UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

- -

In the Matter of: JOHN A. PAULSEN, Respondent	Administrative Proceeding File No. 3-20680 RESPONDENT JOHN A. PAULSEN'S MEMORANDUM OF LAW IN OPPOSITION TO THE SEC DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

- -

Respondent John A. Paulsen, by his attorneys, respectfully submits this response to the Division of Enforcement's motion for summary disposition, dated April 18, 2022, asking the Commission to issue an order permanently barring Mr. Paulsen from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock.

At issue here is the appropriate sanction for the District Court's finding that Mr. Paulsen was liable for aiding and abetting securities fraud and its subsequent permanent injunction enjoining Paulsen from violating Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. For the reasons set forth below and in his Answer to the OIP dated March 7, 2022, a one-year associational suspension, with the right to reapply for reinstatement, rather than a permanent bar, is warranted here.

STATEMENT OF FACTS

Mr. Paulsen, as he must, accepts the findings of fact and conclusions of law found by the District Court in its orders dated October 23, 2020 and October 28, 2021, which are appended to

OS Received 05/16/2022

the Declaration of Eric M. Creizman filed contemporaneously with this memorandum of law. *See, e.g., Peter J. Eichler, Jr.*, Initial Dec. Rel. No. 1032, 2016 WL 4035559.[1]

ARGUMENT

I. Applicable Standards

In determining whether a particular sanction is in the public interest, the Commission considers: (i) the egregiousness of the defendant's actions; (ii) the isolated or recurrent nature of the infraction; (iii) the degree of scienter involved; (iv) the sincerity of the defendant's assurances against future violations; (v) the defendant's recognition of the wrongful nature of his conduct; and (vi) the likelihood that the defendant's occupation will present opportunities for future violations. *See, e.g., Peter Siris*, Rel. No. 34-71068, 2013 WL 6528874, at *5 (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014). The inquiry is a flexible one, with no single factor being dispositive. *Id.*

Moreover, the "severity of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence." *Robert Radano*, Rel. No. 310, 2006 WL 938784, at *5. Thus, "[s]anctions related to registration status of regulated persons or entities are not intended to punish a particular respondent, but to protect the public from future harm." *Id.*[2]

[1] Mr. Paulsen also concedes that: (i) summary disposition is appropriate (SEC Mem. at 7-8); (ii) the only matter at issue is the appropriate sanction, if any, to be imposed against him (SEC Mem. at 7); and (iii) he was associated with a broker-dealer and an investment adviser at the time of his misconduct. (SEC Mem. at 9).

[2] The Division's suggestion that this case involved the violation of a "previous injunction" is factually inaccurate. (SEC Mem. at 10). As the Division well knows, the injunction was imposed by the District Court in connection with its finding of liability in this case. Mr. Paulsen is not accused of violating a previous injunction.

II. A Permanent Associational Bar Against Mr. Paulsen is Not in the Public Interest.

The permanent associational bar urged by the SEC is unwarranted due to substantial and undisputed mitigating factors that are present here. *First*, as the District Court found in *denying* the Division's request for the maximum second-tier penalty, "[t]here is no evidence that the Fund suffered losses as a result of Kelley and Kang's scheme." Ex. B, Order of Hon. Paul G. Gardephe dated October 28, 2021 (the "Civil Penalty Order") at 6. *See, e.g., Marshall E. Melton*, Rel. No. 2151, 56 SEC 695, 698 (2003) (in determining administrative sanctions, the Commission considers the degree of harm to investors and the marketplace resulting from the violation).

Second, as the District Court also found, Mr. Paulsen's "aiding and abetting violations are limited to an isolated incident in February 2015 and his attempts to cover up his, Kelley's, and Kang's wrongdoing." *Id.* Indeed, Mr. Paulsen's 35-year career in the securities industry has otherwise been without blemish. *See, e.g., Antion & Chia, LLP, et al.*, Rel. No. 1407, 2021 WL 517421, at *90 (Feb. 8, 2021) (imposing limited suspension, instead of permanent bar due to the respondent's "lack of recurrent conduct")

Third, Mr. Paulsen did not profit from aiding and abetting the "pay to play" scheme that yielded Navnoor Kang substantial gifts and entertainment for over a year (all of which, other than the ski trip, Mr. Paulsen knew nothing about, including VIP tickets to a Paul McCartney concert and an all-expense paid trip to New Orleans, which included numerous guided tours and lavish meals) and that yielded Deborah Kelley hundreds of thousands of dollars in commissions. There is no evidence to the contrary. Indeed, Mr. Paulsen received no commissions, bonus payment, or any other financial benefit from his misconduct. In that regard, Mr. Paulsen's interview with Morgan Lewis attorneys in connection with Sterne Agee's internal investigation into the Park City ski trip occurred *after* Mr. Paulsen left Sterne Agee's employment. Thus,

there was no conceivable way Mr. Paulsen *could* benefit from aiding and abetting Mr. Kang and Ms. Kelley's illicit pay-to-play scheme.

Of course, the District Court did not find that Mr. Paulsen's "aiding and abetting" conduct was motivated by pecuniary gain. Rather, the District Court found that Mr. Paulsen's motive was "to protect himself. Paulsen understood that his involvement in Kang and Kelley's illegal *quid pro quo* arrangement presented a risk to Paulsen." Ex. A, Mem. Opinion and Order of Paul G. Gardephe (the "Court's Findings of Fact and Conclusions of Law") dated Oct. 23, 2020, at 31. Mr. Paulsen's lack of financial gain is a further mitigating factor that militates against imposing a permanent associational bar against him. The absence of any intent by Mr. Paulsen to harm the Fund or its investors by engaging in unfair trades or personally profiting at the Funds expense is a further mitigating factor that warrants leniency. *See Christopher M. Gibson,* Rel. No. 1398, 2020 WL 1610855, at *30 (Mar. 24, 2020) (declining to impose a permanent bar, and instead imposing a three-year industry bar with the right to reapply for reentry after three years).

Fourth, equitable concerns weigh against the imposition of a permanent bar. As an initial matter, Mr. Paulsen has effectively been barred from the securities industry for almost four years, since he was fired from his role as head of research at an investment adviser days after the Division brought its enforcement action against him in the U.S. District Court for the Southern District of New York on July 26, 2018. He has not since been able to find employment in the securities industry or elsewhere, save for a seasonal job working for an Apple store during the Fall of 2021. The publicity from the Division's enforcement proceedings and trial, his inability to find gainful employment since July of 2018, the substantial damage caused to his reputation,

OS Received 05/16/2022

and the District Court's imposition of a $100,000 civil penalty is more than sufficient to deter Mr. Paulsen and others from future misconduct.

Especially considering Mr. Paulsen's 35-year career in the securities industry in which he otherwise had a solid reputation for both his skill and for his character, the absence of any prior violations, and the isolated nature of the misconduct underlying the judgment against him, a permanent bar is a draconian punishment that does not take into account his relative culpability. For example, Mr. Paulsen did not profit from the "pay to play" scheme that the District Court found he aided and abetted. He did not originate the idea for the ski trip. Ex. A at 8 ¶¶ 20-21. He did not plan the ski trip. *Id.* at 8 ¶¶ 22-23). He did not come up with the idea to omit Kang's name from his expense report. *Id.* at 32. *See, e.g., Anton and Chia, LLP*, *et al.*, 2021 at *90 (considering co-respondent's relative culpability to her co-respondents).

A permanent bar also would be disproportionate considering the fact that the Division chose not to pursue any action against Mr. Paulsen's supervisor (who continues to work in a managerial capacity in the securities industry) whom the Court found: (i) approved the Park City Ski Trip, even after he knew that Kang and Kang's girlfriend would be attending (Ex. A at 8 ¶ 22, 9 ¶ 26); and (ii) explicitly permitted Mr. Paulsen to attend and seek reimbursement for the Park City Ski Trip, even after he knew that Kang would be the only Sterne Agee client attending the ski trip (Ex. A at 9 ¶ 26).

A permanent bar also would be unfair in light of Sterne Agee's culture of encouraging client entertainment, and of analysts, like Mr. Paulsen, playing a support role for salespeople, like Ms. Kelley who were primarily responsible for client entertainment and who were compensated based on the commissions generated from trades by her clients. Ex. A at 6.

OS Received 05/16/2022

Fifth, since the purpose of any sanction, including a collateral bar is to protect the public from future harm, the Commission also considers the age of the violation. *See, e.g., Marshall E. Melton*, 56 S.E.C. at 698. Here, the bulk of the misconduct in which Mr. Paulsen engaged occurred during February 2015, when Mr. Paulsen attended the ski trip and submitted false expense reports to Sterne Agee.

III. Mr. Paulsen has demonstrated contrition for his misconduct.

Although the SEC argues that Mr. Paulsen "has still not recognized the wrongful nature of his conduct," it cannot dispute that in investigative testimony and during the entire enforcement action, Mr. Paulsen did not deny violating Sterne Agee's policy to honor the policies of its customers concerning the provision of gifts and entertainment. It does not dispute that Mr. Paulsen, in his *Wells* submission, throughout the SEC's investigation and subsequent enforcement action—and even during trial—admitted that it was wrong to entertain a public fund employee, to lie on an expense report submitted to Sterne Agee, and to lie to outside counsel conducting the internal investigation.

Mr. Paulsen principal defense was that notwithstanding that his conduct was improper, he was unaware that Ms. Kelley and Mr. Kang were involved in a pay-to-play scheme, so he could not have aided and abetted one. In furtherance of that assertion, Mr. Paulsen noted that he had engaged in legitimate research and analysis for the Fund for over a year, and there was no evidence that he was aware of Ms. Kelley's prior gifts to Mr. Kang. Consequently, he was also unaware that Mr. Kang was steering Fund business to Ms. Kelley in exchange for gifts and entertainment. He also demonstrated a lack of financial motive to aid and abet Mr. Kang and Ms. Kelley's fraud. Indeed, he did not expect nor did not receive any compensation for his participation in the Park City Ski Trip and his efforts to cover up Mr. Kang's involvement.

OS Received 05/16/2022

Contrary to Mr. Paulsen's assertion, the District Court found that Mr. Paulsen was aware of the *quid pro quo* scheme based on his unusual efforts to cover up Kang's involvement in the Park City Ski Trip, including the fact that it was Mr. Paulsen's first time ever lying on an expense report, coupled with Mr. Paulsen's awareness of a single trade executed by the Fund a few days after the Ski Trip. Mr. Paulsen accepts the District Court's ruling, but he has always known, and openly admitted that his underlying conduct was improper.

CONCLUSION

Mr. Paulsen's improper conduct occurred over seven years ago, and he has not worked in the securities industry for almost four years. He has expressed remorse for his misconduct here, which was aberrant in the context of his 35-year career in the securities industry. Mr. Paulsen lacked any profit motive in engaging in this conduct, and he did not realize any profit from his misconduct. It is undisputed that Mr. Paulsen neither sought to harm investors, and no investors suffered, including the Fund and its investors.

For all these reasons, the reasons set forth above, and the reasons set forth in his Answer to the OIP, we respectfully submit a suspension of one year is more than sufficient to address the objectives of Commission sanctions.

Respectfully submitted,

New York, New York
March 7, 2022

/s/ Eric M. Creizman

Eric M. Creizman
ARMSTRONG TEASDALE LLP
7 Times Square, Fl. 44
New York, New York 10036
Tel.: (212) 209-4358
Fax: (212) 409-8385
Email: ecreizman@atllp.com