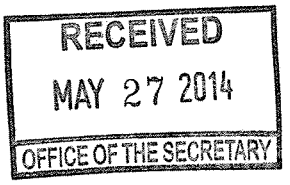
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 23, 2014

Administrative Proceeding
File No. 3-15784



In the Matter of	:
GEORGE LOUIS THEODULE,	:
Respondent.	:

DIVISION OF ENFORCEMENT'S AMENDED MOTION FOR SANCTIONS AGAINST RESPONDENT GEORGE LOUIS THEODULE

Robert K. Levenson
Regional Trial Counsel

DIVISION OF ENFORCEMENT
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1800
Miami, FL 33131
Phone: (305) 982-6341
Fax: (305) 536-4154

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I. Introduction

Pursuant to Rules 155(a) and 220(f) of the Commission's Rules of Practice, and the Law Judge's Order Finding Respondent In Default And Requesting Motion For Sanctions ("Default Order") dated May 13, 2014, the Division of Enforcement moves for the sanctions of an industry bar from association and a penny stock bar against Respondent George Theodule pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"). We set forth the grounds for the sanction below.

II. History Of The Case

The Commission issued the OIP on March 12, 2014, pursuant to Exchange Act Section 15(b) and Advisers Act Section 203(f). In summary, the OIP alleges Theodule fraudulently targeted and solicited Haitian-American investors to invest in his companies in 2007 and 2008, while at the same time giving them investment advice and receiving transaction-based compensation. These facts eventually led both to a guilty plea and conviction in a criminal case, and a final judgment against him in a Commission enforcement action.

The Division, using a process server, served Theodule personally at the Federal Detention Center in Miami, Florida, on April 4, 2014. *See* Division's Notice of Filing Return of Service, dated April 7, 2014. Theodule's Answer was due on April 24, 2014. *See* Order Following Prehearing Conference, dated April 14, 2014. Theodule did not answer or otherwise appear in the case. *See* Order to Show Cause, dated April 25, 2014. Pursuant to the Order to Show Cause, Theodule had until May 12, 2014 to respond and show cause why the Law Judge should not determine the proceeding against him. *Id.* Theodule did not respond, and on May 13, the Law Judge determined Theodule to be in

default and requested the Division to file the instant motion. Default Order at 1.

III. Memorandum Of Law

1. Allegations Of The OIP The Law Judge May Deem True

Pursuant to Rule 155(a), the Law Judge may deem the allegations of the OIP as true for purposes of determining sanctions against Theodule. *Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012); *In the Matter of Peak Wealth Opportunities, LLC and David W. Dube*, AP File No. 3-14979, 2013 WL 812635 at *1 (March 5, 2013). The OIP is attached as Exhibit 1 to this motion. The relevant allegations are:

- From July 2007 through December 2008, Theodule was the president and sole officer and director of Creative Capital Consortium, LLC, and also managed A Creative Capital Concept$ (collectively "Creative Capital"). Theodule used both entities to raise funds from investors; neither entity was ever registered with the Commission. OIP at ¶ II.A.1.

- During 2007 and 2008, as sole officer and president of the Creative Capital entities, Theodule: solicited investor contributions; touted his stock trading strategy; made investment decisions on behalf of clients; controlled clients' trading accounts through agreements with investment clubs that authorized him to trade and act on behalf of club members; received transaction-based compensation in the form of commissions; and misappropriated investor funds. *Id.* at ¶ II.B.6.

- Theodule and the Creative Capital companies charged investors a 10 percent upfront fee and a 40 percent commission on any trading profits. *Id.* at ¶ II.B.6.

- On Oct. 28, 2013, Theodule pled guilty to one count of wire fraud in violation of 18 U.S.C. §1343 in U.S. District Court, in the case *United States v. George Louis Theodule*, Case No. 9:13-CR-80141, Southern District of Florida. *Id.* at ¶ II.B.2; Plea Agreement (attached as Exhibit 2) at 1, ¶1.

- On Feb. 24, 2014, Theodule was sentenced to 12½ years in prison. OIP at ¶ II.B.2; Judgment In A Criminal Case (attached as Exhibit 3) at 2.

- The criminal conviction was based on Theodule's solicitation of investors through Creative Capital. OIP at ¶¶ II.B.1, 3, 4, and 6; Plea Agreement (Ex. 2).

- Theodule solicited investors in South Florida's Haitian American community by holding himself out as a "financial wizard" who, through proven investment strategies, could double investors' money in 30 to 90 days. OIP at ¶ II.B.4.

- Theodule formed approximately 100 investment clubs with more than 2,500 members who invested anywhere from $1,000 to $100,000. *Id.* All told, Theodule raised more than $30 million from investors in 2007 and 2008, and deposited approximately $19 million in trading accounts. *Id.* He lost most of the $19 million and used a substantial amount of investors' funds for his personal benefit and that of family and friends. *Id.*

- The facts in the Plea Agreement also gave rise to a Commission civil enforcement action in U.S. District Court. *Id.* at ¶ II.B.5. In that action, the District Court entered a Final Judgment that included disgorgement of more than $5 million and a $250,000 civil penalty. *Id.*

- The Commission's civil action also was based in part on Theodule's activities of: soliciting investor contributions; touting his stock trading strategy; making investment decisions on behalf of clients; controlling clients' trading accounts through agreements with investment clubs that authorized him to trade and act on behalf of club members; receiving transaction-based compensation in the form of commissions; and misappropriating investor funds. *Id.* at ¶ II.B.6.

2. Additional Evidence

In addition to the OIP allegations and the exhibits listed above, the Division submits the following additional evidence showing we are entitled to the industry and penny stock bars we request:

- The Commission's Emergency *Ex Parte* Motion For Temporary Restraining Order And Other Emergency Relief in the civil enforcement action ("Emergency Motion"), attached as Exhibit 4.

- Temporary Restraining Order And Other Emergency Relief in the civil case, attached as Exhibit 5.

- Order Granting Preliminary Injunction And Other Relief Against All Defendants in the civil case, attached as Exhibit 6.

- Judgment of Permanent Injunction And Other Relief As To Defendant George L. Theodule in the civil case, attached as Exhibit 7.

All of these exhibits, as well as the OIP, demonstrate both that Theodule violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 and that the District Court in the civil case enjoined Theodule from future violations of the statute and the rule.

As the Emergency Motion shows, Theodule solicited and raised more than $23 million from primarily Haitian-American investors in 2007 and 2008 by promising to double their money in 90 days or less through stock and options trading. Ex. 4 at 2, 6-8. He boasted to investors about Creative Capital's high rates of returns and claimed he had made millionaires out of a number of investors. *Id.* at 4. In reality, Theodule: lost more than 97 percent of the money he traded; commingled investor funds with his personal funds; misappropriated at least $3.8 million of investor funds for personal use; and used new investor money to repay earlier investors in Ponzi scheme fashion. *Id.* at 2, 6-8.

Theodule funneled a great deal of the money he raised to the Creative Capital entities through investment clubs. *Id.* at 5-6. Investors gave money to the clubs and could not withdraw it for 90 days. *Id.* The investment clubs in turn sent the money to Creative Capital for Theodule to invest. *Id.* Investors did not have meetings or participate in any way in making investment decisions. *Id.* The investment clubs received a 10 percent commission, and Theodule and his companies were to receive a commission of 40 percent of the investors' profits after 90 days. *Id.*

The allegations in the Emergency Motion led U.S. District Judge Donald Middlebrooks to issue both a temporary restraining order and a preliminary injunction against Theodule, finding the Commission had made a *prima facie* case that Theodule had violated Exchange Act Section 10(b) and Rule 10b-5, and ordering him not to violate those provisions (among other relief that included an asset freeze). Exhibits 5 and 6. Furthermore, on October 22, 2009, the District Court permanently enjoined Theodule, by consent, from violating Section 10(b) and Rule 10b-5. Exhibit 7.

3. Industry And Penny Stock Bars Are Appropriate Sanctions

Because the Law Judge has determined Theodule to be in default, the only question left is what sanctions are appropriate under Exchange Act Section 15(b) and Advisers Act Section 203(f).

Exchange Act Section 15(b)(6)(A) authorizes the Commission to, among other things, issue a penny stock bar and bar from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO") any person, who, at the time of the misconduct was associated with or seeking to become associated with a broker or dealer, if the person has been enjoined from any action specified in Section 15(b)(4)(A)(D) or (E) of the Exchange Act, and if it is in the public interest. 15 U.S.C. §78(o)(b)(6)(A)(i); *In the Matter of Christopher A. Seeley*, AP File No. 3-15240, 2013 WL 5561106 at *13 (Oct. 9, 2013). Section 15(b)(4)(D) specifies that one of the actions giving rise to an industry bar is if the person has willfully violated any provision of the securities laws, including the Exchange Act. 15 U.S.C. §78(o)(b)(4)(D). Section 15(b)(6)(A) further allows the Commission to issue an industry bar from association against any person who has been convicted of a felony "involving the purchase or sale of a security" or arising "out of the conduct of the business of a broker, dealer . . . investment adviser . . . ." 15 U.S.C. §78(o)(b)(6)(A)(ii); 15 U.S.C. §78(o)(b)(4)(B)(i) and (ii).

Section 203(f) of the Advisers Act contains similar provisions permitting the Commission to issue an industry bar against anyone who has willfully violated a provision of the Exchange Act or been convicted of a felony involving the purchase or sale of a security or arising out of the business of a broker, dealer, or investment adviser,

and who was associated with or seeking to become associated with an investment adviser. 15 U.S.C. §80(b)(3)(E) and (F).

As a threshold matter, it is well established that a person does not actually have to be associated or seeking to become associated to be subject to the provisions of Exchange Act Section 15(b)(6) and Advisers Act Section 203(f). A person may be acting as an unregistered investment adviser or engaging in broker activity without being registered and still subject to a bar. *In the Matter of George Elia*, AP File No. 3-15260, 2013 WL 2246025 at *1-2 (May 22, 2013) (issuing an industry bar against individual who acted as an unregistered investment adviser); *In the Matter of Jenny E. Coplan*, AP File No. 3-15798, 2014 WL 1713067 at *2 n.3 (May 1, 2014) (issuing industry bar against individual who was acting as an unregistered broker dealer and noting "The fact that Coplan was not associated with a registered broker-dealer during her wrongdoing does not insulate her from a bar") (citing *In the Matter of Vladislav Steven Zubkis*, AP File No. 3-11625, 2005 WL 3299148 (Dec. 2, 2005)).

Thus, there are three elements the Law Judge must determine: (A) whether Theodule meets any of the pre-requisites for bars under Exchange Act Section 15(b)(6) and Advisers Act Section 203(f); (B) whether he was acting as an investment adviser or engaging in broker-dealer activity; and (C) whether it is in the public interest to bar him.

A. Theodule Violated Exchange Act Section 10(b) And Rule 10b-5

As noted above, both Exchange Act Section 15(b)(6) and Advisers Act Section 203(f) authorize the Law Judge to bar Theodule from the securities industry if he willfully violated a provision of the Exchange Act or was convicted of a felony involving the purchase or sale of a security. Here, both prerequisites are present. First, the District Court enjoined Theodule from violating Exchange Act Section 10(b) and Rule 10b-5,

both preliminarily and permanently. Exhibits 6 and 7. The Commission's Emergency Motion (Exhibit 4), sets forth the factual and legal basis for the injunctions, demonstrating Theodule's conduct met all the elements of a willful violation of Section 10(b) and Rule 10b-5; he: made misrepresentations and omissions; that were material; with scienter; in connection with the purchase or sale of a security; using the means or instrumentalities of interstate commerce. Exhibit 4 at 4-8 and 10-13. *See also Christopher Seeley*, 2013 WL 5561106 at *13 (District Court injunction against violations of Section 10(b), among other statutes, gave rise to industry bar sanction).

Furthermore, the Factual Proffer portion of Theodule's Plea Agreement in the criminal action makes clear the criminal conviction was based on the same set of facts as the Commission's civil action. Exhibit 2 at 8-10. The Factual Proffer, which Theodule admitted was true, demonstrates his criminal conviction was based on his misrepresentations and omissions in soliciting investments in the Creative Capital companies and his subsequent misappropriation of investor money. *Id.* Under either provision – injunction or criminal conviction – a sanction against Theodule is appropriate.

B. Theodule Was Engaged In Unregistered Broker-Dealer And Investment Adviser Activity

The next prerequisite for sanctioning Theodule under either Exchange Act Section 15(b)(6) or Advisers Act Section 203(f) is to show he was engaged in activity as a broker-dealer or investment adviser, even though he was not registered. *George Elia*, 2013 WL 2246025 at *1-2; *Jenny E. Coplan*, 2014 WL 1713067 at *2 n.3. Here Theodule has engaged in both types of activity.

Section 3(a)(4)(A) of the Exchange Act generally 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). Section 15(a) of the Exchange Act provides that it is "unlawful for any broker" to "effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless such broker is "registered in accordance with [Section 15(b) of the Exchange Act]." 15 U.S.C. § 78o(a).

The terms "engaged in the business" and "effecting transactions" are not statutorily defined. Instead, to determine if an individual was "engaged in the business" of "effecting securities transactions," courts and the Commission examine a range of factors. These factors include, but are not limited to, whether an individual: solicited investors or promoted securities; received commissions or other transaction-based remuneration; or regularly participated in securities transactions. *See generally In the Matter of Joseph Kemprowski*, AP File No. 3-8569, 1994 WL 684628, at *2 (Dec. 8, 1994); *see also Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934*, File No. S7-12-01, 2001 WL 1590253 at *20 & n.124 (May 11, 2001) (solicitation); *Persons Deemed Not To Be Brokers*, File No. S7-19-84, 1985 WL 634795, at *4 (June 27, 1985) (receipt of transaction-based compensation); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998) (regularity of participation).

Under these factors, Theodule was engaged in the business of effecting securities transactions. The OIP (Exhibit 1), the Commission's Emergency Motion (Exhibit 4), and the Plea Agreement (Exhibit 2) demonstrate: (1) Theodule held himself out in the South Florida Haitian-American community as a financial wizard who, through proven investment strategies, could double investors' money; (2) held meetings with investors in which he claimed he was a highly successful investor in stock options and could use his investment strategies to make investors' profits; (3) solicited investors to invest money

with Creative Capital; (4) participated in forming more than 100 investment clubs; (5) raised at least $23 million and perhaps more than $30 million from investors; (6) controlled clients' investment accounts through the investment clubs; (7) made all the decisions of how to invest investors' money; (8) along with the Creative Capital entities charged a 10 percent up-front commission and a further commission of 40 percent of all trading profits; and (9) misappropriated at least $3.8 million in investor funds for personal use.

This is more than enough to meet the definition of broker conduct under both the statute and judicial interpretation. *SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005) (defendant's "communications with and recruitment of investors for the purchase of securities" constituted broker conduct; in addition payment by commission instead of salary constituted transaction-based compensation); *SEC v. U.S. Pension Trust Corp.*, Case No. 07-cv-22570, 2010 WL 3894082 at *20-21 (S.D. Fla. Sept. 10, 2010) (solicitation of investors violated Section 15(a)(1)); *SEC v. Art Intellect., Inc.*, Case No. 11-cv-357, 2013 WL 840048 at *20 (D. Utah, March 6, 2013) (defendants acted as broker dealers when they solicited investors to purchase investment contracts). Accordingly, the Law Judge may sanction Theodule under Exchange Act Section 15(b)(6) if it is in the public interest.

Section 202(a)(11) of the Advisers Act contains a broad definition of the term "investment adviser," as a person who, for compensation, gives advice about the value of securities or the advisability of investing or effecting transactions in securities. 15 U.S.C. § 80b-2(a)(11); *see also In the Matter of Anthony J. Benincasa,* AP File No. 3-8825, 2001 WL 99813 at *1 (Feb. 7, 2001).

For the reasons listed above, Theodule's activities meet the definition of an

investment adviser. He repeatedly and regularly advised investors to invest their money with Creative Capital so he could purportedly invest it and double their money. Accordingly, an industry bar against Theodule is appropriate under Advisers Act Section 203(f) if it is in the public interest.

C. Industry And Penny Stock Bars Are In The Public Interest

In determining whether an administrative sanction is in the public interest, the Commission considers the factors outlined in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979): (1) the egregiousness of a respondent's actions; (2) the isolated or recurrent nature of the violations; (3) the degree of scienter involved; (4) the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood the respondent's occupation will present opportunities for future violations. *See also In the Matter of KPMG Peat Marwick, LLP,* AP File No. 3-9500, 2001 WL 47245 at *23-26 (Jan. 19, 2001), *aff'd sub nom KPMG v. SEC*, 289 F.3d 109 (D.C. Cir. 2002); *Peak Wealth Opportunities,* 2013 WL 812635 at *9-10; *Christopher Seeley*, 2013 WL 5561106 at *14. No one factor controls. *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996).

Here, at least five of the six factors weigh in favor of industry and penny stock bars. First, Theodule's actions were egregious. He preyed on unsophisticated investors in the Haitian-American community in South Florida, telling them he had a proven investment strategy that could double their money in 30 to 90 days. He claimed to be a successful stock options trader, and to give the appearance of success, he used new investor money to pay earlier investors their purported profits. He pressured one investor to liquidate the equity in her home to invest, and told all investors their money was secure with him. OIP (Exhibit 1); Emergency Motion (Exhibit 4); Plea Agreement (Exhibit 2).

In reality none of the claims were true, and Theodule either quickly lost most of the $30 million he persuaded investors to give him, or misappropriated millions of it for his own use. In short, Theodule ran an egregious scam.

Second, Theodule's actions were recurrent, continuing for the better part of two years, during which time he raised money from hundreds of investors. Third, Theodule's level of scienter was extremely high. He knew he did not have any proven options trading strategy or history of earning anyone money. Yet he told his web of lies, commingled investor funds, stole some, and lost the rest. To perpetuate his scheme, he paid off earlier investors with new investor money in Ponzi scheme fashion.

Fourth, Theodule has not appeared or defended in this case, and so neither here nor in the civil or criminal cases has he given assurances he will avoid future violations of the securities laws. The fifth factor – Theodule's recognition of his wrongful conduct – is the one factor that may not weigh in favor of a bar. Theodule has not appeared in this case, and at first he contested the Commission's civil case. But he eventually consented to an injunction in that case, and pleaded guilty in the criminal case, giving at least some indication he understands his conduct was wrong. Sixth and finally, although Theodule is in prison now, he will eventually get out, and unless he is barred from the securities industry he will have the chance to reoffend.

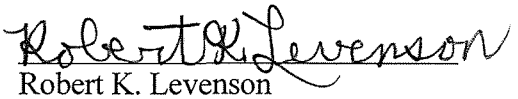
Finally, it is in the public interest to collaterally bar Theodule from all association with the securities industry. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, added collateral bars as sanctions under Exchange Act Section 15(b)(6) and Advisers Act Section 203(f). The Commission has held that Dodd-Frank's collateral bars "are prospective remedies whose purpose is to protect the investing public from future harm," and therefore applying the bars to address

pre-Dodd-Frank conduct is "not impermissibly retroactive." *In the Matter of John W. Lawton*, AP File No. 3-14162, 2012 WL 6208750 at *10 (Dec. 13, 2012). Accordingly, the Law Judge should bar Theodule from the securities industry, even though his conduct occurred in 2007 and 2008, before the enactment of Dodd-Frank.

IV. Conclusion

For all the reasons discussed above, the Division asks the Law Judge to sanction Theodule by issuing a penny stock bar and barring him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or NRSRO.

Respectfully submitted,



Robert K. Levenson
Regional Trial Counsel
Direct Line: (305) 982-6341
levensonr@sec.gov

DIVISION OF ENFORCEMENT
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1800
Miami, FL 33131
Phone: (305) 982-6341
Fax: (305) 536-4154