UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21966

In the Matter of **JOHN D. FIERRO,** **Respondent.**	**DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT JOHN D. FIERRO AND MEMORANDUM OF LAW IN SUPPORT**

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Pursuant to Rule 250(b) of the Securities and Exchange Commission's ("SEC" or the "Commission") Rules of Practice, the Division of Enforcement ("Division") respectfully moves for summary disposition against Respondent John D. Fierro ("Fierro").

This follow-on proceeding stems from a civil injunction imposed by the United States District Court for the District of New Jersey against Fierro, after the Court entered summary judgment on behalf of the SEC. In particular, the Court enjoined Fierro from acting as an unregistered dealer in violation of Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act"). Thus, the sole issue in this proceeding concerns the appropriate sanction against Fierro under Section 15(b) of the Exchange Act. As discussed below, the Commission should grant this motion for summary disposition and impose an associational bar against Fierro.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. District Court Proceedings

On February 26, 2020, the SEC filed a Complaint against Fierro in the United States District Court for the District of New Jersey, alleging that he violated Section 15(a)(1) of the Exchange Act, 15 U.S.C. § 78o(a)(1). Ex. 1, SEC Complaint ("Compl.").[1] According to the Complaint, between January 2015 and November 2017 ("the Relevant Period"), Fierro, through his wholly-owned company JDF Capital, Inc., bought and sold billions of newly-issued shares of penny stocks and generated millions of dollars of profits from those sales, while not registered as a dealer as required by the Exchange Act. *Id.*

[1] Under Rule of Practice 323, notice may be taken 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: Ex. 1 (SEC's Complaint) and Ex. 2 (Final Judgment).

In its Complaint, the SEC specifically alleged that Fierro: (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. ¶ 12; (2) converted these securities into stock at a large discount to the prevailing market price, Compl. ¶ 10; and (3) in the process, obtained billions of newly-issued shares that he dumped on the market, reaping $2,325,095 in profits from his ten highest grossing stocks, Compl. ¶ 18.

1. The SEC Wins Summary Judgment on Liability

On June 29, 2023, the District Court granted the SEC's motion for summary judgment and held that Fierro violated the dealer registration requirements of Section 15(a)(1) of the Exchange Act. The Court explained:

> Defendants concede that, looking only at their ten highest grossing stocks during the Relevant Period, they sold approximately 5.7 billion shares of stock from converted notes. Defendants also admit that those sales resulted in approximately $5.4 million in proceeds and approximately $2.3 million in profits. These undisputed share volumes, proceeds, and profits are strong indicators that Defendants engaged in the "business" of buying and selling securities.

SEC v. Fierro, 2023 WL 4249011, at *6 (D. N.J. June 29, 2023) (internal citations omitted). The Court added, "Moreover, in order to generate such proceeds and profits, Defendants acquired newly issued stock directly from microcap issuers, at significant discounts based on the terms of the convertible notes, and then resold that stock to the public—further evidencing Defendants' status as dealers, not traders." *Id*. The Court further found, "Defendants advertised and promoted their convertible notes business, including through a website and Defendants sponsored and attended conferences at which they promoted JDF's convertible notes business and solicited issuers to sell JDF convertible notes." *Id*. (internal citations omitted).

The Court also found that Fierro had acted as a control person of JDF Capital under Section 20(a) of the Exchange Act because he "'had the power to control the general affairs of

[JDF] at the time it committed its violations and, further, he possessed the power to directly or indirectly control or influence [JDF's] specific policies which resulted in its primary liability.'" *Id.* at *7 (quoting *SEC v. Almagarby*, 479 F. Supp. 3d 1266, 1273 (S.D. Fla. 2020)).

2. The SEC Wins an Injunction and Other Relief Against Fierro

On May 21, 2024, after briefing on remedies, the Court entered a final judgment against Fierro, *inter alia*, permanently enjoining him from:

> violating Section 15(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(a)(1), as a dealer (15 U.S.C. § 78c(a)(5)), by 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 pursuant to 17 C.F.R. § 240.15a-2 or commercial paper, bankers' acceptances, or commercial bills) unless Defendants are registered with the Commission as a dealer in accordance with Section 15(b) of the Exchange Act.

Ex. 2, at ¶ 2.

In the final judgment, the Court also ordered Fierro to pay disgorgement of $4,053,148, prejudgment interest of $1,326,440, and a civil penalty of $500,000 (on a joint and several basis with JDF), for a total judgment of $5,879,588. The Court also ordered him to surrender for cancellation certain stock and conversion rights under existing convertible securities. *Id.* at ¶¶ 4-5.

B. The Follow-on Proceeding

On June 14, 2024, the Commission issued an Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing ("OIP") against Fierro.[2] The OIP alleged that Fierro 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). The OIP seeks to determine whether the allegations were true and whether any remedial action is appropriate in

[2] *John D. Fierro*, Exchange Act Release No. 100339 (June 14, 2024).

the public interest.

On August 28, 2024, Fierro filed an Answer and Affirmative Defenses to the OIP admitting all the allegations in the OIP. *OIP Answer* at ¶¶ 1-5. In his Answer, Fierro also contended: (1) the District Court did not find that his conduct was egregious or that he acted intentionally or with scienter; and (2) the Court's injunction obviates the need for an associational bar. *Id.* at 2-3.

II. ARGUMENT

The Commission should grant the Division's motion for summary disposition because (1) there is no genuine issue of material fact that Fierro meets the requirements for the Commission to sanction him, and (2) an associational bar is appropriate and 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.[3] *See* 17 C.F.R. § 201.250(b). A motion for summary disposition may be granted if there is no genuine issue as 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 Fierro, 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

[3] On October 8, 2024, counsel for the Division sent a letter to Fierro'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.

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 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.").

As discussed above, after the District Court found that Fierro 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, Fierro 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

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investment adviser in a follow-on administrative proceeding."); *Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 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). Under these circumstances, it is appropriate for the Commission to sanction Fierro.

C. A Permanent Industry Bar Is Appropriate in This Case

The Commission should permanently bar Fierro 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) Fierro 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, Fierro was associated with a broker-dealer at the time of the misconduct. Paragraph 2 of the OIP alleged that: "Between January 2015 and November 2017, Respondent [Fierro], through JDF, engaged in the regular business of buying and selling billions of newly issued shares of microcap securities and generated millions of dollars of profits from those sales, while failing to register as a dealer as required by Section 15(a)(1) of the Exchange Act." Fierro specifically admitted these allegations in his answer. *OIP Answer* at ¶ 2. Because the Commission has held that broker-dealers themselves are also "associated" persons for purposes of Section 15(b)(6),[4] Fierro cannot dispute that he meets this factor. He also meets the factor by

[4] *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).

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being the control person of JDF, which the Court also found to be an unregistered dealer. Thus, this factor is satisfied.

Second, the District Court enjoined Fierro from engaging in conduct that was in connection with the purchase or sale of securities, Ex. 2, at ¶ 2, and that order gives the Commission authority to bar Fierro under Exchange Act Section 15(b)(6)(A)(iii). *See Richmond*, 2003 WL 470194 at *2. Paragraph 4 of the OIP stated that: "The Court entered the injunction after finding that Respondent [Fierro] acted as an unregistered dealer in violation of Section 15(a)(1) of the Exchange Act." Fierro's answer to the OIP specifically admitted these allegations. *OIP Answer* at ¶ 4. Therefore, the purchase and sales of securities requirement is met.

D. A Permanent Industry Bar Is in The Public Interest.

Here, a permanent industry bar 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 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*, SEC Release No. IA-2840, Admin. Proc. File No. 3-12716, 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).

The *Steadman* factors – which are identical to the Third Circuit factors upon which the District Court relied in levying its injunction – support an associational bar. *See Fierro*, 2024 WL 2292054, at *1-3 (relying on *SEC v. Desai*, 145 F. Supp. 3d 329, 337 (D.N.J. 2015), *aff'd*, 672 F. App'x 201 (3d Cir. 2016)). Fierro is precluded from relitigating the District Court's findings on these factors. *See John W. Lawton*, Investment Adviser Act Release No. 3513, 2012 WL 6208750, at *5 (Dec. 13, 2012) ("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."); *Eric S. Butler*, SEC Release No. 3262, Admin. Proc. File No. 3-13986, 2011 WL 3792730, at *4-5 (August 26, 2011) (same).

The District Court concluded that, although Fierro's misconduct was not egregious and did not involve scienter (factors 1 and 3), the majority of factors weighed in favor of an injunction. *See Fierro*, 2024 WL 2292054, at *2 (in finding that scienter weighed against an

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injunction, the court noted that "A finding of scienter is not a prerequisite to injunctive relief if scienter is not an element of the charged offense.") So too here, the majority of the *Steadman* factors amply support imposing an associational bar against Fierro.

As to the second *Steadman* factor, the District Court found that the "recurrent nature of Defendants' violations … weighs in favor of an injunction." *Fierro*, 2024 WL 2292054, at *2. Finding that Fierro operated as an unregistered dealer for almost three years, the court stated that: "Courts typically hold such conduct to be 'recurrent' in similar circumstances." *Id*. (citing *SEC v. Almagarby,* 92 F.4th 1306, 1321-22 (11th Cir. 2024) and *SEC v. Keener*, 644 F. Supp. 3d 1290, 1299 (S.D. Fla. 2022)). The Commission should likewise conclude that, for purposes of determining whether an associational bar is in the public interest, Fierro's years-long failure to register as a dealer, while conducting his business of buying and selling securities, was recurrent.

Similarly, as to the fourth and fifth *Steadman* factors – the sincerity of Fierro's assurances against future violations and his recognition of the wrongful nature of his conduct – the District Court squarely rejected his position. The Court found that "Defendants have not offered any evidence assuring the Court that they have recognized the wrongful nature of their conduct and will not commit future violations." *Id.* Fierro argued that his "cessation of unregistered dealer activity for over six years demonstrates [his] assurance that [he] will not violate any securities law in the future." *Id*. The Court correctly observed that Fierro only ceased his conduct when confronted with an SEC investigation, quoting precedent for the principle that: "It is well settled . . . that cessation of illegal activities in contemplation of an SEC suit does not preclude the issuance of an injunction enjoining violations." *Id*. (quoting *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972)). Fierro's timely decision to comply with the law also

should not save him from an associational bar. The Commission should, like the District Court, find that the fourth and fifth *Steadman* factors weigh in favor of a bar.

The final *Steadman* factor – the likelihood that Fierro's occupation will present opportunities for future violations – also weighs in favor of a bar. As the District Court found, "Fierro has made a living as an investor for over twenty years, and 'the buying and selling of securities for its own account' is JDF's inherent business model." *Id*. at *3. The Court noted that "[o]ther courts have found that such extensive experience working in securities weighs in favor of granting injunctive relief." *See id.* (citing *SEC v. CKB168 Holdings, Ltd.*, 2022 WL 3347253, at *3 (E.D.N.Y. Aug. 12, 2022); *SEC v. Baccam*, 2017 WL 5952168, at *9 (C.D. Cal. June 14, 2017)).

The Court pointed out that "Fierro testified at his deposition that he had no current income, was 'trying to figure out' how he would earn income in the future and had last earned income by settling debt owed through convertible note transactions." *Id.* With these undisputed facts, the Court aptly concluded, "[Fierro's] years of experience in the securities industry, and a lack of any indication that [he is] likely to change occupations, weigh in favor of finding it reasonably likely that [his] occupation will present opportunities for future violations." *Id.* at *3. Accordingly, that Fierro may again seek to engage in securities dealer work weighs in favor of an associational bar.

Ultimately, an analysis of the *Steadman* factors argues that a permanent industry bar against Fierro is in the public interest. Given that fact and the other circumstances discussed herein and otherwise demonstrated in the record, a permanent industry bar is appropriate in this case.

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 Fierro.

Dated: December 19, 2024

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 motion was served on the following persons on December 19, 2024:

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