ADMINISTRATIVE PROCEEDING
FILE NO. 3-15887

RESPONDENT'S RESPONSE TO DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

I- HISTORY

THE SECULITIES AND EXCHANGE COMMISSION INSTITUTED THIS PROCEEDING WITH AN ORDER INSTITUTING PROCEEDINGS (OIP) ON MAY 27, 2014, PURSUANT TO SECTION 15(b) OF THE SECULITIES EXCHANGE ACT OF 1934. RESPONDENT BLAYNE S. DAVIS FILED AN ANSWER TO THE OIP ON JUNE 19, 2014. THE DIVISION OF ENFORCEMENT (DIVISION) FILED A MOTION FOR SUMMARY DISPOSITION ON July 29, 2014. DAVIS RECEIVED SAID MOTION ON AUGUST 15, 2014. DAVIS NOW TIMELY FILES THIS RESPONSE.

II - INTRODUCTION

DAVIS IS CUCRENTLY IN CUSTODY PENDING SENTENCING IN THE CASE UNITED STATES V. DAVIS, 6:14-CR-0043(M.D. FLA). AS SUCH, DAVIS DOES NOT HAVE ACCESS TO LEGAL MATERIALS THAT WOULD NORMALLY AID HIM IN THIS RESPONSE WHILE ALSO PROVIDING AN OPPORTUNITY TO ANALYZE THE PLETHORA OF CASES/PROCEEDINGS THE DIVISION RELIES UPON IN SUPPORT OF THEIR POSITION. IT APPEARS THE VAST MAJORITY OF CITES ARE FOR UNCONTESTED PROCEEDINGS THAT PAVED THE WAY FOR PRESS RELEASES AND THE UNDERSIGNED URGES THE COURT TO EXAMINE THOSE WITH A CRITICAL EYE. NEVERTHELESS, THE DIVISION'S BRIEF IS RIFE WITH INNUENDO, CONCLUSORY STATEMENTS, AND PURPOSELY IGNORES CLITICAL FACTS THAT ARE CRUCIAL TO THIS COURT'S ULTIMATE DETERMINATION. DAVIS WILL CLEARLY SHOW THAT WHEN THE COURT IS PROVIDED THE UNEDITED VERSION OF THE FACTS, THE COMMISSION'S REQUESTS ARE DRACONIAN AND THEIR POSITION IS ASININE.

ARGUMENT

III THE CRIMINAL CASE

IF LEFT UP TO THE DIVISION, THIS ENTIRE PROCEEDING WOULD NOT EXIST. THEIR APPROACH IS INSIDIOUS YET FORMULAIC.

STEP 1 = WAIT IN THE SHADOWS OF A CRIMINAL TRIAL (SEE WHAT HAPPENS)
STEP 2 = IF CONVICTED → WAIT TILL THEY ARE SENTENCED (HARD TO FIGHT)
IF ACQUITTED → MOVE ON
STEP 3 = APPLY FOR FULL ARRAY OF SANCTIONS BECAUSE OF LIKELY DEFAULT OR SUCCESSFULLY PARSE OUT DETAILS THAT GO UNCHALLENGED BY THE RESPONDENT.

GAME OVER. DIVISION WINS AND CAN SEND OUT ANOTHER PRESS RELEASE.

AS A PRELIMINARY MATTER, DAVIS UNDERSTANDS THAT A PREVIOUS CONVICTION IS TO BE CONSIDERED, AS THE DIVISION CITED IN GREGORY BARTKO, EXCHANGE ACT RELEASE NO. 71666. (EMPHASIS ADDED). HOWEVER, CONSIDERATION IS FAR DIFFERENT THAN BLANKET ALLEGIANCE. IN THE SECTION STYLED, "FACTS DETERMINED AGAINST DAVIS", THE DIVISION HAS RATHER ARTFULLY TOGGLED BACK AND FORTH BETWEEN DIFFERENT EXHIBITS IN A DESPERATE ATTEMPT TO PAINT A DRAMATIC YET MISLEADING PICTURE OF DAVIS AND THE CRIMINAL CASE UNDERPINNING THIS PROCEEDING. FOR THE SAME REASONS THE JURY REJECTED THE ALLEGATIONS IN PART, THE COURT SHOULD DECLINE THE DIVISION'S INVITATION TO UNIVERSALLY ADOPT THE GOVERNMENT DRAFTED INDICTMENT AS TRUE. AFTER ALL, THE INDICTMENT IS NOT EVIDENCE OF GUILT. AFTER BEING GIVEN AN ALLEN CHARGE AND MORE THAN THREE DAYS OF DELIBERATIONS, THE JURY RETURNED AN INCONSISTENT, MIXED VERDICT.

THE DIVISION REFERENCES THAT THE INVESTMENT OPPORTUNITIES WERE IN THE FOREIGN EXCHANGE (FOREX) MARKETPLACE. (PAGE 3, LINE 3,4). THE DIVISION HAS NEVER EXERCISED REGULATORY JURISDICTION IN THIS SPACE AND TELLINGLY FAILED TO SHOW HOW THEY SUDDENLY DO NOW.

IN FACT, DURING THE TRIAL EVIDENCE DEFINED BY THE APPEALS COURT AS "INTRINSIC", REFERRING TO THE "CAPITAL BLU" MATTER WAS ADMITTED AGAINST DAVIS. (SEE 11th CIR. OPINION PAGE 3). THIS EVIDENCE IS THE BASIS OF THE CIVIL PENALTIES SUFFERED IN CFTC v. CAPITAL BLU, LLC 6:09cv508 (MD. FLA)

THOSE PENALITES INCLUDE A PERMANENT BAR FROM COMMODOTIES TRADING, AN APPROXIMATE FINE OF 4.9 MILLION DOLLARS, AND RESTITUTION OF APPROX. 2.4 MILLION DOLLARS. SO THE CONDUCT THE DIVISION IS SEEKING TO PUNISH A THIRD TIME, THE FIRST BEING PRISON TIME, THE SECOND BEING THE CFTC SANCTIONS, HAS ALREADY BEEN MORE THAN ADEQUATELY PUNISHED BY THE REGULATORY BODY THAT ACTUALLY HAS JURISDICTION. ON THAT BASIS ALONE, THIS ACTION SHOULD BE DISMISSED. HOWEVER, OUT OF AN ABUNDANCE OF CAUTION, DAVIS CONTINUES HIS ARGUMENT.

IV - Summary Disposition Is Absolutely Not Appropriate

1 - Davis's Conviction Does Not Automatically Entitle the Division To Summary Judgement

THERE STILL EXISTS GENUINE ISSUES THAT ARE UNDER COLLATERAL ATTACK. JUST LAST WEEK THE MAGISTRATE JUDGE OVERSEEING DAVIS'S 2255 PETITION ORDERED THE GOVERNMENT TO RESPOND BY WAY OF A SUPPLEMENTAL BRIEF. IN THAT ORDER, JUDGE KELLY SPECIFICALLY DETAILED THE ISSUES REQUIRING RE-BRIEF. (SEE Respondent Exhibit 1) IF THERE WERE NO ISSUES, CLEARLY THIS WOULD NOT OCCUR. SIMPLY PUT, THE SAME "UNDISPUTED FACTS" THE DIVISION IS RELYING UPON IS STILL VERY MUCH IN QUESTION. WITH THE CONVICTION SUBJECT TO BEING VACATED, THIS POSITION IS A BIT ZEALOUS AND SUBSEQUENTLY UNTIMELY.

2 - Davis Does Not Meet The Criteria For Relief Under Exchange Act Section 15(b)(6)(A)

THE REQUIREMENT THAT, "... AT THE TIME OF THE ALLEGED MISCONDUCT, WHO WAS ASSOCIATED WITH A BROKER OR DEALER...". , THAT PERSON IS SUBJECT TO SUSPENSION OR BAN. DAVIS WAS NOT A BROKER, THE DIVISION HAS FAILED TO IDENTIFY THE BROKER OR DEALER, AND CONCEDES THIS MUCH IN THEIR BRIEF. THE DEFINITION AND SUBSEQUENT APPLICATION OF THE "BROKER" REQUIREMENT IS A STRETCH. IN CONCLUSORY FASHION, THE DIVISION STATES THAT, "DAVIS, RECEIVED COMPENSATION BY MISAPPROPRIATING MONEY TO PAY PERSONAL EXPENSES. THEREFORE, DAVIS WAS A BROKER AND A PERSON ASSOCIATED WITH A BROKER DURING THE TIME OF THE MISCONDUCT." (page 6). THE GLARING DEFECTS IN THIS ARE A WHOLESALE FAILURE TO IDENTIFY THE COMPENSATION, THE MISAPPROPRIATION, AND THE ACCOUNT FOR WHICH TRANSACTIONS WERE EFFECTED. OF COURSE, AS WILL BE SHORTLY EXPLAINED, THIS IS A DISINGENUOUS ATTEMPT AT TELLING THE WHOLE STORY. IF UNCHECKED, A CASHIER AT A LOCAL GROCERY STORE WOULD BE CONSIDERED A BROKER.

IV – THE COMPLETE PICTURE AND MITIGATING FACTORS

IN THE COMMISSION'S WRAP-UP ARGUMENT THEY CITE SEVERAL FACTORS (6) TO BE CONSIDERED WHEN EVALUATING THE APPROPRIATENESS OF SANCTIONS. DAVIS FEELS THAT IT'S VITALLY IMPORTANT TO BRING SOME CONTEXT TO THE PROCEEDINGS.

1– AGE AND PERSONAL CHARACTERISTICS

THE CONDUCT UNDERLYING THIS PROCEEDING DATE BACK TO 2005-2006. AT THAT TIME DAVIS WAS 24 YEARS OLD. DAVIS IS NOW 33 YEARS OLD, MARRIED WITH TWO CHILDREN. DAVIS HAS MATURED, IS RESPONSIBLE, AND DOES NOT PRESENT A "RISK" TO THE PUBLIC. FURTHERMORE, IT WOULD BE INAPPROPRIATE TO BAN DAVIS FROM AN INDUSTRY THAT HE'S NEVER RECEIVED A CUSTOMER COMPLAINT NOR WAS THE SEC EVEN INVOLVED. THE ADD-ON OF "PENNY STOCK BAN" UNDERSCORES HOW OVERREACHING THE DIVISION IS ON THE BRIEF. THERE HAS NEVER BEEN AN ALLEGATION OF PENNY STOCK INVOLVEMENT.

2– THE EXCEPTIONALLY RARE, VIRTUALLY NON-EXISTENT "NO LOSS" FEATURE

NOT SURPRISINGLY THE DIVISION HAS CONVIENTLY FORGOT TO MENTION THAT DAVIS SETTLED IN FULL, (ALL TRADING LOSSES AND ATTORNEY FEES) WITH EACH INVESTOR TWO AND HALF YEARS <u>BEFORE</u> THE CRIMINAL INDICTMENT. IN PASSING, THE DIVISION CLAIMS, "...HE HAS NOT EVEN ACCEPTED RESPONSIBILITY FOR HIS PAST CONDUCT." (PAGE 7). DAVIS FINDS THE POSITION IN TOTAL AWE. HOW, IN A FINANCIAL CASE COULD ONE BETTER ACCEPT RESPONSIBILITY THAN TO PAY EACH AND EVERY INVESTOR OFF <u>PRIOR</u> TO BEING INDICTED? THE SHEER STUPIDITY BEHIND THE COMMENT IS IMMEASURABLE. IT'S OBVIOUS THE DIVISION'S INTERPRETATION OF ACCEPTANCE OF RESPONSIBILITY IS TO ROLLOVER. ALL OF THE SETTLEMENT AGREEMENTS ARE PART OF THE 2255 RECORD AND WOULD BE ATTACHED IF DAVIS WAS NOT IN CUSTODY. OF COURSE, THE DIVISION FORGOT TO MENTION THIS, MUCH LESS MAKE THEM PART OF THE RECORD. THIS "EGREGIOUS SLAM", (PAGE 7) [redacted] THE DIVISION CALLS IT HAS NO LOSS, NO VICTIMS, AND IS A DECADE OLD. ONLY NOW ARE THEY INTERESTED IN SANCTIONS UNDER THE AUSPICE OF "PUBLIC PROTECTION". REALLY?

3 - CFTC SANCTIONS AND CURRENT INDICTMENT

AS EXPLAINED EARLIER, THE CFTC HAS PUNISHED THE SUBJECT CONDUCT BY WAY OF A TRADING BAN, A 4.9 MILLION DOLLAR FINE, AND A PERMANENT INJUNCTION. ALL THE CONDUCT HAS BEEN ACCOUNTED FOR IN A TERM OF IMPRISONMENT AND WITH THE ABOVE. THE DIVISION IS TRYING TO MAKE A RECIDIVISM ARGUMENT WITH COMMENTS LIKE, "... HIS MOST RECENT FRAUD INDICTMENT" (PAGE 8), BUT FAILS PURPOSELY TO ATTACH A TIME REFERENCE. THIS "CAPITAL BLU" INDICTMENT OVERLAPS THE SAME TIME PERIOD AND CONSTITUTES THE SAME CONDUCT PREVIOUSLY PROSECUTED BY THE CFTC, AND NOW IS BEING PROSECUTED BY DOJ. ANOTHER WORDS, THE DIVISION'S LANGUAGE IS MISLEADING AND IMPLIES DAVIS RE-OFFENDED. THAT IS NOT THE CASE. ALL CONDUCT SUBJECT TO PROSECUTION WAS COMPLETE IN 2008. SIX YEARS BEFORE THE CRIMINAL INDICTMENT WAS FILED AND THREE YEARS AFTER THE FIRST CRIMINAL INDICTMENT. IT IS BEST CLASSIFIED AS PIECE-MEAL PROSECUTION THAT TARGETTED THE CONDUCT ~~WERE~~ SEPARATELY IN MULTIPLE PROCEEDINGS INSTEAD OF A HABITUAL OFFENDER. AT THE TIME OF WRITING THIS RESPONSE, DAVIS HAS PLEAD GUILTY TO 1 COUNT OF CONSPIRACY FOR THOSE ACTS DATING BACK TO 2008, 2007, 2006.

4 - DAVIS POSES NO THREAT NOR HAS HE BEEN ACCUSED OF ONGOING FRAUD OR COMPLAINTS IN THE SECURITIES INDUSTRY

ANY FURTHER RESTRICTIONS ON DAVIS'S ABILITY TO PARTICIPATE IN THE CAPITAL MARKETS ARE UNNECESSARY AND UNWARRANTED. DAVIS ACCEPTED RESPONSIBILITY FOR HIS ROLE AS A COMMODITIES TRADING ADVISOR WHILE EMPLOYED AT CAPITAL BLU BACK IN 2008. THE INVESTORS THAT ARE PART OF THE CASE THAT THIS COURT CAN LINK TO THIS PROCEEDING SUFFERED NO LOSSES. THAT IS EXTRAORDINARY. DISPLAY OF ALLEGIANCE OF RESPONSIBILITY WHILE DAVIS HIMSELF SUFFERED DEVASTATING LOSSES. THERE HAS NEVER BEEN A COMPLAINT LODGED WITH THE SEC OR NASD. DAVIS WAS AT ONE TIME A LICENSED SERIES 7 BROKER, (10 YEARS+ AGO). WITH THE NASD/SEC.

VI - Conclusion

As discussed above, the remedy the Commission seeks through the Division is absurd. There must be a sense of fair play and equity, and the manner and means by which the Division is operating is deplorable. Davis has shown the Division lacks jurisdiction in the first place, and even if some tenuous grounds existed for their remedies, they have failed to establish why sanctions are necessary, reasonable and just.

Respondent, Blayne S. Davis asks the Law Judge to deny the Division's request for a penny stock bar and barring him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or NRSRO.

Alternatively, issue a suspension ~~of~~ as authorized by the Exchange Act Section 15(b)(6)(A) if the Court deems appropriate. The permanent quality of what the Division seeks is simply unconscionable.

Respectfully submitted,

Blayne S. Davis, Respondent
Appearing Pro Se

Dated this Day of - August 16, 2014

EXHIBIT 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BLAYNE DAVIS,

Petitioner,

v.

Case No. 6:12-cv-1870-Orl-22GJK
(6:10-cr-190-Orl-22GJK)

UNITED STATES OF AMERICA,

Respondent.

ORDER

Petitioner initiated this action by filing a motion to vacate, set aside, or correct sentence (Doc. No. 1). After filing an amended motion to vacate (Doc. No. 7), the Government filed a response in opposition (Doc. No. 15). Petitioner filed a reply (Doc. No. 16) and an amended reply (Doc. No. 20).

Given the significance of these proceedings, the Court finds that within **THIRTY (30) DAYS** from the date of this Order, the Government shall file a supplemental response to further address Petitioner's claims. Specifically, the Government shall address the merits of the following claims: trial counsel was ineffective for failing to object when the Government failed to turn over all prior statements of witness Giddens in violation of the Jenks Act; trial counsel was ineffective for failing to challenge the loss calculations at sentencing; trial counsel was ineffective for failing to challenge the

EXHIBIT 1

determination that the offense involved ten or more victims; and trial counsel was ineffective for failing to challenge the Court's restitution order. Thereafter, the Court will give Petitioner additional time to file a reply to the supplemental response.

DONE AND ORDERED in Orlando, Florida on August 13, 2014.

GREGORY J. KELLY
UNITED STATES MAGISTRATE JUDGE

Copies to:
OrlP-3 8/13
Counsel of Record
Blayne Davis