UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
JOHN D. FIERRO,	)	ADMINISTRATIVE PROCEEDING
	)	FILE NO. 3-21966
Respondent.	)	

RESPONDENT JOHN D. FIERRO'S OPPOSITION TO DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT AND MEMORANDUM IN SUPPORT

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Respondent John D. Fierro ("Mr. Fierro"), by and through his undersigned counsel, hereby submits this Response in Opposition to the Division of Enforcement's (the "Division") Motion for Summary Disposition Against Respondent John D. Fierro ("Motion for Summary Disposition"). In furtherance of the same, Mr. Fierro respectfully states as follows:

I. BACKGROUND

A. District Court Action

1. On February 26, 2020, the Division filed its Complaint against Mr. Fierro in the United States District Court for the District of New Jersey (the "District Court"), Case No. 3:20-cv-02104 MAS-LHG (the "District Court Action"), alleging that Mr. Fierro had violated Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78o(a)(1). *See* Motion for Summary Disposition at Exh. 1, Division's Complaint.

2. On June 29, 2023, the District Court granted the Division's motion for summary judgment holding that Mr. Fierro violated the dealer registration requirements of Section 15(a)(1) of the Exchange Act. The District Court granted the Division's request for a permanent injunction against Mr. Fierro barring future violations of Section 15(a) of the Exchange Act, but denied the Division's request for a penny stock bar against Mr. Fierro. *See SEC v. Fierro*, 2023 WL 4249011, at *6 (D. N.J. June 29, 2023).

B. Administrative Proceeding

1. On June 14, 2024, the Division issued an Order Instituting Administrative Proceeding Pursuant to Section 15(b) of the Exchange Act and Notice of Hearing ("OIP") against Mr. Fierro seeking further relief against Mr. Fierro, beyond what the District Court has already granted. *See generally* OIP.

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2. On approximately December 19, 2024, the Division filed its Motion for Summary Disposition seeking the imposition of a permanent associational bar under Section 15(b)(6)(A)(iii) of the Exchange Act against Mr. Fierro.

II. ARGUMENT

A. Standard

Pursuant to SEC Rule of Practice 250(b), any party who moves for summary disposition must "show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law." 17 C.F.R. § 201.250(b). The Securities and Exchange Commission (the "Commission") must view the facts on summary disposition "in the light most favorable to the non-moving party." *In re BioElectronics Corp.*, 2016 SEC LEXIS 2588 (July 26, 2016). As set forth below, the Division has not met its burden, and its Motion for Summary Disposition must be denied.

B. A Permanent Industry Bar Is Not Appropriate in This Matter

This matter is steeped in irony, since – as noted above – the Division already sought injunctive relief against Mr. Fierro pursuant to Section 15(a)(1) of the Exchange Act for failing to register JDF Capital, Inc. ("JDF") as a securities broker-dealer in the District Court Action. Although the District Court already (1) granted a permanent injunction against Mr. Fierro barring future violations of Section 15(a) of the Exchange Act, and (2) denied the Division's request for a penny stock bar against Mr. Fierro, the Division now seeks further administrative action against Mr. Fierro.

Given the fact that Mr. Fierro's registration violation – which did not involve fraud or sales practices – was determined by the District Court to be neither egregious nor intentional (i.e., made with scienter), no remedial or regulatory purpose exists to subject Mr. Fierro to further administrative action by the Division. *See SEC v. Fierro*, 2024 WL 2292054, at *3-4 (D.

N.J. May 21, 2024) ("The SEC. . . concedes that Defendants' conduct was not egregious . . . [n]or does it allege that Defendants acted with scienter."); *see also SEC v. Almagarby,* 92 F.4th 1306, 1324 (11th Cir. 2024) (denying penny stock bar due to nothing in the record establishing that the defendant's Section 15(a) violations were egregious or intentional). Moreover, the Eleventh Circuit has held that these types of violations are more akin to "minor, technical violations," rather than those involving "intentional, knowing conduct." *Almagarby,* 92 F.4th at 1325. Ultimately, the District Court concluded that, "[b]ecause Defendants' misconduct was not egregious and did not involve any scienter, the Court finds that a permanent injunction against future misconduct without a complete penny stock bar 'provide[s] full relief without inflicting unnecessary pain.'" *Fierro,* 2024 WL 2292054 at *8 (emphasis added).

C. A Permanent Industry Bar is Against the Public Interest

A permanent industry bar is "the severest of sanctions." *Khaled A. Eldaher,* Initial Dec. Rel. No. 857, 2015 SEC LEXIS 3360, *29 (Aug, 17, 2015). Such a harsh sanction is only warranted when it serves the public interest. *See id.* at *25. To determine whether a sanction serves the public interest, the Securities and Exchange Commission (the "Commission") should consider six factors:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (the "*Steadman Factors*"). This inquiry is flexible, and no one factor is dispositive. *See Kornman v. SEC,* 592 F.3d 173, 180 (D.C. Cir. 2010). Additionally, "each case has its own particular facts and circumstances which determine

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the appropriate penalty to be imposed[.]" *ZPR Investment Management, Inc. and Max E. Zavanelli*, Initial Dec. Rel. No. 602, 2014 SEC LEXIS 1797, at *180 (May 27, 2014).

In cases with similar culpability levels, the Commission and administrative law judges ("ALJ") alike universally deny imposing permanent bars. For instance, in *Khaled A. Eldaher*, 2015 SEC LEXIS 3360, the defendant was accused of knowingly violating Section 15(a)(1) of the Exchange Act and "acting as an unregistered broker because he received 'transaction-based' compensation for soliciting Facebook investors on Prima Capital's behalf." *Id.* at *13. The Division argued that a lifetime bar was appropriate, while Eldaher countered that such "sanctions are too extreme and not tailored to the facts in this proceeding[,] . . . [and] punitive and grossly disproportionate to the violation alleged." *Id.* at *24. The ALJ agreed and imposed a six-month suspension from association and from participating in penny stock offerings. *Id.* at *31. In doing so, the ALJ reasoned that "all the investors were made whole, and no investor witnesses testified as to economic loss or misrepresentations by Eldaher. . .[and] Eldaher's total compensation as a result of the violations was $15,478." *Id.* at *28-29. Following the ALJ's ruling, the Commission adopted this decision as final. *Khaled A. Eldaher*, Rel. No. 76132 (Oct., 13, 2015). In this matter, the Commission should follow the above dispositions and decline to impose a permanent bar against Mr. Fierro as the *Steadman Factors*, prior settlements, and proceedings (including the District Court Action) clearly weigh against imposing such bar.

Factor one: Mr. Fierro's conduct was wrong, but not egregious. As stated above, the District Court noted that the Division conceded that Mr. Fierro's conduct was not egregious and failed to allege that Mr. Fierro acted with scienter. *See Fierro*, 2024 WL 2292054, at *4 ("The SEC, however, concedes that Defendants' conduct was not egregious . . . Nor does it allege that Defendants acted with scienter.). Ultimately, the Court concluded that, "[b]ecause Defendants'

misconduct was not egregious and did not involve any scienter, the Court finds that a permanent injunction against future misconduct without a complete penny stock bar 'provide[s] full relief without inflicting unnecessary pain.'" *Id.* (internal citation omitted). As such, no remedial or regulatory purpose exists to subject Mr. Fierro to further administrative action by the Commission.

Factor Two: Mr. Fierro's conduct was isolated. As an investor, Mr. Fierro invested in a variety of investments, including public companies, private companies, and real estate for approximately twenty (20) years.[1] See Ex. 1 at 1, 3. In the District Court Action, the Division based its entire action on one type of investment – convertible notes – that Mr. Fierro and his entity JDF Capital, LLC ("JDF") made over an approximate two-year period from January 2015 through November 2017. *See* Motion for Summary Disposition at Exh. 1. Such an isolated indiscretion in the context of an otherwise exemplary career does not warrant a bar. *See John Jantzen*, Initial Dec. Rel. No. 472, 2012 SEC LEXIS 3446, *4-6 (Nov. 6, 2012) (noting, "the isolated nature of Jantzen's misconduct weighs in favor of imposing a more lenient sanction. The Commission has not alleged that Jantzen engaged in any other wrongful acts during the past 20 years).

Factor Three: Mr. Fierro did not act with a high degree of scienter. Again, the District Court did not find that Mr. Fierro acted with scienter given the fact that Mr. Fierro's registration violation did not involve fraud or sales practices. These types of violations are more akin to "minor, technical violations," rather than those involving "intentional, knowing conduct." *Almagarby,* 92 F.4th at 1325; *see also Steadman*, 967 F.2d at 648 (refusing to grant

[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. Respondent respectfully requests that the Commission take judicial notice of the following exhibit to this opposition: Ex. 1 (JDF and Mr. Fierro's Motion for Summary Judgment (D.E. 30-9)); and Ex. 2 (Order on JDF and Mr. Fierro's Motion for Summary Judgment (D.E. 50))

an injunction where the securities laws violations at issue were not "flagrant or deliberate" and the defendant made corrective measures).

Factors Four and Six: Mr. Fierro has provided assurances against future violations and his conduct has demonstrated that future violations are unlikely. In the District Court Action, the Division did not – and could not – establish that Mr. Fierro and JDF were currently engaged in any unlicensed dealer activity. In fact, as the District Court noted in the District Court Action, Mr. Fierro and JDF ceased all convertible note activity in June 2017, when Mr. Fierro received notice of the Division's investigation concerning such conduct. *See* Ex. 1 at 6; Ex. 2 at 6. Moreover, prior to this action, Mr. Fiero had never been accused of violating the securities laws despite his twenty-year long career as an investor. *See also SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 699 (9th Cir. 1978) (recognizing that the defendant's past conduct is relevant to the likelihood of further violations in the future).

Thus, Mr. Fierro's conduct since June 2017 (and prior to the instant action) are evidence that he would not commit future Section 15(a) violations. *See WHX Corp.*, 362 F.3d at 861 (reversing cease and desist order where the defendant ceased dubious conduct "once the Commission had made its official position clear, and . . . offered no reason to doubt [the defendant's] assurances that it will not violate the rule in the future").

Ultimately, five of the six *Steadman* factors weigh overwhelmingly against imposing any bar, let alone a permanent bar, against Mr. Fierro. The Commission should decline to impose an associational bar against Mr. Fierro as such would be excessive, punitive, and against the public interest.

III. CONCLUSION

For the forgoing reasons, Mr. Fierro respectfully requests that the Commission decline to impose a permanent associational bar under Section 15(b)(6)(A)(iii) of the Exchange Act against Mr. Fierro as such bar is excessive, punitive, and not in the public interest.

DATED: December 23, 2024
Miami, Florida

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 20, 2024:

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