UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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DIVISION OF
ENFORCEMENT

October 18, 2022

VIA ECF

The Honorable Ronnie Abrams
United States District Judge
United States District Court for the Southern
District of New York
Thurgood Marshal United States Courthouse
40 Foley Square
New York, New York 10007

RE: *SEC v. Moraes*, No. 22-cv-8343 (RA)

Dear Judge Abrams:

The Securities and Exchange Commission ("Commission") respectfully submits this letter in response to this Court's October 6, 2022 Order ("Order") (ECF. No. 8). The Order directed the Commission to respond to the Court's inquiry on: (1) the purpose and necessity of the "no-deny" provision in Defendant Fernando Motta Moraes' ("Moraes") consent agreement; and (2) why "it is not a prior restraint on speech that infringes on Mr. Moraes' First Amendment rights." Order at 1.

First, the "no-deny" provision is a material term of the consent judgment because it preserves the SEC's ability to litigate the complaint's allegations in a judicial forum—something it is giving up by settling—in the event that Mr. Moraes later publicly denies the allegations of the complaint. The provision ensures that the Commission can then seek to litigate disputes about specific allegations before this Court and avoid the problems that result when a defendant settles on a no-admit basis one day, and denies the allegations the next, once outside the adversarial process and its procedures for deciding questions of fact.

Second, the no-deny provision does not infringe upon Mr. Moraes's First Amendment rights because he is agreeing to waive those rights. As the Second Circuit found in *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (Jun. 21, 2022), which controls here, the "no-deny" provision is not a prior restraint on speech because defendants, like Mr. Moraes, may constitutionally waive their constitutional rights, including agreeing not to deny the complaint's allegations without repercussions.

A. The "No-Deny" Provision Preserves the SEC's Right to Litigate the Complaint's Allegations If Mr. Moraes Publicly Disputes His Liability.

The Commission has used "no deny" provisions in settlements where defendants do not admit allegations for almost 50 years. *See Consent Decrees in Judicial or Administrative Proceedings*, 37 Fed. Reg. 25,224 (Nov. 29, 1972) (announcing SEC policy not to agree to settlements where defendants "consent to a judgment that imposes a sanction while denying the allegations of the complaint.").[1] As part of the parties' compromise in this case, the Commission and Mr. Moraes have each agreed to relinquish certain rights. *See SEC v. Citigroup Global Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014) (describing the "numerous factors that affect a litigant's decision whether to compromise a case or litigate it to the end"). The SEC agreed to settle its insider trading claim against Mr. Moraes without requiring him to admit to the truth of the complaint's allegations. *See* Consent, ¶ 2 (ECF No. 6-1). In doing so, the SEC gave up its right to pursue its case at trial, to have the alleged facts determined by the Court or a jury, and to have a civil judgment entered based upon a conclusive determination of those facts. Mr. Moraes agreed to give up his right to a jury trial, to findings of fact and conclusions of law, and to appeal from the entry of judgment. *See* Consent, ¶¶4-5. He also agreed, as the Court noted, not to deny publicly the complaint's allegations. *Id.* ¶ 11. *See Citigroup*, 752 F.3d at 295 (stating that "in many cases, setting out the colorable claims, supported by factual averments by the S.E.C., neither admitted nor denied by the wrongdoer, will suffice to allow the district court to conduct its review" of whether to enter a consent judgment).

Mr. Moraes' agreement to the SEC's "no-deny" policy ensures that if he publicly denies the allegations after settling without admissions, the Commission can seek to reopen the matter and prove its case. It is a material part of the compromise for the Commission to have the ability to seek its day in court in the wake of a denial. The Commission has an interest in ensuring that, should the settlement terms be breached, public disputes about specific allegations are decided in a judicial forum, under its rules of procedure and evidence, thereby avoiding the confusion that would result from freewheeling, extra-judicial battles of press releases or tweets.

The agreement to comply with the SEC's "no-deny" policy is narrowly focused on the complaint's allegations. The provision does not preclude Mr. Moraes from publicly criticizing the Commission or its policies. The only thing he has agreed not to do is publicly deny the complaint's allegations.

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[1] The Second Circuit has recognized a "strong federal policy favoring the approval and enforcement of consent decrees." *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991). Following this policy, courts in this District, including this Court, have reviewed and generally approved of this form of consent judgment. *See, e.g.*, *SEC v. Shah*, 22-cv-2012-LJL, ECF Nos. 32-1 (Consent), 33 (Judgment); *SEC v. Nikas*, 1:19-cv-09645-CM, ECF Nos. 43-1 (Consent), 44 (Judgment); *SEC v. Hofmann*, 21-cv-7407-RA, ECF Nos. 5.1 (Consent), 7 (Judgment).

Further, the Commission's remedy for Mr. Moraes' breach of the "no-deny" agreement is tied directly to what the Commission gave up in accepting Mr. Moraes' waiver. If Mr. Moraes publicly denies the SEC's allegations, the SEC's only remedy is to ask the Court to vacate the judgment, a request that the Court may grant or deny. Consent, ¶ 11. To the extent the SEC seeks vacatur (which it may never do), and to the extent the Court grants the relief, it would restore the SEC's rights to litigate Mr. Moraes' denials in a judicial forum. The Commission cannot seek contempt or ask for relief beyond what the parties agreed to in the event of a public denial. *See United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 343 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2833 (2015) ("'[I]f parties to a consent decree wish to cabin the district court's equitable discretion by stipulating the remedies for breach, they are free to do so,' and 'the stipulation will fix the measure of relief to which the victim of a breach is entitled.'").

Providing the Commission the option to seek revival of its case will avoid misleading impressions that could result if Mr. Moraes could settle one day without admissions and publicly deny the allegations the next. If Mr. Moraes can sign a "no-admit" consent and publicly deny the allegations later – in contrast to criminal pleas that require an admission of guilt and a factual basis for the plea, Fed. R. Crim. P. 11 – it could create the incorrect impression that there was no basis for the Commission's enforcement action, but only after the Commission has relinquished its right to proceed to trial and prove its case. *See* 37 Reg. 25,224 (Nov. 29, 1972) (explaining "enforcement activities" policy was intended "to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct did not, in fact, occur").

B. Moraes' Agreement to Comply with the SEC's "No-Deny" Policy Is a Permissible Waiver of His Rights, Not a Prior Restraint on Free Speech.

The "no-deny" provision is not a prior restraint, such as a judicial order imposed against the subject's will. Rather, it is Mr. Moraes' voluntary "agreement," Consent, ¶¶ 6, 11, to waive his right to publicly deny the complaint's allegations and to agree to a specific remedy in the event of breach. *See United States v. Int'l Brotherhood of Teamsters*, 931 F.2d 177, 188 (2d Cir. 1991) (concluding union waived First Amendment objection by consenting to decree).

Mr. Moraes, like any defendant, was not obligated to settle this civil enforcement action. During settlement discussions, the SEC staff provided his counsel with a copy of the form consent so that Mr. Moraes could assess its terms and make an informed decision whether to accept or reject them. If Mr. Moraes wanted to retain the right to publicly deny the allegations, he could have chosen to litigate. Here, however, he chose to settle. As part of his settlement offer, he voluntarily agreed to not publicly deny the complaint's allegations.

Voluntary waivers of constitutional rights in consent decrees are permissible and frequent. Just as it is "settled that plea bargaining does not violate the Constitution even

though a guilty plea waives important Constitutional rights," it is settled that parties can waive their constitutional rights when resolving other types of litigation. *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987); *SEC v. Romeril*, 15 F.4th 166 at 172 (*"*In the course of resolving legal proceedings, parties, can, of course, waive their rights, including such basic rights as the right to a trial and the right to confront witnesses."). "The First Amendment is no exception, and parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings." *Romeril*, 15 F.4th at 172-73 (citing *Int'l Brotherhood of Teamsters*, 931 F.2d at 188); *accord In re George F. Nord Bldg.*, 129 F.2d 173, 176 (7th Cir. 1942) (noting that the "right of free speech . . . may be waived" and that "one who has been a party to a proceeding wherein a consent decree has been entered and who was been party to that consent, is in no position to claim that such decree restricts his freedom of speech."); *Leonard v. Clark*, 12 F.3d 885, 889-92 (9th Cir. 1993) (upholding union's waiver of First Amendment rights in provision of labor agreement). "[S]imply because a contract includes the waiver of a constitutional right does not render the contract *per se* unenforceable." *Lake James Community Vol. Fire Dept. v. Burke County*, 149 F.3d 277, 280 (4th Cir. 1998).

A litigant may waive speech rights as part of a settlement so long as "the waiver is voluntary, knowing and intelligent." *Leonard*, 12 F.3d at 889; *accord United States v. Local 1804-1, Int'l Longshoremen's Ass'n, AFL-CIO*, 44 F3.d 1091, 1098 n.4 (2d Cir. 1995). Here, Mr. Moraes submitted his offer to settle after an opportunity to review the entire consent with his counsel. Indeed, Mr. Moraes' counsel signed the consent indicating his approval as to its form. Consent, p. 6. On this record, there is no reason to doubt that Mr. Moraes, with the advice of counsel, made a voluntary, knowing and intelligent waiver of all the Constitutional rights covered by the consent, including the right to publicly deny the complaint's allegations without repercussion.

C. The Court's Analysis Should Follow the *Romeril* Decision.

The SEC also respectfully submits that the Court's view of the "no-deny" provision should be controlled by the Second Circuit's decision in *Romeril*, where the court determined that a defendant's voluntary agreement to the "no-deny" provision in an SEC consent judgment does not constitute a prior restraint on free speech.[2] Romeril, a former CFO of Xerox Corporation who was represented by counsel, agreed to settle an SEC enforcement action by consent judgement that included the "no-deny" provision. The District Court approved the consent judgment in 2003. *Id.* at 170. Sixteen years later, Romeril moved pursuant to Fed. R. Civ. P. 60(b)(4) to set aside the judgment, arguing the judgment was void because the "no-deny" provision "constituted a prior restraint infringing his First Amendment rights and violated his right to due process." *Id.* The District Court (Cote, J.) denied the motion. On appeal, Romeril continued to press his First Amendment claim, arguing that the District Court "was without power" to issue

[2] The Court's Order cites a concurring opinion from *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring). This out-of-circuit concurrence is not controlling authority. Further, the concurrence's reference to prior restraint, which is unsupported by legal analysis, should not be followed. The *Romeril* decision's reasoned analysis represents controlling authority that the "no-deny" provision is not a prior restraint.

the no-deny provision because it "was an unconstitutional prior restraint that violated the First Amendment." *Id.* at 172. The Second Circuit rejected this challenge to the District Court's power to approve the consent. *Romeril*, 15 F.4th at 172-73. Applying reasoning similar to that expressed in this letter, the *Romeril* Court concluded: "To the extent that Romeril had the right to publicly deny the SEC's allegations against him, he waived that right by agreeing to the no-deny provision as part of a consent decree." *Id.* at 172.

Following the guidance of the *Romeril* decision, and for the reasons stated in this letter, the SEC respectfully submits that Mr. Moraes' agreement to comply with the "no-deny" policy represents a valid waiver of his right to publicly deny the allegations of the complaint. Further, because Mr. Moraes was given an opportunity to review the terms of the consent with his counsel, who approved the form of the consent, his waiver was voluntary, knowing and intelligent, and therefore permissible.

Accordingly, the Commission respectfully requests entry of the proposed consent final judgment.

Respectfully submitted,

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