Initial Decision Release No. 1213
Administrative Proceeding
File Nos. 3-17874 and 3-17875

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of

Talman Harris and
Victor Alfaya

Initial Decision
October 30, 2017

Appearances: John O. Enright for the Division of Enforcement, Securities and Exchange Commission

Talman Harris, *pro se*

Victor Alfaya, *pro se*

Before: Cameron Elliot, Administrative Law Judge

Summary

Respondents Talman Harris and Victor Alfaya were part of a scheme to sell restricted penny stock to unsuspecting investors between 2008 and 2014, and both were convicted of securities fraud violations and enjoined from future violations of the antifraud provisions of the securities laws. This initial decision imposes the further sanction of barring Respondents from associating 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 (collectively, collateral bar).

Procedural Background

On March 10, 2017, the Securities and Exchange Commission issued orders instituting proceedings (OIPs) against Harris and Alfaya pursuant to Section 15(b) of the Securities Exchange Act of 1934. The OIPs allege that

on February 7, 2017, in *SEC v. Cope*, No. 1:14-cv-7575 (S.D.N.Y.) (*Cope*), Harris and Alfaya were enjoined from violating antifraud provisions the Securities Act of 1933 and the Exchange Act. *Harris* OIP at 2; *Alfaya* OIP at 2. The *Harris* OIP further alleges that Harris was convicted on September 7, 2016, of various offenses, including conspiracy to commit securities and wire fraud, in *United States v. Scholander*, No. 1:15-cr-335 (N.D. Ohio) (*Scholander*). *Harris* OIP at 2. The *Alfaya* OIP alleges that on April 28, 2016, Alfaya pleaded guilty to conspiracy to commit securities and wire fraud in the same case. *Alfaya* OIP at 2. Because the OIPs both concerned *Cope* and *Scholander*, the matters were consolidated. *See Talman Harris*, Admin. Proc. Rulings Release No. 4675, 2017 SEC LEXIS 753, at *1 (ALJ Mar. 13, 2017).

Harris was served with his OIP on April 29, 2017, and Alfaya was served on May 18, 2017. *Talman Harris,* Admin. Proc. Rulings Release No. 4834, 2017 SEC LEXIS 1580, at *1-2 (ALJ May 26, 2017). Harris did not answer; however, unlike Alfaya, he appeared at the telephonic prehearing conference in May. *Talman Harris,* 2017 SEC LEXIS 1580, at *2. At the prehearing conference I issued a show-cause order against Alfaya. *See id.* I discharged that order when I received a copy of Alfaya's answer, which he had attempted to timely file. *Talman Harris,* Admin. Proc. Rulings Release No. 4880, 2017 SEC LEXIS 1871, at *1 (ALJ June 21, 2017). In his answer, Alfaya generally denied the allegations in his OIP and asked for leniency, but admitted that he had pleaded guilty to one count of conspiracy to commit securities fraud. *Alfaya* Answer ¶¶ 1-2, 6.

The Division submitted a motion for summary disposition against Harris on June 16, 2017 and a similar motion against Alfaya on July 17, 2017. Each motion was accompanied by a declaration by a Division attorney, providing relevant evidence from *Cope* and *Scholander*.[1] Neither Respondent filed an opposition.

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[1] The two declarations of the Division attorney, John O. Enright, will be referred to as "*Harris* Enright Decl." and "*Alfaya* Enright Decl." to avoid confusion. One of the exhibits is a third declaration that Enright filed in *Cope*, but which was submitted in this proceeding without any of the attached documentary evidence. *See Harris* Enright Decl. Ex. 3 (no exhibits); *Alfaya* Enright Decl. Ex. 3 (no exhibits). I take official notice of the complete version of that third declaration with its exhibits, which will be referred to as "*Cope* Enright Decl." Declaration of John O. Enright in Support of Plaintiff Securities and Exchange Commission's Application for an Order to Show Cause as to Why Default Judgments Should Not Be Entered Against Defendants Talman Harris, William Scholander, Victor Alfaya, and Kona

Decisional Standards

Although Harris has not filed an answer or responded to the Division's motion for summary disposition, he participated in the prehearing conference and neither he nor the Division objected to the summary disposition briefing schedule. Therefore, I do not deem Harris in default and I do not deem the allegations in the *Harris* OIP to be true. 17 C.F.R. §§ 201.155(a)(2), .220(f). Nor do I find Alfaya in default; although he did not file an opposition brief, he did file an answer. *See* 17 C.F.R. § 201.250(b) (permitting summary disposition "after a respondent's answer has been filed").

Summary disposition is appropriate where there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. *Id.* The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *40-41 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *19-20 & n.21 (Feb. 4, 2008) (collecting cases), *pet. denied*, 561 F.3d 548 (6th Cir. 2009). Summary disposition briefing was scheduled to be complete on August 17, 2017, less than 75 days ago, and this initial decision is therefore timely. *Talman Harris,* 2017 SEC LEXIS 1871, at *1; 17 C.F.R. § 201.360(a)(2)(i)(B).

The findings and conclusions in this initial decision are based upon the record, including the Division's declarations, and the underlying documents from *Scholander* and *Cope*, officially noticed pursuant to Rule of Practice 323. *See* 17 C.F.R. § 201.323; *see also Robert Bruce Lohmann*, 56 S.E.C. 573, 583 n.20 (2003) (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions"). The deemed-true facts in the *Harris* OIP shall be considered only in resolving the proceeding as to Harris. *See* 17 C.F.R. § 201.155(a).

All filings and all documents and exhibits of record have been fully reviewed and carefully considered. All arguments and proposed findings and conclusions that are inconsistent with this initial decision have been considered and rejected.

Jones Barbera, *Cope*, No. 1:14-cv-7575 (S.D.N.Y. Dec. 19, 2015), ECF Nos. 204–204-21; *see* 17 C.F.R. § 201.323.

Findings of Fact

Between 2008 and 2014, Respondents were part of schemes in which they were paid undisclosed commissions for inducing their clients to buy shares of penny stocks from Izak Zirk Engelbrecht (n/k/a/ Izak Zirk de Maison) and his associates. *See Harris* Enright Decl. Ex. 4 ¶¶ 2-5, 7-12, 14 (Englebrecht Decl.); *see Harris* Enright Decl. Ex. 11 at 1 (conspiracy ending September 18, 2014); *Alfaya* Enright Decl. Ex. 13 at 1 (conspiracy ending April 6, 2011).

In one scheme, Engelbrecht enlisted Harris and others to help him liquidate shares of Lenco Mobile Inc. Engelbrecht Decl. ¶¶ 2-4. In exchange for "commissions"—or what Engelbrecht himself called kickbacks—"of between 30% and 50% of the proceeds," Harris bought shares of Lenco from Engelbrecht on his clients' accounts. Engelbrecht Decl. ¶¶ 4, 5, 9. Between February 13, 2008, and November 12, 2009, Engelbrecht made at least twenty-nine payments to Harris, totaling $775,104. *Cope* Enright Decl. ¶ 21 & n.1; *id.* Exs. 14-15; *see Harris* Enright Decl. Ex. 5 at 4. Harris did not disclose these kickbacks to his customers. Engelbrecht Decl. ¶ 5. Harris was associated with a registered broker at the time and had been since 1999. FINRA, *Broker Check: Talman Anthony Harris CRD#: 3209947*, https://brokercheck.finra.org/individual/summary/3209947 (last visited Oct. 16, 2017); *see William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at 1-3 & n.1 (Mar. 31, 2016), *pet. denied sub nom. Harris v. SEC*, No. 16-1739, 2017 U.S. App. LEXIS 21318 (2d Cir. Oct. 25, 2017).

In a similar scheme, Engelbrecht illegally sold shares of Lustros, Inc., into the public market by paying unregistered individuals, including Alfaya, to solicit investors. *Alfaya* Enright Decl. Ex. 12 at 36-37; Engelbrecht Decl. ¶¶ 9-10. Engelbrecht provided Alfaya's employer, Kieran Kuhn, with a kickback of "40% to 50% of the sale proceeds" and Alfaya, in turn, received at least 5% of the sale proceeds. Engelbrecht Decl. ¶ 14; *Alfaya* Enright Decl. Ex. 12 at 38. Between May 18, 2012 and March 15, 2013, Alfaya received ill-gotten gains totaling $136,540.00. *Cope* Enright Decl. ¶ 23; *id.* Exs. 17-18; *see Alfaya* Enright Decl. Ex. 5 at 4. Alfaya, like Harris, did not disclose these payments to the investors. *Alfaya* Enright Decl. Ex. 12 at 33-35; *see* Engelbrecht Decl. ¶¶ 11-12 (Engelbrecht "had numerous discussions" with Alfaya "that the commission arrangement was never to be disclosed to investors").

The government filed criminal (*Scholander*) and civil (*Cope*) enforcement actions against Respondents and other participants in the scheme. *See Harris* Enright Decl. Exs. 1, 9; *Alfaya* Enright Decl. Ex. 11.

In *Scholander*, Alfaya pleaded guilty on April 28, 2016, to one count of conspiracy to commit securities fraud under 18 U.S.C. § 1348 and wire fraud under 18 U.S.C. § 1343 in violation of 18 U.S.C. § 1349, and, on January 25, 2017, the United States District Court for the Northern District of Ohio sentenced him to 21 months in prison and found him jointly and severally liable for $3,629,516.19 in restitution. *Alfaya* Enright Decl. Ex. 13 at 2, 6; *see id.* Ex. 12. On September 7, 2016, Harris was found guilty by a jury of one count of conspiracy to commit securities fraud under 18 U.S.C. § 1348 and wire fraud under 18 U.S.C. § 1343, in violation of 18 U.S.C. § 1349; three counts of wire fraud in violation of 18 U.S.C. § 1343; and one count of obstruction of justice in violation of 18 U.S.C. §§ 2, 1503. *Harris* Enright Decl. Ex. 10. He received concurrent sentences of 60 months for each of counts 1 through 4 and an additional consecutive sentence of 3 months for count 5, and he was found jointly and severally liable for $843,423.91 in restitution. *Id.* Ex. 11 at 2, 6.

On February 7, 2017, the court in *Cope* entered a final default judgment against Harris and Alfaya, who had not responded to the order to show cause issued by the United States District Court for the Southern District of New York. *Harris* Enright Decl. Ex. 5. Harris and Alfaya were enjoined from violating Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5; and Alfaya was also enjoined from violating Exchange Act Section 15(a). *Id.* at 2-3. Both Respondents were also barred from participating in the sale of penny stocks. *Id.* at 3-4. In addition, Harris was ordered to pay $775,104 in disgorgement, $201,984.17 in prejudgment interest, and a civil penalty of $1,000,000, and Alfaya was ordered to pay disgorgement of $136,540.00, prejudgment interest of $16,835.00, and a civil penalty of $500,000. *Id.* at 4.

Conclusions of Law

The Division seeks a permanent collateral bar against each Respondent. *See Harris* Mem. at 15; *Alfaya* Mem. at 14. Under Exchange Act Section 15(b)(6), a collateral bar is authorized if: (1) Respondents have been convicted of any offense specified in Section 15(b)(4)(B) within 10 years of the OIP, or were permanently enjoined from any action, conduct or practice specified in Section 15(b)(4)(C), which includes any conduct or practice in connection with acting as a broker-dealer or in connection with the purchase or sale of any security; (2) they were associated with a broker or dealer, whether registered or unregistered, at the time of the misconduct; and (3) the sanction is in the public interest. 15 U.S.C. § 78*o*(b)(4)(B), (b)(4)(C), (6)(A)(iii); *see Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *32 (July 26, 2013) (holding that it is "well established that [the

Commission is] authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding").

Respondents were both convicted of securities fraud and enjoined from violating securities laws

Respondents were convicted in 2016 of conspiracy to commit securities and wire fraud in violation of 18 U.S.C. § 1349, which is a felony that "involve[d] the purchase or sale of any security." 15 U.S.C. § 78*o*(b)(4)(B)(i); *see Harris* Enright Decl. Ex. 11 at 1; *Alfaya* Enright Decl. Ex. 13 at 1. In addition, both were enjoined from, among other things, "conduct . . . in connection with the purchase or sale of any security," 15 U.S.C. § 78*o*(b)(4)(C), when they were permanently enjoined from violating the antifraud provisions of the securities laws. *See Harris* Enright Decl. Ex. 5 at 2-4.

Respondents were associated with a broker or dealer at the time of the misconduct

Harris was a registered broker and was associated with a registered brokerage firm at the time of the misconduct. *William Scholander*, 2016 SEC LEXIS 1209, at 2-3 & n.1; *Broker Check: Harris*, https://brokercheck.finra.org/individual/summary/3209947.

Although unregistered, Alfaya was also associated with a broker. The Exchange Act defines a broker as any person "engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). In selling Lustros stock, Alfaya effected securities transactions by, among other factors, actively finding investors and receiving payment by commission, and at his plea allocution he did not dispute that he acted as a broker. *See Alfaya* Enright Decl. Ex. 12 at 36-38, 40; Engelbrecht Decl. ¶¶ 9-10, 14; *see, e.g.*, *SEC v. Collyard*, 861 F.3d 760, 766 (8th Cir. 2017) (identifying common, nonexclusive factors); *James S. Tagliaferri*, Securities Act Release No. 10308, 2017 SEC LEXIS 481, at *14 (Feb. 15, 2017) (same). Alfaya was therefore associated with a broker—himself—at the time of his misconduct. *See James S. Tagliaferri*, 2017 SEC LEXIS 481, at *17-18.

The public interest warrants a permanent collateral bar

The appropriateness of any remedial sanction in this proceeding is guided by the public interest factors set forth in *Steadman v. SEC*, namely: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's

recognition of the wrongful nature of his conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010). The Commission has also considered the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, 58 S.E.C. 1197, 1217-18 (2006); *Marshall E. Melton*, 56 S.E.C. 695, 698 (2003). This is a flexible inquiry, and no one factor is dispositive. *Gary M. Kornman*, 2009 SEC LEXIS 367, at *22.

At the outset, I note that Respondents were enjoined in *Cope* for conduct involving fraud. *See Harris* Enright Decl. Ex. 5 at 2-3. The Commission considers misconduct involving fraud to be particularly egregious and requiring a severe sanction. *See Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013) (stating that 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'" (quoting *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 (Apr. 20, 2012))), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014). Where a respondent has been enjoined from violating antifraud provisions of the securities laws, the Commission "typically" imposes a permanent bar. *Toby G. Scammell*, Investment Advisers Act of 1940 Release No. 3961, 2014 SEC LEXIS 4193, at *37 (Oct. 29, 2014). The *Steadman* factors confirm the appropriateness of that guidance in this case.

Egregiousness and recurrence

Respondents' misconduct was egregious and recurrent. Each was convicted of conspiracy to commit securities fraud, reflecting "an egregious abuse of the trust placed in him as a securities professional." *Eric S. Butler*, Exchange Act Release No. 65204, 2011 SEC LEXIS 3002, at *15-16 (Aug. 26, 2011) (quoting *John S. Brownson*, 55 S.E.C. 1023, 1029 (2002), *pet. denied*, 66 F. App'x 687 (9th Cir. 2003)). Harris and Alfaya each acted as promoters for Engelbrecht for at least a year, during which they received at least $775,104 and $136,540, respectively, in undisclosed kickbacks. *Cope* Enright Decl. ¶¶ 21 & n.1, 23; *id.* Exs. 14-15, 17-18; *see Harris* Enright Decl. Ex. 5 at 4. And they acted in furtherance of a criminal scheme that took place over six years and swindled investors out of almost $4.5 million. *See* Englebrecht Decl. ¶¶ 2-5, 7-12, 14; *Harris* Enright Decl. Ex. 11 at 2, 6; *Alfaya* Enright Decl. Ex. 13 at 2, 6. Alfaya acknowledged that there were more than ten victims of the conspiracy. *Alfaya* Enright Decl. Ex. 12 at 22, 24 (agreeing to a

sentencing enhancement based on the number of victims); *see id.* Ex. 13 at 6-10 (listing over 50 individuals to whom Alfaya owed restitution); *see also Harris* Enright Decl. Ex. 11 at 6-7 (listing six individuals to whom Harris owed restitution).

Moreover, Alfaya actively solicited clients to invest or reinvest in Lustros without registering as a broker. *See Alfaya* Enright Decl. Ex. 5 at 3. In requiring that brokers or dealers register with the Commission to purchase or sell securities, Section 15(a) ensures "that customers . . . receive either the regulatory protections that result from a [broker] being registered himself or the protections that stem from the [broker] being supervised by a registered firm." *Anthony Fields, CPA*, Securities Act Release No. 9727, 2015 SEC LEXIS 662, at *72-73 (Feb. 20, 2015) (quoting *Charles A. Roth*, 50 S.E.C. 1147, 1152 (1992), *pet. denied*, 22 F.3d 1108 (D.C. Cir. 1994)). Alfaya's failure to register deprived his clients of these regulatory protections, making it easier for Alfaya and his co-conspirators to defraud them.

Scienter

Respondents acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980). Respondents were convicted of conspiracy to commit securities fraud and were separately enjoined from committing securities fraud, showing a high degree of scienter. *See Harris* Enright Decl. Exs. 5, 10; *Alfaya* Enright Decl. Ex. 13.

Harris was one of the brokers directly enlisted by Engelbrecht in the conspiracy. *See* Engelbrecht Decl. ¶ 4. He "understood" that the kickbacks he received from Engelbrecht "had to be concealed from investors" or "they would never [have] agree[d] to buy shares." *Id.* ¶ 5. In addition, Harris demonstrated that he knew he was committing a crime by directing Engelbrecht to pay the kickbacks to Harris's fiancé "to avoid creating a paper trail that would enable regulators and legal authorities to track his wrongful acts." *Id.* ¶¶ 6-7.

Even though he was not directly recruited by Engelbrecht, Alfaya was nevertheless described as the "right-hand man" of one of the central conspirators. Engelbrecht Decl. ¶ 12. In his extended plea colloquy, Alfaya admitted that he "knowingly" conspired to commit securities fraud. *Alfaya* Enright Decl. Ex. 12 at 13-16. Engelbrecht "had numerous discussions" with Alfaya indicating that the kickbacks should not be disclosed, so Alfaya knew that he was concealing material information from potential investors. Engelbrecht Dec. ¶¶ 11-12; *see Alfaya* Enright Decl. Ex. 12 at 13-16.

Assurances against future violations, recognition of wrongful conduct, and likelihood of future violations

Although "the existence of a past violation, without more, is not a sufficient basis for imposing a bar[,] . . . 'the existence of a violation raises an inference that it will be repeated.'" *Tzemach David Netzer Korem*, 2013 SEC LEXIS 2155, at *23 n.50 (alteration in internal quotation omitted) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)); *see Gann v. SEC*, 361 F. App'x 556, 560 (5th Cir. 2010) (affirming permanent associational bar and stating "if [respondent] doesn't know right from wrong in this industry, how can he avoid wrongdoing in the future?"). Respondents have not rebutted that inference.

Instead of providing assurances, Harris's actions show that he wishes to avoid the consequences of his actions. Harris was so desperate to avoid prosecution that he repeatedly instructed a witness to lie to law enforcement officers about the nature of the kickbacks that Harris received. *See Harris* Enright Decl. Ex. 9 ¶¶ 60-64; *id.* Ex. 10 at 5 (conviction for obstruction of justice). There is no evidence of Harris's remorse in the record and—given Harris's long history in the industry—no guarantee that he will not harm investors in the future. *See Broker Check: Harris*, https://brokercheck.finra.org/individual/summary/3209947.

Alfaya, in contrast, represents that he "has no interest in ever returning to the penny stock industry and willingly would consent to being barred from such industry in the future." *Alfaya* Answer ¶ 7. But the wording of Alfaya's pleading leaves it ambiguous whether he is actually consenting to a permanent collateral bar or whether he is merely agreeing to abide by the penny stock bar that was already imposed by the district court in *Cope*. *See Alfaya* Enright Decl. Ex. 5 at 3-4.

In addition, Alfaya does not appear to believe that he has done anything wrong. The government suggested that Alfaya had accepted responsibility for his actions at the time of his plea colloquy in April 2016. *See Alfaya* Enright Decl. Ex. 12 at 22-23. In his answer in this proceeding, however, Alfaya maintains that "at no time" did he "admit[ ] to ever intentionally defrauding any individuals." *Alfaya* Answer ¶ 2. Instead of accepting responsibility, he attributes his guilty plea to "the advice of his court appointed counsel." *Alfaya* Answer ¶ 3. This failure to recognize wrongdoing establishes a threat of future violations. *See Christopher A. Lowry*, 55 S.E.C. 1133, 1144 (2002), *pet. denied*, 340 F.3d 501 (8th Cir. 2003).

* * *

Weighing all the factors, there is substantial need to protect investors from Respondents and deter others from engaging in similar conduct. Associational bars have long been considered effective deterrence. *See Guy P. Riordan*, Securities Act Release No. 9085, 2009 SEC LEXIS 4166, at *81 & n.107 (Dec. 11, 2009) (collecting cases), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010). There is nothing in the record to suggest that the deterrent effect would be lessened in this case. A permanent collateral bar "will prevent [Respondents] from putting investors at further risk and serve as a deterrent to others from engaging in similar misconduct." *Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *86-87 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015).[2]

I have also considered the effect on this proceeding of *Kokesh v. SEC*, 137 S. Ct. 1635, 1645 (2017), which held that disgorgement in Commission enforcement actions is a "penalty" within the meaning of the statute of limitations, 28 U.S.C. § 2462. In *Saad v. SEC*, -- F.3d --, 2017 U.S. App. LEXIS 19970, at *16 (D.C. Cir. Oct. 13, 2017), the United States Court of Appeals for the District of Columbia remanded a case challenging, as "impermissibly punitive," a lifetime associational bar imposed by FINRA so that the Commission could determine "the relevance—if any—of" *Kokesh*. The D.C. Circuit has held that a lifetime associational bar imposed by a self-regulatory organization must be "remedial and not 'excessive or oppressive.'" *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1175-76 (D.C. Cir. 2009) (quoting 15 U.S.C. § 78s(e)(2)). By contrast, the D.C. Circuit has held, at least in some cases, that an associational bar imposed by the Commission itself qualifies as a penalty. *Compare Johnson v. SEC*, 87 F.3d 484, 489-92 (D.C. Cir. 1996) (finding a six-month bar on acting as a supervisor at a broker-dealer to be punitive), *with McCurdy v. SEC*, 396 F.3d 1258, 1264-65 (D.C. Cir. 2005) (holding that the Commission "may impose sanctions for a remedial purpose, but not to punish," and finding that the purpose of a one-year suspension from practicing before the Commission as an accountant "was not to punish McCurdy, but rather to protect the public"). In any event, as Judge Millett

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[2] The injunction entered in *Cope* already prohibits Respondents from participating in an offering of penny stock, which may render duplicative the penny stock bar included as part of the full collateral bar. *See Harris* Enright Decl. Ex. 5 at 3-4; *compare* 15 U.S.C. § 78*o*(b)(6)(A), (C), *with* 15 U.S.C. §§ 77t(g), 78u(d)(6). But the Commission nevertheless directed me to consider whether a penny stock bar was appropriate, and the Division requested one. *See Harris* OIP at 2-3; *Alfaya* OIP at 2; *Harris* Mem. at 15; *Alfaya* Mem. at 14. Because I find that it is appropriate to enter such a permanent bar based on the evidence, I will include it in the ordered relief.

pointed out in her opinion *dubitante*, "[n]othing in *Kokesh* unravels [the D.C. Circuit's] on-point circuit precedent" allowing the Commission to impose a permanent associational bar after considering the relevant factors. 2017 U.S. App. LEXIS 19970, at *32-33; *see, e.g.*, *Kornman*, 592 F.3d at 187-89 (affirming imposition of a permanent bar after considering the *Steadman* factors); *Horning v. SEC*, 570 F.3d 337, 346 (D.C. Cir. 2009) (similar). I have weighed the relevant factors, and even assuming that a permanent bar is punitive under *Kokesh*, my analysis of those factors remains the same.

Order

It is ORDERED that the Division of Enforcement's motions for findings of default and sanctions against Talman Harris and for summary disposition against Victor Alfaya are GRANTED.

It is FURTHER ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Talman Harris and Victor Alfaya are permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360. *See* 17 C.F.R. § 201.360. Under that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111. *See* 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occurs, the initial decision shall not become final as to that party.

Harris may move to set aside the default in this case. Rule 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). A motion to set aside a default shall be made within a

reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.*

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Cameron Elliot
Administrative Law Judge