UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

Admin Proc. File No. 3-20597

IN THE MATTER OF

THOMAS J. POWELL

RESPONSE OF THOMAS J. POWELL TO ENFORCEMENT DIVISION MOTION TO STRIKE

I. INTRODUCTION

Respondent Thomas J. Powell ("Mr. Powell") respectfully submits this brief in opposition to the Division of Enforcement's ("Division") Motion to Strike portions of his Reply Brief in Support of Application to Vacate or for Consent to Associate ("Reply"). The Division's Motion to Strike, filed on June 12, 2025, without leave from the Commission, erroneously seeks to strike as untimely Mr. Powell's request for *nunc pro tunc* vacatur of his administrative bars, a clarification necessitated by the Division's own arguments in its May 7, 2025, Response to Application to Vacate ("Response) and recent legal developments. As set forth below, the Division's Motion to Strike must be denied or disregarded because Mr. Powell's request for *nunc pro tunc* relief is not a new substantive argument, but rather a permissible clarification of the form of relief sought. This specification of *when* the relief should take effect is a direct, unavoidable, and appropriate reply to Division's Response.

This matter concerns Mr. Powell's Application to Vacate Bar or for Consent to Associate/Participate, filed on January 19, 2024, pursuant to Commission Rule of Practice 154, seeking to vacate certain administrative bars imposed in a September 2021 settlement order or, in the alternative, to grant consent to associate with Resolute Capital Advisors LLC and participate in penny stock offerings (the "Application"). On April 7, 2025, the Commission ordered additional briefing: on May 7, 2025, the Division filed its Response opposing Mr. Powell's Application, and on May 22, 2025, Mr. Powell filed his Reply. In its Response, the Division fundamentally misconstrued Mr. Powell's Application, premising its entire opposition on Commission Rule of Practice 193 ("Applications by barred individuals for consent to associate") and authorities relying on Rule 193, while conspicuously ignoring Mr. Powell's invocation of Rule 154 in his Application. In the very first sentence of Mr. Powell's application, he made

explicit that his request was made "pursuant to Rule 154 of the SEC Rules of Practice," and only in the alternative did he request relief under Rule 193, noting that "Prior to granting an application to vacate a bar, the Commission does not require an applicant to initially seek 'incremental grants of relief,' citing the Commission's vacating a bar over the Division's objection in *Cozzolino*).

In his Reply, Mr. Powell elaborated on the critical necessity of *nunc pro tunc* relief to address the severe and unintended collateral consequences of the "bad actor" provisions, which continue to unjustly impact his professional activities despite his full compliance with the settlement terms and the passage of the two-year bar period plus an additional 20 months (now entering the 23rd month and approaching a full four years of exclusion from his professional activities). The Division's Motion to Strike mischaracterizes the nature of Mr. Powell's Application and deliberately attempts to obfuscate the record by misrepresenting the impact of Rule 193 and authorities involving Rule 193 (and by ignoring Mr. Powell's reliance on Rule 154). As demonstrated by its order in *In the Matter of Nano Magic Inc.* (Exchange Act Release No. 101298, October 10, 2024), issued after Mr. Powell filed his initial application to vacate the bars, the Commission has inherent discretion to order relief *nunc pro tunc*. The Enforcement Division mischaracterized Mr. Powell's Application as made pursuant to Rule 193 and argued that all of the limitations and restrictions imposed by Rule 193 govern his Application. Under these circumstances, Rule 450 unequivocally permitted Mr. Powell to remind the Commission of its inherent ability to order relief *nunc pro tunc* pursuant to Rule 154 or *sua sponte*, a necessary response to the Division's fundamental mischaracterization.

The Commission should deny or disregard the Enforcement Division's Motion to Strike.

II. ARGUMENT

Mr. Powell's request for *nunc pro tunc* relief—seeking retroactive vacatur of bars to address persistent "bad actor" disqualifications—is not a new substantive claim but rather a permissible and logically necessary clarification of the form of relief sought in his initial Application, especially given the Division's arguments. This is distinct from substantive arguments, which introduce new merits-based claims, and aligns with requests regarding the timing or manner of relief, which may be clarified in reply briefs. The Division's Response deliberately mischaracterized Mr. Powell's Application as arising pursuant to Rule 193 and, in doing so, raised the issue of the continued effect of the bar, thereby implicitly and necessarily encompassing the "bad actor" disqualifications. This directly necessitated Mr. Powell's response, which is expressly allowed under SEC Rule of Practice 450(b) for matters addressed in opposition briefs: "Reply briefs shall be confined to matters in opposition briefs of other parties; except as otherwise determined by the Commission in its discretion, any argument raised for the first time in a reply brief shall be deemed to have been waived."[1]

The Division's repeated invocation of Rule 193 (and failure to address Rule 154 in any way) throughout its Response and in its Motion to Strike, fundamentally misapprehends the nature of Mr. Powell's Application and the appropriate procedural framework. Mr. Powell's Application was, and remains, properly brought pursuant to Commission Rule of Practice 154,

[1] Ironically, the Division's Motion to Strike itself is prohibited by Rule 450, which says in relevant part, ". . . the Commission shall issue a briefing schedule order directing the party or parties to file opening briefs and specifying particular issues, if any, as to which briefing should be limited or directed. . . . *No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Commission*." (emphasis added). On April 7, 2025, the Commission directed the Division to file a brief on May 7, 2025, and Mr. Powell to file a reply by May 22, 2025. The Commission never directed the Enforcement Division to file its June 12, 2025, Motion to Strike, and the Enforcement Division never sought the Commission's permission to file its Motion to Strike.

which governs motions in administrative proceedings. It is imperative for the Commission to proceed under Rule 154, rather than Rule 193, for several compelling reasons specific to Mr. Powell's circumstances and the relief he seeks.

First, the September 2021 Settlement Order imposing the industry bars on Mr. Powell does not reference Rule 193, despite the rule being in effect at the time the order was entered. Instead, the order states that any "reapplication for association by Respondent Powell will be subject to the applicable laws and regulations governing the reentry process," without referencing Rule 193 in any way. This lack of specificity failed to provide clear notice to Mr. Powell that securing a sponsor, such as an investment adviser or broker-dealer, was a prerequisite for reentry into the industry, particularly for addressing the collateral "bad actor" disqualifications. Had such a requirement been clearly articulated, Mr. Powell could have negotiated a settlement more aligned with his understanding that he would be able to resume his professional activities after the two-year bar period. The absence of a Rule 193 reference in the Settlement Order supports proceeding under Rule 154 to address Mr. Powell's unique request for relief, especially concerning the *nunc pro tunc* vacatur.

Second, Rule 154 governs motions "except where another rule expressly governs," and Rule 193 does not expressly apply to the circumstances Mr. Powell currently faces. Mr. Powell seeks relief beyond the scope of Rule 193, as his request for *nunc pro tunc* vacatur is specifically designed to address the ongoing and severe collateral consequences of the "bad actor" disqualifications, which extend far beyond the direct terms of the bar. The stigma associated with these disqualifications, particularly in a post-*Jarkesy* and *Axon/Cochran* legal environment, complicates his ability to attract a sponsor under Rule 193. A preliminary determination by the Commission that Mr. Powell's reentry is consistent with the public interest, and that the "bad

actor" disqualifications should be retroactively lifted, is necessary to facilitate his ability to secure such sponsorship, making Rule 154 the appropriate framework for this motion.

Third, applying Rule 193 would be fundamentally unfair, as Mr. Powell was not adequately informed that the Rule 193 process is delegated to the Division of Enforcement. At the time of settlement, Mr. Powell reasonably believed that his right to reapply after two years would allow him to resume his career without the burdensome requirement of obtaining a sponsor under a process controlled by the same Division that prosecuted him. The Commission's rules delegate authority to the Director of the Division of Enforcement to grant or deny Rule 193 applications, but this delegation was not transparently disclosed to Mr. Powell during settlement negotiations and would be contrary to more recent statements by the Commission to maintain the separation of adjudicatory and enforcement functions. Allowing the Division of Enforcement, which initially sought the bars against Mr. Powell and now resists his vacatur, to evaluate his request for relief raises concerns about impartiality and conflicts with the principle of separating adjudicatory and enforcement functions, as recently acknowledged by the Commission. Proceeding under Rule 154 ensures a fairer adjudicatory process by allowing the Commission itself to evaluate Mr. Powell's motion for comprehensive relief.

Mr. Powell's clarification regarding the *nunc pro tunc* effective date of the vacatur is entirely permissible under SEC Rule of Practice 450, which allows a reply brief to address matters raised in an opposition brief. This principle is analogous to the Second Circuit Court of Appeal's holding in *Bayway Refining Co. v. Oxygenated Marketing and Trading AG*, 215 F.3d 219 (2d Cir. 2000). In *Bayway*, the court affirmed the district court's proper admission of evidence concerning industry custom and practice, despite it being "first proffered in the moving party's reply papers." *Id*. at 221. The *Bayway* court recognized that new information, even if

presented in a reply, is permissible, particularly when it serves to rebut a claim or clarify an issue raised by the opposing party. Here, the Division's opposition brief, by repeatedly invoking SEC Rule 193 and authorities relying on Rule 193 in support of the continued imposition of the bars and the purported "incompleteness" of Mr. Powell's alternative requests, squarely raised the issue of the bars' full scope and collateral consequences, including the "bad actor" disqualifications. Mr. Powell's request for *nunc pro tunc* relief in his Reply is a direct and necessary response to fully address the implications of the relief sought, ensuring the Commission has all relevant information to make a complete determination, much like the evidence admitted in *Bayway* clarified the contractual terms.

III. CONCLUSION

For the foregoing reasons, Mr. Powell respectfully urges the Commission to deny (or simply disregard as impermissible under Rule 450) the Enforcement Division's Motion to Strike. To ensure a fair and just resolution, *nunc pro tunc* relief is warranted for the following reasons:

- **Prolonged Collateral Consequences**: The bars and "bad actor" disqualifications have persisted for nearly four years since the 2021 settlement, far exceeding the intended two-year bar period, unjustly limiting Mr. Powell's professional activities.
- **Procedural Mischaracterization**: The Division's reliance on Rule 193, rather than Rule 154, misrepresents the nature of Mr. Powell's Application, necessitating clarification that *nunc pro tunc* relief under Rule 154 is appropriate to address these unique circumstances.
- **Commission's Discretion**: The Commission's inherent authority, as demonstrated in *In the Matter of Nano Magic Inc.* (Exchange Act Release No. 101298, October 10, 2024), supports granting *nunc pro tunc* vacatur to remedy the ongoing harm of the bars.
- **Fairness and Public Interest**: Retroactive relief aligns with the public interest by allowing

Mr. Powell to resume his career without the undue burden of "bad actor" stigma, especially given his full compliance with the settlement terms.

Dated: July 17, 2025

Respectfully submitted,

/s/ Nicolas Morgan

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CERTIFICATE OF SERVICE

Pursuant to Rule 150, this document has been served to the following individuals by electronic means:

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