No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE PAUL C. SPITZER

PAUL C. SPITZER,
Petitioner,
v.
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

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INTRODUCTION

Petitioner Paul C. Spitzer ("Spitzer") requests the issuance of a writ of mandamus because, like many others who have sought relief from agency sanctions, he finds himself trapped in the bureaucratic "black hole" of an administrative proceeding before the United States Securities and Exchange Commission ("SEC" or "Commission") from which he has no other means of escape. Spitzer does not ask for a ruling on the merits, but rather seeks a writ that simply directs the SEC to end its unreasonable delay and act on a motion, crucial to his personal welfare, reputation, and ability to earn a living, which has been fully briefed and ready for hearing and decision for more than 18 months.

This petition arises out of an SEC order entered pursuant to the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21, ("Advisers Act") which barred Spitzer from acting in a supervisory capacity while allowing him to continue his career as an investment adviser under supervision. Petitioner's Appendix ("PA"), at A157-164 (SEC January 14, 2021 Order). Spitzer consented to this sanction under financial duress, which resulted from the burdens of a three-year SEC investigation and enforcement action coupled with the fear of losing his livelihood, after an investment adviser representative under his supervision secretly circumvented his firm's safeguards and engaged in professional misconduct.

Key to Spitzer's consent was the SEC staff's representation that the sanction would not prevent him from working under supervision as an investment adviser, which was essential to his financial survival, because he was already in his 70s and had exhausted his financial resources defending against the SEC investigation. Soon thereafter, however, Spitzer discovered that the securities industry's reaction to the sanction was different than he and the SEC staff had anticipated. Spitzer's access to investment platforms dwindled even though he was acting under supervision, which increasingly limited his ability to service his advisory clients. When the SEC staff would not informally assist him in rectifying the situation, Spitzer had no alternative except to file with the SEC a formal "Motion to Dismiss Order Instituting Remedial Sanction of Bar on Supervisory Activities" ("Motion to Dismiss").

More than 18 months later, Spitzer's Motion to Dismiss remains undecided. The SEC has not even set the motion for hearing, and when it will act, if ever, is unknown. Because of his advanced age and financial circumstances, however, Spitzer cannot wait any longer for the wheels of SEC justice to finally turn. Not only is the SEC's delay in deciding Spitzer's motion patently unreasonable, its legal effect is that Spitzer is essentially becoming "forever barred" from his career as an investment adviser without due process. On this basis, Spitzer respectfully submits that the interests of justice compel the issuance of the requested writ of mandamus at this time.

RELIEF REQUESTED

Spitzer requests the issuance of a writ of mandamus directing the SEC to hear and enter a final decision on his Motion to Dismiss within 30 calendar days.

ISSUE PRESENTED

Does the SEC's unreasonable delay warrant the issuance of a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), which would direct the SEC to hear and enter a final decision on Spitzer's Motion to Dismiss within 30 calendar days?

Spitzer respectfully submits that the answer to this question is "yes."

JURISDICTION AND VENUE

Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), this Court may grant interlocutory relief from "agency inaction" through the issuance of a writ of mandamus. *See Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992). This authority is available to federal appellate courts, including this Court, for use "in aid of their prospective jurisdiction." *Id*. It is well settled that, "[w]hen the prospective jurisdiction over an issue rests exclusively in the court of appeals, the district court necessarily has no power to grant interlocutory relief on that issue under the All Writs Act." *Id*. "'Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction.'"

Confederated Tribes of the Umatilla Indian Rsrv. v. Bonneville Power Admin., 342 F.3d 924, 930 (9th Cir. 2003) (quoting *Telecomm. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984)).

The SEC bases its jurisdiction in the underlying administrative proceeding against Spitzer on Sections 203(e), 203(f) and 203(k) of the Advisers Act. A157 (SEC January 14, 2021 Order). Given that this Court would have jurisdiction to review the SEC's final order on Spitzer's Motion to Dismiss under the Advisers Act, 15 U.S.C. § 80b–13, it necessarily has jurisdiction to issue a writ of mandamus directing the SEC to hear and decide the motion at this time. *See* 15 U.S.C. § 80b–13(a); *In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1138 (9th Cir. 2020). Federal law requires this Court to "compel agency action unlawfully withheld or unreasonably delayed." *See* 5 U.S.C. § 706(1); *see also In re Pesticide Action Network N. Am.*, 798 F.3d 809, 813 (9th Cir. 2015) (the Administrative Procedure Act grants federal appellate courts this authority). This Court is the proper venue for this petition because Spitzer resides within this Circuit. *See* A158 (SEC January 14, 2021 Order); 15 U.S.C. § 80b–13(a).

STATEMENT OF RELEVANT FACTS

I. The Petitioner

In 2010, Spitzer founded Advanced Practice Advisors, LLC ("APA"), an investment adviser firm located in La Quinta, California, and served as its chief

executive officer. A161 (SEC January 14, 2021 Order); A70 (Spitzer Motion to Dismiss). Spitzer's duties as chief executive officer encompassed oversight of APA's operational functions, including hiring and compliance. A70. Over the years, APA employed and supervised approximately 17 investment adviser representatives. A70-71. None of these investment adviser representatives had a history of misconduct while under Spitzer's supervision. A71.

II. Procedural History

A. The SEC Order

In 2015, Spitzer hired David Sztrom as an investment adviser representative at APA. A71. Although David Sztrom had none of his own advisory clients at the time, he represented to Spitzer that he intended to assume responsibility for advisory clients that had been serviced by his father, Michael, who previously worked as an investment adviser representative at another firm. A71. APA would not associate with Michael Sztrom because he was the subject of an ongoing FINRA investigation. A159. Spitzer's understanding therefore was that David Sztrom would develop and service his own book of advisory clients that consisted primarily of Michael Sztrom's former clients. A71. Subsequently, in late 2015, a representative of APA's custodian at the time, Charles Schwab & Company ("Schwab"), notified Spitzer that Schwab had reason to believe that Michael Sztrom was managing his son's client accounts even though he was not associated with APA. *Id.* The basis for this belief

was evidence that Michael Sztrom had impersonated his son during telephone calls to Schwab's trading desk and had entered trades. *Id.* Such conduct, among other things, violated the terms of Schwab's prime brokerage and custody agreements with APA. *Id.* Schwab thereafter denied APA and Spitzer further access to its investment platform. A77.

The ensuing investigation by SEC staff resulted in the entry of an SEC administrative order dated January 14, 2021, consented to by APA and Spitzer under the threat of prolonged and costly litigation, which imposed remedial sanctions and a cease-and-desist order (the "Order"). A157-64; A24. Under the terms of the Order, the SEC found that APA clients had been misled into believing that Michael Sztrom was formally associated with APA, David Sztrom lacked reasonable supervision, and compliance failures facilitated the Sztroms' misconduct. A159-61. Based on such findings, the SEC held that APA and Spitzer violated Sections 203(e)(6), 206(2), and 206(4) of the Advisers Act and related rules. A161.

Although the foundation of this holding was the SEC's conclusion that Spitzer knew or should have known that Michael Sztrom was advising APA clients, Spitzer consistently maintained that he had no knowledge of the Sztroms' fraud. A71-72. Spitzer lacked such knowledge because the Sztroms deliberately circumvented the APA system by using their personal telephones to communicate with clients via text message. A71-72; A154-56. The result was that, unbeknownst to Spitzer, the

Sztroms engaged in an ongoing violation of APA's compliance policies, procedures, and controls. A71-72.

While the SEC eventually commenced a separate enforcement action against the Sztroms[1], the Order imposed various sanctions against Spitzer, including a cease-and-desist order, censure, $20,000 civil penalty, and bar on his supervisory activities. A162-64; A71-72; A97-145 The Order permitted Spitzer to continue to act as an investment adviser, but under supervision. A162-63. Relevant here is the bar on supervisory activities, which prohibited Spitzer from "act[ing] in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization." A162. As discussed below, this bar had the unintended adverse effect of impairing Spitzer's ability to earn a living as an investment advisor to support himself and his wife. A76-79; A154-56.

[1] Ironically, by contesting the SEC's administrative proceeding against them (rather than consenting to settle under duress as Spitzer did), the Sztroms have benefitted from the delays inherent in SEC administrative proceedings. The SEC's administrative proceeding against the Sztroms has been pending, unresolved since January 2021, and, as a result, the Sztroms have never been subject to administrative bars because of their conduct. *See* SEC Admin. Proc. File No. 3-20204, available at https://www.sec.gov/enforcement-litigation/administrative-proceedings/3-20204. In the meantime, Spitzer remains subject to his "forever bar" because of the Sztroms' conduct.

B. Spitzer's Motion to Dismiss

After Schwab denied access its platform in 2015, Spitzer moved APA's clients to TD Ameritrade's ("TDA") investment platform. A77. Crucial to Spitzer's decision to consent to the Order was having the opportunity to continue his relationship with TDA and retain access to its platform. A77-78; 147-48. When Spitzer associated with Ingham Wealth Management, LLC ("IWM") of San Diego, California, in January 2021, ensuring this continued relationship was essential because IWM did business on the TDA platform. A76-77; A150-51.

Consequently, before Spitzer consented to the Order, he sought assurance from SEC staff that the bar on his supervisory activities would not harm his ability to earn a living by continuing to service his long-term clients as an investment adviser while acting under supervision. A77-78; 147-48. In its response, the SEC staff essentially stated that the restriction on Spitzer's supervisory activities "should not" have that effect. A77-78. Spitzer therefore consented to the Order, believing he would have the opportunity to earn a living while under supervision as long as he complied with the SEC's terms. *Id.* Schwab's subsequent acquisition of TDA, however, imperiled Spitzer's access to TDA's platform because Schwab considered any "bar" a "collateral bar." A78-79.

The adverse effect of the Schwab-TDA deal on Spitzer's ability to earn a living while acting under supervision as an investment adviser revealed that the SEC

and Spitzer misapprehended the practical effects of the Order. Two months after the SEC issued the Order, TDA denied Spitzer access to its investment platform. A152-53. The reason for TDA's decision apparently was a bright red banner appearing at the top of Spitzer's Investment Adviser Public Disclosure Report that stated, "BARRED BY THE SEC OR FINRA," which was erroneous because the Order did not "bar" Spitzer from acting as an investment advisor. A152-56. The SEC sanctioned Spitzer by restricting his future supervisory activities, but correspondence and negotiations between the SEC and Spitzer confirmed that SEC staff did not intend for the Order to effectively bar Spitzer from the securities industry. A162-63.

Thus, despite Spitzer's full compliance with the Order, the unintended consequence of the bar on his supervisory activities has jeopardized his ability to act as an investment adviser under supervision. A25-26; 150-51. Because neither Spitzer nor the SEC intended this result, Spitzer sought to obtain appropriate relief from the Order through informal discussions with SEC staff. A77-78; A152-53. Those efforts, however, proved unsuccessful. As a result, on December 29, 2022, Spitzer filed his Motion to Dismiss with the SEC, seeking to vacate the bar imposed by the Order on his supervisory activities and to obtain relief under which brokers and custodians would allow him to access their institutional platforms. A66-151.

C. The SEC's Failure to Act

Spitzer's Motion to Dismiss was ready for adjudication by the SEC within three months of its December 29, 2022 filing date. Spitzer and SEC staff from the SEC's Enforcement Division fully briefed the motion by February 8, 2023, and then completed briefing on Spitzer's related motion to appear and argue at the SEC hearing by March 7, 2023. A66-152; A33-65; A16-32; A12-15; A7-11; A1-6. The SEC nevertheless still has not set Spitzer's motion for hearing or entered a decision on the motion without a hearing. Spitzer's personal life and career therefore have remained in limbo for more than 18 months without any indication from the SEC as to when, or even whether, it would consider his request for relief from the Order.

The SEC's inaction is particularly egregious given Spitzer's personal circumstances. Spitzer was 73 years old when he filed his Motion to Dismiss nearly two years ago after having spent his entire career in the securities industry with no record of misconduct. A78. Not only did the Order cause Spitzer to lose his $3 million investment in APA, he and his wife have no meaningful assets remaining after depleting their home equity, retirement savings, and cash because of the Sztrom matter. A78-79. The relief that Spitzer seeks from the SEC is vital to ensure that he and his wife have the financial resources needed to survive. A76-78. Now in his mid-70s, Spitzer no longer has time to waste as the SEC continues to procrastinate in setting his motion for hearing and decision. The SEC's apathy toward his plight has

left Spitzer with no alternative except to request this Court's intervention through the issuance of a writ of mandamus directing the SEC to hear and decide his motion to dismiss without further delay.

III. Historical Context

Because the SEC has a long history of unreasonable delay, the Court should not consider this petition in isolation. It is common for the SEC to take *years* to decide pending matters, which has not escaped the Supreme Court's attention. *See, e.g.*, *SEC v. Jarkesy*, 144 S.Ct. 2117, 2141 (2024) (Gorsuch, J., concurring) (pointing out that, after agreeing to review an ALJ decision, the Commission "afforded itself the better part of six years to issue an opinion" in which "it largely agreed with the ALJ"); *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring) (observing that the underlying SEC administrative proceedings "have already dragged on for seven years").

According to one recent amicus brief filed in a recent U.S. Supreme Court case, *SEC v. Cochran*, "There are, for example, thirteen pending enforcement proceedings on the five-member Commission's appellate review docket—seven of them commenced, like the respondent's case, more than six years ago. The mean and median age of these cases are 2,177 days and 2,291 days, respectively. By comparison, federal civil cases disposed of through judgments obtained via jury verdict had an average case duration of 771 days." Brief of the Cato Institute as

Amicus Curiae Supporting Respondent, *SEC v. Cochran*, No. 21-1239, 2022 WL 2760528, at *2-3 (July 7, 2022).

Such delays regularly occur at the SEC regardless of the nature of the relief sought, including appeals or motions seeking to vacate bars. *See, e.g.*, *In re Eric S. Smith*, No. 24-1189, Order at *2 (6th Cir. Aug. 5, 2024) (ordering SEC response to petition for writ of mandamus where an appeal from a lifetime bar for violation of the Exchange Act had been fully briefed for more than 39 months and the sanction puts petitioner's "individual welfare and reputation at stake, and the ongoing delay hinders his ability to earn a living"); *In the Matter of Sachin K. Uppal*, Admin. Proc. File No. 3-16706-rtv, Investment Advisers Act Rel. No. 6554, Order at 2-3 (Feb. 13, 2024) (denying motion to vacate collateral bars that had been pending for four and a half years) (available at https://www.sec.gov/files/litigation/opinions/2024/ia-6554.pdf); *In the Matter of Stephen Stuart*, Admin. Proc. File No. 3-16151, Exch. Act Rel. No. 97642, Order at 2-3 (June 2, 2023) (nearly six years after the filing of a motion to vacate bars, the SEC denied motion as moot, taking no new information into consideration and declining to undertake any factual investigation) (available at https://www.sec.gov/files/litigation/opinions/2023/34-97642.pdf).

As former SEC Commissioner Michael Piwowar once warned about the process following entry of a bar: "Based on my experience as Commissioner, the reinstatement process, even if successful, can take years to complete after the

requisite time period has expired. Moreover, since there is no assurance that a petition for reinstatement will be granted by the Commission, the right to apply for reinstatement can be illusory." *See In the Matter of John J. Aesoph, CPA and Darren M. Bennett, CPA*, File No. 3-15168, Exch. Act Rel. No. 78490, Opinion of Piwowar, Comm'r at 2 (Aug. 5, 2016) (Piwowar, Comm'r, concurring and dissenting in part) (available at https://www.sec.gov/litigation/opinions/2016/34-78490.pdf).

Perhaps the most instructive example of the SEC's longstanding practice of unreasonably delaying its decision on motions to vacate administrative bars is its approach to the so-called "*Bartko*" collateral bar dismissals. Until 2017, when the issue first came to the D.C. Circuit's attention, the SEC routinely imposed collateral bars, which are bars that, after an individual violates certain securities laws, bars that individual from industries with which they were not associated or not seeking to associate at the time of the violation. In *Bartko v. SEC*, 845 F.3d 1217, 1225 (D.C. Cir. 2017), the D.C. Circuit held that certain collateral bars were improper. Consequently, in February 2017, the SEC announced that people subject to such bars could request an order vacating them. *See* Commission Statement Regarding Decision in *Bartko v. SEC* (Feb. 23, 2017) (available at https://www.sec.gov/news/statement/commission-statement-regarding-bartko-v-sec). Dozens of people thereafter filed applications for such relief.

More than five years later, in April 2022, as a result of a totally unrelated error by the SEC (what the SEC euphemistically referred to as an agency "control deficiency"), the agency issued a statement that its error impacted many pending administrative matters, including 46 pending petitions for relief from collateral bars that followed the D.C. Circuit's decision in *Bartko*. *See* Commission Statement Relating to Certain Administrative Actions (Apr. 5, 2022) (available at https://www.sec.gov/newsroom/speeches-statements/commission-statement-relating-certain-administrative-adjudications). On June 2, 2023, four to five years after many of the impacted individuals petitioned for relief, the SEC vacated the bars. Had the SEC not committed the "control deficiency," it is unknown how long the 46 *Bartko* petitions for relief would have remained in limbo with no decision forthcoming from the SEC. *In re Administrative Proceedings*, Exch. Act Release No. 97641 (June 2, 2023) (available at https://www.sec.gov/files/litigation/opinions/2023/33-11199.pdf).

Finally, Justice Gorsuch's recent observations regarding the inequities commonly suffered by targets of investigations by federal agencies, including the SEC, are particularly apt here:

> That review is available in a court of appeals *after* an agency completes its work hardly makes up for a day in court *before* an agency says it's done. When a case eventually makes its way to an appellate court, judges sometimes defer to the agency's conclusions (especially when it comes to disputed questions of fact). And how many people can afford to carry a case that far anyway? . . . . Thanks in part to these realities,

> the bulk of agency cases settle. *See Tilton v. SEC*, 824 F.3d 276, 298, n. 5 (CA2 2016) (Droney, J., dissenting) ("vast majority" of SEC cases settle); Tr. of Oral Arg. in No. 21-1239, p. 6 ("more than 90 percent" of such cases settle). Aware, too, that few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way.

Axon Enterprise, 598 U.S. at 217 (Gorsuch, J., concurring) (italics in original). When Justice Gorsuch wrote these words, he could have been discussing Spitzer's predicament. Forced to settle with the SEC to avoid the additional costs of seemingly endless litigation and the potential loss of his livelihood after having already endured a three-year agency investigation and enforcement action, Spitzer is now unable to get the SEC's attention to obtain relief from an order that neither he nor SEC staff anticipated would bar him from acting under supervision as an investment adviser. Thus, until the Court issues a writ of mandamus directing the SEC to hear and decide his Motion to Dismiss the Order, Spitzer's welfare, reputation, and ability to earn a living will remain at risk.

ARGUMENT

I. Legal Standard for Issuance of the Writ

The issuance of a writ of mandamus that compels a federal agency to act is warranted in instances when the agency's delay is "egregious." *In re Pesticide Action Network N. Am.*, 798 F.3d at 813. As is the case here, "[a]n administrative agency's unreasonable delay presents such a circumstance because it signals the 'breakdown of regulatory processes.'" *In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413,

418 (D.C. Cir. 2004) (quoting *Cutler v. Hayes*, 818 F.2d 879, 897 n. 156 (D.C.Cir.1987) The "primary purpose" of granting mandamus relief when unreasonable delay occurs is to ensure that the agency does not "thwart" the Court's "jurisdiction by withholding a reviewable decision." *Id*. at 419. It is axiomatic that "agencies cannot insulate their decisions from Congressionally mandated judicial review simply by failing to take 'final action.'" *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1124 (9th Cir. 2001) ("mandamus relief may be warranted where agency action has been delayed to such an extent as to frustrate the court's role of providing a forum for review"). To prevent this concern from becoming a reality in this case, the issuance of a writ of mandamus directing the SEC to hear and decide Spitzer's Motion to Dismiss is now warranted.

II. The SEC Has a Duty to Act on Spitzer's Motion to Dismiss

When deciding whether to grant a petition for a writ of mandamus based on unreasonable delay, the Court must first determine whether the subject agency has a duty to act. *In re A Community Voice*, 878 F.3d 779, 784 (9th Cir. 2017). It is self-evident that "an agency cannot unreasonably delay that which it is not required to do." *Id*. Both the Advisers Act and the Administrative Procedure Act impose a duty on the SEC to decide Spitzer's Motion to Dismiss within a reasonable time.

First, the Court need look no further than the SEC's regulatory authority over Spitzer, as an investment adviser, to find its duty to decide his Motion to Dismiss.

Acting pursuant to this authority, the SEC entered its Order imposing sanctions on Spitzer, including its bar on his supervisory activities, under Sections 203(e), 203(f), and 203(k) of the Advisers Act. A157. Having chosen to investigate and sanction Spitzer under that authority, the SEC has a duty to decide his motion for relief from its Order. *See In re A Community Voice*, 878 F.3d at 785. The Order itself provides for such an application to the SEC. A162-63.

Second, under the Administrative Procedure Act, the SEC has a duty to "conclude a matter presented to it" "within a reasonable time[,]" which means that it "has a duty to fully respond to matters that are presented to it under its internal processes." *See In re A Community Voice*, *supra*, 878 F.3d at 784 (quoting 5 U.S.C. § 555(b)). To "conclude" Spitzer's Motion to Dismiss, the SEC therefore "must enter a final decision subject to judicial review" within a reasonable time. *See id*. The SEC "'cannot simply refuse to exercise [its] discretion' to conclude a matter," as it has apparently done here. *See id*. (quoting *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 n.6 (9th Cir. 1997)).

Thus, based on these two statutory frameworks, the SEC plainly has a duty to hear and decide Spitzer's Motion to Dismiss within a reasonable time, which it has failed to do.

III. The SEC Has Unreasonably Delayed Acting on Spitzer's Motion to Dismiss Under the Applicable *TRAC* Factors

This Circuit has adopted the "six factor balancing test" promulgated by the D.C. Circuit in *Telecommunications Research and Action Center v. Federal Communications Commission*, *supra*, 750 F.2d at 75 (hereinafter "*TRAC*") for use in deciding a petition for a writ of mandamus that seeks relief from an agency's unreasonable delay. *In re A Community Voice*, 878 F.3d at 783-84. These factors include:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Id. at 786 (quoting *TRAC*, 750 F.2d at 80). Because Congress has not established a "firm deadline" by which the SEC has a legal duty to act on Spitzer's Motion to Dismiss, the Court must balance these factors to determine whether the SEC's inaction is the result of unreasonable delay. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n. 11 (9th Cir. 2002). Even the most cursory analysis

of these factors compels the conclusion that the SEC has unreasonably delayed in hearing and deciding Spitzer's motion.

Factor 1: Rule of Reason

"Rule of reason," the most important of the *TRAC* factors, plainly weighs in Spitzer's favor. *See In re Nat. Res. Def. Council, Inc.*, 956 F.3d at 1139; *see also In re A Community Voice*, 878 F.3d at 786 ("[t]he most important is the first factor, the 'rule of reason,' though it, like the others, is not itself determinative"). This factor considers "whether the time for agency action has been reasonable." *In re Nat. Res. Def. Council, Inc.*, 956 F.3d at 1139. Such a determination "necessarily turns on the facts of each particular case." *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1988). "Repeatedly," however, "courts in this and other circuits have concluded that 'a reasonable time for agency action is typically counted in weeks or months, not years.'" *In re Nat. Res. Def. Council, Inc.*, 956 F.3d at 1139 (quoting *In re A Community Voice*, 878 F.3d at 787). Yet, Spitzer has been waiting more than 18 months since briefing completed for the SEC to set his Motion to Dismiss for hearing, let alone to enter its final decision on his requested relief, with no apparent end to such delay in sight.

Given Spitzer's advanced age and the financial peril he and his wife face daily because of the Order's unintended adverse consequences for his career as an investment adviser, it is untenable for Spitzer to wait any longer for the SEC to

decide his Motion to Dismiss. Not only was the SEC aware of these considerations throughout the underlying administrative proceeding, even noting in the Order that Spitzer was 71 years old at the time, Spitzer's motion reminded the SEC of his age and explained how he and his wife could not financially survive because the restriction on his supervisory authority has unexpectedly hindered his ability to work under supervision as an investment adviser.

After having pursued an investigation and enforcement action against Spitzer for three years before issuing the Order, the SEC now remains silent as to when it will act on his Motion to Dismiss. A70; A78; A147-48. The SEC's delay in deciding his motion is patently unreasonable.

Factor 2: Congressional Timetable

Congress has not enacted a specific timetable by which the SEC must act on matters like Spitzer's Motion to Dismiss. The second *TRAC* factor therefore does not directly apply here. *See Vaz v. Neal*, 33 F.4th 1131, 1138 n.6 (9th Cir. 2022). The Administrative Procedure Act, however, "instructs agencies to complete their work 'within a reasonable time.'" *In re Pesticide Action Network N. Am.*, 798 F.3d at 813 (quoting 5 U.S.C. § 555(b)). While "there is no *per se* rule as to how long is too long," it is indisputable that "'inordinate agency delay would frustrate congressional intent by forcing a breakdown of regulatory processes.'" *See In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (quoting *Cutler*, 818 F.2d at

897 n. 156). Not only could such delay "undermine the statutory scheme," it could "inflict harm on individuals in need of final action" and "collide with the right to judicial review." *See Cutler*, *supra*, 818 F.2d at 897. That is the situation here, where the SEC's ongoing failure to act on Spitzer's Motion to Dismiss has the effect of imposing a "forever bar," indefinitely depriving Spitzer of relief through both the SEC's decision-making process and this Court's judicial review.

The SEC's own rules of practice, while not establishing an applicable deadline, confirm that even the Commission would consider unreasonable its 18-month delay in deciding Spitzer's Motion to Dismiss. Notably, under these rules, "a decision by the Commission with respect to an appeal from the initial decision of a hearing officer, a review of a determination by a self-regulatory organization or the Public Company Accounting Oversight Board, or a remand of a prior Commission decision by a court of appeals will be issued within ***eight months*** from the completion of briefing on the petition for review, application for review, or remand order," but "[i]f the Commission determines that the complexity of the issues presented in a petition for review, application for review, or remand order warrants additional time, the decision of the Commission in that matter may be issued within ***ten months*** of the completion of briefing." *See* 17 C.F.R. § 201.900(a)(1)(iii) (emphasis added). By contrast, Spitzer's fully-briefed motion remains undecided long after the Commission's self-imposed deadline for concluding an entire

appellate process. Thus, not only is the SEC contravening the congressional mandate to complete its work within a reasonable time, but it is also ignoring its own concept of reasonableness by failing to decide Spitzer's motion. *See In re Pesticide Action Network N. Am.*, 798 F.3d at 813.

Unlike the situation regarding appeals of administrative orders, which have deadlines by which the Commission must make decisions, the SEC has imposed on itself no time limit for deciding motions to vacate existing bars. Coupled with the lack of a specific congressionally-imposed deadline, this omission leaves people like Spitzer in the position of having no guidance on how long it might take for the SEC to consider his motion. To date, however, the SEC's approach suggests that its own notions of "reasonableness" impose no urgency to decide Spitzer's long-pending motion.

Factor 3: Human Health and Welfare at Stake

While the SEC's lengthy delay in deciding Spitzer's Motion to Dismiss may not raise an issue of widespread public concern, its threat to human health and welfare is no less significant. Spitzer advised the SEC that relief from the Order was necessary because it jeopardized his and his wife's financial survival by impeding his employment as an investment adviser under supervision. A76-79; 147-48. As referenced above, not only did the Order cause Spitzer to lose his $3 million investment in his business, he and his wife have no meaningful assets remaining

after depleting their home equity, retirement savings, and cash in order to deal with the SEC's investigation and enforcement action. The SEC's continued inaction under such circumstances necessarily amounts to a manifest disregard for human health and welfare.

Factors 4 and 5: Competing Agency Priorities and Prejudice From Delay

The issuance of a writ of mandamus directing the SEC to act on Spitzer's Motion to Dismiss would not detract from any "higher or competing" agency priorities. *See In re Nat. Res. Def. Council, Inc.*, 956 F.3d at 1141. Spitzer recognizes that his motion is not the only matter now pending before the SEC. However, after having spent three years pursuing an investigation and enforcement action against Spitzer, the SEC would need little time and effort to assess the merits of his motion. The SEC's failure to act under such circumstances suggests that its delay is motivated by a lack of good faith rather than out of concern for other priorities. *See Indep. Mining Co.*, 105 F.3d at 510 ("'[W]here [an] agency has manifested bad faith, as by singling someone out for bad treatment or asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities'").

Moreover, the relevant consideration when evaluating agency priorities is the "consequence" of the SEC's delay – *i.e.*, the prejudice to Spitzer – because "[t]he deference traditionally accorded an agency to develop its own schedule is sharply

reduced when injury likely will result from avoidable delay." *See Cutler*, 818 F.2d 879, at 898. Given Spitzer's advanced age and tenuous financial situation caused by the Order, this matter is a hornbook example of the maxim "justice delayed is justice denied." *See Dietrich v. Boeing Co.*, 14 F.4th 1089, 1095 (9th Cir. 2021). Contrary to the fair administration of justice, Spitzer will continue to suffer severe prejudice if the SEC is allowed to prolong its delay in deciding his motion because the Order's supervisory bar will persist in impeding his employment as an investment adviser even acting under supervision. Spitzer's personal circumstances therefore do not allow him to wait endlessly until the SEC finally acts, if ever.

Factor 6: Agency Impropriety

Although the Court need not find any impropriety to hold that agency inaction constitutes unreasonable delay, the SEC's ongoing failure to decide Spitzer's Motion to Dismiss demonstrates a lack of good faith because such conduct is irreconcilable with its aggressive approach taken in the three-year investigation and enforcement action that culminated in its Order against him. A70; A78; A147-48. Having already comprehensively investigated Spitzer, no reasonable basis exists for the SEC to neglect his motion because the bulk of its work has been done. It is well settled that, "[i]f the court determines that the agency [has] delay[ed] in bad faith, it should conclude that the delay is unreasonable." *See Indep. Mining Co.*, 105 F.3d at 510 (insertions in original, quoting *Indep. Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1367

(D. Nev. 1995)). Because the SEC's ongoing delay only serves to prevent Spitzer from obtaining justice, the circumstances here compel the conclusion that the SEC is acting unreasonably.

On these grounds, each *TRAC* factor weighs in favor of granting Spitzer mandamus relief. No matter how the Court balances these factors, they clearly and unmistakably demonstrate that the SEC has unreasonably delayed in hearing and deciding Spitzer's Motion to Dismiss. However, even assuming that the SEC "has numerous competing priorities under the fourth factor and has acted in good faith under the sixth factor, the clear balance of the *TRAC* factors favors issuance of the writ." *See In re A Community Voice*, 878 F.3d at 787. The *TRAC* factors confirm that the SEC's unreasonable delay will continue to subject Spitzer to undue prejudice until it finally decides his Motion to Dismiss. The Court therefore should grant this petition in its entirety.

IV. The Commission (Not Its Delegee) Should Decide Spitzer's Motion

Spitzer respectfully requests the Court to order the Commission itself (rather the SEC's Enforcement Division, which is the Commission's delegee) to decide Spitzer's Motion to Dismiss. As referenced above, the SEC's Enforcement Division issued a brief opposing Spitzer's Motion to Dismiss, and it would be clearly unjust for the same entity that opposed Spitzer's position in the Motion to Dismiss briefing to adjudicate that very dispute. A33-65.

The Commission published a rule delegating authority to the Director of the Division of Enforcement to grant or deny Rule 193 applications. See 17 C.F.R. § 200.30-4(a)(5) (delegation "to the Director of the Division of Enforcement to be performed by him or under his direction" to "grant or deny applications made pursuant to Rule 193 of the Commission's Rules of Practice, § 201.193 of this chapter, provided, that, in the event of a denial, the applicant shall be notified that such a denial may be appealed to the Commission for review."). The Commission's delegation drew little public notice at the time. *See Applications by Barred Individuals for Consent to Assoc. with A Registered Broker, Dealer, Mun. Sec. Dealer, Inv. Adviser or Inv. Co.*, Exch. Act Release No. 20783, 1984 WL 547096, at *1, *4 (Mar. 16, 1984) (reflecting an absence of public comment letters received in response to the proposed rule including its proposal to give Enforcement delegated authority to decide Rule 193 applications) ("Applications by Barred Individuals Release").

In practice, the Commission has relied on its rule to delegate authority to the Director of the SEC's Enforcement Division to decide Rule 193 applications. *See, e.g.*, *Matthew D. Sample*, Exch. Act Release No. 75893, 2015 WL 5305992, at *3 (Sept. 10, 2015) (where Enforcement acted pursuant to delegated authority to deny Rule 193 application). But not always and not consistently. The Commission decides some Rule 193 applications itself. *See Eric D. Wanger*, Advisers Act

Release No. 5621, 2020 WL 6286295 (Oct. 26, 2020) (where the Commission granted Rule 193 application presumably without, first, an initial decision on the application by Enforcement's delegated authority); *Kenneth W. Corba*, Advisers Act Release No. 2732, 2008 WL 1902077 (Apr. 30, 2008). (same). *See also Applications by Barred Individuals Release* at *4 ("Notwithstanding this delegation, in any case where the Director believes it appropriate, the matter may be submitted to the Commission").

While Congress has provided for the Commission's ability to delegate its functions to, *inter alia*, its various divisions, Congress has not provided any intelligible principle that serves to limit the SEC's ability to delegate authority. *Compare* 15 U.S.C. § 78d-1 (regarding Commission delegations to staff) *with Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022), *aff'd on other grounds*, 144 S. Ct. 2117, 219 L. Ed. 2d 650 (June 27, 2024) (finding unconstitutional delegation of legislative power by Congress to the Commission when it fails to provide an intelligible principle by which the Commission would exercise the delegated power, in violation of Article I of the U.S. Constitution's vesting of "all" legislative power in Congress). This lack of limitation on the SEC's ability to delegate can lead to inconsistent or unreasonable outcomes, such as the situation that Spitzer will face if the same entity that opposed his Motion to Dismiss will decide that Motion's fate.

The Commission itself, and not the Director of the Enforcement Division through delegated authority, should decide Spitzer's motion to avoid an unconstitutional delegation of authority. Were the Commission to delegate such authority here, the SEC's Enforcement Division would decide the very application the Division has opposed in briefing to the Commission.

CONCLUSION

For the foregoing reasons, Petitioner Paul C. Spitzer respectfully requests that the Court grant this petition in its entirety and issue a writ of mandamus directing the SEC to hear and enter a final decision on his Motion to Dismiss within 30 calendar days.

DATED: November 8, 2024 INVESTOR CHOICE ADVOCATES NETWORK

By: */s/ Nicolas Morgan*
Nicolas Morgan
Attorneys for Petitioner
Paul C. Spitzer

STATEMENT OF RELATED CASES
PURSUANT TO CIRCUIT RULE 28-2.6

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court.

The case number and name of each related case and its relationship to this case are:

DATED: November 8, 2024 INVESTOR CHOICE ADVOCATES NETWORK

By: */s/ Nicolas Morgan*
Nicolas Morgan
Attorneys for Petitioner
Paul C. Spitzer

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. 21(d) AND CIRCUIT RULE 21-2

Pursuant to Federal Rule Appellate Procedure 21(d) and Circuit Rule 21-2, I certify that this document, Petition for Writ of Mandamus to the United States Securities and Exchange Commission, complies with the word and length limits of Fed. R. App. P. 21(d)(1) and Circuit Rule 21-2(c) because, excluding the parts of the document exempted by Fed. R. App. P. 21(a)(2)(C) and Fed. R. App. P. 32(f), this document contains 6,581 words and does not exceed 30 pages, and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point font size and Times New Roman type style.

DATED: November 8, 2024 INVESTOR CHOICE ADVOCATES NETWORK

By: */s/ Nicolas Morgan*
Nicolas Morgan
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Paul C. Spitzer

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is Mitchell Silberberg & Knupp LLP, 2049 Century Park East, 18th Floor, Los Angeles, CA 90067-3120, and my business email address is bag@msk.com.

On November 8, 2024, I served a copy of the foregoing document(s) described as **PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION** on the interested parties in this action at their last known address as set forth below by taking the action described below:

Gary Y. Leung, Esq.
Regional Trial Counsel
Division of Enforcement
Los Angeles Regional Office
Securities and Exchange Commission
444 S. Flower Street
Suite 900
Los Angeles, CA 90071

Phone: (323) 965-3998
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Office of the Secretary
U. S. Securities and Exchange Commission
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Washington, D.C. 20549-1090

☑ **BY PLACING FOR COLLECTION AND MAILING**: I placed the above-mentioned document(s) in sealed envelope(s) addressed as set forth above, and placed the envelope(s) for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at 2049 Century Park East, 18th Floor, Los Angeles, California 90067-3120 in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 8, 2024, at Los Angeles, California.

/s/ Bertha A. García-Stone
Bertha A. García-Stone