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 MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT JUSTIN W. KEENER AND MEMORANDUM OF LAW IN SUPPORT**

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Pursuant to Rule 250(b) of the Securities and Exchange Commission's ("SEC" or "Commission") Rules of Practice, the Division of Enforcement ("Division") respectfully moves for summary disposition against Respondent Justin W. Keener ("Keener"). This is a follow-on proceeding arising from a civil injunction imposed by the United States District Court for the Southern District of Florida against Keener, after the Court entered summary judgment on behalf of the SEC and after full briefing on remedies. Because Keener has been enjoined from acting as an unregistered dealer in violation of Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act"), and the sole issue in this proceeding concerns the appropriate sanction against him under Section 15(b) of the Exchange Act, the Commission should grant this motion for summary disposition and impose an associational bar against Keener.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. District Court Proceedings

On March 24, 2020, the SEC filed a Complaint against Keener in the United States District Court for the Southern District of Florida, alleging that he violated Section 15(a)(1) of

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the Exchange Act, 15 U.S.C. § 78o(a)(1). *Ex. 1, SEC Complaint* ("*Compl.*").[1] According to the Complaint, between January 2015 and January 2018 ("the Relevant Period"), Keener, who does business as JMJ Financial, bought and sold billions of newly issued shares of penny stocks and generated millions of dollars of profits from those sales, while failing to register as a dealer as required by the Exchange Act. *Id.* The SEC specifically alleged that Keener: (1) held himself out to the public—through a website, conference sponsorships, and cold callers working on commission—as a business that purchases debt securities directly from penny stock companies, *Compl*. ¶ 10; (2) converted these securities into stock at a large discount to the prevailing market price, *Compl*. ¶¶ 1, 10-11, 15, 17; and (3) in the process, obtained billions of newly issued shares that he dumped on the market, reaping more than $20 million in profits. *Compl*. ¶¶ 1-2, 15-16.

On January 21, 2022, after extensive discovery, briefing, and oral arguments, the Court granted the SEC's motion for summary judgment and held that Keener violated the dealer registration requirements of Section 15(a)(1) of the Exchange Act. The Court found that in operating his unregistered dealer business Keener "converted more than 100 convertible notes from more than 100 different microcap issuers," "liquidated billions of shares of common stock," "sought to make a profit from selling the converted stock," and "generated approximately $10 million in net proceeds from these transactions." *SEC v. Keener*, 580 F. Supp. 3d 1272, 1286–87 (S.D. Fla. 2022). The Court also observed that "[a]s further evidence

[1] Under Rule of Practice 323, notice may be taken in this proceeding of "any material fact which might be judicially noticed by a district court of the United States…." 17 C.F.R. § 201.323. Thus, official notice may be taken of the Commission's public official records and of the docket reports, court orders, official court transcripts, motion exhibits, and other court filings by the parties in the civil action. The Division respectfully requests that the Commission take judicial notice of the following exhibits to this motion: Exhibit 1 – SEC's Complaint and Exhibit 2 – District Court's Final Judgment.

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that [Keener] meets the statutory 'dealer' definition, [he] acquired newly issued stock directly from microcap issuers at a discount, ranging between 10% to 50% depending on the terms of the convertible notes, and then resold the stock into the public market." *Id.* at 1287-88. The Court further noted that Keener "[held] himself out as being willing to buy and sell a particular security on a continuous basis," where he "operated a website that described his business operations," "hired employees to find issuers who were willing to sell convertible notes to him," and "sponsored and attended conferences in which he and his employees would find microcap issuers in person." *Id.* at 1288-89.

On December 20, 2022, after full briefing on the question of the appropriate remedies, the Court entered a final judgment against Keener, *inter alia*, permanently enjoining him from:

> directly or indirectly making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) while engaged in and pursuant to the regular business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for his own account through a broker or otherwise unless Keener is registered as a dealer with the Securities and Exchange Commission, or unless he is associated with a broker-dealer that was so registered.

Ex. 2 at 1.

In its final judgment, the court also ordered Keener to pay disgorgement of $7,786,639, prejudgment interest of $1,425,266, and a civil penalty of $1,030,000, for a total judgment of $10,241,905. The court also imposed a five-year penny stock bar against Keener and ordered him to surrender for cancellation certain stock and conversion rights under existing convertible securities. *Id.* at 2.

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B. The Follow-on Proceeding

On January 10, 2023, the Commission issued an OIP against Keener pursuant to Section 15(b) of the Exchange Act. The OIP alleged that Keener engaged in the regular business of buying and selling securities, while failing to register as a dealer, and that a federal district court had enjoined him from future violations of Exchange Act Section 15(a).[2] The OIP instituted proceedings to determine whether the allegations were true and whether any remedial action is appropriate in the public interest. On January 27, 2023, Keener moved to stay the proceeding pending the outcome of his appeal of the injunctive action to the United States Court of Appeals for the Eleventh Circuit. On February 3, 2023, the Division filed an opposition to Keener's motion. On March 23, 2023, the Commission denied Keener's motion.[3]

On February 2, 2023, Keener filed an Answer to the OIP generally denying the allegations in Section II.A.2 of the OIP, because he "is not a 'dealer' under the [Exchange Act]."[4] *OIP Answer* at 1-2. In his Answer, Keener also contended: (1) the decision to initiate these proceedings was premature because his pending Eleventh Circuit appeal rendered the proceedings nonfinal;[5] (2) the SEC lacks jurisdiction over him because the ALJs and Commissioners "have unconstitutional removal protections"; (3) because he is enjoined from further violations of the dealer registration provisions of the Exchange Act, any additional

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[2] *Justin W. Keener*, Exchange Act Release No. 96627, 2023 WL 155182 (Jan. 10, 2023).

[3] *Justin W. Keener*, Exchange Act Release No. 97192, 2023 WL 2631010 (March 23, 2023).

[4] This is not an appropriate denial in this proceeding. "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." *John W. Lawton*, Investment Adviser Act Release No. 3513, 2012 WL 6208750, at *5 (Dec. 13, 2012).

[5] As the Commission explained in its order denying Keener's motion to stay these proceedings, any pending appeal of an underlying judgment does not prevent the Commission from exercising its jurisdiction in a follow-on administrative proceeding. *Justin W. Keener*, 2023 WL 2631010 at *1.

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sanctions would not be in the public interest, and would instead be arbitrary and capricious; and (4) none of the available sanctions are available to the SEC because Keener is not registered as a broker or dealer. *Id.* at 2-6.

II. ARGUMENT

The Commission should grant the Division's motion for summary disposition because there is no genuine issue of material fact that Keener meets the requirements for the Commission to sanction him, and an associational bar is in the public interest.

A. Standard for Summary Disposition.

SEC Rule of Practice 250(b) provides that after a respondent's Answer has been filed and documents have been made available to the respondent for inspection and copying, a party may move for summary disposition of any or all allegations of the OIP.[6] *See* 17 C.F.R. § 201.250(b). A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. *Id*.

B. The Exchange Act expressly provides for sanctions in this case.

The Exchange Act expressly authorizes the Commission to sanction persons, like Keener, who are enjoined from acting as an unregistered dealer. Exchange Act Section 15(b)(6)(A)(iii) provides, in part, that "the Commission, by order, shall censure, place limitations on the activities or functions of [any person who is associated, or at the time of the alleged misconduct was associated with a broker-dealer] 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

[6] On April 10, 2023, counsel for the Division sent a letter to Keener's attorneys informing them that the Division had complied with Rule of Practice 230, which describes the obligations surrounding inspection and copying of documents in an OIP.

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dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, . . . if the Commission finds . . . [that such a sanction] is in the public interest" and that such person "is enjoined from any action, conduct or practice specified in subparagraph (C) of paragraph 4," which includes any conduct "in connection with the purchase or sale of any security." 15 U.S.C. §§ 78o(b)(6)(A) (iii), 78o(b)(4)(C), 78o(b)(4)(D); *see 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."); *Michael D. Richmond*, Initial Decision, SEC Rel. No. 224, Admin. Proc. File No. 3-10848, 2003 WL 470194, at *2 (Feb. 25, 2003) (holding Section 15(b)(6)(A)(iii) provides "authority to bar any person who is associated with a broker or dealer if the Commission finds the bar is in the public interest and the associated person is enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security.").

After the District Court found that Keener acted as an unregistered dealer, it entered an injunction against him, prohibiting him from engaging in continued misconduct in violation of the dealer registration provision in Exchange Act Section 15(a)(1). As an unregistered dealer, Keener is subject to the Commission's follow-on proceeding authority pursuant to Exchange Act Section 15(b)(6). *See, e.g., Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *32 (July 26, 2013) ("It is well established that we are authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding."); *Vladislav Steven Zubkis*, Exchange Act Release No. 52876,

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2005 SEC LEXIS 3125, at *9 & n.16 (Dec. 2, 2005) (unregistered associated person of an unregistered broker-dealer barred from association with a broker or dealer).

C. Keener was associated with a dealer during the relevant period, and the District Court enjoined him from conduct in connection with the purchase or sale of securities.

The Commission should permanently bar Keener from associating "with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization" under Section 15(b)(6)(A)(iii) of the Exchange Act. The bar is warranted because: (1) Keener was associated with a dealer at the time of the misconduct; (2) the District Court enjoined him from conduct in connection with the purchase or sale of securities; and (3) the sanction is in the public interest.

First, although Keener contends in his OIP Answer that he "has not been and has not sought to be associated with a broker or dealer," he is wrong under the plain language of the relevant statute. *OIP Answer* at 6-7; 15 U.S.C. § 78o(b)(6)(A). Keener plainly was associated with a dealer under the Exchange Act's definition of a "person associated with a broker or dealer." 15 U.S.C. § 78c(a)(18). The statute deems someone to be associated with a dealer when they are "directly or indirectly controlling, controlled by, or under common control with such broker or dealer." The District Court specifically found that Keener—who did business as JMJ Financial, a registered fictitious name in Florida—operated as a securities dealer at all relevant times and was responsible for every aspect of JMJ Financial's convertible notes business. *Keener*, 580 F. Supp. 3d 1272 at 1277-79; s*ee SEC v. Martino,* 255 F. Supp. 2d 268, 285 (S.D.N.Y. Apr. 2, 2003) (finding defendant "plainly was associated with CMA [Martino's closely-held brokerage firm]" noting that at all relevant times defendant "Martino owned 100% of CMA, was its president, and routinely entered into brokerage agreements with issuers through

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CMA."). Keener was thus associated with a dealer under Section 15(a)(1) of the Exchange Act. Keener is precluded from relitigating the facts underlying this conclusion. *See Lawton, supra*, note 4 at *5; *Eric S. Butler*, SEC Release No. 3262, Admin. Proc. File No. 3-13986, 2011 WL 3792730, at *4-5 (August 26, 2011).

Second, the District Court enjoined Keener from engaging in conduct that was in connection with the purchase or sale of securities, and that order gives the Commission authority to bar Keener under Exchange Act Section 15(b)(6)(A)(iii). *See Richmond*, 2003 WL 470194 at *2. In his Answer to the OIP, Keener contends that Section 15(b)(6) requires the Division to show that the District Court enjoined him from acting as a broker-dealer. *OIP Answer* at 4. He then argues that the "injunction ordered by the District Court says the opposite" of Section 15(b)(6). *OIP Answer* at 4. He asserts that he "has not been enjoined from acting as a broker or dealer; rather, he has been ordered to register as a broker or dealer if he intends to buy or sell securities while engaged in the regular business of buying and selling securities for his own account." *Id.* This reasoning misstates what Section 15(b)(6)(A)(iii) requires, which is merely that he has been enjoined from conduct in connection with the purchase or sale of securities. There is no question that the Court's order, which prohibits him from buying or selling securities without being registered, is in connection with the purchase or sale of securities. The District Court's injunction easily satisfies the "enjoined" requirement of Section 15(b)(6)(A)(iii).

D. An industry bar against Keener is in the public interest.

In determining appropriate sanctions, the Commission is guided by the public interest factors identified in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). *See* 15 U.S.C. §§ 78o(b)(6). The *Steadman* factors include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances

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against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. *Id*. at 1140. Additionally, the Commission considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, 56 S.E.C. 695, 698 (2003).

The *Steadman* factors are flexible and no one factor is dispositive. *See Gary M. Kornman*, Admin. Proc. File No. 3-12716, SEC Release No. IA-2840, 2009 WL 367635, at *6-7 (Feb. 13, 2009). The Commission must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities," and the decision "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." *Ross Mandell*, Exchange Act Release No. 71668, Admin. Proc. File No. 3-14981, 2014 WL 907416, at *2 (Mar. 7, 2014) (internal quotation marks omitted), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016). The Commission must consider whether the sanction will have a deterrent effect. *See Schield Mgmt Co. and Marshall L. Schield*, SEC Release No. 2477, Admin. Proc. File No. 3-11762, 2006 WL 231642, at *8 n.46 (Jan. 31, 2006) (stating that the selection of an appropriate sanction involves consideration of several elements, including deterrence).

In deciding to issue an injunction against Keener, the District Court judge applied the *Steadman* factors set forth in Eleventh Circuit case law. *See SEC v. Keener*, No. 20-cv-21294 (BB), 2022 WL 17484383, at *3 (S.D. Fla. Dec. 7, 2022) (applying *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004)). Even if Keener were not precluded from relitigating the District Court's findings, *see Lawton, supra*, note 4 at *5; *Butler*, 2011 WL 3792730, at *4-5, the District Court's *Steadman* analysis was correct.

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As to the first factor, the District Court agreed with the Magistrate Judge's determination in her Report and Recommendation ("R&R") that "Keener's conduct was not egregious" because it did not involve scienter.[7] *Id.* Courts have observed that the dealer registration requirement is "of the utmost importance in effecting the purposes of the Act" because it enables the Commission "to exercise discipline over those who may engage in the securities business and it establishes necessary standards with respect to training, experience, and records." *SEC v. Benger*, 2010 WL 918065, at *9 (N.D. Ill. Mar. 10, 2010) (quoting *Celsion Corp. v. Stearns Mgmt. Corp.*, 157 F. Supp.2d 942, 947 (N.D. Ill. 2001) and *Regional Props, v. Financial & Real Estate Consulting, Co*., 678 F.2d 552, 562 (5th Cir. 1982)). Because of the significance of the dealer registration requirements, Keener's conduct in disregarding these requirements while running a convertible notes business was sufficiently egregious to warrant an associational bar.

As to the second *Steadman* factor, the recurrent nature of the conduct, the District Court accepted the Magistrate Judge's conclusion that Keener's "conduct was recurrent because he disregarded the dealer registration requirement during a period of over three years as he acted as an unlicensed dealer." *Keener*, 2022 WL 17484383 at *3. The court found that rather than being an "isolated incident" Keener's failure to register was "a systemic practice of noncompliance with the Exchange Act." *Id.* The Commission should likewise conclude that, for purposes of determining whether an associational bar is in the public interest, Keener's yearslong failure to register as a dealer, while conducting his business, was recurrent.

As the District Court properly noted, the SEC did not allege scienter because violations of Section 15(a) of the Exchange Act do not require proof of scienter. *Id.* This fact does not

[7] Despite its conclusions that Keener's misconduct was not egregious—and even though a violation of Section 15(a) of the Exchange Act does not require proof of scienter—the Court still found that the other factors militated in favor of an injunction.

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undermine the strength of the other *Steadman* factors, which amply support the associational bar the Division is requesting. The final three factors tilt heavily in favor of finding that a bar is in the public interest.

Regarding the fourth *Steadman* factor, the sincerity of Keener's assurances against future violations, the R&R properly noted there were two facts that weighed against Keener's sincerity: (1) the Financial Industry Regulatory Authority's ("FINRA") decision to bar Keener in 2012 "for failing to provide information regarding sales of unregistered securities" and (2) the circumstances surrounding Keener's sales of Blink Charging Co. ("Blink") stock after the SEC filed its complaint alleging that Keener was operating as an unregistered dealer. *Keener*, 2022 WL 17484383 at *3. As the District Court observed, "[a]s 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." *Id.* Keener's insincerity regarding any assurances of future violations was also evident in his misrepresentations to the court regarding how he acquired millions of shares of Blink stock. The District Court properly focused on Keener's "statements and arguments in [the] litigation relating to the Blink stock." *Id.* The court found that Keener's contention that he did not acquire the Blink stock through his convertible notes activities was "materially false." *Id.* at 4. As the Court observed, the SEC's "uncontested calculations" showed that contrary to Keener's contention that he obtained his Blink shares through "a simple loan," he only acquired 73,529 shares in this manner, "compared to 3.8 million shares that he acquired as a result of the convertible note." *Id.* The court was troubled that:

> [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

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> 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. The Commission should likewise conclude that Keener's assurances against future violations are not sincere.

The District Court correctly found that Keener has not recognized the wrongful nature of his conduct. *Id.* But because the court acknowledged that Keener was entitled to a full and vigorous defense, it afforded this factor little weight. *Id.*

Regarding the final *Steadman* factor, the likelihood that Keener's occupation will present opportunities for future violations, Keener is unquestionably poised to instantly return to the same unregistered dealer conduct underlying this matter. First, as the District Court found, "Keener's firm roots in the financial markets and ready access to capital and contacts will afford him ample opportunities to reengage in prohibited conduct." *Id.* Moreover, while he may contend that he could legally restart his convertible notes business if he registers as a dealer, "[g]iven Keener's FINRA bar, it appears unlikely that he *could* have successfully registered as a dealer." *Id.* at *8 & n.1 (emphasis in original). As the District Court aptly concluded, "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.'" *Id.* at *4.

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III. CONCLUSION

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

Dated: August 23, 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 true and correct copy of the foregoing motion was served on the following persons on August 25, 2023:

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