



1(213) 683-6181
nicolasmorgan@paulhastings.com

January 19, 2024

Ms. Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Thomas J. Powell Application To Vacate Bar or For Consent to Associate/Participate
(Admin. Proceeding File No. 3-20597)

Dear Secretary Countryman:

On behalf of our client, Thomas J. Powell, we respectfully submit this application pursuant to Rule 154 of the SEC Rules of Practice, 17 C.F.R. § 201.154, to vacate certain bars imposed upon him as part of a settled action reflected in a September 24, 2021 Order Instituting Administrative and Cease and Desist Proceedings. *See In the Matter of Resolute Capital Partners, Ltd, LLC, et al.*, AP File No. 3-20597 (Sept. 24, 2021) (the "Settled OIP"). In the alternative¹, Mr. Powell applies pursuant to SEC Rule of Practice 193, 17 C.F.R. § 201.193, for consent to associate with Resolute Capital Advisors, LLC ("RCA"), a Delaware limited liability company formerly registered with the SEC as an investment adviser that currently has no employees or operations.² Mr. Powell further applies in the alternative for consent to participate in offerings of penny stock.³

1. Introduction and Background.

As set forth in the Settled OIP, on September 24, 2021, Mr. Powell agreed to undertake certain actions, cease and desist from certain conduct, pay a civil penalty, and – the focus of this motion – he agreed to certain bars "with the right to apply for reentry after two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission." Mr. Powell, having fully complied with all

¹ Prior to granting an application to vacate a bar, the Commission does not require an applicant to initially seek "incremental grants of relief" such as consent to associate with an adviser or consent to participate in a penny stock offering. *In the Matter of Ciro Cozzolino, SEC Admin. Proceeding File No. 3-4403 (Dec. 9, 2003)* (vacating bar order over Enforcement Division's opposition and remarking that the "Division's position appears unduly restrictive . . . if Cozzolino cannot obtain new employment, he will not be in a position to establish the 'track record' of association . . .")

² Because of the significant overlap in factors considered by the Commission in connection with applications to vacate a bar and applications for consent to associate under SEC Rule 193, we will address both sets of factors for the Commission's consideration below. Rule 193(d) sets out eight factors which pertain to the circumstances of potential re-association with a registered entity: (1) the time period since the imposition of the bar; (2) any restitution or similar action taken by the applicant to recompense any person injured by the misconduct that resulted in the bar; (3) the applicant's compliance with the order imposing the bar; (4) the applicant's employment during the period subsequent to the imposition of the bar; (5) the capacity or position in which the applicant proposes to be associated; (6) the manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant; (7) any relevant courses, seminars, examinations or other actions completed by the applicant subsequent to imposition of the bar to prepare for his or her return to the securities business; and (8) any other information material to the application.

³ The Commission requires similar but more limited information in connection with requests to consent to participate in penny stock offerings. *In the Matter of Roger M. Taft*, Admin Proc. File No. 3-10557 (Aug. 13, 2001).

Ms. Vanessa A. Countryman, Secretary
January 19, 2024
Page 2

of his agreed-upon obligations as set forth in the Settled OIP, makes this application more than two years after the Settled OIP.

Pursuant to the Settled OIP, respondent Resolute Capital Partners LTD, LLC ("RCP") and Mr. Powell undertook to engage an Independent Compliance Consultant ("ICC"). Attached as Exhibit A hereto is the ICC's most recent certificate of compliance, which Mr. Powell submits in support of this motion ("ICC Report"). Mr. Powell further submits his own sworn affidavit, which is attached hereto as Exhibit B ("Powell Affidavit"). As set forth in the ICC Report and Powell Affidavit, Mr. Powell has complied with the terms of the Settled OIP. But Mr. Powell has gone further than mere compliance; Mr. Powell has voluntarily taken additional steps not required by the Settled OIP described in greater detail below in recognition of the importance of investor protection.

Mr. Powell has fully complied with the Settled OIP's requirements, including that he be barred from certain activity (the "Bars"). Specifically, Mr. Powell has refrained from engaging in any of the activities or associations prohibited by the Settled OIP, which required that Mr. Powell be:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

The Commission has long recognized that, as a general rule, it should not impose a limitation or restriction upon the business activities of a securities professional unless such a limitation or restriction is necessary to protect the investing public from further risk of harm.⁴ In cases involving vacating administrative bars, such as *Van Dusen*, the Commission has explained they "have been cognizant of the importance of exercising the discretionary power reposed in us in this area in a manner that will afford investors protection without visiting upon the wrongdoers adverse consequences not required in achieving the statutory objectives."⁵ The Commission has also consistently stated it will act in response to those situations in which, "under all the facts and circumstances, the equitable need for relief, consistent with the public interest and investor protection, warrants vacating or modifying a Commission bar order."⁶ In cases such as *In the Matter of Robert Hardee Quarles* (SEC Admin. Proceeding File No. 3-14486 (Mar. 7, 2012)), the Commission has identified the following as factors it considers when assessing whether to vacate an administrative bar:

⁴ See *In the Matter of Paul Edward Van Dusen*, 47 SEC 668 (1981) and *Cozzolino*, *supra*.

⁵ *Van Dusen*, 47 SEC 668, 671 (citing *Commonwealth Securities Corporation*, 44 SEC 100, 101-102 (1969)).

⁶ *Cozzolino*, *supra*. See also *In the Matter of Edward I. Frankel*, SEC Admin. Proceeding File No. 3-2783 (Dec. 29, 2003) and *In the Matter of Stephen S. Wien*, SEC Admin. Proceeding File No. 3-6102 (Dec. 29, 2003).

Ms. Vanessa A. Countryman, Secretary
January 19, 2024
Page 3

- (1) the nature of the misconduct at issue in the underlying matter;
- (2) the time that has passed since the issuance of the bar;
- (3) the compliance record of, and any regulatory interest in, the applicant since issuance of the bar;
- (4) the age and securities experience of the applicant, and the extent to which the Commission has granted prior relief from the bar;
- (5) whether the applicant has identified verifiable, unanticipated consequences of the bar; and
- (6) whether there exists any other circumstance that would cause the requested relief to be inconsistent with the public interest or the protection of investors.

As discussed in further detail below, the Commission should grant Mr. Powell's application to vacate the Bars as his circumstances compare favorably with those situations in which the Commission has determined to vacate administrative bars, and granting Mr. Powell's application would be in the public interest.

2. The Nature of the Settled OIP's Findings Supports Vacating the Bars.

Without minimizing the importance of the findings in the Settled OIP, it is notable for purposes of this application that the Bars in the Settled OIP are based on non-fraud violations of Section 5 and negligence-based violations of Sections 17(a)(2) and (3) of the Securities Act of 1933. Further, the Settled OIP specifically did not require Mr. Powell to pay any disgorgement, and the Commission's findings did not include any suggestion of self-dealing or ill-gotten gains by Mr. Powell or damages suffered by any investors as a result of Mr. Powell's conduct.⁷

The Commission has previously vacated bar orders for individuals found to have engaged in conduct far more egregious than any findings against Mr. Powell in the Settled OIP. For example, in *Cozzolino*, the applicant's bar was vacated notwithstanding the finding that he willfully "aided and abetted a stock manipulation by participating in a scheme to withhold shares from public sale, to place the shares in nominee accounts from which they were sold in the aftermarket at manipulated prices, and to later sell the withheld shares at inflated prices, accompanied by fraudulent misrepresentations; and aid[ed] and abet[ted] recordkeeping violations by causing false entries to be made in his employing broker-dealer firm's books and records."⁸ However, because *Cozzolino* (like Mr. Powell, as discussed further below) had no further compliance infractions subsequent to the misconduct at issue, the Commission vacated his bar notwithstanding the seriousness of his misconduct. Similarly, in *Quarles*, the SEC granted the petition to vacate a supervisory and proprietary bar, even though *Quarles* had been found to have "recklessly represented to his customers that they would be lending money to an individual having cash flow problems" causing his customers to suffer losses of around \$490,000.⁹

⁷ As part of the Settled OIP, Mr. Powell agreed to pay a \$75,000 civil penalty, which he timely paid.

⁸ *Cozzolino*, *supra*. The Order found that *Cozzolino* willfully aided and abetted violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. *Cozzolino*, p.5, footnote 3. The Commission alleged no such scienter-based violations against Mr. Powell.

⁹ *In the Matter of Bobby Bruce, Cletus Marion Hodge, John Kilpatrick, Carlos Arturo Smith, Jr., Robert Hardee Quarles, and William Edward Shelton, IV*, SEC Admin. Proceeding File No. 3-6310 (Dec. 20, 1984) at p.39-43, 69; *Quarles* at p.4.

Ms. Vanessa A. Countryman, Secretary
January 19, 2024
Page 4

The nature of the Settled OIP's findings weighs in favor of Mr. Powell's application to vacate the Bars.

3. Many Years of Unblemished Conduct in the Securities Industry Weigh in Favor of Vacating the Bars.

The conduct described in the Settled OIP occurred during the relevant period from July 2016 to October 2019, a period from 4 to 7 years ago. Other than the specific violations set forth in the Settled OIP, the Commission has not suggested or alleged that Mr. Powell committed any other violations or was subject to any other disciplinary action at any time. The Settled OIP made no other findings of any violations or disciplinary issues before, during, or after the 2016 to 2019 time-frame. Further, the Settled OIP permitted Mr. Powell to file for reinstatement after two years from September of 2021. As seen in cases like *Quarles*, the SEC has held that the age of a violation, with subsequent good conduct, can be an important indication that there is no current risk of harm to the investing public and can weigh in favor of relief.¹⁰

To be sure, there are instances of the Commission vacating orders after many more years had transpired than have transpired here. However, the Commission has made clear that the mere passage of time since the date the Commission issued its order, even if "lengthy, does not, standing alone, weigh significantly in favor of relief."¹¹ Rather, the Commission's analysis of the passage of time turns on whether the bar serves any public interest and furthers the Commission's investor protection mandate. Here, the Bars no longer serve any public interest and do not further the Commission's investor protection mandate; vacating the Bars is consistent with the public interest and investor protection.

Mr. Powell's exemplary conduct, beginning even before the Commission issued the Settled OIP, makes the point. Mr. Powell has not committed any securities law violations following the Settled OIP, and in fact has spent much of his time assisting in the wind-up of oil and gas investments and furthering his education. Mr. Powell has undertaken these activities in recognition of the importance of the Commission's investor protection objectives.

With regard to his efforts to increase his understanding of legal requirements relating to investments and investing, in May 2022 he completed a Master of Science in Law degree at Northwestern University Pritzker School of Law, graduating with honors. His coursework included relevant ethics, contracts, corporate law, arbitration, and more. He is currently pursuing a Doctorate of Law and Policy at Northeastern University with an expected completion date of July 2024. So far in this program, he has completed doctoral coursework in research methods, policy analysis, law and legal reasoning, ethics, quantitative methods, and other pertinent subjects. In addition to his efforts in pursuit of advanced degrees, Mr. Powell has obtained a number of executive education certificates to expand his appreciation of issues relating to investments and investor protection. For example, in April 2022, he earned certificates in Contract Drafting and Corporate Finance from IE University in Madrid. He also completed certificates in Private Equity from Columbia Business School in November 2020 and Artificial Intelligence and Business Strategy from the MIT Sloan School of Management in September 2020.

¹⁰ See *Quarles; Wien; In the Matter of John W. Bendall, Jr.*, SEC Admin. Proceeding File No. 3-1660 (Feb. 24, 1997); *In the Matter of Bruce William Zimmerman*, SEC Admin. Proceeding File No. 3-4498 (Sept. 25, 1995).

¹¹ See *Cozzolino, supra*.

Ms. Vanessa A. Countryman, Secretary
January 19, 2024
Page 5

In short, Mr. Powell has made a concerted effort to continue his legal, policy, ethics, finance, and technology education since 2017 through rigorous coursework and certifications from highly respected academic institutions. His educational and training efforts will greatly enhance his ability to further his and the Commission's interest in investor protection.

The same is true for Mr. Powell's efforts to support investor recovery efforts relating to RCP and PetroRock Mineral Holdings, LLC and other entities referred to in the Settled OIP (collectively, "PetroRock") that were operated and managed by a co-respondent and others.¹² Upon learning about potential bad acts by PetroRock control persons, Mr. Powell took a series of corrective actions attempting to maintain and recover value for investors. Under his direction and at his own expense, he paid to provide tax returns to investors; hire lawyers, accountants, and other oil and gas operators and industry professionals; audit PetroRock and affiliated entity transactions; and put PetroRock into a court-appointed receivership in the State of Texas. In short, Mr. Powell commenced the PetroRock wind-up action and paid many expenses during the early stages of the proceedings without reimbursement, all of which inured to the benefit of creditors and PetroRock investors.

Mr. Powell's compliance record, the absence of any regulatory interest in Mr. Powell, and Mr. Powell's voluntary efforts to remedy past harms and to ensure no future violations all weigh in favor of granting Mr. Powell's application to vacate the Bars.

4. The Bars Have Caused Unanticipated Adverse Consequences.

In addition to the intended consequences, the Bars have resulted in many unintended consequences for Mr. Powell.

Those unintended consequences are numerous and ongoing, but include, for example, termination of significant real estate related transactions. One such investment failed to go forward following a regulatory revocation of approval for an international company that had secured commitments exceeding \$200 million for investment in real estate ventures. The ensuing dissolution of the business incurred a direct financial loss of over \$2.5 million in capital from the holding company owned by a trust for which Mr. Powell is the beneficiary and investment trustee. The Bars also led to the cessation of involvement in a lucrative development project in downtown Atlanta, including a 70-acre parcel sold to Microsoft, which would have yielded a significant profit.

Further, the Bars have also had adverse consequences on Mr. Powell's ability to conduct routine financial transactions. The Bars resulted in the termination in whole or in part of longstanding relationships with financial institutions including the closure of brokerage and bank accounts and credit card accounts. Specifically, without any prior notice, one multinational financial services company summarily terminated or closed multiple credit cards used for business and personal expenses and travel, causing serious hardship and disruption. Among other things, these terminations caused the loss of over two million points accumulated in associated accounts. It should be noted that the financial services company apparently terminated these accounts solely because of the Settled OIP – Mr. Powell had an excellent credit history reflected in an 830+ FICO score. Two other financial services companies – again without prior notice -- closed Mr. Powell's brokerage accounts, one of which was his retirement account that also served as the designated account for an employer-sponsored 401(k). In addition to disrupting

¹² Importantly, the Settled OIP does not find that Mr. Powell controlled or operated PetroRock.

Ms. Vanessa A. Countryman, Secretary
January 19, 2024
Page 6

retirement planning investments, the abrupt account closures also resulted in liquidation of all positions irrespective of investment strategy or current market conditions. Mr. Powell simply received a check for the account balance.

Finally, another unanticipated adverse consequence of the Settled OIP is the attempt by private litigants to misuse the order. The Settled OIP makes clear on its face that its “findings herein are made pursuant to Respondents’ Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.” Settled OIP fn 1. Courts have made clear that consensual settlements like the one Mr. Powell and the Commission agreed to should not have any evidentiary value in other proceedings to which the Commission is not a party. *Lipsky v. Commonwealth United*, 551 F.2d 887, 893-94 (2d Cir. 1976) (granting motion to strike allegations from private party’s complaint derived from a separate SEC action and consent judgment, observing that a consent settlement does not result from “true adjudications of the underlying issues” and cannot “be used as evidence in subsequent litigation between [the settling party] and another party”).

Despite the explicit limitations of the Settled OIP, several private plaintiffs have attempted to use the Settled OIP as “evidence” of wrongdoing. In October 2022, a number of investors filed a purported class action complaint attaching the Settled OIP as “Exhibit A” and quoting liberally from the Settled OIP throughout the complaint. *Cruz, et al. v. Resolute Capital Partners Ltd LLC, et al*, 22-cv-02349-E (N.D. Tex. Oct. 19, 2022). While Mr. Powell is among the more than two dozen named defendants, earlier this year, the court stayed the action and compelled arbitration. To date, plaintiffs have not pursued claims in arbitration against Mr. Powell. While Mr. Powell would vigorously defend himself against any claims of private liability asserted in the complaint, the bottom line is that the plaintiffs used the Settled OIP as the basis for including Mr. Powell in a public federal court complaint that is now stayed indefinitely.

The adverse, unanticipated, and ongoing consequences suffered by Mr. Powell as a result of the Settled OIP weigh in favor of vacating the order.

5. If the Commission Permits Mr. Powell to Associate with RCA and Participate in Penny Stock Offerings, No Future Violations Will Occur.

In the first instance, Mr. Powell requests that the Commission vacate the Bars in their entirety for the reasons stated above. In the alternative, if the Commission is not inclined to vacate the bars, Mr. Powell requests pursuant to SEC Rule 193 the Commission’s consent to associate with RCA, which, as mentioned above, was formerly registered with the SEC as an investment adviser that currently has no employees or operations. Mr. Powell further requests that he be permitted to participate in penny stock offerings.

In addition to the compelling reasons supporting Mr. Powell’s application to vacate the Bars, Mr. Powell further satisfies the additional factors set forth in SEC Rule 193. Specifically, Mr. Powell is experienced and capable of compliantly associating with RCA, and any Mr. Powell’s association with RCA would continue to be overseen by the ICC. ICC’s oversight will continue through the end of its three year engagement until September 2024. But even beyond that period, Mr. Powell will remain responsible for diligently complying with all regulatory obligations, including any obligations to disclose the Settled OIP in future professional engagements. This disclosure is not merely a formality; it is a profound obligation that may include disclosure to prospective investors, employers, licensing authorities, and regulatory

Ms. Vanessa A. Countryman, Secretary
January 19, 2024
Page 7

bodies, and Mr. Powell regards such disclosure obligations as consistent with his commitment to transparency and ethical conduct in all his professional dealings.

Regarding participating in penny stock offerings, Mr. Powell has a long history and experience investing in early-stage companies that sometimes fall within the definition of a "penny stock." The Settled OIP did not involve penny stocks and did not allude to any misconduct relating to any penny stocks. Indeed, Mr. Powell record regarding penny stocks is and remains unblemished. Mr. Powell has complied with the Settled OIP's requirement that he refrain from participating in any offering of a penny stock. Mr. Powell is not proposing involvement in a specific penny stock offering largely because the Bars have made even exploration of such opportunities impossible. But in light of the nature of the findings in the Settled OIP, the absence of any penny stock-related misconduct by Mr. Powell, Mr. Powell's compliance with the Settled OIP's restrictions on penny stock offering participation, and Mr. Powell's history and experience with penny stocks, Mr. Powell respectfully requests that he be permitted to participating in any offering of penny stocks.

6. Conclusion.

Mr. Powell respectfully submits that each of the factors set out by the SEC in determining a timely application for vacating of an administrative bar has been amply met. He has fully complied with the Settled OIP; several years have elapsed since the conduct described in the Settled OIP, and more than two years have elapsed since entry of the Settled OIP. During this time, Mr. Powell's record is unblemished by any disciplinary or other similar allegations other than the Settled OIP, and he has taken steps to ensure no violations will occur in the future.

We hope that then-Commissioner Michael Piowar was not correct about the process following entry of a bar when he said in a dissenting opinion, "Based on my experience as Commissioner, the reinstatement process, even if successful, can take years to complete after the requisite time period has expired. Moreover, since there is no assurance that a petition for reinstatement will be granted by the Commission, the right to apply for reinstatement can be illusory."¹³

Accordingly, Mr. Powell respectfully requests that the Commission approve his application to vacate the Bars, or, in the alternative, to consent to his associating with RCA and participating in penny stock offerings as described above.

Respectfully submitted,



Nicolas Morgan
Paul Hastings

NM

¹³ *In the Matter of John J. Aesoph, CPA and Darren M. Bennett, CPA*, No. 3-15168 (Aug. 5, 2016), at Dissent p. 2.