UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20407

In the Matter of

Executive Financial Services, Inc.,

Respondent.

DIVISION OF ENFORCEMENT'S MOTION
FOR ENTRY OF DEFAULT JUDGMENT AND SANCTIONS

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COMMISSION'S RULES OF PRACTICE

Pursuant to the August 1, 2022 Order to Show Cause in this matter, Exch. Act Release No. 95401 (Aug. 1, 2022), the Division of Enforcement ("Division") submits this motion for default judgment and sanctions against Respondent Executive Financial Services, Inc. ("EFS" or "Respondent").

I. INTRODUCTION

EFS was a sales agent for the unregistered securities of Wellington Sports Club, LLC, LLC ("Wellington"). EFS also acted as an unregistered broker for the offering. Wellington was one of Six Entities that raised $30 million by selling unregistered securities to more than 600 investors, under the guise of pooling investor funds to make sports bets in Las Vegas casinos. Contrary to Defendants' representations, the Six Entities did little actual sports betting. Instead, the majority of the money raised from investors was misused and misappropriated to fund the lifestyles of the two principals of the Six Entities, to pay commissions, or to make Ponzi payments.

The instant proceeding was commenced on July 21, 2021 based upon the entry of a final judgment against EFS, permanently enjoining it from future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), and Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act"), in the civil action entitled *Securities and Exchange Commission v. Thomas, et al*. Case. No. 2:19-cv-01515-APG-VCF (Dist. Nev.), in the United States District Court for the District of Nevada. *See* Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("OIP") Exch. Act. Rel. 92463 (July 21, 2021).

Pursuant to SEC Rule of Practice 141(a)(2)(iii), the OIP was served on Respondent. EFS did not file an answer, and thus is in default. Accordingly, the Division moves, pursuant to Rules 155(a)(2) and 220(f) of the SEC's Rules of Practice, for a finding that EFS is in default and for the imposition of remedial sanctions. The Division specifically requests that the Commission issue an order barring EFS from being associated 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.

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II. FACTS

A. Respondent

Respondent is a Florida corporation. Declaration of Lynn M. Dean ("Dean Decl."), Ex. 1 OIP at ¶ A.1. Its principal place of business is Weston, Florida. *Id.* It is not registered with the Commission in any capacity. *Id.* Douglas Martin is its sole owner and serves as its president, treasurer, secretary, and director. *Id.* From 2016 until 2018, Respondent acted as an unregistered broker selling unregistered securities of Wellington. *Id.* From 1992 to 2002, Respondent's principal Douglas Martin was a registered representative associated with one or more broker-dealers registered with the Commission. *Id.*

B. Respondent Sold Unregistered Securities

EFS violated Sections 5(a) and 5(c) of the Securities Act by selling unregistered securities. *See* 15 U.S.C. § 77e(a), (c). These provisions prohibit the unregistered offer or sale of securities in interstate commerce, unless an exemption from registration applies. *See SEC v. Eurobond Exch*., 13 F.3d 1334, 1338 (9th Cir. 1994). Section 5 operates as a strict liability statute. *See SEC v. Holschuh*, 694 F.2d 130, 137 n.10 (9th Cir. 1982) ("good faith is not relevant to whether there has been a primary violation of the registration requirements"). A Section 5 violation is established by showing that: (1) a defendant directly or indirectly, offered or sold securities; (2) no registration was in effect or filed with the SEC for those securities; and (3) interstate transportation or communication or the mails were used in connection with the offer and sale. *See* 15 U.S.C. §§ 77e(a), 77e(c); *SEC v. Phan*, 500 F.3d 895, 902 (9th Cir. 2007).

The Wellington offering was not registered with the SEC (Dean Decl. Ex. 3 at pp. 5), and no exemptions to the registration requirements are available. First, the intrastate exemption under Section 3(a)(11) of the Securities Act, the Rule 147 safe harbor, and the Rule 147A exemption are not available because the securities were sold in at least 40 states. Dean Decl. ¶ 5. Second, none of the offerings met the requirements of the private placement exemption under Section 4(a)(2) of the Securities Act because there were over 600 investors nationwide and investors did not have access to the kind of information that registration would reveal, such as financial statements. Russell

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Decl. ¶¶ 9-10; Dean Decl. ¶ 5, Ex. 6 at pp. 7-8 (declining to provide number of investors or current assets).

Third, the securities did not satisfy the safe harbor and exemptions provided by Regulation D. The integrated offerings raised at least $30 million from over 600 investors.[1] Russell Decl. ¶¶ 9-10. Thus, the integrated offerings exceeded the $1 million maximum aggregate offering amount allowable under Rule 504 and the $5 million maximum aggregate offering amount under Rule 505.[2] The Rule 505 exemption and Rule 506(b) safe harbor are not available because investors were not furnished with the information required by Rule 502(b), particularly financial statements including at least an audited balance sheet. In addition, in order to rely on the Rule 506(c) exemption, all of the investors had to be accredited, and the offeror must have taken reasonable steps to verify accreditation. None of the investors were questioned about their income or net worth before they invested. Dean Decl. Exs. 7 (Donald Berger Tr. 102:1-7); 8 (Ostertag Tr. 74:18-75:21); 9 (John Berger Tr. 39:8-40:1); 10 (Martin Tr. 157:20-158:23). Several investors are in fact unaccredited. *Id.*, Exs. 8 (Ostertag Tr. 74:18-75:21); 9 (John Berger 39:8-40:1); 10 (Martin Tr. 157:20-158:23).

EFS, through Martin, solicited potential investors. Martin, a life insurance agent, directed his life insurance clients to invest by phone and email, discussed the investment with them, fielded investor questions, and encouraged potential investors to send funds. Dean Decl. Exs. 10 (Martin Tr. 20:19-20; 57:13-25, 64:8-65:7); 12. More than 25 people from at least two states invested in Wellington through Martin and EFS. *Id.*, Ex. 10 (Martin Tr. 64:8-65:7).

[1] The district court treated the offerings as integrated because they were part of a single plan of financing and for the same general purpose, and all of the offerings contained the same class of securities (investment contracts in the form of the Agreements) and received the same form of consideration (cash). The principals exercised common control over the Six Entities, and commingled the Entities' funds. Russell Decl. Ex. 1.

[2] The Rule 505 exemption was repealed effective May 23, 2017, but was in effect at the time of some of the offers and sales here.

C. Respondent Acted as an Unregistered Broker

EFS, through Martin, acted as a broker for Wellington's securities. Investors were solicited through a network of over 150 brokers and agents. Dean Decl. at ¶ 5; Ex. 11 (Gorovtsova Tr. 77:8-12); Russell Decl. ¶ 9. The Six Entities entered into Sports Investment Broker Agreements ("Broker Agreements") with the brokers. Dean Decl., Exs. 4-5. These Broker Agreements provided that the brokers received a 10% front-end sales commission and a 10% back-end commission based on payouts to their investors. The agreements signed by the brokers and agents state that they are not employees of the Six Entities. *Id.*, Exs. 4-5 at p. 2.

In August 2016, Martin entered into a Broker Agreement with Wellington. *Id.,* Ex. 4. In October 2016, EFS entered into a Broker Agreement with Wellington. *Id.,* Ex. 5. Martin and EFS were among the highest paid brokers, earning commissions of at least $458,000. Russell Decl. ¶ 11. Martin and EFS were not registered brokers, nor were they associated with a registered broker, at the time that they were selling the Wellington offering. *Id.*, Ex. 10 (Martin Tr. 18:20-25). In 2017 and 2018, 80% of Martin's annual income came from commissions from Wellington. *Id.*, Ex. 10 (Martin Tr. 106:11-20).

D. Entry of the Injunction

On November 20, 2020, a final judgment was entered against EFS, permanently enjoining it from future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), and Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act"), in the civil action entitled *Securities and Exchange Commission v. Thomas, et al*. Case. No. 2:19-cv-01515-APG-VCF (Dist. Nev.), in the United States District Court for the District of Nevada. Dean Decl., Ex. 1 (OIP. at B.2).

The Commission's complaint alleged that, from October 2016 until 2018, EFS solicited customers for, and effected the sale of, the securities of Wellington without registering independently as a broker or being affiliated with any registered broker. The complaint also alleged that EFS sold unregistered securities of Wellington and received $458,000 in commissions. *Id.* (OIP. at B.3).

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E. EFS is in Default

The Order Instituting Proceedings ("OIP") in this matter was filed on July 21, 2021. The OIP was served on Respondent by U.S. Postal Express Mail, return receipt requested on July 29, 2021, in accordance with Commission Rule of Practice 141(a)(2). Exch. Act. Rel. No. 95401 (Order to Show Cause).

On August 1, 2022, the Commission issued an Order to Show Cause ordering EFS, by August 15, 2022, to show cause why it should not be deemed to be in default and why this proceeding should not be determined against it due to its failure to file an answer and to otherwise defend this proceeding. *Id.* The Order further directed that if EFS failed to file a response, the Division should file a motion for default judgment and other relief by September 12, 2022. *Id.* EFS did not appear or respond to the OSC. Dean Decl. ¶ 15.

III. ARGUMENT

A. EFS Is In Default and the Allegations of the OIP May Be Deemed To Be True

Because EFS has not responded to the OIP, it is in default. Rule 155(a) of the SEC's Rules of Practice states:

> A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against the party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails: . . .
>
> (2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding . . . .

17 CFR § 201.155(a). Moreover, the OIP itself provides: "If Respondent fails to file the directed answer . . . . the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true. . ." Dean Decl. Ex. 1 (OIP at p. 3).

The Commission has already made findings that EFS was properly served with the OIP, and has failed to answer. *See* Order to Show Cause, Exch Act. Rel. No. 95401 (Aug. 1, 2022) at

p.1. Under Rule 155(a), the allegations of the OIP may thus be deemed to be true and the Commission may determine the proceedings against the party upon consideration of the record, including the OIP. 17 CFR § 201.155(a).

B. Imposition of a Permanent Bar Is Warranted

Based on the record here and in the underlying action, the Division respectfully requests that sanctions be imposed under Section 15(b)(6) of the Exchange Act. That section provides in relevant part:

> With respect to any person who is associated, . . . or, at the time of the alleged misconduct, who was associated . . . with a broker or dealer, . . . the Commission, by order, shall censure, place limitations on the activities or functions of such a person, or suspend for a period not exceeding 12 months, or bar any such person from being associated 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, if the Commission finds, on the record after notice and an opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person – . . .
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> ***
>
> (iii) is enjoined from any action, conduct or practice specified in subparagraph (C) of such paragraph (4)" of Section 15(b).

Thus, Section 15(b)(6) authorizes the Commission to impose an associational bar against a respondent if: (1) at the time of the alleged misconduct, he was acting as or associated with a broker; (2) he is enjoined from any action, conduct or practice specified in Section 15(b)(4)(C); and (3) a bar is in the public interest.

1. At the Time of the Misconduct, Respondent Was Acting as a Broker

As to the first factor, EFS was acting as a broker for Wellington. Section 15(a) of the Exchange Act requires brokers or dealers who "effect any transaction in, or induce or attempt to induce the purchase or sale of, any security" through interstate commerce, to be registered with the Commission or, if the broker or dealer is a natural person, to be associated with a registered broker or dealer that is not a natural person. Scienter is not required in order to prove a violation

of Section 15(a). *See SEC v. Nat'l Exec. Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C., 1980); *see also SEC v. Wilde*, 2012 WL 6621747, at *14 (C.D. Cal. Dec. 17, 2012).

Section 3(a)(4)(A) of the Exchange Act defines the term "broker" to include "any person engaged in the business of effecting transactions in securities for the account of others." A person is engaged in the business of effecting transactions in securities if he or she regularly "participat[es] in securities transactions at key points in the chain of distribution." *Mass. Fin. Servs, Inc. v. Secs. Investor Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976); *SEC v. Small Bus. Capital Corp.*, 2013 WL 4455850, at *14 (N.D. Cal. Aug. 16, 2013). Courts have also considered whether the alleged broker: "1) is an employee of the issuer; 2) received commissions as opposed to a salary; 3) is selling, or previously sold, the securities of other issuers; 4) is involved in negotiations between the issuer and the investor; 5) makes valuations as to the merits of the investment or gives advice; and 6) is an active rather than passive finder of investors." *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003); *Small Bus. Capital*, 2013 WL 4455850, at *14. A representation to investors from whom one is actively soliciting participation that he or she is engaged in the brokerage business is sufficient to trigger the registration requirements under Section 15(a). *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 13 (D.D.C. 1998) (court found no triable issue as to regularity of whether firm's participation where the firm "held itself out as being engaged in the business" in its representations to investors). Firms that purport to execute trades in securities that do not, in fact, trade in those securities, may be charged with Section 15(a) violations. *See SEC v. Deyon*, 977 F. Supp. 510, 518 (D. Me. 1997), *aff'd*, 201 F.3d 428 (1st Cir. 1998) ; *SEC v. Profit Enters., Inc.*, 1992 WL 420904 (D.D.C. Nov. 16, 1992).

Here, EFS acted as an unregistered broker in connection with the Wellington offering. EFS solicited customers for, and effected the sale of, the securities of Wellington without registering independently as a broker. Dean Decl. Ex. 10 (Martin Tr. 18:20-25). EFS was entitled to transaction-based compensation for the securities it sold and did in fact take $458,000 in commissions. Dean Decl. Exs. 4-5; Russell Decl. ¶ 11.

2. The District Court Enjoined EFS From Violating the Securities Laws

The second element under Section 15(b)(6) is also established by the record in the underlying district court action, because Respondent was enjoined from conduct specified in Section 15(b)(4)(C). The acts enumerated under Section 15(b)(4)(D) include willful violations of the Securities Act, the Exchange Act or any rules or regulations under such statutes. Here, the district court permanently enjoined Respondent from violating Sections 5(a) and 5(c) of the Securities Act and Section 15(a) of the Exchange Act. Dean Decl., Ex. 1, OIP at ¶ B.2.; Ex. 2 (Judgment).

C. A Bar Is in the Public Interest

Finally, the record establishes that a bar is in the public interest. In determining whether an administrative sanction is in the public interest, the Commission considers a number of factors, including (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (3) the sincerity of the respondent's assurances against future violations; (4) recognition of wrongful conduct; and (5) the likelihood that the respondent's occupation will present future opportunities for violations. *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 81 (1981); *Lonny S. Bernath*, Initial Dec. Rel. No. 993 at 4, 2016 SEC LEXIS 1222 *10-11 (Apr. 4, 2016) (*Steadman* factors used to determine whether a bar is in the public interest).

As to whether a bar is appropriate in a follow-on proceeding, "[t]he existence of an injunction can, in the first instance, indicate the appropriateness in the public interest of a suspension or bar from participation in the securities industry." *Michael V. Lipkin and Joshua Shainberg*, Init. Dec. Rel. No. 317, 88 SEC Docket 2346, 2006 WL 2422652, at *4 (Aug. 21, 2006), *notice of finality*, 88 S.E.C. Docket 2872, 2006 WL 2668516 (Sept. 15, 2006).

1. Respondent's violations were egregious, intentional and recurrent

The first three *Steadman* factors are met here. Respondent's violations were not an isolated incident. Instead, EFS sold unregistered securities and acted as an unregistered broker over a two

year period and received over $458,000 in commissions. Dean Decl. Ex. 10 ((Martin Tr. 18:20-25; 57:13-25, 64:8-65:7); Russell Decl. ¶ 11. More than 25 people from at least two states invested in Wellington through Martin and EFS. *Id.*, Ex. 10 (Martin Tr. 64:8-65:7). In 2017 and 2018, 80% of Martin's annual income came from commissions from Wellington. *Id.*, Ex. 10 (Martin Tr. 106:11-20). EFS's participation in selling these unregistered securities enabled a scheme that defrauded over 600 investors out of millions of dollars. Russell Decl. ¶ 9. The egregiousness and extent of Respondent's fraud clearly favor a bar under *Steadman*.

2. The remaining Steadman factors also favor a bar

The remaining *Steadman* factors also favor a bar. To begin, Respondent has failed to appear and provide any assurance against future violations or recognition of his wrongful conduct. Dean Decl. ¶ 15. The "absence of recognition by [a respondent] of the wrongful nature of his conduct" favors a permanent bar. *Jonathan D. Havey, CPA*, Initial Dec. Rel. No. 959, 2016 SEC LEXIS 522, at *11 (Feb. 11, 2016) (granting permanent bar on motion for summary disposition in follow-on proceeding to criminal conviction); *Siming Yang*, Initial Dec. Rel. No. 788, 2015 SEC LEXIS 1735, at *10 (May 6, 2015) (noting, as part of grant of summary disposition and imposing of permanent bar in follow on proceeding to civil injunction, that, "[c]onsistent with a vigorous defense of the charges, [respondent] ha[d] not recognized the wrongful nature of his conduct"); *Delsa U. Thomas and The D. Christopher Capital Management Group, LLC*, Initial Dec. Rel. No. 205, 2014 SEC LEXIS 4181, at 24 (Nov. 4, 2014) (imposing permanent bar and revoking adviser's registration on summary disposition following civil fraud injunction, noting that "Respondents do not recognize the wrongful nature of their conduct. Instead, they deny any culpability, insist that none of their conduct was inappropriate, and accuse the Commission and the Commission's witnesses of bias or lying"); *Terrence O'Donnell*, Initial Dec. Rel. No. 334, 2007 SEC LEXIS 2148, at *14 (Sept. 20, 2007) (weighing in favor of bar respondent's "protest" that the securities laws were not sufficiently clear, finding this "evidence that [respondent] still seeks to minimize his misconduct"); *Steadman*, 603 F.2d at 1140.

In addition, the final *Steadman* factor considers "the likelihood that the respondent's occupation will present future opportunities for violations." Although EFS's current activities are not known, the other *Steadman* factors strongly favor the imposition of the bar, which is in the public's interest.

IV. CONCLUSION

For the foregoing reasons, the Division respectfully requests that Respondent be barred from being associated 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.

September 12, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 12, 2022, I caused the foregoing document to be served on the following persons, by electronic mail, facsimile, or by UPS overnight mail as stated:

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