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 REPLY TO RESPONDENT JOHN D. FIERRO'S OPPOSITION TO THE DIVISION'S MOTION FOR SUMMARY DISPOSITION**

Pursuant to Rule 250(f) of the Securities and Exchange Commission's ("SEC" or "the Commission") Rules of Practice, the Division of Enforcement ("Division") respectfully submits this Reply to the Opposition of Respondent John D. Fierro to the Division's Motion for Summary Disposition ("MSD").

I. SUMMARY

Fierro's brief presents two main arguments in opposition to the MSD:

(1) there is no need for an associational bar because the District Court's injunction already prohibits Fierro from acting as a dealer; and

(2) an associational bar would not be in the public interest under *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

Neither argument is compelling. First, an associational bar is necessary and a separate form of relief from the District Court's injunction. Fierro's first argument ignores that Congress expressly intended injunctions and associational bars to work in tandem when it made an injunction a prerequisite for obtaining an associational bar. Second, an associational bar would be in the public interest based on the factors the Division set forth in its MSD, and Fierro's arguments to the contrary are unavailing.

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Accordingly, the Commission should grant the Division's MSD and order an associational bar against Fierro.

II. ARGUMENT

A. An Associational Bar Is Necessary

Fierro contends that "no remedial or regulatory purpose exists to subject [him] to further administrative action" because the District Court already enjoined his illegal dealer activity. (Opp'n at 2.) But his argument ignores that the associational bar the Division seeks would prohibit him from engaging in more than just illegal dealer conduct. It would also bar Fierro from associating with any broker, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical ratings agency. *See* 15 U.S.C. § 78o(b)(6)(A)(iii); *see also 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."). The District Court's injunction does not cover all these potential associations.

Fierro's argument is also contrary to the statutory scheme, in which being enjoined is a *prerequisite* for a bar under Section 15(b)(6) of the Exchange Act. *See* 15 U.S.C. § 78o(b)(6)(A)(iii). Congress expressly stated that an injunction against "acting as a[] … dealer" is the kind of injunction that could trigger a bar under Section 15(b)(6). 15 U.S.C. §§ 78o(b)(4)(C) & (b)(6)(A)(iii). Congress unquestionably intended that a Respondent could be enjoined by a district court and later receive an associational bar. Fierro's argument does not address these points and is otherwise unpersuasive.

B. An Associational Bar Is in the Public Interest

Fierro also contends that the Commission should follow *Khaled A. Eldaher*, Initial Dec. Rel. No. 857, 2015 WL 4881988 (Aug. 17, 2015), where an ALJ[1] imposed a six-month bar against an unregistered broker for violations of Exchange Act Section 15(a)(1). Fierro's illegal dealer activity was much more extensive than that of the respondent in *Eldaher*. "Eldaher's conduct involved referring twelve customers on one security. Eldaher's total compensation as a result of the violations was $15,478…." *Id*., 2015 WL 4881988, at *11. By contrast, Fierro's conduct involved more than twenty different penny stocks, billions of shares, and more than $4 million in unlawful profits that Respondent has been ordered to disgorge. *See SEC v. Fierro*, 2023 WL 4249011, at *2 (D. N.J. June 29, 2023) (summary judgment decision making factual findings); *SEC v. Fierro*, 2024 WL 2292054, at *7 (D. N.J. May 21, 2024) (remedies decision ordering disgorgement). The cases are not comparable.

Fierro's argument about the *Steadman* factors is similarly unpersuasive. *See Steadman*, 603 F.2d at 1140.[2] He urges the Commission to place the most weight on the factors for egregiousness and scienter. (Opp'n at 4-5.) The Division acknowledges that it offered no evidence of scienter in connection with the underlying violations and they were not egregious. Nevertheless, the District Court found that the totality of all the factors supported imposing an injunction against Fierro. *Fierro*, 2024 WL 2292054, at *1-3.

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[1] The ALJ's decision became final pursuant to Rule 360(d) of the Commission's Rules of Practice, because the respondent did not file a petition for review and the Commission did not choose to review the decision on its own initiative. *See In the Matter of Khaled A. Eldaher*, Admin. Proc. File No. 3-16326, 2015 WL 5935347, at *1 (Oct. 13, 2015).

[2] The District Judge in *Fierro* applied mostly the same factors (except for egregiousness), citing an analogous case in the Third Circuit. *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)).

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Additionally, the Commission has ordered bars against respondents for similar non-scienter-based violations as Fierro committed. *See Steve G. Blasko*, Admin Proc. File No. 3-19336, 2023 WL 4126711 (June 21, 2023) (ordering associational bar for non-scienter based violations of Exchange Act Section 15(a)(1) and Securities Act Sections 5(a) and (c)); *Alexander Charles White*, Admin Proc. File No. 3-19237, 2023 WL 4126483 (June 21, 2023) (same); *Paul Douglas Vandivier*, Admin Proc. File No. 3-19241, 2019 WL 2992079 (July 9, 2019) (same); *Chad Anthony Lewis*, Admin Proc. File No. 3-18693, 2018 WL 4103631 (Aug. 29, 2018) (same).

Further, Fierro contends that his violations were isolated, rather than "recurrent" under *Steadman*. (Opp'n at 5.) The District Court held that: "Defendants operated as unregistered dealers for almost three years, from January 2015 through November 2017. Courts typically hold such conduct to be 'recurrent' in similar circumstances." *See Fierro*, 2024 WL 2292054, at *2 (internal citations omitted). Fierro also states that he "invested in a variety of investments, including public companies, private companies, and real estate for approximately twenty (20) years," and asserts that convertible notes were just one form of investment. (Opp'n at 5.) That may be so, but he earned millions of dollars from convertible notes. He did not present any evidence to the District Court (or to the Commission) that his other "investments" were comparable in scale. Even if he had done so, that would not negate the recurrent nature of his convertible notes business, which produced $4,053,148 in net profits during the 35-month period between January 2015 and November 2017. *See Fierro*, 2024 WL 2292054, at *6-7.

Fierro also conflates the fourth and sixth *Steadman* factors ("sincerity of assurances against future violations" and the likelihood that his occupation will present opportunities for future violations). (*See* Opp'n at 6.) Fierro contends that he ceased his dealer business when he learned of the Division's investigation. (*See id*.) He fails to address the District Court's holding

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specifically rejecting these arguments: "But the Defendants ceased their convertible note activity only after learning that the SEC was investigating them. '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.'" *See Fierro*, 2024 WL 2292054, at *2 (internal citations omitted). Fierro misconstrues the sixth *Steadman* factor, which does not focus solely on the likelihood of future violations (*see* Opp'n at 6), but also on whether a respondent's *occupation* will present opportunities for future violations. He does not discuss how his occupation will affect the likelihood of future violations, let alone address the District Court's finding that his "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." *See id.* at *3.

Fierro also ignores the fifth *Steadman* factor—whether he recognizes the wrongful nature of his conduct. This is particularly significant considering the District Court's holding 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." *See Fierro*, 2024 WL 2292054, at *2.

When considered in total, the *Steadman* factors demonstrate that an associational bar against Fierro would be in the public interest.

III. CONCLUSION

For the foregoing reasons, the Division of Enforcement respectfully requests that the Commission grant its Motion for Summary Disposition and impose an associational bar under Section 15(b)(6)(A)(iii) of the Exchange Act against Fierro.

Dated: January 6, 2025

Respectfully submitted,

/s/ Antony Richard Petrilla

Antony Richard Petrilla
Joshua E. Braunstein
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549
Counsel for Division of Enforcement

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 January 6, 2025:

By e-fap:

Office of Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-2557

By email:

Mark David Hunter, Esq.
Hunter Taubman Fischer & Li LLC
848 Brickell, Suite 200
Miami, Florida 33131
(305) 629-1180 (tel)
mhunter@htflawyers.com

/s/ Antony Richard Petrilla

Counsel for Division of Enforcement