sentencing findings about whether Kara would reoffend. *Id*. Like *Megalli*, the ALJ in *Kara* did not subordinate the *Steadman* factors to any sentencing court's findings.

[4] To the extent that the ALJ gave "preclusive effect to the court's sentencing findings," 2018 WL 3199049 at *7 n.19, the Division respectfully disagrees with such ruling, as it is inconsistent with Second Circuit and Commission precedents discussed above.

Fourth, in any event, the sentencing court's finding in the parallel criminal case here was limited in scope. In sentencing Kamensky to six months of imprisonment, followed by six months of supervised release with home detention,[5] with a fine of $55,000,[6] Div. Ex. 6, the court stated that "I don't find that there is a need here to provide a sentence to the defendant that guards against a repeat of this activity." Div. Ex. 7 at 30. In making that finding, however, the court appropriately focused on the specific sentencing factors under 18 U.S.C. § 3553(a), including whether "the need for the sentence imposed … afford[ed] adequate deterrence to *criminal* conduct." *Id*. (emphasis supplied). The court had no need to address, and did not make *any* findings on, whether Kamensky "fully underst[ood] the seriousness of securities fraud," *John W. Lawton*, 2012 WL 6208750, at *12, and made assurances against future violations in matters to the Commission. Nor did the sentencing court focus on the remedial purpose of the public interest analysis — "the welfare of investors generally and the threat one poses to investors and the markets in the future." *Kornman*, 2009 WL 367635, at *9.

4. Kamensky caused an enormous harm to the bankruptcy system.

Kamensky claims that his conduct caused "no economic harm" or "direct harm" to the creditors to whom he "owed a fiduciary duty," and thus no more sanctions would be appropriate. Opp. at 28. His argument is meritless.

The Commission has made clear that a lack of harm to the investing public does not mitigate the sanction. *Gary M. Kornman*, 2009 WL 367635, at *9 ("We are unpersuaded by

[5] The advisory sentencing guideline range for Kamensky was 12 to 18 months of imprisonment. Div. Ex. 7 at 3. The Government requested a sentence within that range; Kamensky requested a "non-incarceratory" sentence. *Id*.

[6] In light of this sentence and a fine, the Commission did not seek any further punitive sanctions in the underlying civil action.

Kornman's claim that neither the investing public nor the Commission was harmed should mitigate the sanction.").

Nonetheless, it is undisputed that Kamensky caused an enormous harm to the bankruptcy system. As William K. Harrington, the United States Trustee for the New York area, who provided a victim impact statement in the parallel criminal case, explained,

> Here, Kamensky, a former bankruptcy attorney at a prominent international law firm, knowingly and intentionally coerced and pressured a potential bidder not to submit a bid that potentially could have been financially advantageous to the unsecured class of creditors-a class to whom Kamensky owed a fiduciary obligation. The information about the potential bidder was information that Kamensky received in his capacity as a potential bidder for the Series B Shares but also while serving as a co-chair of the [Unsecured Creditors] Committee. A committee member's use of confidential information for reasons other than to serve the interests of the unsecured creditor body as a whole serves to erode public confidence in the bankruptcy system. The bankruptcy system is premised upon transparency and the honesty of fiduciaries serving important roles. Without faith in the bankruptcy sale process, it would be difficult to obtain willing buyers to purchase bankruptcy estate assets through the court approved auction sale process—a process that may be the only option for companies in bankruptcy….

Ex. 10 to Div. Mem. at 4. Thus, the United States Trustee concluded, "[t]he harm that resulted from Kamensky's abuse of the bankruptcy system cannot be overstated." *Id*.

Indeed, Kamensky has acknowledged this harm at sentencing. *See* Div. Ex. 7 at 30 (Kamensky's counsel's statement at Kamensky's sentencing: "[W]e don't want to minimize the harm that was done to the bankruptcy process").

5. Kamensky cannot convert his criminal sentence or other "public consequences" stemming from his misconduct into a mitigating factor.

Kamensky (as well as the character reference letters) claims that the goal of general deterrence has already been served by his criminal sentence and other "public consequences he has faced." Opp. at 23-25, 28-29. Kamensky once again places heavy weight on "the judgment of the sentencing court." *Id*. at 29. This argument too is meritless for three reasons.

First, as discussed above, the Commission is not bound by (or, for that matter, give any undue weight to) a sentencing judge's finding in "[its] independent assessment of the public interest." *Contornis*, 2014 WL 1665995 at *2. *Second*, the Commission "do[es] not view [a respondent's] criminal sentence as mitigative of the appropriate sanction to be imposed in the public interest in this administrative proceeding." *Don Warner Reinhard*, Exchange Act Release 63720, 2011 WL 121451, at *7 (Jan. 14, 2011). *Third*, "[h]ow a respondent might in other respects suffer as a result of his or her misconduct or the sanctions that follow—*e.g.*, loss of money, unemployment, or harm to reputation—is not a mitigating factor." *Anthony Fields*, Securities Act Release No. 9727, 2015 WL 728005, at *22 (Feb. 20, 2015).

III. CONCLUSION

For these reasons, as well as those in the Division's opening submissions, the Division's motion for summary disposition against Kamensky should be granted, and Kamensky should be permanently barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent or nationally recognized statistical rating organization.

Dated: December 14, 2021
New York, New York

Respectfully submitted,

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In accordance with Rule 150 of the Commission's Rules of Practice, I hereby certify that true and correct copy of the foregoing reply was served on the following persons on December 14, 2021, and otherwise sent, by the method indicated:

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DIVISION EXHIBIT 12

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re:	)	Chapter 11
	)	
NEIMAN MARCUS GROUP, LTD., LLC, et al.,	)	Case No. 20-32519 (DRJ)
	)	
Debtors.	)	Jointly Administered

The interview of MOHSIN MEGHJI, called by the Office of the United States Trustee for examination taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of interviews, taken before Timi M. Turunen, CSR, RPR, taken remotely via Zoom Videoconferencing, on August 14, 2020, at 4:19 p.m.

APPEARANCES:

OFFICE OF THE UNITED STATES TRUSTEE
REGION 11
BY: MR. PATRICK S. LAYNG
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appeared on behalf of the Office of the United States Trustee;

OFFICE OF THE UNITED STATES TRUSTEE
REGION 5
BY: MR. RICHARD H. DREW, III
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appeared on behalf of the Office of the United States Trustee;

PACHULSKI, STANG, ZIEHL & JONES
BY: MR. ALAN J. KORNFELD
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appeared on behalf of the Deponent.

ALSO PRESENT:
Mr. Mike Duffy, Zoom Host.

* * * * *

I N D E X

WITNESS

MOHSIN MEGHJI

EXHIBITS:

(No exhibits marked.)

MR. DREW: All right. Mr. Meghji, first of all, thank you for appearing voluntarily. We couldn't have compelled you to come so we appreciate you taking the time late like this on a Friday to speak with us. I know it's certainly not convenient.

You know, I think, you know, when we take statements we typically like to have people, you know, under oath if possible. We can't compel you to take the oath. Are you willing to be sworn, sir?

MR. MEGHJI: Yes.

MR. DREW: And can the court reporter swear Mr. Meghji in?

(Witness sworn.)

MOHSIN MEGHJI

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. DREW:

Q. And, Mr. Meghji, can I also ask, do you have the production that was made on your behalf, I guess, by the committee? Do you have that available to you?

him and expressed an interest, and he -- but he asked me -- when I reached out to him, he asked me whether I've be interested in being an examiner. And I said, no, my preference would have been to be the financial advisor to the committee.

Q. So you reach out to him with being the UCC's financial advisor in mind when you reached out to Mr. Kamensky; is that right?

A. Correct. Yes.

Q. And why did you prefer that potential role to being an examiner?

A. My -- my sort of view and gut was that an examiner's role here would involve -- because this is a fraudulent conveyance. The issues at hand were fraudulent conveyance, that an attorney was probably more suitable for that role than, you know, kind of a financial person, but that was just my feeling at the time.

Q. Okay. So for you, Mr. Kamensky's involvement in this case was sort of a positive for you. You had worked with him before and were interested in potentially working with him on another matter, working in association with him in some way in another matter; is that right?

A. Yeah. I mean, look, to be fair and clear, Mr. Kamensky was -- was the person that put me up, you know, in the original -- in these committee selection processes, you need somebody that stands up for you.

Now, by the end of the process we had talked to a lot of other people who I've dealt with, and I think some of the other committee members as we looked at them, it turned out were pretty familiar with us, but from the other side, hadn't worked with us. You know, they'd been opposite us, but Dan was very helpful in getting us hired, yes.

Q. Okay. And do you know the exact date you were officially retained by the committee?

A. It would be the same day that the Pachulski firm was retained if you have that.

Q. Okay. May 22nd, does that sound right?

A. I was just going to say, by memory, I think it's May 22nd. It was a Friday.

Q. Okay.

A. So, yeah, that's sound about right.

Q. Okay. Can you give us just sort of an overview of the sort of different financial

DIVISION EXHIBIT 13

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re:	) Chapter 11
	)
NEIMAN MARCUS GROUP, LTD., LLC, et al.,	) Case No. 20-32519 (DRJ)
	)
Debtors.	) Jointly Administered

The interview of RICHARD PACHULSKI, called by the Office of the United States Trustee for examination taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of interviews, taken before Timi M. Turunen, CSR, RPR, taken remotely via Zoom Videoconferencing, on August 14, 2020, at 1:04 p.m.

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appeared on behalf of the Deponent.

ALSO PRESENT:
Ms. Tanya Perez, Zoom Host.

* * * * *

I N D E X

WITNESS

RICHARD PACHULSKI

EXHIBITS:

(No exhibits marked.)

(Witness sworn.)

RICHARD PACHULSKI

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. LAYNG:

Q. Again hello, Mr. Pachulski. My name is Pat Layng. I'm with the U.S. trustee program. I'm helping out Region 7 on this issue. I'm with Richard Drew, who will be assisting me today. I will be asking most of the questions. If you need any break, anybody needs a break, let me know.

First of all, you understand you're here to be interviewed pursuant to Judge Jones' August 5, 2020, order in the Neiman Marcus group of cases?

A. I do.

Q. And you understand that you're not -- you have not been compelled to be here; correct?

A. I have not been compelled. I was requested, and I volunteered to appear, that's correct.

Q. And we thank you very much for your cooperation today. So I guess I should probably

to Richard. He may have to clean up stuff I missed, but I didn't give him a lot of time.

THE WITNESS: If you need extra time.

MR. DREW: I'm going to be very quick.

EXAMINATION

BY MR. DREW:

Q. The evening of July 31st on your second call with Mr. Weisfelner, he provided an explanation of Mr. Kamensky's conduct that there was no attempt to simply order him to stand down; instead he was trying to see if Jefferies was serious. And if they were serious, they should go ahead. But if they weren't serious, they should stand down, is that the explanation that was provided to you?

A. That was the explanation that was provided.

Q. And I understood that you said that you did not find that explanation to be a credible explanation for Mr. Kamensky's conduct?

A. That isn't what I said.

Q. Okay.

A. I didn't -- I did not -- I had no idea. My problem wasn't -- I don't know he said; she

said. So it wasn't a matter of credible or not. My difficulty was that the call was made. What was said during that call, I have no clue.

Q. Okay. So you don't have any -- you didn't make any judgment as to between Geller's account of the call and Weisfelner's account of the call?

A. I would have to speculate on that, and I don't -- I don't think the call should have been made.

Q. Sure. Since your August 2nd letter that was filed with the Court, have you ever learned anything else that adds to your evaluations of Kamensky's conduct on July 31st?

A. There has been nothing that has changed any of my recitation of the facts based on anything that took place after July 31st --

Q. Okay.

A. -- and into August 1st. Until we sent the U.S. Trustee's office the letter on August 2nd, which was, I thought, a pretty complete letter, nothing has changed one way or the other.

Q. So you've learned nothing that would support either the Geller account or the Weisfelner

account of their calls since your August 2nd letter?

A. I have nothing -- I mean, unless it was recorded, I don't think there have been anything. Geller hasn't called and Weisfelner hasn't called to change their perspectives, and nobody has told me anything that would lead me to believe that their positions have changed.

Q. Okay. Last thing is, I think you had earlier said that there had been a understanding that before a committee member reached out to the debtors' principals, it had to be ratified by the committee. Was that an understanding that was there with the committee, or did I misunderstand that?

A. I think generally that if there was a major issue that would be discussed, we -- someone -- either I would be advised or the committee would be advised. I'd have to know what the issue is, but there was a protocol that people pretty much followed. It doesn't mean someone didn't violate the protocol, but that was the understanding of most committees that I represent.

Q. So when Mr. Kamensky had his