UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21270

In the Matter of **JUSTIN W. KEENER,** **Respondent.**	**DIVISION OF ENFORCEMENT'S REPLY TO RESPONDENT JUSTIN W. KEENER'S OPPOSITION TO THE DIVISION'S MOTION FOR SUMMARY DISPOSITION**

Pursuant to Rule 250(f) of the Securities and Exchange Commission's ("SEC" or "Commission") Rules of Practice, the Division of Enforcement ("Division") respectfully submits this reply to the Opposition of Respondent Justin W. Keener to the Division's Motion for Summary Disposition.

I. SUMMARY

Keener's brief presents four main arguments in opposition to the Division's motion for summary disposition ("MSD"):

(1) the Commission can only bar a person who is "associated" with a broker-dealer under Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act"), and Keener is not an "associated" person because he personally acted as a dealer and cannot associate with himself;

(2) there is no need for an associational bar because the District Court's injunction already prohibits Keener from acting as a dealer;

(3) an associational bar would not be in the public interest; and

(4) these proceedings would be unconstitutional if an Administrative Law Judge ("ALJ") were presiding over them.

Each argument lacks merit. First, the Commission has expressly held that individuals can associate with themselves for purposes of Section 15(b)(6), and Keener cites no authority to the

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contrary. Second, an associational bar is necessary and would be broader than the district court's injunction. Keener's argument ignores that Congress expressly intended injunctions and bars to work in tandem when it unquestionably made an injunction a predicate for obtaining a bar. Third, the bar is in the public interest based on the factors the Division set forth in its MSD, and Keener does not meaningfully dispute these arguments. Finally, this proceeding is not before an ALJ, which renders Keener's constitutional argument moot.

Accordingly, the Commission should grant the Division's MSD and order a permanent associational bar against Keener.

II. ARGUMENT

A. Keener Was an "Associated" Person under Exchange Act Section 15(b)(6)

The centerpiece of Keener's opposition to summary disposition is his contention that he is not an "associated" person who could be subject to an associational bar. (Opp'n at 6.) He asserts:

> There is no evidence that Mr. Keener is currently associated with a dealer, nor that he was associated with a dealer during the relevant period to these proceedings. The District Court in this matter only found that *Mr. Keener* acted as an unregistered dealer, not that Mr. Keener was associated with a dealer, nor that JMJ Financial was an entity acting as an unregistered dealer.

(*Id.* (emphasis in original).) The MSD argued that Keener's sole proprietorship, JMJ Financial, operated as a dealer and that he associated with it. (MSD at 7-8.) Keener opposes this position on the grounds that JMJ Financial is a "fictitious name" in Florida and is not a legal entity separate from him. (Opp'n at 7.) Acknowledging that the District Court found him to be a dealer under Section 15(a)(1) of the Exchange Act, Keener argues that he cannot associate with himself for purposes of Section 15(b)(6). (*Id*. at 6-7.)

Under the statute, and Commission decisions interpreting it, Keener meets the definition of an "associated" person by operating as a dealer under the Exchange Act. Keener's argument

to the contrary fails because it ignores—and is contrary to—both the relevant statutory language and the Commission's interpretation of it. Exchange Act Section 3(a)(18) defines a "person associated with a broker or dealer" to be "any person directly or indirectly controlling, controlled by, or under common control with such … dealer." *See* 15 U.S.C. § 78c(a)(18). Keener unquestionably controlled himself and his dealer activities.

The Commission has expressly found this language in Exchange Act Section 3(a)(18) to mean that broker-dealers themselves are also "associated" persons for purposes of Section 15(b)(6). *See Allen Perres*, Admin Proc. File. No. 3-17013, 2017 WL 280080, at *3 (Jan. 23, 2017) (Comm. Op.) (order "finding that Perres acted as an unregistered broker also establishes that he was associated with a broker for purposes of Exchange Act Section 15(b)(6)"); *James S. Tagliaferri*, Admin Proc. File. No. 3-15215, 2017 WL 632134, at *5 (Feb. 15, 2017) (Comm. Op.) (same). Keener offers no legal basis for his position that unregistered dealers are not associated with themselves—that they do not "directly or indirectly control" their own actions.

The Commission should conclude that Keener was an "associated" person based on the District Court's finding that he acted as an unregistered dealer.

B. An Associational Bar Is Necessary

Keener claims that the Commission "*must* decline to issue [] a bar" because it is unnecessary. (Opp'n at 8 (emphasis added).) He asserts that the District Court's injunction already prohibits him from acting as a dealer and that an "associational bar would not plug any holes related to that alleged misconduct." (*Id*.) He also cites the District Court's five-year penny stock bar as another reason an associational bar would be unnecessary. (*Id*. at 9.)

Keener's argument glosses over the fact that the associational bar the Division seeks would prohibit him from engaging in more than just dealer conduct. It would also bar Keener from associating with any broker, investment adviser, municipal securities dealer, municipal

adviser, transfer agent, or nationally recognized statistical ratings agency. *See* 15 U.S.C. § 78o(b)(6)(A)(iii); *see also Bartko v. SEC,* 845 F.3d 1217, 1220-21 (D.C. Cir. 2017) ("Under Dodd-Frank, then, the Commission is now able to bar a securities market participant from the six listed classes—broker-dealers, investment advisers, municipal securities dealers, transfers agents, municipal advisors and NRSROs—based on misconduct in only one class."). The District Court's injunction does not cover all of these potential associations.

Keener's argument against an associational bar is also contrary to the statutory scheme, and he ignores that being enjoined is a *prerequisite* for a bar under Section 15(b)(6) of the Exchange Act. 15 U.S.C. § 78o(b)(6)(A)(iii). Congress specifically cited an injunction against "acting as a[] … dealer" as an example of the kind of injunction that could trigger a bar under Section 15(b)(6). 15 U.S.C. §§ 78o(b)(4)(C) & (b)(6)(A)(iii). Congress intended that a Respondent like Keener could be enjoined by a district court and then receive an associational bar in a case like this. Keener's argument is without merit.

C. An Associational Bar Is in the Public Interest

Keener's argument concerning the public interest factors is flawed in several key respects. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).[1] For example, he agrees that the District Court found his "underlying actions were recurrent" but he "disagrees with the further conclusion that the ***violation*** was recurrent." (Opp'n at 11 (emphasis in original).) He contends that the recurrent nature of his conduct should not be considered in terms of the number of violative actions he took during the

[1] The District Judge in *Keener* applied the same factors but cited an analogous case in the Eleventh Circuit. *SEC v. Keener*, No. 20-cv-21254-BLOOM/Louis, 2022 WL 17484383, at *3 (S.D. Fla. Dec. 7, 2022) (citing *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004)).

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Relevant Period but instead, by the number of times that he "considered whether he needed to register … and decided not to do so." (*Id*.) Keener provides no support in the law for his analysis. Nor is this sort of legal and factual hairsplitting permissible in this proceeding. *See John W. Lawton*, Admin, Proc. File No. 3-14162, 2012 WL 6208750, at *5 (Dec. 13, 2012) (Comm. Op.) ("Follow-on proceedings are not an appropriate forum to revisit the factual basis for, or legal challenges to, an order issued by a federal court, and challenges to such orders do not present genuine issues of material fact in our follow-on proceedings."). Keener then asserts that this factor should be afforded less weight because the Magistrate Judge found the violation to be "merely technical" in her Report and Recommendation. (Opp'n at 11.) He cherry-picks this finding while ignoring that the Magistrate Judge found that overall the factors weighed in favor of an injunction. *See Keener*, 2022 WL 17484383, at *1. His arguments are equally unpersuasive and impermissible.

Addressing the factor for "sincerity of assurances against future violations," Keener claims that "[t]he Division presents no evidence suggesting that Mr. Keener will violate the Exchange Act's registration requirements in the future." *See id*. This is simply wrong. The Division cited his 2012 FINRA bar as evidence of his insincerity (*see* MSD at 11), and the District Court agreed. *Keener*, 2022 WL 17484383 at *3 ("As early as 2012, when FINRA barred him for failing to provide requested information regarding his financing of 'small-cap, publicly traded companies,' Keener has evinced an unwillingness to comply with financial regulatory bodies.").

Keener's argument again cherry-picks helpful language from the District Court's analysis of these factors, focusing on the Court's finding that his large sales of Blink Charging Co. stock, after the SEC filed its Complaint and Keener filed a motion to dismiss, were "***not, in itself,***

conclusive evidence that he will continue to engage in illegal activity." (Opp'n at 12 (emphasis in original).) This mischaracterizes the District Court's finding and ignores the fact that the Court rebuked him for misrepresenting facts. *See Keener*, 2022 WL 17484383 at *4. As the Division noted in its MSD (at 11-12), the District Court was troubled that Keener had misrepresented the circumstances under which he *acquired* the Blink stock, calling his representation on that point "materially false." *Keener*, 2022 WL 17484383 at *4. The Court admonished:

> [i]n briefing before this Court, rather than admitting his misrepresentation, Keener continues to argue that his sales of Blink stock are unrelated to this litigation. ECF No. [140] at 5. Keener's arguments regarding his sales of Blink stock reflect, at best, a misunderstanding of what rendered his conduct illegal, and at worst, an intent to obfuscate. The Court agrees with the R & R that there is good reason to doubt the sincerity of Keener's assurances against future violations of the Exchange Act.

Id. Keener elides the Court's holding on this factor, which is additional evidence that his assurances against future violations are not sincere.

Keener also glosses over (Opp'n at 13) the District Court's finding that his occupation will present opportunities for future violations. *See Keener*, 2022 WL 17484383 at *4 ("Keener's decade-long history of noncompliance and nondisclosure, when combined with his firm position in the financial industry, lead to a 'reasonable likelihood' that Keener 'will engage in wrongful actions in the future.'"). He suggests that there is no likelihood of future violations because the District Court has enjoined him. (Opp'n at 13). This is not a meaningful nor a compelling argument. Applying Keener's logic, the Commission could never find that an enjoined respondent in a follow-on administrative proceeding like this one would be likely to

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commit further violations based upon his or her occupation. Again, Keener provides no legal support for this position.[2]

Keener urges the Commission to place the most weight on the factors for egregiousness and scienter. (Opp'n at 10-11.) The Division acknowledges that it has no evidence of scienter for the underlying violation and the District Court did not find the violation to be egregious. Nevertheless, the District Court found that the *Steadman* factors (in the Eleventh Circuit the *Calvo* factors), taken as a whole, supported imposing an injunction against Keener. *Keener*, 2022 WL 17484383 at *3-4. Keener responds that the standard for an associational bar is different than the standard for an injunction, even if they rely upon the same factors. (Opp'n at n. 4 ("the Division ignores that the District Court was assessing whether to impose a ***different*** injunction than at issue in this proceeding").) But he again offers no law to support his position, nor does he meaningfully address how any differences would change the outcome.

The Commission has routinely ordered bars against respondents for the same or similar non-scienter based violations as Keener committed. *See Steve G. Blasko*, Admin Proc. File No. 3-19336, 2023 WL 4126711 (June 21, 2023) (ordering associational bar for non-scienter based violations of Exchange Act Section 15(a)(1) and Securities Act Sections 5(a) and (c)); *Alexander Charles White*, Admin Proc. File No. 3-19237, 2023 WL 4126483 (June 21, 2023) (same); *Paul Douglas Vandivier*, Admin Proc. File No. 3-19241, 2019 WL 2992079 (July 9, 2019) (same); *Chad Anthony Lewis*, Admin Proc. File No. 3-18693, 2018 WL 4103631 (Aug. 29, 2018) (same).

[2] Keener contends that his "current occupation does not support a conclusion that he is likely to commit future violations" (Opp'n at 13), but notably does not disclose his current occupation.

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D. There Is No ALJ Involved in this Proceeding and that Fact Alone Defeats Keener's Constitutional Argument

According to Keener, "[t]he Commission cannot issue the relief sought by the Division because if these proceedings are conducted in the first instance before an ALJ, the proceedings are unconstitutional under *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022), *cert. granted*, 143 S.Ct. 2688 (2023)." (Opp'n at 13-14.) None of these proceedings have occurred before an ALJ, as Keener knows. His argument is inapposite.

IV. CONCLUSION

For the foregoing reasons, the Division of Enforcement respectfully requests that the Commission grant its Motion for Summary Disposition and impose a permanent associational bar under Section 15(b)(6)(A)(iii) of the Exchange Act against Keener.

Dated: October 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 150 of the Commission's Rules of Practice, I hereby certify that a true and correct copy of the foregoing was served on the following persons on October 6, 2023:

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