UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21280

In the Matter of

DARAYL D. DAVIS,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

DIVISION OF ENFORCEMENT
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The Division of Enforcement (the "Division") submits this Reply Memorandum of Law in Further Support of its Motion for Summary Disposition filed on January 4, 2024 (the "Division's Motion" or "Div. Mot.").[1]

I. INTRODUCTION

DaRayl D. Davis ("Respondent") is a convicted felon who, for more than a decade, stole millions of dollars clients gave him to invest with two entities Respondent held out as investment firms that provided investment advisory services. For his misconduct, Respondent pleaded guilty to criminal charges and is serving a sentence of imprisonment of 160 months. A federal district court also permanently enjoined him from violating the antifraud provisions of the federal securities laws. Commission precedent holds that, in the absence of extraordinary mitigating circumstances, it is in the public interest to bar a respondent who is criminally convicted or enjoined from violating the antifraud provisions of the federal securities laws. In his Opposition Brief ("Opp. Br."), Respondent has failed to show any extraordinary mitigating circumstances, and none exist.

Nevertheless, Respondent attempts to defeat summary disposition of this matter by arguing that his criminal conviction is subject to reversal on appeal, attacking the basis of the civil injunction, and further attempting to relitigate the indisputable fact that he conducted a multi-million-dollar fraud while acting as a trusted investment adviser and, from 2003 through 2008, while associated with a dually registered broker-dealer and investment adviser. None of his arguments merits a hearing in this matter. Moreover, Respondent has yet to provide any assurance that he would refrain from further fraud if the Commission were to allow him to

[1] Accompanying this reply memorandum is the Affidavit of Karen M. Klotz, dated May 6, 2024, and Exhibits 14 and 15, attached thereto. Exhibits 1 through 13 previously were filed with the Division's Motion and are cited herein as "Ex. to Div. Mot."

remain in the securities industry. Given the egregious nature of his decades-long fraud, and for the reasons stated in the Division's Motion, Respondent should be barred from associating with the securities industry and from participating in an offering of penny stock.

II. ARGUMENT

A. Respondent's Criminal Conviction for Mail Fraud Satisfies the Predicate for Associational and Penny Stock Bars

In his opposition to the Division's Motion, Respondent first argues that his underlying felony criminal conviction "is the subject of an appeal" and, therefore, cannot form the basis for associational and penny stock bars. Opp. Br. at I.A. and II.D. Respondent is wrong. It is well settled that a pending appeal does not prohibit the Commission from basing an action on an injunction or conviction. *See Eric Christopher Cannon*, Exchange Act Release No. 99858, 2024 WL 1327397, at *2 (Mar. 27, 2024) (stating that an appeal of the underlying conviction "does not alter the effect of respondent's having been found to have violated the securities laws or the court's imposition of an injunction against him") (internal quotation and citation omitted); *see also Justin W. Keener*, Exchange Act Release No. 97192, 2023 WL 2631010, at *1 (Mar. 23, 2023) ("[W]e have repeatedly held that 'the pendency of an appeal of a civil or criminal proceeding does not justify any delay in related 'follow-on' administrative proceedings.") (quoting *Thomas D. Melvin, CPA*, Exchange Act Release No. 75844, 2015 WL 5172974, at *7 n.52 (Sept. 4, 2015)).

Moreover, he also is incorrect that his conviction is being appealed. The Seventh Circuit Court of Appeals already dismissed Respondent's direct appeal of his criminal conviction. *See United States v. Davis*, 29 F.4th 380 (7th Cir. 2022). The matter which Respondent cites in his opposition brief, *United States v. Davis*, No. 24-1039 (7th Cir. 2024), is his appeal of the district court's denial of his motion for collateral relief under 28 U.S.C. § 2255 ("§ 2255 Motion"). Of

course, such action similarly does not warrant a pause of these proceedings or render Respondent's criminal conviction transitory. "If a direct appeal is no bar to collateral estoppel, it logically follows that a § 2255 Motion is also not a bar to collateral estoppel." *SEC v. Durham*, No. 1:11-cv-00370, 2017 WL 3581640, at *7 (S.D. Ind. Aug. 18, 2017); *see also SEC v. Parker,* No. 15-cv-1535, 2020 WL 6899795, at *1 (W.D. Pa. Nov. 24, 2020) (citing *Durham*). Accordingly, Respondent's arguments concerning his pending appeal are unavailing. Respondent's 2021 conviction for mail fraud, independent of the civil injunction, satisfies the predicate for the requested associational and penny stock bars.

Next, repeating failed arguments from his sentencing memorandum and § 2255 Motion, Respondent contends that the mail fraud scheme to which he pleaded guilty did not involve securities. *See* Opp. Br. at II.B.1. Section 15(b)(6)(A) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") require that, for the Commission to bar Respondent from associating in the securities industry and from participating in an offering of penny stock, the criminal conviction must have involved the "purchase or sale of any security," "theft," or "embezzlement." 15 U.S.C. § 78o(b)(6)(A) (cross-referencing 15 U.S.C. § 78o(b)(4)); 15 U.S.C. § 80b-3(f) (cross-referencing 15 U.S.C. § 80b-3(e)). Additionally, "Exchange Act Section 15(b) authorizes sanctions on a person associated with a broker or dealer who has been convicted of a felony … that 'involves' the violation of 18 U.S.C. § 1341, the federal mail fraud statute." *Angela Rubbo Beckcom Monaco*, Release No. ID-1378, 2019 WL 2337350, at *8 (May 30, 2019) (initial decision) (quoting 15 U.S.C. § 78o(b)(4)(B)(iv)), *Angela Rubbo Beckcom Monaco*, Exchange Act Release No. 86843 (Aug. 30, 2019) (finality notice); *see also See Gary Harrison Lane*, Release No. ID-738, 2015 WL 242394, at *3 (Jan. 20, 2015) (initial decision) ("[A]ny single violation of Section 1341

would meet the second [statutory] factor" set forth in Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act that authorizes the Commission to impose an associational bar), *Gary Harrison Lane,* Exchange Act Release No. 74420, 2015 WL 883123 (Mar. 3, 2015) (finality notice). Respondent's conviction in *United States v. Davis*, No. 1:18-CR-0025 (N.D. Ill.) ("Criminal Action") easily satisfies these requirements.

It is uncontested that Respondent pleaded guilty to mail fraud in violation of 18 U.S.C. § 1341 (Cr. Judgment [Ex. 12 to Div. Mot.]) and that from 2005 to 2008, Respondent maintained securities licenses and was an associated person of Investors Capital Corp. ("Investors Capital"), a dually registered broker-dealer and investment adviser (Davis CRD [Ex. 3 to Dov. Mot.]) and Investors Capital CRD/IARD [Ex. 4 to Div. Mot.]). Respondent's conviction, therefore, satisfies the requirements of Exchange Act Section 15(b). *Angela Rubbo Beckcom Monaco*, 2019 WL 2337350, at *8; *Gary Harrison Lane*, 2015 WL 242394, at *3.

Moreover, Respondent's guilty plea makes clear that his conviction involved the purchase and sale of securities. In his plea agreement, Respondent admitted that:

- he held out the two entities he created and controlled, Financial Assurance Corporation ("FAC") and Affluent Advisory Group, LLC ("AAG"), as investment firms that provided investment advisory services;
- he fraudulently obtained funds from victim investors through the offer and sale of purported investment products issued by, or obtained through, FAC and AAG;
- he knowingly made numerous materially false representations to investors about the purported investments, including that investors' funds would be invested by or through FAC and AAG;
- he guaranteed investors protection against the loss of their principals and fixed annual interest payments; and
- he did not invest investors' funds as promised but rather used the funds for his own personal benefit.

Plea Agmt. [Ex. 10 to Div. Mot.] at 2-4. At Respondent's sentencing hearing, the district court found that his offense conduct involved "a violation of securities law" pursuant to Section 2B1.1(b)(20)(A) of the U.S. Sentencing Guidelines. *See* Sent. Hr. Tr. [Ex. 14] at 46-47. Moreover, Respondent admits in his Opposition Brief that the instruments at issue in the Criminal Action were "promissory notes." Opp. Br. at II.B.1. The Exchange Act defines "[t]he term 'security'" to include "any note" and respondent presented nothing in the Criminal Action to rebut that presumption. 15 U.S.C. § 78c(a)(10); *see also Reves v. Ernst & Young*, 494 U.S. 56, 67 (1990) ("[A] note is presumed to be a 'security'"). Respondent's criminal conviction clearly involved the purchase and sale of securities.

Respondent's conviction also involved theft of funds from the victim investors who entrusted him to invest and protect their funds as he had promised. *See Gary Harrison Lane*, 2015 WL 242394, at *3 (Jan. 20, 2015) (finding that respondent's mail fraud conviction constituted "theft" under Section 15(b)(6)(A) of the Exchange Act and Section 203(f) of the Advisers Act because he admitted in his guilty plea that he "induced his victims to invest by falsely telling them he would invest their money in treasury bonds"). In addition to the admissions in his guilty plea agreement set forth above, Respondent admitted during his sentencing allocution that he was "guilty of fraud" and promised to "restore the money" he took from the victim investors. Sent. Hr. Tr. [Ex. 14] at 104-05. In this proceeding, Respondent "cannot relitigate the facts to which he admitted when entering into his plea agreement and which he then confirmed again in open court in a change-of-plea hearing." *William M. Apostelos*, Exchange Act Release No. 99539, 2024 WL 624007, at *2 (Feb. 14, 2024). Associational and penny stock bars can and should issue based on the underlying criminal conviction.

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B. The District Court Considered the Entire Record—Including Uncontroverted Witness Affidavits and Supporting Exhibits—When Entering Default Judgment

Respondent next contends that the injunction imposed by the district court in *SEC v. Davis, et al.*, 1:17-CRV-09224 (N.D. Ill.) ("Civil Action") cannot form the basis for the associational and penny stock bars because it was entered after liability was established through default. Opp. Br. at I.A and II.E. In cases where an injunction is entered by default, the Commission typically will not rely on the injunction itself to determine whether respondent's conduct warrants remedial sanction. *Jaswant Gill*, Advisers Act Release No. 5858, 2021 WL 4131427, at *2 n.7 (Sept. 10, 2021). However, "the Commission has given preclusive effect to substantive findings that have *accompanied* the entry of default." *See generally Gary L. McDuff,* Exchange Act Release No. 74803, 2015 WL 1873119, at *2 and n.14 (Apr. 23, 2015) (emphasis in original).

In granting the Commission's motion for default judgment, the district court made findings of fact and relied specifically on the evidence submitted in support of the Commission's Motion for Emergency Relief. *See* Order Granting Mot. for Entry of Default Judgment as to Liability [Ex. 15] at 1. These 35 exhibits, totaling more than 160 pages, included screen shots from Respondent's Smart Money Academy website; promotional materials for Respondent's Financial Assurance Corporation entitled "Preparing You For The New Retirement Environment"; a copy of a Financial Assurance Corporation promissory note; Affluent Advisory Group/Intelligent Wealth Management engagement letter; numerous letters, emails, and text messages between Respondent and several victim investors; an affidavit from a representative of a well-known insurance company (identified in the Commission's complaint as "Company A") affirming that the notes Respondent sold as Company A's notes were not legitimate; Financial Assurance Corporation Investor Statements; and bank statements, wire transfers, and investor

checks. *See* Civ. Dkt. [Ex. 6 to Div. Mot.] Nos. 8, 11, 14-16 (with attachments). The district court found, that "the SEC has introduced *uncontroverted evidence, including witness affidavits and accompanying exhibits*, sufficient to make a *prima facie* showing that, among other things, Defendant directly or indirectly engaged in the violations alleged in the Complaint." Ex. 15 at ¶ 10 (emphasis added).

Moreover, Respondent mischaracterizes the record with the suggestion that "the 'civil action' did not afford [him] an opportunity to present evidence or any defenses in response to the Commission's complaint[.]" Opp. Br. at II.E. Respondent participated *pro se* in the Civil Action and filed several motions contesting the temporary restraining order, asset freeze, and entry of default in which he presented possible defenses to the charges. *See* Civ. Dkt. [Ex. 6 to Div. Mot.] No. 31 (*pro* se entry of appearance for DaRayl Davis); Nos. 37-39 (motion and memorandum of law to set aside entry of default judgment as to liability); Nos. 40-42 (motion to modify the preliminary injunction and order freezing assets); No. 45 (response to SEC complaint); Nos. 46-48 (motion, brief, and declaration in opposition to contempt motion). The district court rejected all these arguments. Accordingly, the civil injunction can form the basis for the requested associational and penny stock bars.[2]

[2] Even if the Commission determined that it could not rely on the underlying conclusions in the Court's default judgment, Respondent's criminal conviction is more than sufficient to justify the requested relief here. *See Gary M. Kornman,* Exchange Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009) (using respondent's criminal conviction as the sole basis for an associational bar); *Edward Becker*, Release No. ID-252, 2004 WL 1238256, at *5-*6, *13 (June 3, 2004) (initial decision) (holding that respondent's criminal conviction satisfied the predicate for associational and penny stock bars), *Edward Becker*, Exchange Act Release No. 49972, 2004 WL 1531834 (July 6, 2004) (finality notice); *John S. Brownson*, Exchange Act Release No. 46161, 2002 WL 1438186, at *2 (July 3, 2002) (holding that "[a]bsent extraordinary mitigating circumstances," an individual who has been criminally convicted of securities fraud "cannot be permitted to remain in the securities industry"), *pet. denied*, 66 Fed. Appx. 687 (9th Cir. 2003).

C. The Uncontroverted Evidence of Record Establishes that Respondent Acted as an Investment Adviser During the Course of the Fraud

Respondent contends that summary disposition is inappropriate in this proceeding because a material fact exists as to whether he acted as an investment adviser at the time of the fraud. Opp. Br. at II.A. Respondent attempts to avoid the consequences of having acted as an investment adviser by referring to himself as a "financial coach" and "registered financial consultant." This argument did not work at his sentencing hearing or in his § 2255 Motion and it does not work here. It has been conclusively established that Respondent held securities licenses and was associated with a dually registered broker-dealer and investment adviser during a portion of the fraud. His argument to the contrary ignores the unrefuted evidence in the CRD reports [Ex. 3 and Ex. 4 to Div. Mot.], the findings of the district court, and indeed his own statements.

From 2005 to 2008, Respondent was an associated person (CRD# 4934582) of Investors Capital (CRD# 30613), a dual registrant, and held Series 7 and 66 licenses until 2010. *See* Davis CRD [Ex. 3 to Div. Mot.] and Investors Capital CRD/IARD [Ex. 4 to Div. Mot.]. Further, Respondent admitted in his plea agreement and plea colloquy that he held out FAC and AAG to be investment firms that provided investment advisory services and offered investment opportunities for investors. Plea Agmt. [Ex. 10 to Div. Mot.] at 3; Plea Hr. Tr. [Ex. 11 to Div. Mot.] at 22. This plainly meets the broad definition of an investment adviser. *See* 15 U.S. Code § 80b–2 (defining "investment adviser" to include "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities").

In fact, at the sentencing hearing, the District Court applied a four-level enhancement to Respondent's sentencing Guidelines' range pursuant to §2B1.1(b)(20)(A) because his offense

involves "a violation of securities law and, at the time of the offense, the [he] was … an investment adviser, or a person associated with an investment adviser." §2B1.1(b)(20)(A). In making this finding, the District Court found:

> This isn't even close. Mr. Davis held himself out as an investment advisor. He advised -- he even says in his allocution letter to me on pages 3 and 4 that . . . I abused my trusted position relationships to influence people to invest money in ways that did not benefit them. I think by his own admission, he was an investment advisor for all the reasons that [the Assistant United States Attorney] mentioned and all of the myriad documents in which he holds himself out as someone who could be trusted to advise these people that he defrauded to invest money with him in these various entities. It includes notes and bonds that [the Assistant United States Attorney] mentioned, which are clearly covered under the statutory definition. So I don't think this is even close. He was definitely an investment advisor. That's how he was able to pull this off.

Sent. Hr. Tr. [Ex. 14] at 46-47. There is no credible dispute that Respondent was an investment adviser during the time of the fraud. *See Sean Stewart*, Exchange Act Release No. 99613, 2024 WL 835280, at *6 (Feb. 27, 2024) (rejecting respondent's "contention that he should not be subject to an investment adviser bar simply because he allegedly was not associated with an investment adviser at the time of his misconduct … [because] the Exchange Act allows [the Commission] to impose collateral bars, including an investment adviser bar, on an individual associated solely with a broker or dealer at the time of the underlying misconduct, provided that such a bar is in the public interest").

D. Respondent Should Be Barred From Associating in the Securities Industry and From Participating in an Offering of Penny Stock

The Commission has repeatedly recognized that "'[t]he securities industry presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants.'" *Gary M. Kornman*, 2009 WL 367635, at *7 (quoting *Bruce Paul*, 48 S.E.C. 126, 128 (1985)). "Indeed, the importance of honesty for a securities professional is so paramount that [the Commission] ha[s] barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business." *Id.* at *7. As set

forth in the Division's Motion, the public interest would best be served by the issuance of an associational and penny stock bar against Respondent. Div. Mot. at 11-14.

An investment adviser bar is a particularly important component of the remedy in this case because investment advisers are trusted fiduciaries. As the district court noted when sentencing Respondent, "investment advisors are people that we trust. The whole point of having an investment advisor is to put your trust into somebody …." Sent. Hr. Tr. [Ex. 14] at 111. Respondent has demonstrated through his egregious breaches of his clients' trust, his deception in stealing clients' funds to sustain his luxurious lifestyle, and his deliberate decision to "never invest[] a nickel" of his clients' funds as promised, that he should not be trusted with fiduciary duties. Sent. Hr. Tr. [Ex. 14] at 111.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Division's Motion for Summary Disposition and Memorandum of Law, the Division respectfully requests that the Commission bar Respondent from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock.

Dated: May 6, 2024

Respectfully submitted,

[redacted]

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DIVISION OF ENFORCEMENT'S INDEX OF ATTACHMENTS

Attachment	Description
A	Declaration of Karen M. Klotz in support of Division of Enforcement's Reply Memorandum of Law in further Support of its Motion for Summary Disposition
B	Exhibits 14 and 15 to the Division of Enforcement's Reply Memorandum of Law in further Support of its Motion for Summary Disposition
C	Certificate of Service