

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
ADMINISTRATIVE PROCEEDING
File No. 3-21790

IN THE MATTER OF

ERIC CHRISTOPHER CANNON,

RESPONDENT.

**RESPONDENT ERIC
CHRISTOPHER CANNON'S
RENEWED MOTION FOR AN
ORDER STAYING OR
DISMISSING THE AMENDED
ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND
MEMORANDUM OF LAW IN
SUPPORT THEREOF**

In response to the March 27, 2024, Amended Order Instituting Administrative Proceedings (the “Amended OIP”) issued by the Securities and Exchange Commission (“SEC” or “Commission”), Respondent Eric Christopher Cannon (“Mr. Cannon”) moves for a limited stay or postponement until the earlier of August 1, 2024, or resolution of a pending motion to stay in Mr. Cannon’s appeal in the 9th Circuit Court of Appeals. 17 C.F.R. § 201.161. In the alternative, Mr. Cannon requests an order dismissing this matter, pursuant to Rule 250(a) of the Commission’s Rules of Practice, 17 C.F.R. § 201.250.¹

On March 27, 2024, the Commission denied Mr. Cannon’s previous motion to dismiss or stay this proceeding and simultaneously granted the Division’s motion to amend the OIP (the “Order Denying Stay,” Release 34-99858). In denying Mr. Cannon’s motion to stay these proceedings, the Commission concluded that an “indefinite stay” was not appropriate because “the public interest is advanced by promptly enforcing the securities laws.” *Id.*

Today, Mr. Cannon filed a motion in the 9th Circuit Court of Appeals to stay the district court injunction that serves as the statutory predicate for this proceeding (the “9th Circuit Motion to Stay” attached hereto as Attachment 1 without exhibits). Accordingly, Mr. Cannon respectfully requests that the Commission stay this proceeding until the earlier of the resolution of Mr. Cannon’s 9th Circuit Motion to Stay or August 1, 2024. Whereas staying this action

¹ This motion is not the sort of “routine” and “noncontroversial” matter that may be decided by the Office of General Counsel pursuant to delegated authority. 17 CFR § 200.30-14(i)-(k) (delegating authority to, e.g., “determine procedural requests or similar prehearing matters” and “rule upon non-dispositive, prehearing matters.”) See also, Release No. 33-10537 (August 22, 2018) (describing delegation of authority to OGC as limited to those “prehearing matters that are typically of a routine or non-controversial nature” authorized by Congress in Public Law No. 87-592, 76 Stat. 394, 15 U.S.C. 78d-1(a)). The Commission itself, and not the staff, should decide this motion to avoid an unconstitutional delegation of legislative power by Congress to the Commission that fails to provide an intelligible principle by which the Commission would exercise the delegated power, in violation of Article I of the U.S. Constitution’s vesting of “all” legislative power in Congress. *Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022).

pending resolution of the 9th Circuit Motion to Stay would not prejudice the Commission or be contrary to the public interest, permitting the proceeding to go forward would cause irreparable harm Mr. Cannon. To be clear, Mr. Cannon is not requesting an “indefinite stay” that will prevent the Commission from “promptly enforcing the securities laws.” In the alternative, Mr. Cannon moves to dismiss the Amended OIP.

I. Procedural History

On August 10, 2023, the District Court in *Securities and Exchange Commission v. Pacific West Capital Group, Inc., et al.*, Civil Action Number 2:15-CV02563-DDP-ASx (the “PacWest Case”) entered a “final judgment” against Mr. Cannon. On October 6, 2023, Mr. Cannon filed a Notice of Appeal in the PacWest Case, initiating an appeal to the Ninth Circuit Court of Appeals. Three weeks later, on October 31, 2023, with that appeal pending, the Commission instituted this proceeding against Mr. Cannon pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) (the “Original OIP”).² The Original OIP asserted that “[i]n view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest” that proceedings be instituted to determine whether the Enforcement Division’s allegations are true and what remedial action is appropriate and in the public interest against Mr. Cannon. Original OIP ¶ II, B, 3.

Although the Original OIP purported to describe the “PacWest Case, the description was factually inaccurate, incomplete, and misleading in multiple respects, including because it (a) cited allegations not present in the SEC Enforcement Division’s Complaint in the PacWest Case, (b) referenced the “final judgment” against Mr. Cannon from August 2023, but this judgment

² *Eric Christopher Cannon*, Exchange Act Release No. 98827, 2023 WL 7180201 (Oct. 31, 2023).

was amended four months later in December 2023 based on an errors by the Division, and (c) did not reference Mr. Cannon’s appeal of the District Court’s final judgment.

On November 14, 2023, the Division and Mr. Cannon filed a joint stipulation to stay (“Stay Stipulation”) the proceeding “until 30 days after the earlier of the Supreme Court’s decision in *SEC v Jarkesy* or July 31, 2024.”³ Two weeks later, on December 13, 2023, the District Court in the PacWest case issued an amended judgments to correct an error regarding disgorgement amounts against Mr. Cannon (the “Amended Judgment”). On December 28, 2023, the SEC Office of the General Counsel (“OGC”), “pursuant to delegated authority,” denied the Stay Stipulation reached by the Division and Respondent in part on the basis that “this proceeding has never been assigned to an administrative law judge.”⁴ Because the OGC refused to stay this action, Mr. Cannon was compelled to litigate in two forums, and, roughly a week later, on January 8, 2024, Mr. Cannon filed an amended notice of appeal in the Ninth Circuit, based in part on the Amended Judgments.

A week later, on January 17, 2024, Mr. Cannon filed an Answer to the OIP. Two days later, on January 19, 2024, Mr. Cannon filed his Motion to Dismiss the OIP, citing in part the various inaccuracies in the OIP discussed above. The Division opposed, and on January 26, 2024, OGC issued an order requesting further briefing on the inaccuracies in the OIP. On February 7, 2024, the Division filed a motion to amend the OIP. While this request was pending, on March 7, 2024, Mr. Cannon filed his opening brief before the Ninth Circuit. A week later, on March 12, 2024, the SEC requested an extension of time to respond to Mr. Cannon’s opening appeal brief.

³ *Eric Christopher Cannon*, Exchange Act Release No. 99249 (Dec. 28, 2023).

⁴ *Id.*

Two weeks later, on March 27, 2024, the Commission granted the Division of Enforcement's request for an amended OIP and attached the Amended OIP to its order. On April 16, 2024, Respondent answered the Amended OIP. Just a week later, on April 24, 2024, as this proceeding remained pending, the SEC requested another extension from the Ninth Circuit to respond to Mr. Cannon's opening brief. Five days after requesting additional time from the Ninth Circuit, on April 29, 2024, the Division of Enforcement filed its Disposition Motion in this matter. On April 30, 2024, in the 9th Circuit appeal, Mr. Cannon filed a motion to stay the district court's injunction pending resolution of the appeal.

II. The SEC Should Stay or Postpone This Proceeding Until Mr. Cannon's 9th Circuit Motion to Stay is Resolved

Rule of Practice 161(b) authorizes postponements based on a consideration of, among other things, the length of the proceeding to date; the number of postponements, adjournments, or extensions already granted; the stage of the proceedings at the time of the request; and any other such matters as justice may require. This proceeding was initiated six months ago on October 31, 2023, fact discovery has not closed, and no evidentiary hearings have been held.⁵

In the *Joshua Abrahams* matter, initiated on October 21, 2022, the Commission postponed a proceeding "until the earlier of 30 days after the Supreme Court issues its mandate in *Jarkesy* or July 31, 2024." That is, the Commission stayed the *Abrahams* proceeding for nearly two years so that an appeal could be resolved in a totally unrelated case that would presumably have an impact on the whether the *Abrahams* administrative proceeding would be assigned to an administrative law judge. In the Order Postponing Proceeding, the Commission

⁵ *Joshua Abrahams*, Exchange Act Release No. 98122 (August 14, 2023) (order postponing proceeding until "the earlier of 30 days after the Supreme Court issues its mandate in *Jarkesy* or July 31, 2024").

cited no irreparable harm that Mr. Abrahams would suffer in the absence of a postponement. Similarly, the Commission identified no harm to the public interest in promptly enforcing the securities laws despite fact that the proceeding had been initiated 10 months earlier and fact discovery had closed.

Similarly, on April 4, 2023, the Commission postponed the *Jason Jianxun Tang* matter indefinitely because “Tang is currently cooperating with a related ongoing investigation by the Division of Enforcement, and the full extent of his cooperation likely will impact the parties’ positions regarding what, if any, civil penalties against Tang are appropriate.”⁶ As in the *Abrahams* matter, the Commission cited no harm that would befall Mr. Tang had he been compelled to go forward with the proceedings. In support of the postponement, the Commission cited the fact that Tang was subject to an SEC cease and desist order and had been denied the ability to practice before Commission as an accountant. However, the Commission identified no harm to the public interest in promptly enforcing the securities laws despite the fact that the ALJ had granted three prior postponements and the postponement granted by the Commission was indefinite “until Tang’s cooperation with the Division’s investigation has concluded.” One year later (and approximately 18 months after inception of the proceeding) the matter remains stayed.

As in the *Abrahams* and *Tang* proceedings, the public interest in prompt enforcement will not suffer if the Commission postpones this proceeding until the earlier of August 1, 2024, or resolution of Mr. Cannon’s motion to stay currently pending in the 9th Circuit Court of Appeals. This proceeding was instituted less than a year ago, fact discovery is not closed, and no evidentiary hearings have been held. As in the *Abrahams* postponement, the outcome of the 9th Circuit stay motion may greatly impact this administrative proceeding. In the event the 9th

⁶ *Jason Jianxun Tang*, Securities Act Release No. 97246 (April 4, 2023).

Circuit stays the district court’s injunction, the legal predicate for this proceeding will no longer have effect. The impact of a stay issued by the 9th Circuit exceeds the impact of cooperation by respondent in the *Tang* matter, where the only remaining issue is the extent of penalty, if any, to be imposed. In the meantime, similar to the cease and desist order the *Tang* matter, Mr. Cannon remains subject to the district court’s injunction against violations of the pertinent federal securities laws, providing prophylactic protection against public harm much in the same way as the cease and desist and 102(e) order provided prophylactic protection against public harm in the *Tang* matter. On the other hand, Mr. Cannon will suffer greatly – certainly no less than the harm suffered by respondents in either the *Abrahams* and *Tang* matters -- if he must expend time and resources to defend himself in this proceeding, or potentially be barred (as the Division recently requested in its Disposition Motion) from “association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and (2) barring Cannon from participating in the offering of any penny stock,” before the 9th Circuit considers Mr. Cannon’s motion to stay the injunction on which the Commission has based this proceeding. The Commission should postpone or stay this proceeding until the earlier of August 1, 2024, or resolution of Mr. Cannon’s motion to stay currently pending in the 9th Circuit Court of Appeals.

III. The Commission Should Dismiss this Action Because it Denies Mr. Cannon’s Due Process Rights and is Barred by Res Judicata

The Commission has been litigating in federal court against Mr. Cannon since 2015. In that litigation, the Commission had the option to pursue injunctive relief tailored to what it believed was necessary to protect the public interest. And in fact, the Commission sought and obtained from the district court a final judgment enjoining Mr. Cannon from violating certain provisions of the federal securities laws. However, the Commission elected not to pursue other

types of injunctive relief in federal court. So, for example, the Commission elected not to pursue an injunction prohibiting Mr. Cannon from any future participation in penny-stock offerings, which the Commission often seeks against other federal court defendants. *See, e.g. SEC v. Almagarby, et. al*, 479 F.Supp.3d 1266, 1273–74 (2020) (overturned in part by *SEC v. Almagarby*, No. 21-13755 (11th Cir. 2024) (not approving of district court enjoining “a defendant from participating in otherwise lawful behavior when that defendant had not already exhibited his unlikeliness to comply with the law going forward”). The SEC has long sought from federal courts all manner of ancillary relief, injunctive and otherwise. *See, e.g., SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984) (“any form of ancillary relief may be granted where necessary and proper to effectuate the purposes of the statutory scheme”). And yet in this proceeding, having failed to ask the federal district court for an injunction prohibiting Mr. Cannon from participating in the offering of any penny stock (or any other form of ancillary injunctive relief), the Division now asks the Commission to impose that exact same remedy based only on the federal district court’s injunction against future violations of certain provisions of the federal securities laws and a finding by the Commission that barring Mr. Cannon from participating in the offering of any penny stock would be in the public interest.

To be sure, the Commission has the statutory authority to seek some types of bars in either federal court or in an administrative proceeding (compare Exchange Act Section 21(d)(6)(A), 15 U.S.C. § 78u(d)(6)(A), with Exchange Act Section 15(b)(6)(A), 15 U.S.C. § 78o(b)(6)(A)). However, pursuing conduct-based bars in a follow-on proceeding such as this when the underlying conduct has already been adjudicated in federal court and no such relief was sought in that forum presents specific Due Process issues. The Commission, which has been Mr. Cannon’s legal adversary for nine years will now be in the position of determining what

restrictions on Mr. Cannon's otherwise legal conduct are in the "public interest." Mr. Cannon is entitled to a hearing in front of a judge that is not the same entity that has been litigating the underlying claims against him as his adversary in federal court. A "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "This applies to administrative agencies which adjudicate as well as to courts." *Withrow v Larkin*, 421 U.S. 35, 46 (1975) (citation omitted). This proceeding violates Mr. Cannon's Due Process rights, and, on that basis, the Commission should dismiss the proceeding.

For much the same reason, the Commission should dismiss this proceeding because it is barred by res judicata. *See, e.g., Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (superseded by statute on other grounds))). To successfully assert a res judicata defense, a party must establish: "(1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Id.* This proceeding is premised entirely upon the final judgment in the federal district court, and the parties are identical. Res judicata "bars litigation of any claim for relief that was available in a prior suit between parties or their privies, whether or not the claim was actually litigated." *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *55 (Feb. 13, 2009) (citing *Jones*, 115 F.3d at 1178), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010). The Commission could have, but elected not to, seek a penny stock bar and professional bars as part of the equitable relief it obtained in

the federal court action. Res judicata bars the Commission from pursuing this action, and, accordingly, it should be dismissed.

IV. Conclusion

For at least the foregoing reasons, the Commission should postpone or stay this proceeding until the earlier of August 1, 2024, or resolution of Mr. Cannon's motion to stay currently pending in the 9th Circuit Court of Appeals. Alternatively, the Commission should dismiss this proceeding entirely as it violates Mr. Cannon's Due Process rights and is barred by res judicata.

Dated: April 30, 2024

Respectfully submitted,

/s/ Nicolas Morgan
Nicolas Morgan
INVESTOR CHOICE ADVOCATES NETWORK
453 South Spring Street
Suite 400
Los Angeles, CA 90013
Attorneys for Respondent,
Eric Christopher Cannon