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 BRIEF IN OPPOSITION TO THE DIVISION'S SUMMARY DISPOSITION MOTION

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In response to the April 26, 2024, Division of Enforcement's Motion for Summary Disposition ("Disposition Motion"), Respondent Eric Christopher Cannon ("Mr. Cannon") responds as follows in opposition.

This proceeding and the Disposition Motion suffer from a number of fatal flaws. As explained further below, the proceeding and Disposition Motion deny Mr. Cannon his constitutional right to Due Process, are barred by *res judicata*, exceed the Commission's statutory authority, are not in the public interest, and should be stayed pending the outcome of Mr. Cannon's appeal of the injunction on which they are based. In short, rather than granting the Division's Disposition Motion, the Commission should dismiss the proceeding altogether. In the alternative, the Commission should simply deny the Disposition Motion.

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").[1] 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

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

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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 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."[2] 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,

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

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.

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. Also on April 30, Mr. Cannon filed a renewed motion to stay or dismiss this proceeding, which the Division opposed today.

II. Res Judicata Bars the Proceeding and Disposition Motion

In the district court 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.

As a result of the foregoing, the Commission should deny the Division's Disposition Motion and also 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, the Disposition Motion should be denied and this proceeding should be dismissed.

In the Division's opposition to Mr. Cannon's renewed motion to stay or dismiss, the Division responded to the foregoing res judicata. The Division's first line of opposition is a curious one: the Division concedes that it could have pursued (but elected not to pursue) a penny stock bar in federal court. As to the associational bar relief sought here, the Division cites no authority (presumably because none exists) that would have precluded the Commission from seeking associational bars as part of its request for injunctive relief in federal court. The Division does not cite a single authority holding that the Commission is free to pursue bars in a follow-on administrative proceeding that it could have pursued but did not pursue in federal court. Instead, the Division cites a case in which the concept of res judicata is not mentioned a single time even in passing, *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988). The Division compounds that error by citing to a Commission opinion cursorily rejecting a res judicata defense relying on only one federal court case in support of its position, *Blinder*. *Michael T. Studer*, Exchange Act Release No. 50411, 2004 SEC LEXIS 2135 (Sept. 24. 2004) (citing *Blinder*). The Division also cites two opinions by administrative law judges who had been unconstitutionally appointed, *Tzemach David Netzer Korem*, Release No. 70044 at *9 (July 26, 2013); *Lodavina Grosnickle*, Initial Decisions Release No 441, 2011 SEC LEXIS 3969 (Nov. 10, 2011).

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The Division does not distinguish or even address the *Jones* case or the United States Supreme Court case quoted therein, *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) ("Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. . . ").

The Commission has previously recognized that *res judicata* is available in administrative proceedings to bar "litigation of any claim for relief that was available in a prior suit between the same parties or their privies, *whether or not the claim was actually litigated*." *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *13 (Feb. 13, 2009) (emphasis added, quoting *Transaero, Inc. v. La Fuenza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998)). Here, the Commission had the ability to seek injunctive relief in federal court matching the relief sought by the Division in this proceeding. The Commission chose not to seek such relief, and *res judicata* bars it from doing so now. Accordingly, the Commission should deny the Disposition Motion and dismiss this proceeding.

III. The Proceeding and Disposition Motion Violate Due Process

As set forth in Mr. Cannon's Renewed Motion to Stay or Dismiss, this proceeding and the Division's Disposition Motion violate Mr. Cannon's constitutional rights to due process. The Commission, which has been Mr. Cannon's legal adversary since 2015 is 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).

In the Division's opposition to Mr. Cannon's renewed motion to stay or dismiss, the Division cites only to a single case to suggest that Mr. Cannon's due process rights have not been

violated, *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104 (D.C. Cir. 1988) (*citing Withrow v Larkin*, 421 U.S. 35(1975)). However, a more recent Supreme Court case calls into question the viability of *Withrow*, and, consequently, the viability of *Blinder*: *Williams v Pennsylvania*, 579 U.S. __, 136 S. Ct. 1899 (2016) (forbidding a person from being both an accuser and adjudicator in the same case). In *Williams*, the Supreme Court set forth an objective standard: "The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias". *Id*. at 1905. The Commission has been and continues to be Mr. Cannon's "accuser" in federal district court and now federal appellate court. Under the objective test set forth in *Williams*, an unconstitutional potential for bias exists, and granting the Division's Disposition Motion or continuing this proceeding would violate Mr. Cannon's right to due process.

IV. The Commission Should stay the Disposition Motion and Proceeding

For the reasons set forth in Mr. Cannon's renewed motion to stay or dismiss, the Commission should stay the proceeding and the Disposition Motion. Mr. Cannon will not repeat his prior arguments here, but the Commission should note that in the case relied upon by the Division in opposing Mr. Cannon's renewed motion to stay or dismiss, the D.C. Circuit Court of Appeals (over the Commission's opposition) entered an order staying the entry of sanctions in a follow-on administrative proceeding after the Commission had denied such a stay. *Blinder, Robinson Co., Inc. v. SEC*, 837 F.2d 1099, 1103 (D.C. Cir. 1988) ("this court, over the opposition of the SEC, entered an order staying the entry of sanctions") (cited for other purposes by the Division in its opposition to renewed motion to stay at 2). Neither the Commission nor the public interest will suffer any harm by staying this proceeding, and, by extension, the Division's Disposition Motion.

V. This Proceeding Is Not Appropriate for Summary Disposition

A motion for summary disposition may only be granted if there is no genuine issue with regard to any material fact. 17 C.F.R. § 201.250(b). Here, significant genuine issues remain in dispute regarding whether or not the bars sought by the Division would be in the public interest. Many of the factors the Commission considers in making a determination of what is in the public interest relate to issues that require an evidentiary hearing and witness testimony. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981) (factors to consider 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 against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations).

Were the Commission to grant the Division's Dispositive Motion, Mr. Cannon would be precluded from providing testimonial evidence at a hearing regarding several of these factors, including his scienter, the sincerity of his assurances against future violations, and the recognition of the wrongful nature of his conduct. The Division takes the position that all of these issues have been addressed in the federal court, and, accordingly, Mr. Cannon is precluded from entering further evidence in this proceeding. The Division "is wrong." *Blinder, Robinson Co., Inc. v. SEC*, 837 F.2d 1099, 1109 (D.C. Cir. 1988) (holding that the public interest "determination is separate from and in addition to the SEC's determination as to the existence of the disqualifying conditions necessary for the imposition of any sanctions"). In *Blinder*, the DC Circuit Court of Appeals reversed a Commission decision, holding:

> Precluding petitioners in administrative disciplinary proceedings from presenting all evidence relevant to the issue of sanctions — whether or not previously presented to a District Court — would do violence to the considered allocations of adjudicatory responsibilities. . . . The statutory obligation placed on the SEC to exercise its judgment is not satisfied simply by having the SEC adopt the findings

of the District Court.

Id. at 1111. Granting the Division's Disposition Motion would do the same "violence" here and would be similarly inappropriate.

That impropriety is particularly acute here given the state of the record in the district court. In its Disposition Motion, the Division is much more guarded on the issue of Mr. Cannon's scienter than it was in the district court proceedings. In the district court, the Division said bluntly, "the issue of scienter was resolved in favor of Defendants" and "the Court found that the *absence of scienter* weighed against the issuance of an injunction." (Dkt. 579). The Commission will find no such blunt acknowledgements by the Division in its Disposition Motion. Instead, it appears the Division is trying to introduce selected portions of the record and argument to create an issue on scienter that the district court *already decided against the Commission*. If the Commission is inclined to reverse or rethink the district court's findings characterized by the Division as "the absence of scienter," surely Mr. Cannon is entitled to present evidence and testimony at a hearing on that issue.

Similarly with regard to a determination of the likelihood of future violations by Mr. Cannon and his recognition of the wrongful nature of his conduct, the Division cites to the district court's ruling on that point on a summary judgment record. Mr. Cannon was not provided an opportunity for an evidentiary hearing in the district court, which is a reversible error he has addressed in his appeal to the 9th Circuit. But by the same reasoning, it would be improper for the Commission to make a determination of a likelihood of future violations on summary disposition without an evidentiary hearing. In *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692 (9th Cir. 1978), the 9th Circuit reversed the district court's injunction imposed on the basis of a summary judgment record in light of triable issues of fact regarding the likelihood of future

violations. Addressing the likelihood of future violations—the court in *Koracorp* stressed that "expressions of the defendants' states of mind ... are relevant to a determination of the likelihood of repetition," and that "summary judgment is singularly inappropriate where credibility is at issue. Only after an evidentiary hearing or a full trial can these credibility issues be appropriately resolved." *Id*. at 699 (citations omitted). The same is true here.

If, as the D.C. Circuit Appellant Court concluded in *Blinder*, the "statutory obligation placed on the SEC to exercise its judgment is not satisfied simply by having the SEC adopt the findings of the District Court," then Mr. Cannon is entitled to present testimonial evidence and have an evidentiary hearing. To deny Mr. Cannon those opportunities by granting the Division's Disposition Motion "would do violence to the considered allocations of adjudicatory responsibilities," and would constitute reversible error. *Blinder*, 837 F.2d at 4111. *See also*, *SEC v. Husain*, 70 F.4th 1173, 1177 (9th Cir. 2023) (reversing district court imposition of remedies on summary judgment record).

Finally, as to the "egregiousness" *Steadman* factor, the Commission must first determine that Mr. Cannon committed "blatant" securities-law violations. *SEC v. Almagarby*, No. 21-13755 at 29-30 (11th Cir. 2024) (overturning district court penny stock bar in part due to absence of egregious violations because "Defendants put forward a non-frivolous argument that they were not required to register . . ."). In Mr. Cannon's case, the district court specifically found that "the legal questions [Mr. Cannon raises] on appeal are not frivolous." (Dkt. 590). The Commission cannot find "egregious" violations on the current record.

But more fundamentally, to find that Mr. Cannon committed egregious securities law violations, the Commission will first have to find that Mr. Cannon committed *any* securities law violations at all. When moving on summary judgment in the district court in the Central District

of California, the Commission and the district court felt no need to consider as controlling authority the D.C. Circuit court's very clear decision in *SEC v. Life Partners, Inc.*, 87 F.3d 536, 546-48 (D.C. Cir. 1996), *rehearing denied*, 102 F.3d 587 (D.C. Cir 1996) (fractional interests in life insurance settlement arrangement are not securities). But in this proceeding, charged with determining whether barring Mr. Cannon would be in the public interest, the Commission must address anew whether Mr. Cannon committed any egregious violations. Sitting as the Commission does within the District of Columbia, the D.C. Circuit's decision in *Life Partners* cannot be ignored. Indeed, *Life Partners* is controlling authority for this proceeding. Accordingly, for purposes of this proceeding, the life settlement arrangements at issue are not securities; the offering of the life settlement arrangements was not required to be registered; and, as Mr. Cannon was not effecting transactions in securities, he was not required to be registered as a securities broker. Mr. Cannon did not commit egregious violations of the federal securities laws. Under controlling law for this proceeding, Mr. Cannon did not commit any violations whatsoever.

VI. Conclusion

For at least the foregoing reasons, the Commission should deny the Division's Disposition Motion and dismiss this proceeding.

Dated: May 3, 2024

Respectfully submitted,

/s/ Nicolas Morgan

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CERTIFICATE OF SERVICE

In accordance with 17 C.F.R. §§ 201.150, 201.151, I certify that a copy of Respondent Eric Christopher Cannon's Brief in Opposition to the Divisions Summary Disposition Motion was served on the following on May 3 2024, via the method indicated below:

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/s/ Nicolas Morgan
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