

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20460

In the Matter of

DAVID P. ORTIZ,

Respondent.

**RESPONDENT DAVID P. ORTIZ’S ANSWER AND DEFENSES TO ORDER
INSTITUTING ADMINISTRATIVE PROCEEDINGS**

Pursuant to Rule 220 of the Rules of Practice of the Securities and Exchange Commission (the “Commission” or “SEC”), 17 CFR § 201.220, Respondent David P. Ortiz (“Respondent” or “Mr. Ortiz”), by an through his undersigned attorneys, hereby respectfully submits his answer and defenses to the Commission’s *Order Instituting Administrative Proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, and Notice of Hearing*, initiated on or about August 13, 2020 (the “OIP”), as follows:

I.

PRELIMINARY STATEMENT

Pursuant to a stipulated settlement with the Commission in *Securities and Exchange Commission, Plaintiff, v. David P. Ortiz, Defendant*, United States District Court, Southern District of Florida Case No. 21-cv-60590-ALTMAN/HUNT (the “Underlying Action”), Mr.

Ortiz accepted responsibility for violating Sections 5(a) and 5(c) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. §§ 77e(a) and 77e(c)] and Section 15(a)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78o(a)(1)] in connection with his sales of 1 Global Capital 9-month notes to certain of his advisory clients through an established wholesaler, American Alternative Investments LLC (“AAI”). At every step of the way, Mr. Ortiz fully cooperated with Staff, including making full and complete disclosures and productions of all applicable emails and related documents regarding his sales of 1 Global Capital notes.

As requested by Staff, Mr. Ortiz agreed in settlement with the Commission to an injunction against future violations of Section 5 of the Securities Act of 1933 (selling unregistered securities), and Section 15(a)(1) of the Securities Exchange Act of 1934 (acting as an unregistered broker or dealer), agreed to pay disgorgement of the entire amount of commissions he obtained for his sales of the 1 Global Capital 9-month notes (*i.e.*, \$149,986), plus prejudgment interest of \$16,216; and agreed to pay a civil penalty of \$30,000. Mr. Ortiz agreed to a Stipulated Judgment in favor of the Commission reflecting these settlement terms. The sole issue in this Administrative Proceeding is whether it is appropriate, just and equitable for the Administrative Law Judge to issue an order barring Mr. Ortiz from the securities industry for life. Such an industry bar would end Mr. Ortiz’s livelihood and that of his 8 employees, while leaving his clients – many members of under-represented minority communities – without their chosen investment adviser.

There is no evidence that Mr. Ortiz acted with scienter and the SEC never alleged in the Underlying Action that Mr. Ortiz committed fraud. To the contrary, the evidence is that he acted in good faith by conducting due diligence and relying on a legal opinion letter and other oral and written representations by the issuer's outside securities counsel, as well as his own independent research, in concluding that the short-term notes were not securities. Nor could his conduct in any way be considered "egregious." An industry bar would represent a draconian penalty

untethered to the actual facts of the case and unsupported by applicable law. Such a bar order would contravene, rather than support, the public interest factors under *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981) (“*Steadman*”).

II.

SPECIFIC RESPONSES TO THE ALLEGATIONS OF THE COMMISSION’S OIP

A. RESPONDENT

1. Ortiz, 59, resides in Whittier, California. Since August 2016, Ortiz has been associated with David Ortiz Advisors, Inc., a California company registered as an investment adviser with the State of California. Ortiz holds a Series 6 securities license and previously held a Series 63 license. From no later than July 2017 through July 2018, Ortiz acted as an unregistered broker or dealer by selling the securities of 1 Global Capital LLC, without being registered as a broker-dealer or associated with a registered broker-dealer.

RESPONDENT’S ANSWER:

Respondent admits the allegations in Paragraph 1 of the Commission’s OIP.

B. ENTRY OF THE INJUNCTION

2. On August 9, 2021, a final judgment was entered by consent against Ortiz, permanently enjoining him from future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 (“Securities Act”) and Section 15(a)(1) of the Exchange Act, in the civil action entitled Securities and Exchange Commission v. David Ortiz, No. 21-cv-60590 (S.D. Fla.)

RESPONDENT’S ANSWER:

Respondent admits the allegations in Paragraph 2 of the Commission’s OIP, but notes that he consented to the injunction requested by the Commission without admitting or denying the allegations in the Commission’s Complaint in the Underlying Action.

3. The Commission’s complaint alleged that, from no later than July 2017 until July 2018, Ortiz offered and sold the securities of 1 Global, a merchant cash advance company based in Hallandale Beach, Florida, in unregistered transactions. The complaint alleged Ortiz offered and sold 1 Global’s securities to his advisory clients and other individuals via various means, including emails, telephone calls, and in-person meetings, while not registered as a broker-dealer or associated with a registered broker-dealer.

RESPONDENT'S ANSWER:

Respondent admits the allegations in Paragraph 3 of the Commission's OIP, subject to the qualification that Mr. Ortiz never solicited new investors to pitch 1 Global Capital's 9-month notes; he did not advertise the notes, make "cold calls," hold seminars, or otherwise actively market them. Rather, he included them in the recommended portfolio for certain existing clients, based on the representations of 1 Global Capital, AAI, and 1 Global Capital's attorneys..

4. The complaint further alleged that Ortiz told potential 1 Global investors that the Company had averaged 15 percent annual returns and was a less risky alternative to the stock market. It also alleged that he falsely told investors their money was secured by 1 Global's MCA loans, and personally vouched for 1 Global's business model. The complaint alleged that Ortiz ignored red flags that should have alerted him that 1 Global's representations to sales agents and shareholders were not true. For his sales efforts, Ortiz earned more than \$149,000 in transaction-based compensation from 1 Global.

RESPONDENT'S ANSWER:

Respondent denies he "personally vouched for 1 Global Capital's business model." He recommended the product believing, reasonably, that it was an exempt 9-month promissory note. Mr. Ortiz denies that he "ignored red flags that should have alerted him that 1 Global's representations to sales agents and shareholders were not true." He did comprehensive due diligence, and relied reasonably on the representations of 1 Global Capital's outside securities counsel that the 1 Global Capital 9-month notes were not securities. Mr. Ortiz admits that told a single client that the 1 Global Capital notes were earning a 15% annualized rate of return (as reported by 1 Global Capital at that particular time); that he described the notes to some clients as "investments" instead of "loans," contrary to AAI's advisements; that he told some clients that the notes were unsecured, rather than being collateralized by accounts receivable, as indicated in a least one 1 Global Capital document; and that he failed to note from the 1 Global Capital form contracts that the 9-month notes were subject to automatic renewal at the end of the 9-month term. Respondent admits he earned more than \$149,000 in transaction-based compensation from 1 Global, which he has agreed to disgorge.

Mr. Ortiz respectfully asserts that none of these allegations rises to the level of recklessness or willful blindness that would support a finding of scienter against Mr. Ortiz. At most, this evidence suggests lack of attention not amounting to gross negligence, much less recklessness. And none of these discrepancies and alleged failures constituted "red flags" that individually or collectively did or should have put Mr. Ortiz on notice that the 9-month notes in fact were unregistered securities.

Mr. Ortiz – who has worked in financial planning for over 30 years, and has been a California-registered Investment Advisor since September 2016 – has no disciplinary history before any securities regulatory agency or otherwise; nor does he have any criminal history whatsoever. His record, until now, is 100% clean. His sales of the 1 Global Capital 9-month notes were an isolated instance, not part of a pattern of misbehavior.

His advisory business is his family's sole source of income, as it is for his eight employees (who also have no prior disciplinary or criminal records). Unlike the typical Section 15 case involving offerings later found to have been fraudulent, Mr. Ortiz was not affiliated with 1 Global Capital or a sales agent of the company. Rather, he learned about 1 Global Capital through AAI, an independent third party which at that time was an established wholesaler of investment and insurance products which had connected him with other products over the years without incident.

Upon being made aware of 1 Global Capital's 9-month note products by AAI, Mr. Ortiz conducted extensive due diligence, including the following:

- Attending several live (*i.e.*, in person) and online seminars provided by AAI regarding the 1 Global Capital 9-month notes;
- Interviewing by telephone and in person several of the principals at 1 Global Capital, including but not limited to Scott Merkelson (Senior Vice President of 1 Global Capital) and Dale Ledbetter (outside general counsel and securities law expert at the prestigious law firm of Kopelowitz Ostrow Ferguson Weiselberg Gilbert ["Kopelowitz Ostrow"]);

- Reviewing the formal legal opinion letter prepared by Jan Atlas, Esq., of the Kopelowitz Ostrow firm, opining and representing that the 1 Global Capital 9-month notes not securities;
- Confirming in person with Mr. Atlas's partner, Dale Ledbetter, that the 1 Global Capital notes were not securities and the agents or other sellers of them (like Mr. Ortiz) did not need to have a securities license as a registered representative or broker-dealer to offer and sell the notes;
- Requesting and reviewing AAI's "Due Diligence Review" regarding 1 Global Capital and its 9-month note products;
- Conducting extensive online research regarding 1 Global Capital's outside accounting firm, Daszcal Bolton LLP, and whether there was any adverse regulatory, criminal, or litigation history for 1 Global Capital or its principals, legal counsel, or external accountants; and
- Conducting independent research on the SEC's advisory materials and other publicly-available information regarding the non-securities status for certain types of 9-month notes.

Based on AAI's and 1 Global Capital's representations, as well as the representations and opinion letters by 1 Global Capital's outside general counsel and securities experts, and his own due diligence, Mr. Ortiz reasonably concluded that Global Capital's 9-month notes were not securities, and represented an appropriate part of the product mix which he could recommend to certain existing clients.

1 Global Capital, both directly and through AAI, made misrepresentations to Mr. Ortiz on which he reasonably relied, including but not limited to numerous asseverations that the 1 Global Capital notes were not securities and did not need to be registered, and that he did not need to be a registered representative or affiliated with a broker-dealer in order to sell them. Like many investors, including—to his dismay and embarrassment—several of his own longtime clients, Mr. Ortiz was victimized by the 1 Global fraud investigated by the SEC.

Moreover, Mr. Ortiz has undertaken significant steps to mitigate this situation from ever arising again, including but not limited to implementing more stringent compliance and due diligence policies and procedures supervised by reputable third party compliance and due diligence firms: RIACF (<https://riacompliancefirm.com>) and Fact Right

(<https://www.factright.com>). He commenced those corrective actions following notice of the 1 Global Capital bankruptcy proceedings, before the Staff contacted him about its investigation of his 1 Global Capital note sales.

In summation, an industry bar against Mr. Ortiz would be highly unfair under the circumstances, ending his career and ruining his family business and the livelihood of his 8 employees despite the absence of any allegations of fraud or scienter-based violations of the securities laws. It also would be legally indefensible under the securities laws and SEC precedent.

III.

RESPONDENT'S DEFENSES TO THE COMMISSION'S OIP

Further answering the OIP, Respondent asserts the following defenses, without assuming the burden of proof when such burden would otherwise be on the Commission:

1. The OIP fails to state a claim upon which relief may be granted.
2. The OIP fails to allege adequately any basis upon which the relief sought by the Commission could be granted.
3. Respondent acted at all times in good faith and lacked the requisite state of mind to commit any violation of law, rule or regulation as alleged.
4. Any misrepresentations or omissions which form the basis for the claims asserted by the Commission (if they were made at all) were inadvertent or not material.
5. An industry bar is not supported by the *Steadman* factors.
6. The OIP and the remedial action sought are neither necessary nor appropriate, and they are not in the public interest.
7. Respondent reasonably and in good faith relied upon others (including but not limited to 1 Global Capital's outside counsel) to determine the propriety of his actions and

omissions, including his reasonable belief that the 1 Global Capital notes were not unregistered securities.

8. Respondent alleges such other affirmative defenses as may be determined to be applicable during discovery

DATED: September 19, 2021

Respectfully submitted,

MARK ANCHOR ALBERT & ASSOCIATES

By:



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CERTIFICATE OF SERVICE

Pursuant to Rule 150 of the Commission's Rules of Practice, I, the undersigned counsel for Respondent David P. Ortiz, hereby certify that on September 20, 2021, the foregoing document -- **RESPONDENT DAVID P. ORTIZ'S ANSWER AND DEFENSES TO ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS** -- was filed using the Commission's FAP system and that a true and correct copy of that filing has been served via email on this 20th day of September 2021, on the following persons entitled to notice:

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